DOCUMENT FIVE

THE SENTENCING OF CHILD AND ADOLESCENT SEXUAL OFFENCES IN THE IRISH YOUTH JUSTICE SYSTEM: JUDICIAL DISCRETION AND THE JUSTICE/WELFARE DICHOTOMY

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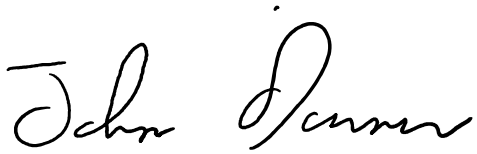
Qualification:	A thesis submitted to the Nottingham Law School in part-fulfilment of the degree of the Doctor of Legal Practice
Institution:	Nottingham Law School Nottingham Trent University
Date:	10 August 2021
Word Count:	41, 590

DECLARATION

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it). All external references and sources are clearly acknowledged and identified within the contents. I have read and understood the regulations of Nottingham Trent University concerning plagiarism.



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ACKNOWLEDGEMENTS

The thesis topic was first suggested to me by Professor Ursula Kilkelly of University College Cork. Her constant support and encouragement both as a friend and mentor have been invaluable to me on my doctorate journey. I would like to particularly thank my supervisors, Professor Jonathan Doak and Dr Vicky Palmer of the Nottingham Law School, for their expert guidance, expertise, patience and encouragement throughout my professional doctorate. It is fair to say they made it possible for me to complete my thesis and it is doubtful if I could have done so without their support.

I am particularly grateful to the Hon Mr Justice Frank Clarke, Chief Justice of Ireland and the Irish Judicial Studies Board for part-funding the fees for the doctorate. Apart from the financial benefit, their trust in my ability to complete the project which they saw as a valuable contribution to the Irish judiciary repertoire of knowledge for juvenile justice helped sustain me in the turmoil I sometimes endured as a doctorate student. My own judicial colleagues were all very supportive and while most would wish to remain anonymous, I would like to acknowledge the generosity of Mr Justice Paul Coffey, Mr Justice Paul McDermott and Mr Justice Michael White for making available to me transcripts of their judicial decisions in the Central Criminal Court and Mr Justice John Edwards of the Court of Appeal for his constant support and encouragement. I would particularly like to acknowledge the 22 judges who undertook the semi-structured interviews and Judges Rosemary Horgan and Colin Daly, former Presidents of the District Court, for their friendships and collegiality.

Young People Probation Service deserve a special mention not just for their support and access but also their generosity in facilitating necessary changes of methods of research at short notice during the COVID-19 pandemic in 2020. A number of experts were very generous with their time, patience and support, including Mr Thomas O'Malley, National University of Ireland, Galway, Professor Geoffrey Shannon, Dr Nessa Lynch, Victoria University of Wellington, Dr Louise Forde, Dr Bernadette Ní Áingléis, Dr Rebecca Murphy, and Chief Superintendent Colette Quinn, An Garda Síochána.

Finally, I would not have completed this thesis without the great encouragement, patience, kindness and wisdom of my beloved wife Pamela and the tolerance and time of my children Elena and Mark. To them, a very special thank you.

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LIST OF ACRONYMS AND TERMINOLOGY

AIM	Assessment, Intervention, Moving On
AIM3	Assessment for Adolescents who display HSB
ASD	Autism Spectrum Disorder
CAMHS	Child and Adolescent Mental Health Services
CFA	The Child and Family Agency also known as Tusla
Child-friendly justice	Refers to an established concept of European juvenile justice developed as a result of the emergence of international child-friendly justice best practice. The concept is used to articulate the extent to which children's rights are protected in judicial and other decision-making processes at the European regional level.
DPP	Director of Public Prosecutions
DYCA	Department of Youth and Children Affairs
European Union [EU]	The European Parliament and the Council adopted Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. It establishes minimum standards and harmonises existing regulations on the guarantees of suspected and accused children in criminal proceedings in the EU Member States. However, Ireland did not participate in the Directive.
HSB	Harmful Sexual Behaviours
In Camera	The case is heard in private; members of the public are not permitted to attend.
International child-friendly justice	Refers to the codification of juvenile justice principles in the United Nations Convention on the Rights of the Child 1989 [the UNCRC] and soft law standard-settings such as the Beijing Rules, the Riyadh guidelines and Tokyo Rules (Muncie 2014; CRC/C/GC/24).
International child-friendly justice best practice	Refers to the codification of legal standards at the global and European regional level to the exclusion of Irish domestic law.

Irish Constitution (1937)	The Irish Constitution known as Bunreacht na hÉireann was ratified by the Irish people in 1937.
IYJS	Irish Youth Justice Service
JLO	Juvenile Liaison Officer
LBGTQ	LGBTQ is an acronym for lesbian, gay, bisexual, transgender and queer or questioning
NIAPP	National Inter-Agency Prevention Programme run by CFA
Oberstown	Oberstown Children Detention Campus (Ireland's only Child Detention Centre)
PSR	Pre-Sanction Reports
The Children Act 2001	The Children Act 2001-20151
The Committee on the Rights of the Child	Refers to the 18 experts elected by State Parties and monitors State-compliance with the UNCRC and its protocols. In particular, General Comment 24 underscores the requirement for UNCRC Member States to develop and implement a comprehensive juvenile justice policy.

The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms better known as the Convention of Human Rights (ECHR) is a European rights treaty on civil and political rights.

The Council of Europe's Guidelines on Child-Friendly Justice builds on international child-friendly justice and is a soft law instrument adopted by the Committee of Ministers in 2010.

The European Court of Human Rights (ECtHR) is the monitoring body of the ECHR and has developed substantial caselaw relating to children's rights including the rights of children in conflict with the law.

1 Children Act 2001 includes Children Acts 2001 to 2015. The Children Act 2001 is one of a group of Acts included in this collective citation to be construed together as one (Children (Amendment) Act 2015 (30/2015), section 1(2)). The Acts in this group include: Children Act 2001 (24/2001); Health Act 2004 (42/2004), section 75, in so far as it amends the Children Act 2001; Criminal Justice Act 2006 (26/2006), Part 12; Child Care (Amendment) Act 2007 (26/2007), Part 3 (except section 21); Child Care (Amendment) Act 2011 (19/2011), sections 27, 32, 33, 37 to 45 and 47; Children (Amendment) Act 2015 (30/2015), Parts 1 and 2.

YLS/CMI	Youth Level of Service/ Case Management Inventory
YPP	Young Persons' Probation
YPPO	Young Persons' Probation Officers

ABSTRACT

This thesis explores the nature of judicial decisions in juvenile sexual offending in the context of the justice and welfare debate in Ireland. It does so by reference to the Children Act 2001, the UN Convention on the Rights of the Child and extensive literature in the area. The research is the first study in Ireland to explore the complex terrain of juvenile sexual offending and judicial sentencing in the youth justice system.

Qualitative semi-structured interviews with judges and young people's probation officers combined with an interrogation of best practice in such countries as New Zealand, England and Wales, and the United States of America, are central to the methodology. By adopting qualitative mixed methodology and a combination of doctrinal socio-legal and comparative analysis, the research contends that although Irish youth justice has made substantial progress in recent years, this progress has not necessarily transferred to judicial sentencing for sexual offences. It is acknowledged that children who sexually offend are not a homogenous group and are amenable to therapeutic interventions that assist in reducing or eliminating recidivism.

The thesis considers the implications of personal issues such as the age, maturity and neuro-developmental nature of children and adolescents who sexually offend and the implications for sentencing. Findings in this research point to a paucity of resources to deal effectively with children who sexually offend exacerbated further by inadequate court data, significant delays in bringing cases to court and limited judicial training and specialisation among the judiciary.

Drawing from the research findings, a new holistic model of sentencing is recommended. The model is child-structured and takes a balanced account of justice and welfare issues by moving away from an increasingly defensive youth justice system and a punitive youth sentencing approach. A new judicial specialism court model is proffered to serve both justice and welfare requirements in youth justice in Ireland. In doing so, it is submitted that the needs and best interests of the child who sexually offends, public policy, and the interests of victims are accommodated within both the letter and the spirit of the law.

CHAPTER 1: INTRODUCTION

1.1 Introduction

Adolescence is an important transitional stage between childhood and adulthood encompassing elements of biological growth and major social transitions that have changed significantly in recent years (Sawyer *et al.* 2018). It is a time "characterized by growing opportunities, capacities, aspirations, energy and creativity, but also significant vulnerability" (CRC/C/GC/20 2016). The transition from childhood is illustrated by a striving for independence from parents and other adults and an increasing sense of autonomy and a greater intimacy with peers (Hartley and Somerville, 2015). Societal changes have meant that 21st century adolescents grow up in a much more mobile and globalised world than heretofore. It is a world amplified by the ubiquity of contemporary technologies such as the internet and social media where children can negotiate their social identities but which can give rise to exposure to extreme pornography, exploitation and peer abuse (Sawyer *et al*. 2018). In this context, several academics have highlighted the emergence of a hypersexualised culture (Egan and Hawkes, 2012; Killean *et al.* 2021) giving rise to discourse and concern around the nature of explorative and exploitative sexual behaviour (Killean *et al.* 2021). This in turn feeds into the public's perception that the rate of child and adolescent sexual offending is increasing rapidly and exponentially.

1.1.1 Adolescent sexual activity

The view is held that adolescents are also undertaking sexual intimacies at an increasingly younger age with a high burden of decision-making resting with the individual young person.[2] Furthermore, this sexual activity is frequently conducted in a context of complex and adolescent developmental needs alongside relationship and familial problems (Erooga and Masson, 2006; Hackett, 2014). Some of this activity can result in sexual assault and both the justice system and the public are struggling to reconcile their response to the seriousness of the crimes whilst at the same time mindful of the age and maturity level of the adolescent when the crimes were committed. Few crimes shock as much as sexual assault, and this is particularly disturbing where the victims are also children and young persons (Blackley and Bartels, 2018).

2 A recent research report published by the Economic and Social Research Institute (ESRI) on the sexual behaviour of 17-year-olds in Ireland indicated that approximately one-third had had sexual intercourse while four in ten had had oral sex and/or intercourse (Nolan and Smyth, 2020).

Teenage sex offenders also create challenges that parents and families of abusers have to face in coming to terms with the abuse (Cherry and O'Shea, 2006; Hackett *et al.* 2013) or where some of the abusers require care and protection as well as welfare interventions (Erooga and Masson, 2006). However, while children who sexually offend pose particular challenges, their immaturity and lack of understanding does not mean they should be treated as mini-adults or as a special sexual mutant category of a human being (Hackett *et al*. 2006; Chaffin, 2008; Blackley and Bartels, 2018).

From a legal point of view, the law has been used to both protect and empower adolescents, but the justification for this legislation is not always apparent (Sawyer *et al.* 2018). There is the added complexity also in that adolescent sexual behaviours exist on a continuum which ranges from normal and developmentally appropriate to highly abnormal and violent at the other end (Hackett, 2014). In Ireland, it is not helpful that there is a dearth of research, statistics and empirical evidence on juvenile sexual offending. In particular, little is known about criminal justice interventions such as court sentences (Kilkelly, 2014). In that context, this thesis explores new ground in analysing the sentencing of children, teenagers and young persons for sexual offending in Ireland and the discourses and factors that influence judicial decisions in the context of the criminal justice and welfare dichotomy. The current judicial process together with the age and maturity of the child take centre stage in this analysis.

1.1.2 Dualistic legal system in Ireland

This thesis familiarises the reader with the international framework on child-friendly justice such the UN Convention on the Rights of the Child (UNCRC). In doing so, it incorporates a methodology that captures an understanding of the Irish courts' model in the context of international best practice and child-friendly justice as envisaged at the European regional level. It acknowledges that incorporation of international treaties into Irish law represents a utopian ideal but it also accepts the reality of dualism as expressed by Article 29(6) of the Irish Constitution (1937). This provides that the Oireachtas (Irish Legislature) determines whether an international agreement has any legal effect in domestic law. Therefore, dualism potentially creates a significant gap by not incorporating all of the provisions that apply to the international framework of best practice into domestic law. However, realism also suggests that the UNCRC and international treaties are not autonomous vectors of change. Therefore, this thesis moves beyond the theoretical concept of the implementation of international treaties into domestic law by challenging the existing Irish juvenile sentencing system with a reform agenda that is

not entirely dependent on the Oireachtas. In order to address this challenge, it requires the Irish model to be contextualised and explored including by reference to international comparators where relevant.

1.1.3 Criminal law

The UNCRC General Comment No. 20 stated that:

> State parties should take into account the need to balance protection and evolving capacities and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.[3]

In this regard, Article 5 of the UNCRC and the principle of evolving capacities is pertinent to children in conflict with the law (Kilkelly, 2020) and the exercise of judicial discretion in a sentencing system. In criminal law, a child's capacity is defined by his/her status which in effect is the age of the young person. An adolescent in Ireland under 17 years of age or 18 years of age in certain circumstances (Criminal Justice (Sexual Offences) Act 2006) does not have the legal capacity in criminal law to have sexual relations. There are limited exemptions from criminal liability for non-abusive peer adolescent sexual relationships between the ages of 15 and 17 years (Leahy and Fitzgerald O'Reilly, 2018). However, the rules are complex. The standards are also high by international standards. Therefore, to engage in any sexual activity, adolescents must understand these complex criminal law rules as well as balancing their own and others' emotions and physical sensations (Print *et al.* 1999). The net effect is that mature adolescents are criminalised simply because of their status, a fact which the UN General Comment No. 24 (2019) is critical of (CRC/C/GC/24).

In regards to abusive relationships, criminal law makes few concessions for children (Ashford *et al.* 2006) and a poor understanding or a distorted view of what constitutes abuse, or offending behaviour is generally little defence to a criminal charge. There is no agreed legal or academic definition of sexual abuse by children and a comparison can vary culturally over time and between professionals. As Hackett (2014, p.12) asserts "This means that comparisons between studies and research populations can be problematic."

3 The UNCRC, General Comment No. 20 on the implementation of the rights of the child during adolescence (UNCRC/C/GC/20/2016).

1.1.4 Establishing the issues in respect of sex abuse by children

What emerges from the research to date is that children who sexually abuse are a very heterogeneous group in terms of age, personal vulnerabilities and the risks they present to others (Erooga and Masson, 2006). While there is a diversity in motivations, age and victims (Righthand and Welch, 2001), existing research suggests that early adolescence represents the peak of children committing sexual offences against young persons, whereas sexual offending against other teenagers appears to peak in mid to late adolescence (Finkelhor *et al*. 2009; Hackett, 2014). Many children have extensive prior experiences of supports from social services (O'Callaghan, 2004; Hackett, 2014), problematic family backgrounds and multiple disadvantages and adversities. Hackett *et al.* (2013) found that two-thirds of teenage sexual abusers have experienced abuse, rejection, domestic violence or parental rejection, while Vizard *et al.* (2007) found in their sample, that the rate was 92%. Specifically, in relation to prior sexual abuse, Hackett *et al.* (2013) found 31% of young males had been sexually victimised earlier in their childhood, a figure which is replicated in other studies (Manocha and Mezey, 1998; Taylor, 2003), leading to a view that there may be some parallel between children who are sexually abused and their own sexually abusive behaviour.

In this regard, judges are struggling to understand and define what is harmful and sexually abusive as opposed to inappropriate for children in a digital communication age which did not exist when they were teenagers. This in turn raises new and important challenges for judges in understanding what are societal norms around capacity, consent, coercion, sexual identity and sexual agency for children (Killean *et al.* 2021). However, the identification of more homogeneous subgroups of offenders such as peer based sexual abuse and exploitation (Calder *et al.* 1997; McAlinden, 2018), or co-morbid mental health, non-sexual offending adolescents or offenders who have suffered trauma, children and family dysfunction (Lambie and Seymour, 2006) may improve treatment for specific needs of offenders and inform sentencing structures (Fanniff and Kolko, 2012). In the observed heterogeneity identifiable subgroup, the statistics suggest that the vast majority are young males (Finkelhor *et al.* 2009) "even taking into account under-reporting and the lack of services for young women" (Hackett, 2014, p. 37).

From a criminal justice point of view, it is accepted that diversion from the traditional court process is the preferred route, but it is not always an option, such as for example, children in

the special care of the State due to their high therapeutic need.[4] Exclusion from diversionary treatment does not mean however, that a child or young adult will not receive adequate therapeutic interventions.5

Document 4 established that some children displaying harmful sexual behaviour (HSB) and receiving treatment in the criminal justice system struggled to understand why their abusers did not face consequences for the same type of offence against them. Even where they did face consequences, children who were dealt with in the criminal courts were perplexed as to why other children undertaking the same programme through diversion or in the care system were not under the same legal penalty for similar type offences. In the context of HSB and treatments, a number of interventions are available.[6] However, in Ireland, in the context of the criminal justice system, the AIM Project (currently known as the AIM 3 Project) (Leonard and Hackett, 2019) is the usual model used and works within the parameters of the diversion programme and the Irish court sentencing system (Document 4).

Before evaluating the appropriate judicial response, a closer look at the statistics is warranted.

1.1.5 Juvenile sexual offences statistics

Juvenile sexual offences are a significant issue with existing research and statistics generally stating it can vary from a quarter to a third of all sexual abuse that comes to the attention of professionals (Erooga and Masson, 2006; Hackett *et al*. 2014; Campbell *et al.* 2020). However, even this figure may be conservative as it does not include unknown cases that have come to the attention of the criminal justice or child protection agencies (Ashurst and McAlinden, 2015; Killean *et al.* 2021).

In reality, it is impossible to determine accurately the true extent of the problem of teenagers who sexually abuse (Lambie and Seymour, 2006). We can glimpse at some aspects. For instance, the 2018 My World 2 survey in Ireland found that 47% of young adults (18-25 years) reported that they had been touched against their will or without consent, and 20% said they

[4] A special care order is granted in exceptional circumstances by the High Court and is usually for an initial period of three months and renewed on a monthly basis thereafter. It is effectively a needs-based civil detention order. See *DPP v. AB* [2017] IEDC 12 para. 11 (O'Connor J.).

5 Children Act 2001 Part 4; Article 40(3) UNCRC; General Comment No. 24 (2019), section 13-18 (CRC/C/GC/24).

[6] Examples include Good Lives Model (Fortune, 2018), Bernardos Taith Service, the Inform Young People Multisystemic Therapy for Problem Sexual Behaviour (Borduin and Schaeffer, 2002), and Cognitive Behaviour Therapy applicable in the criminal justice system (Blackley and Bartels, 2018).

had been forced or pressurised to have sex (Dooley *et al.* 2019).[7] It is not possible to equate this research with Irish court data as the collection of court data generally is particularly poor with the recording of youth justice sanctions (Kilkelly, 2014). However, *An Garda Síochána* (Irish Police) (Appendix 1) reported that there were 417 sexual offences involving a child (10-17 years) in 2019 representing almost 18.6% of all sexual offences compared with adults. In Ireland, the recorded crime statistics are substantially dependent on the provision of *An Garda Síochána* computer system (known as 'Pulse') data (CSO, 2020). Sexual assault, rape of a female and child pornography accounted for 80% of the offences.[8] Consistently, statistics state child sexual offending accounts for approximately 2% of all child offending in England and Wales,[9] a figure that appears to be replicated in Ireland based on data from *An Garda Síochána* (Appendix 1).

In summary, criminal justice systems throughout the world are struggling to reconcile the issue of the young age of the offender with the gravity of sexual crimes. On the one hand, sexual crimes are so abhorrent that there is frequently a public demand for a tough sentence. On the other hand, in the case of children, there is also a recognition that judges should prioritise rehabilitative sentences over punishment recognising the complex developmental needs of adolescents and the impact of childhood trauma (Blackley and Bartels, 2018). Effective juvenile sexual sentences require a unique way of dealing with the issue of a developing sense of sexual identity and childhood vulnerability without diminishing the need to support victims' rights, particularly in the case of child victims (Arthur, 2019).

While this thesis primarily focuses on the sentencing policies of the Irish judiciary, the analysis is clearly situated within the global debate on the justice versus welfare struggle in youth justice criminal law. Existing research on child and adolescent sexual offending in an Irish context has relied heavily on quantitative research and legal textbooks. Prior to this research, no major qualitative research study had been conducted on judicial attitudes in regards to teenage sexual offending in Ireland. This research aims to understand the aforementioned by exploring judicial

7 The numbers reporting for females in the first category increases to 56% and in the second category to 25% whereas for males it was 23% and 10% respectively (Nolan and Smith, 2020).
8 The total figure for adults and children was 1792 incidents of all sexual offences. In 2018, the figure was 21.3% for children. In 2019, while the numbers for children dropped, the numbers for adults increased by a near similar amount (Appendix 1); The Office of Director of Public Prosecutions does not list juvenile crime as a separate category to adults. While the probation service reports are analysed by age category and by statistics as to probation outcome, no details are furnished as to juvenile sexual offences.
9Youth justice annual statistics for 2019 to 2020 for England and Wales. Published 28 January 2021 Ministry of Justice and Youth Justice Board for England and Wales (Ministry of Justice and Youth Justice Board for England and Wales, 2021).

decision-making in its full complexity. A qualitative approach, in this writer's view, can capture professional insights in a way that quantitative and desk-based research cannot. It is timely, at this point, to examine the aim of the research in more detail.

1.2 Aim and limitations of the research

The research addresses the question of how the rights and best interests of children and teenagers in conflict with the law are dealt with in the sentencing of children and young adolescents for sexual offences by the Irish judiciary. At the outset, it is acknowledged that the judicial work is very challenging as it forces judges to confront in a unique way an amalgam of issues such as sex, violence, children as victims and children as abusers. This can also be contentious from a political point of view and distressing for all the parties involved in the legal process. It is acknowledged that only a minority of cases finds their way into the courts and indeed "much sexual abuse never finds its way into official statistics or research" (Hackett, 2006, p. 240).

It is also conceded that the nature of case law reviewed is on male heterosexual teenagers as offenders and largely but not exclusively on female teenagers and children as victims. Absent from Irish case law and also largely absent from existing literature are the complexities of gendered identities and the need to understand offending by young persons who identify as lesbian, gay, bisexual, transgender, and questioning (or queer) (LBGTQ).

It is of note that female adolescent sexual offenders have been under-reported and under-represented in the sexual offender literature (Schmidt and Pierce, 2004) and have not featured in Irish case law. The limited data demonstrate that where female teenage sex offending occurs in Ireland, it is dealt with as a mental health issue which in turn has implications for children's rights (Document 4). Evidence of gender or racial/ethnic differences is less clear and underscores the need for further research to ascertain if there are disparities in the criminal juvenile justice system.

1.2.1 Hybrid nature of the Irish youth justice system

The Children Act 2001 provided the first coherent framework for the development of youth justice since the Children Act 1908. Children in conflict with the law frequently have multiple and complex issues and deserve wider attention than a narrow 'justice' and 'welfare' debate

(O'Connor, 2019). Document 2 concluded that the Irish juvenile criminal justice system generally was a justice model with welfare wings. The welfare approach was noted in the extensive diversion programme, family conferencing requirements, and the legislative principles of sentencing set out in the Children Act 2001, which are largely in compliance with the UNCRC. The justice model was evidenced by the low age of criminal responsibility and the fact that "Ireland has a relatively punitive approach to young offenders - prosecution is the norm for those for whom diversion is neither appropriate or successful" (Kilkelly 2006, p. xvii). However, the hybrid nature of the Irish youth justice system left the justice welfare debate unresolved in sexual offences sentencing by the judiciary (Kilkelly, 2006).

The author's research explored how Irish judges approached the competing priorities of justice and welfare in the sentencing of children for sexual offences by way of semi-structured interviews.[10] While noting that judges were largely empathic towards adolescence as a phase of development, it found that judges lacked the required training and were eclectic in their views on juvenile justice sentencing and in particular in regards to sexual offending (O'Connor, 2019). Document 3 concluded that judges were heavily dependent on pre-sanction probation and welfare reports from probation officers in formulating sentences for children who sexually offend.

In the light of this finding, Document 4 explored the perspectives of Young People Probation Officers (YPPOs) on adolescent sexual reoffending sentencing. A sample of 12 YPPOs were interviewed (via focus groups and telephone). Findings revealed that while the YPPO Service is a specialised and committed profession, significant gaps are apparent in training, education and resources. Implications arise in the context of assessment and supports for children and young people (and their families) who sexually offend. Although other professions such as psychologists may fill the gap, there was a distinct view held by YPPOs that some children with complex developmental needs or who have experienced childhood trauma including sexual abuse, were not adequately assessed in the current courts system. This is turn raises a question in respect of Ireland's compliance with international juvenile justice rights and welfare standards.

Calls for guidance for the judiciary who deal with children who sexually offend were loud in the research conducted, with almost all judges and YPPOs in favour of guidance in some format

10 The research for the pilot study comprised 22 judges, of which 18 were practising and four had retired.

with the majority in favour of non-mandatory guidelines. Of particular concern was the perception revealed in the interviews by the YPPOs that the possibility of a custodial sentence is frequently dependent on the individual judge before whom the child appears. Specifically, YPPOs believed that a geographic distinction could be made; rural judges were more likely to give a custodial sentence than their urban counterparts (Document 4).

The research also found restorative justice (RJ) was the preferred route by the Garda diversion programme including for serious sexual crimes committed by children. There were mixed views from judges and YPPOs on the effectiveness of RJ for the courts in finalising sentencing for sexual crimes. In this regard, evidence revealed that the Irish judiciary in practice have not used RJ for juvenile sexual offending sentences even though over 70% of them were in theory positive about the concept of RJ (Document 4). This raises questions over the usefulness of RJ if it not used in practice and whether legislative and practice reform is needed. There is also the issue of whether RJ is impractical for victims of child sexual offending given that many of whom are very young and they may not wish to revisit their trauma.

The issues researched revealed that justice and welfare concerns for juvenile sexual offending were made more complex by a lack of court statistics and by an inability of some parents to accept adolescent child sexual development as a normal part of growing up (Document 4). Sexual abuse is a highly emotive subject and its repugnance and alarm are undoubtedly reflected in the media (Banks, 2006). The majority of judges and YPPOs believed that the media influence the public's perception of juvenile sexual offending. A significant minority of judges (28%) was prepared to accept that media coverage could also influence the judicial sentence itself (Document 4).

This thesis reviews the Irish judicial response in case law analysis to these sentencing considerations in the context of the justice and welfare debate; the main objective is to facilitate an effective judicial response that complies with international best practice and one that serves individuals' interests and society's interests (Liefaard, 2012). This is turn leads to an evaluation by the Irish Courts of the practical impact of these concepts for children and adolescents who commit offences bearing in mind Ireland's obligations under the UNCRC. The thesis acknowledges judicial developments in the European Court of Human Rights (ECHR) in common law jurisdictions with a particular focus on New Zealand (NZ)'s Youth Court.

In the common law world, the judiciary in New Zealand have established in a unique way a pivotal role in amalgamating the long-standing justice and welfare concerns in holding children who offend (including for sexual offending) accountable. In determining an outcome for children who sexually offend, children are encouraged to accept responsibility for their behaviour (Lynch, 2019). However, the legislative and judicial response in NZ is not a punitive approach. The US Supreme Court judiciary have expanded the constitutional parameters of the principle of best interests by reference to neurobiological science (Document 2). This raises the question of whether the science of adolescent brain development should inform public policy. In this respect, the English Superior Courts have filled a lacuna in the legislation by recognising that maturity is not just a chronological issue as evidenced in *R v. Clarke, Andrews and Thompson* [2018] EWCA Crim 185. NZ is the only jurisdiction in which judges of first instance have engaged in significant judicial activism in youth justice (Lynch, 2021a). Considering these findings, the thesis examines the coherence of the Irish judicial sentencing procedure and whether any improvements could be made to current sentencing practices.

The research questions addressed in this thesis are:

- How are children's rights and needs currently assessed by the Irish judiciary in their sentencing of children and young persons for sexual offences in the context of the Children Act 2001 and international standards such as the UNCRC?
- What improvements might be made by the judiciary and the *Oireachtas* (the Irish legislature) to ensure sentencing by the Irish judiciary in child and young person's sexual crimes comply with international child-friendly justice and best practice?

In doing so, the research addresses a significant lacuna in the existing research in Ireland.

1.3 Contribution to scholarship

The thesis is the culmination of research and findings in four previous documents during the course of this doctorate journey. It is the first study in Ireland to explore sentencing by Irish judges in regards to child and adolescents convicted of sexual offences within the context of the justice and welfare debate. It is hoped that findings will contribute to that domain and to interdisciplinary research in the area of youth sexual offending and rehabilitation more generally. Juvenile sexual offending sentencing is inherently complex. Judges must undertake a careful exercise in the synthesis of the evidence presented to them and balance it with priorities in the Children Act 2001. This involves assessing the extensive welfare provisions which include rehabilitation of the child and the interests of victims and public policy. The

research to date indicates that judges appear to evaluate these priorities guided by a combination of experience, precedent judgments and intuition as much as by the legislation.[11]

The thesis takes the matter further through a comprehensive analysis of Irish case law in the context of the Children Act 2001 and international instruments such as the UNCRC and the ECHR. Ultimately, it is hoped that it will contribute to a new perspective on the judicial sentencing system for children in Ireland. It challenges the notion that rights/justice and welfare/best interests are incompatible philosophies for juvenile justice sentencing for sexual offences (Pratt, 1993). It forcefully establishes that the judicial process, including the police investigation, can have a substantial bearing on sentencing practice. It establishes that children's rights and the concept of best interests are evolving. It notes that while the sentencing of children whose sexual behaviour is problematic, "it is essential to recognise that developing sexuality is a complex and important transitional stage in adolescent development" (Vizard and Usiskin, 2006, p. 146). It recognises that many children who are sentenced for sexual abuse are themselves victims of crimes perpetrated by adults or other children and their voices need to be heard and recognised. However, it also argues that for a sentencing process to be effective for victims and public policy,

> there should be an increased emphasis on effective and meaningful participation for child victims in youth processes, and increased recognition of children as victims in international and national standards (Lynch, 2018, p. 229).

The thesis analyses the various methods of sanction such as RJ and family conferencing as alternatives to detention but meaningful in their own right. It suggests practical legislative and judicial reforms. Where a child is deprived of liberty, it recognises "children do not leave their rights at the detention centre gate" (Kilkelly *et al.* 2011, p. 26; *Golder v. UK* App No 4451/70, A/18, [1975] ECHR 1; *Dickson v. UK* (Application 44362/04) [2007] All ER (D) 59). International best practice requires a rehabilitative element in all juvenile sentencing but most particularly in sexual offence cases. The major contribution of this thesis to the field in question lies in the combined examination of how a new holistic model for sentencing for children and young person's sexual offending can comply with Irish legislative and international best standards. It argues that for judicial sentencing to be compliant from both a rights and welfare perspective, judges must be pro-active in addressing this new holistic approach. It is submitted

11 Semi-structured interviews with Irish judges and focus group and telephone interviews with young people's probation officers (Document 4).

that the insights gained through this research can offer a new perspective on how Irish judges and the legislature can move with greater confidence towards greater compliance with the international best practice standards. In this regard, the thesis offers some useful recommendations for the development of the Irish youth justice sentencing system for sexual offences. To conduct the research, it was necessary to develop a research strategy to collect the data required to answer the research questions. The research questions required a distinctive methodology which would accommodate not just the theory of law but one's own insider knowledge, masterly of law and engagement with judicial practice (Roberts, 2017). The writer (a practising judge) was acutely aware of the limitations of such insider knowledge and the potential for unconscious bias. For this reason, an 'off the peg wardrobe' type methodology did not neatly fit (Roberts, 2017). Instead, it led to the development of a methodology (Chapter 2) which in its theoretical and conceptual framework is intellectually robust, flexible, and acceptable to judicial practice.

1.4 Structure of thesis

Chapter 2 follows with an outline of the methodology and methods used in the research. Chapter 3 will explore the issues at stake in the justice/welfare paradigm in young justice and in its application to the area of child sexual offending. This will be followed in Chapter 4 by an exploration of the rationale for sentencing of children and young persons who sexually offend. Rights and welfare issues set against international standards will frame Chapter 5 and lead into an analysis in Chapter 6 of the justice/welfare issues within a sentencing structure in Ireland. Chapter 7 is devoted to a critical analysis of the Irish juvenile court system with a particular focus on sentencing in the Children Court and specifically in relation to children who sexually offend. In Chapter 8, a critical spotlight is placed on how child sexual offending is dealt with in a number of other jurisdictions through a focused lens on how the justice/welfare paradigm plays out in judicial practice and sentencing in those jurisdictions. Irish case law analysis relating to child sexual offending and sentencing forms the core of Chapter 9 and will include an analysis of sentencing barriers, options, and complications in the Irish context. The final chapter (Chapter 10) will present a summary of the findings, some key conclusions and recommendations for future research and reform in the area of juvenile justice. The recommendations are integrated with the findings to provide a strong coherence throughout.

The thesis proceeds now to Chapter 2 and outlines the methodological approach adopted.

CHAPTER 2: METHODOLOGY AND METHODS

2.1 Introduction

The thesis provides insights into how the Irish judicial youth justice system might address the justice and welfare debate in sentencing for juvenile sexual offences. It does so with respect to the existing judicial doctrinal approach adopted by judges. However, it advocates best practice by reference to international treaties, scientific developments and rights-compliant youth judicial systems. It, therefore, requires a comprehensive methodology to enable the research questions to be addressed. This is answered by a combination of a doctrinal and socio-economic and comparative approach and a suitably aligned methodology.

2.2 Methodology

At the outset, the research questions challenged the writer's own professional experience, philosophical interpretation and reflective analysis. It entailed exploring a methodology to analyse juvenile justice sexual sentencing practice in a critical manner using a qualitative technique. From an ontological perspective, the research stance is based on the belief that one's understanding of the world is subjective leading to a postmodern idealism (Document 4). Ontology, therefore, is "concerned with the question what is the nature of the social world" (Pope and Mays, 2020, p. 16).

Postmodernism posits that reality is created by the individual and made real by the individual based on the belief that there are multiple realities in a world created by multiple people (Pope and Mays, 2020). In turn, it is dependent on the lens through which a person views that world. However, while postmodernism facilitates an understanding of the world, in contrast, the writer's epistemological stance is that one cannot uncover universal truths. Although intertwined with his ontology, it is more subjective than the idealism of his ontology. It is realistic about competing aims and labels. For example, legislatively the welfare of the child is pitted against the interest of the victim and public policy (section 96(5) of the Children Act 2001). As a professional judge of the Children Court in Ireland for six years, the writer is unavoidably ethically challenged and cannot be entirely neutral and value-free in a specialised area of law as a judge. Many of the Superior Court judgments originated in the Children Court when the writer was the principal judge. Therefore, the writer is an 'insider' (as a judge) and this could give rise to insecurity and indeterminism in the research. In this respect, any

perceived bias must be open to scrutiny and by recognising the place that postmodernism has in the context of the research.

One recognises that the closest one gets to reality is to explore the meanings attributed to the individual events, processes, and judgments. The writer has the advantage of knowing the court culture, the judges interviewed, and the Irish judges whose judgments are analysed. It would be naïve and limiting to exclude personal experience entirely, but personal anecdotes have not been relied upon. While this stance is not unproblematic, the writer is an experienced and ethical judge and carries high professional and ethical standing (Hockey, 1993).

From a practical point of view, this means recognising that the same child can be described differently depending on the person dealing with them. For example, a child designated in the criminal justice system as 'a juvenile criminal' may be referred to as 'a child with a conduct or personality disorder' by a psychiatrist or 'a child in need' by Tusla (the Child and Family Agency) or 'a thug' by tabloids or as 'my son or daughter' by a parent (Delmage, 2012). Whatever term is used, it illustrates that juvenile justice is an interdisciplinary discipline and that even though judges alone decide the sentence, other factors and persons may influence the final decision.

The methodology also acknowledges that new issues are constantly emerging, such as new drugs of misuse, new neuroscientific and behavioural research that assists in the understanding of adolescent capacity and control mechanisms (Delmage, 2013; Hales *et al.* 2019), and new technologies which shape how adolescents develop their identities and relationships, including those of a sexual nature (Eleuteri *et al.* 2017). It also acknowledges that new academic studies and judicial thinking create a greater understanding of child and adolescent deviant behaviour.

Postmodernism raises the question: can judges ever be objective in sentencing? While they may wish to be objective, subconsciously, are they constrained by their own culture, social backgrounds and legal traditions? (Brown, 2017). However, it can also be argued that the view is a sceptical one. The totality of the legal tradition including its concepts of language, rules principles and legal processes hierarchical institutions and the art of lawyering create a restraint which effectively stabilizes the process (Tamanaha, 2006; Brown, 2017). Judges who operate outside these restraints or rules risk disapproval or rebuke from appellate courts. Therefore, while the underpinning methodology for the thesis is driven by a jurisprudential commitment to study juvenile sentencing in the context of a postmodern world, it is accepted that from a

practical point of view, one should not be too rigid in regards to the ontological stance adopted. Research has to be relevant, and if research is to effect change, it is necessary to embrace a methodology in which judges would have confidence and trust.

The research questions outlined are answered in this thesis through a methodological approach that combines:

i. A legal doctrinal approach;
ii. A socio-legal analysis; and
iii. A comparative analysis as to case law sentencing.

Although a combined methodology, legal doctrinal is the primary model while socio-legal and comparative analysis are subsidiary and complimentary processes. The rationale for doing so is grounded in understanding that juvenile sexual offending sentencing is inherently interdisciplinary. It acknowledges that as a practising judge, the writer is an insider with a unique insider perspective on law and legal institutions. In this context, the primary sources of law such as the Constitution, legislation, international treaties and case law are taken seriously with varying degrees of intensity. However, 'being an insider-participant is a judicial tradition should not be equated with its wholehearted endorsement' (Roberts, 2017, p. 96). It, therefore, requires an interdisciplinary understanding and a recognition that the subject matter is developing in different jurisdictions though not at the same rate. For legitimacy and relevance, it recognises that a legal grounding is required to ensure relevance for the actors involved. The combined methodological approach facilitated an exploration of how sentencing for juvenile justice sexual offences operates in practice and provided an opportunity to explore new insights into the juvenile justice system more generally.

2.2.1 Doctrinal legal approach

Doctrinal analysis or 'black letter law' is at the heart of traditional legal research and is the working method of the judiciary (Kennedy, 2016). It is a research methodology developed intuitively within the common law (Hutchinson and Duncan, 2012). It is the primary legal, methodological approach used in this thesis. Although it can take many forms, it largely comes from the courts and legislative interventions. In this regard, judicial decisions create the standards and rules that comprise legal doctrinal methodology (Tiller and Cross, 2006). From a legal analysis point of view, sources of law were located and then interpreted (Hutchinson and Duncan, 2012) and synthesised (Giofriddo, 2007). This involved a reconciliation of any

inconsistencies to create "some over-arching theory of law, but one that is consistent within itself, not one that is consistent with external values*"* (Kennedy, 2016, p. 24). Doctrinal analysis is logical, pragmatic, and premised on a rule of law framework which "facilitates conceptual coherency and consistency, giving integrity to law and the decision-making process" (Kilcommins, 2016, p. 13).

How judges interpret legal doctrine is not always understood (Tiller and Cross, 2006). In theory, from a legal doctrinal point of view, the past interprets the future. However, this claim of objectivity and rationality can be questioned in trial courts which, unlike appellate courts, largely deal with facts rather than extensive points of law (Kilcommins, 2016). Most juvenile justice decisions are made by the Children Court which is a division of the District Court (the lowest court in a hierarchy of Irish courts). In theory, the higher courts review the decisions of the lower courts and give guidance by way of precedents or commentary. In reality, this is rare and apart from the Court of Appeal, there are only limited reported cases (O'Connor, 2019).

'Black letterism' can mask a bias in a highly political sensitive subject as well as ignoring the increasing inter-professional expertise of juvenile justice (Document 4). In addition, it is, therefore, highly questionable if 'black letterism' is the best source of authority when much of juvenile justice is essentially empirical in nature. Therefore, it is necessary to expand the process methodology by incorporating a broader socio-legal approach but without abandoning its rationality for lawyers and judges.

2.2.2 Socio-legal approach

A socio-legal approach was considered in the context of broadening and deepening the legal doctrinal methodology by exploring and interrogating the effects of Irish judicial sentencing in a wider international rights and welfare context. It also digs beneath the surface of legal doctrinal analysis to find an explanation and rationalisation for judicial decision-making (Lacey, 1996). In doing so, it also recognises the increasing inter-disciplinary nature of youth justice, legal medical developments and the need to interrogate a deeper legal and social logic which underpins recent international and professional developments. As Roberts claims, "many of the most interesting and important facets of criminal prosecutions cannot be investigated by scanning law reports or reviewing the statute book" (Roberts, 2017, p. 111).

A socio-legal approach takes into account the considerable research already undertaken with individual judges and YPPOs for this doctorate. However, in evaluating the possible impact of socio-legal methodology, the writer considered "whether law and legal institutions are, in fact, open to the application of other knowledges" (O'Donovan, 2016, p. 114).

Juvenile justice and in particular, sexual offending, are not autonomous subjects and a social legal methodology as defined enhances the legal doctrinal approach by facilitating an external values analysis which legal doctrinal approach could not do so. By acknowledging its place as a complementary methodology, it facilitates judges in coming to terms with a synthesis of law, logic and international best practice.

2.2.3 Comparative law approach

Comparative law refers to materials from a variety of jurisdictions. Crossing traditional categories of law, it integrates public and private international law with domestic law (McConville and Chui, 2017). At first glance, a comparative research of the different jurisdictional youth justice policies is difficult to conceptualise as a coherent methodical approach. This is due to the competing and fluid political justice and welfare discourses. (Muncie and Goldson, 2006). Selective comparative analysis is subject to academic criticism of cherry-picking the good bits of youth justice policies without appreciating their cultural and social context (Muncie, 2001). In this respect, each justice system is embedded in its own historical and social context, and the paucity of robust comparative data results in the fact that the youth justice systems "differ to such an extent that those measures that are available do not necessarily reflect similar stages of processing or similar decision-making criteria" (McAra and McVie, 2018, p. 75).

The aim of this study is not to rank a better system of juvenile justice (Paris, 2016). Rather, it seeks to understand that many of the issues that different judges in different countries have to deal with are similar to what Irish judges have to deal with in day-to-day practice in the courts. While the laws and sentencing criteria may differ from one country to another, each jurisdiction is struggling with the same fundamental issues in juvenile justice particularly around understanding child maturation and development. In this context, different legal systems provide a common basis of comparison (Wilson, 2017) and sentencing law is the one area of youth justice that lends itself to comparative treatment (O'Malley, 2008). In doing so, it allows

the study to rise above "the parochialism of our taken for granted assumptions about sentencing law and practice" (Brown, 2020, p. 4).

Therefore, in the light of judicial decisions concerning:

- the application of the US Supreme Court's scientific research in the area of brain development;
- NZ Youth Court judiciary pioneering RJ conferencing for child sex offenders;[12] and
- The English Court of Appeal's recent jurisprudential developments in connection with youth offenders who have turned 18 years of age,

the methodological approach offers the possibility of a disciplined and imaginative international addition to the study of Ireland's judicial approach to juvenile sexual offending sentencing. Furthermore, the approach of adopting to new changes is captured in the UN General Comment No. 24 (2019) on children's rights in juvenile justice (CRC/C/GC/24) which recognise the practical developments of youth criminal justice systems globally. England, NZ, Australia, the US and Ireland have historically broadly similar cultures and share issues over the minimum age of criminal responsibility. In particular, the NZ youth justice system directly influenced the drafting of the concept of family conferencing in the Children Act 2001 in Ireland (O'Donoghue, 2000).

As this thesis is seeking to inform and reform judicial sentencing for sexual crimes in the absence of Irish sentencing guidelines and the paucity of Irish case law, it is prudent to interrogate these developments. It does so with an awareness of its limitations, such as the failure (in England and Wales) to cite empirical and academic research in sentencing judgments generally (Ashworth, 2015). Overall, the jurisdictions chosen are collectively more comprehensive in considerations of academic and empirical research in sentencing principles based on the age and neurodevelopmental needs of children who offend. The net effect is to ascertain if the Irish judiciary need to adjust their policies on sentencing on children who sexually offend in the light of these international developments. It is acknowledged that a comparative study will not discover a universal utopian juvenile justice system. However, the near universal acceptance of the UNCRC as a meaningful benchmark for juvenile justice rights and welfare conceptualisations, and its interpretation by the ECHR and other common law countries courts, does allow the possibility of contributing international case law and other

[12] Supplemented by the Australian experience (O'Brien, 2011; Blackley and Bartels, 2018).

juridical experiences as a tool in aiding the primary methodology in constructing a meaningful exploration of the issues. Many Western European civil law countries have opted for a more inclusionary therapeutic intervention compared to Ireland. However, it was felt a review of those countries was outside the scope of this thesis as they are civil law countries with divergences between those countries in their general approach to sex-offender risk. In addition, their individual approaches are not necessarily any more effective than Anglo-Irish-American approaches (McAlinden, 2012),[13] and the insights gained may result in confusing the Irish judicial policy-making process. There is undoubtedly scope for future research in case law, most notably in the civil law jurisdictions that are using the Nordic *Barnahus* model (Johansson *et al.* 2017).[14] Case law is particularly important in the writer's research.

2.3 Methods

2.3.1 Use of case law

This thesis comprises a new detailed study of sentencing case law. One of the key aspects of understanding juvenile justice sentencing in practice is through an analysis of judicial case law. When a sentence is imposed, a judge does so by reference to a framework, which takes into account legislation, case law, human rights obligations and other statutory and judicial criteria such as statutory or judicial guidelines. Sentencing is exclusively a judicial task and it cannot be delegated to anyone else (O'Malley, 2016). In other words, judges make case law. In this context, judicial precedent has an important role in that the decisions of the Irish Superior Courts[15] are followed and applied in most cases.

However, all trial courts in Ireland furnish oral sentencing decisions only as opposed to written decisions.[16] Judges in the Central Criminal Court who deal with serious indictable cases such as rape are furnished with transcripts of their court proceedings. Judges in the Circuit Court and District Court are not furnished with transcripts. The proceedings are recorded on the Courts Service Digital Audio Recording (DAR). However, it would be unethical for another judge to listen to juvenile cases unless specifically authorised; authorisation is predominantly obtained in connection with the actual proceedings such as in a judicial review application.

13 A more detailed comparative research is needed as the study did not distinguish youth offending.
14 I am part of a working group led by Dr Etain Quigley from Maynooth University and the Irish Research Council Foundations regarding Juvenile Sexual Offending: an EU-wide Prevalence and State Response Study.
15 Supreme Court, Court of Appeal, High Court.
16 An exception was when the writer was a judge in the Children Court and a number of written decisions were produced.

In the case of unpublished judgments, and *ex tempore* sentencing judgments delivered at first instance, recourse has been had to court transcripts of the Central Criminal Court where available, and secondary sources such as newspaper reports or by judicial researchers taking a note of the transcripts.[17] From an appellate point of view, decisions of the Children Court can be appealed to a single judge of the Circuit Court and are heard *de novo* so the appeal is heard without reference to the decision in the Children Court. In contrast, decisions of the Circuit Court and Central Criminal Court are both heard by the Court of Appeal which consists of three judges[18] and are largely confined to issues such as severity of the sentence or an alleged miscarriage of justice. From a practical point of view, this has resulted in case law in Superior Court decisions being the primary authority and secondary sources such as journal articles or textbooks used to support particular interpretations (Dobinson and John, 2017).

From a research of cases point of view, a combination of Boolean (free text search) with a browsing method (relying on the structure of a database) was carried out for the period 2016 and 2021 to create an index and database of relevant Irish cases. However, reported decisions of an earlier period were included if deemed relevant. The low number of cases on juvenile justice generally and for child and adolescent sexual offences specifically reduced the risk of a Boolean search becoming too unwieldly. Therefore, a free text search of court judgments combined with an online information aggregator on cases and articles such as Westlaw JustisOne assisted in creating the database for the doctoral research.

In contrast, the method used for trial courts are as follows: in the case of the Central Criminal Court, transcripts of the oral sentences are generally relied upon. In the absence of transcripts from the Circuit Court and District Court, secondary sources such as newspapers and comments made by Court of Appeal judges (*vis-à-vis* Circuit Court cases) are used. This was supplemented by quasi-primary sources such as extracts from appellate courts referring to quotes or reasoning in the trial court and by the Irish courts Legal Research and Library Services consenting to their database of unreported cases being consulted for this research.

Overall, the study acknowledges the reality that doctrinal research is not in itself sufficient to understand judicial discretion and that sentencing decisions are not substitutes for other types of data (Atkinson and Coffey, 2004; Brown, 2017). In this regard, to enhance an analysis of

17 Authorisation was obtained from the Judicial Research Office, Courts Service (Ireland).
18 Appeals to the Supreme Court are only made where issues of major public importance arise or where the interests of justice require such an appeal.

case law, this thesis considers the extensive empirical research carried out through the writer's research with Irish judges (Document 3) and YPPOs (Document 4). It also involved consulting leading textbooks and (although not authoritative) are frequently persuasive in their consideration of court judgments (Dobinson and John, 2017).

It is acknowledged that case law by itself is subject to inherent weaknesses in that it only represents a minority of cases that appear before the courts which is due to the fact that only a small minority of cases are ever reported. In addition, they are not always comprehensive enough to explain all the reasons for a sanction. In particular, trial judges "rarely have time to write judgments that explain all the relevant factors considered at the time of sentencing" (Brown, 2017, p. 22).

However, the fundamental weakness in case law is that traditionally it relies on earlier dicta from previous judgments as the best source of authority. While judges are the only persons who can issue sentences, they are not the only actors in the criminal justice system who have an input into sentencing. YPPOs almost invariably contribute to the sentence due to the near compulsory requirement of probation reports for sentencing (section 99 of the Children Act 2001). In addition, optionally at the discretion of the judge, psychologists, psychiatrists, social workers and Gardaí (the Irish police) furnish reports to a judge before a sentence is finalised. Finally, prosecution and defence counsel frequently make submissions while victims furnish impact statements before sentencing. All of this means that judges and other actors need to have an appreciation of the circumstances that give rise to juvenile sexual abuse as well as the harm to victims and the breaches of public policy.

2.3.2 Method of analysing case law

Both inductive and deductive analytic techniques were employed in analysing Irish case law on sentencing. This involved reading and re-reading of sentencing decisions. The inductive method of analysing sentencing decisions involved immersion in judicial written decisions where available. Where there were only transcripts available, the verbatim transcript as a data source was used to identify key factors in sentencing such as the types of mitigation, aggravation, maturity analysis, rehabilitation comments and novel type of sentences.

Deductive content analysis was applied by reading the court decisions, transcripts and newspaper reports by extracting themes that applied to the pre-defined categories of interest such as different formats of custodial and non-custodial sentence options. The combined

technique enabled qualitative data in that themes that commonly occurred were included but those that were not relevant were excluded. Targeted comparative analysis facilitated a deeper insight and understanding of the themes emerging from the data.

In analysing each court decision, the following areas provided rich data domains:

- A summary of the offence;
- Relevant factors about the child including developmental issues;
- Aggravating and mitigating factors in sentencing;
- Issues concerning rehabilitation;
- Issues concerning victims where known;
- The purpose and aims of the sentence.

2.3.3 Sentencing characteristics and themes

Judges aim to balance competing objectives of risk mitigation and rehabilitation with offence seriousness, retribution and desistance (O'Malley, 2016). However, this exercise is especially challenging when sentencing young offenders over 18 years of age for offences committed when they were under 18 years. In particular, the loss of the benefit of the Children Act 2001 is considerable. The most challenging themes to emerge are the issue of procedural delay such as prosecution delay, young adults aging out of the jurisdiction of the Children Act 2001, historical offences, and the issue of young victims and sibling victims.

A doctrinal legislative approach and case law in Irish juvenile sexual offending sentencing is challenged by the absence of legislative guidelines and a paucity of reported Irish cases. This lacuna is partly filled by a methodological approach which evaluates developments in science and in common law jurisdictions which in turn will enrich the Irish judicial experience. It also envisages enhancing traditional case law methods by exploring primary sources such as transcripts of unreported sentencing decisions and secondary data sources such as newspaper articles as part of the research literature in the area of youth justice, welfare, and sentencing.

The next chapter will explore key issues underpinning the conceptualisation of a justice-welfare framework for youth justice. It will present an overview of the relevant literature in the area and the sentencing regime in respect of youth justice in Ireland.

CHAPTER 3: ESTABLISHING A CONCEPTUAL JUSTICE /WELFARE FRAMEWORK

3.1 Introduction

Juvenile justice has been traditionally characterised by political contradictions (Muncie, 2014) and by two conflicting and competing conceptual ideologies of justice and welfare (Naffine, 1992). Historically, justice in youth sentencing is represented by the competition between accountability, deterrence, rehabilitation and rights. In contrast, welfare emphasises a paternalistic approach focusing on vulnerability and needs of the child. In doing so, traditional criminal justice rights principles, such as proportionality and due process, give way to best interests. However, Document 2 found a polarisation of justice and welfare in approaches is not a correct analysis in Ireland. In contrast, it found legislatively at least, justice was predominant in the judicial process and welfare dominant in judicial sentencing.

3.2 The justice model

Goldson (2013) has described the justice model as central to the concept of justice and is the model guiding the Anglo-Welsh system of juvenile justice (Pratt, 1989). It embodies the principle that the child is primarily a rights-bearer requiring respect for due process and proportionality (O'Connor, 2019). In this model, "human beings are viewed as self-determining agents whose principal concern is to secure the maximum degree of liberty for themselves" (Naffine, 1993, p. 3). The goal of the justice model for children is predicated on the classic principles of deterrence and punishment which assume that children can weigh up the potential of risks against the potential consequences such as punishment. The judge is expected to impose an appropriate sentence having considered the seriousness of the offending (O'Connor, 2019). However, the sentence imposed should be the least restrictive sanction commensurate with the severity of the act (Smith, 2012). Sentencing children is different from sentencing adults since children by virtue of their psychological and neurobiological immaturity cannot be held responsible for their behaviour in a way that adults would be held responsible.[19]

19 *Roper v. Simmons* 543 U.S. 551 (2005); *Graham v. Florida* 130 S. Ct. 2011 (2010); *Miller v. Alabama* 132 S. Ct. 2455, 2460 (2012); G v. DPP [2014] IEHC 33.

The importance of due process rights such as, for example, the right to a fair trial, is protected domestically by the Constitution (1937) and internationally by the ECHR and other instruments.[20] In *T and V. UK* [2000] 30 EHRR 121, the ECHR required adaptations to the procedure in criminal trials for children so that they could effectively participate in the trial process. However, as this thesis will demonstrate, there is a danger that in some cases, children's procedural rights can delay proceedings to the extent that a child could face a harsher sentence at the end of the process; this issue is replicated in other jurisdictions. Thus, for example, in the US, the trend towards a justice model for juveniles has resulted in more children entering the adult penal system with the consequences of a more punitive system (Cavadino and Dignan, 2006).

Nevertheless, children are on a developmental trajectory and arguably the justice system pays little attention to a child's capacity for developmental reform (O'Malley, 2016). A justice/rights-based sentencing approach needs to do so within the rule of law which is an international accountability standard embedded in a range of international instruments,[21] and frequently referred to by lawyers as the cornerstone of a legal system.[22] It is an elusive concept and there is the danger that it can consist of any content whatsoever to serve any desired end (Tamanaha, 2006).

For this reason, the Council of Europe's Guidelines for Child-Friendly Justice[23] is of assistance in affording purpose to the concept of the rule of law in the context of juvenile justice. As Lifeward (2015, p. 912) asserts:

> The Guidelines provide that children should have the right of access to courts (and informal equivalents) and that their right to a fair trial (i.e., "due process") should not be minimised or denied under the pretext of [their] best interests.[24]

In summary, a justice system can be problematic and as O 'Malley J. outlined in *G v. Director of Public Prosecutions ("DPP")* [2014] IEHC 33 (para 92):

20 The Universal Declaration of Human Rights (UNDHR), and United Nations Standard Minimum Rules for the Administration of Juvenile. Justice ("The Beijing Rules") adopted by General Assembly resolution 40/33 of 29 November 1985.
21 Such as the Declaration of Human Rights (1948) and the European Convention of Human Rights (1950).
22 Lord Bingham of Cornhill defined 'the Rule of Law' generally as 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts' (Bingham, 2011, p. 8).
23 Adopted by the Committee of Ministers in 2010 (Council of Europe, 2012, p. 19).
24 See also Council of Europe 2012, para. 45-48.

> It is for this reason that it has long been recognised that it is unfair to hold a child to account for his or her behaviour to the extent that would be appropriate when dealing with an adult.

It is useful and timely to reflect on alternative models in youth justice and in sentencing.

3.3 The welfare model

The alternative to the justice model is the welfare model, which can be defined as severing the crime from the punishment so that neither gravity nor the triviality of the criminal behaviour necessarily determine the extent of the punishment thought appropriate (Naffine, 1993). Welfare in youth justice is based on the assumption that all state intervention such as probation, indeterminate sentencing, care orders, individualised treatment, and separate custodial regimes should be directed to meet the needs of young people, rather than punishing their deeds (Muncie, 2002). Historically, the welfare model has tended to see little differentiation between offending and non-offending troublesome behaviour; both are symptomatic of a more extensive deprivation, whether material neglect, a lack of moral guidance or a "parenting deficit" (Muncie, 2014, p. 275). The labelling, stigmatisation of children is counterproductive and can in fact make matters worse for the child leading to higher crime rates (Burke, 2018).

Children are the subject of their environment and the criminal justice system should, therefore, address the underlying cause of the child's offending rather than punishing the offence (Alder and Wundersitz, 1994). In contrast, a welfare model has been defined as "the proposition that the principles of meeting needs, wide judicial discretion, in formalism and treatment should be the central elements of systems of youth justice" (Muncie, 2015, p. 401). In prioritising a child's needs over a child's crimes, the welfare model recognises childhood development issues such as attachment, bereavement, separation, mental health and learning difficulties (British Medical Report, 2014). In this context, crime is seen as a sign of social pathology rather than social irresponsibility (Naffine 1993). However, in the context of adolescents who sexually abuse, there is a recognition that children who have co-morbid mental health issues or come from dysfunctional families pose serious questions for risk assessment and treatments (Lambie and Seymour, 2006). Whatever the solution to those needs might be, there is a general recognition that it cannot mirror adult solutions and must take a developmental approach. One of the most effective welfare solutions in this regard is a diversion approach.

3.4 Diversion – A welfare alternative to a judicial sentence

A foundational element of youth justice is that children should be protected from the full rigours of the criminal justice system (Muncie, 2014); a factor which underlies the ethos of the UNCRC and is well-recognised in the Beijing Rules, the Riyadh guidelines and the Tokyo Rules (Muncie 2014; CRC/C/GC/24). This tradition can involve diversion from crime such as crime prevention and diversion from prosecution such as the diversion programme and diversion from custody which is an alternative sentence to custody. General Comment No. 24 (2019) (CRC/C/GC/24) notes, referring to Article 40 (3) of the CRC, "…diversion should be the preferred manner of dealing with children in the majority of cases."

In keeping with this international standard, there is an extensive statutory diversion programme in Ireland which is welfare-orientated and is one of the key features of the Irish Children Act 2001 (Kilkelly, 2006; Berkery, 2018). Therefore, to contextualize sentencing, it is necessary to understand the rationale that every child must be first considered for diversion by the Director of the diversion programme (section 49 of the Children Act 2001). The decision to admit a child to the diversion programme[25] is made by reference to the statutory criteria prescribed in Part 4 of the Children Act 2001. In this regard, the Director of the Diversion Programme is obliged (under section 23 of the Children Act 2001) to take into account the best interests of the child as well as the interests of society and those of the victim. However, these criteria do not always coincide such as for example in a high-profile case where the interests of the public and best interests of the child may in fact be in direct conflict (McDermott and Robinson, 2003; Kilkelly, 2006). This in turn suggests that in practice any child deemed unsuitable for admission into the programme will mostly likely be prosecuted because there is a stronger public policy argument in seeing them prosecuted.

The legal effect of admission to the programme is a bar to prosecution for that offence. It is based on the premise that the child accepts responsibility (Walsh, 2008). It takes no account of a child's capacity, of delayed admission of guilt or children coming to terms with their offending (London *et al.* 2008). It also fails to evaluate the effect of a failure to give independent legal advice or a delay in bringing the prosecution. An example of this occurred

[25] A child admitted to the diversion programme will receive either an informal or a formal caution, depending on the seriousness of the behaviour; the latter is usually accompanied by 12 months supervision (s27 Children Act 2001) by a specially training member of An Garda Síochána known as a Juvenile Liaison Officer (JLO). The JLO may also decide to convene a family conference (s29 Children Act 2001) to bring together the child, his/her family and others, to establish why the child became involved in the alleged behaviour and the context.

in the case *DPP v. Francis Barry* [2017] IECA 171. In this case, a young male aged 24 years who suffered from a mental disorder including suicidal ideation entered a guilty plea in the Central Criminal Court to four counts of rape and two counts of sexual assault. He was aged between 12 and 14 years when the offences occurred. He was sentenced to five years imprisonment with the final three and a half years suspended. In the Court of Appeal, it was claimed that when interviewed by the Gardaí, the then child[26] admitted to two sexual assault charges but not the rape offences. He was, therefore, deemed not suitable for consideration for admission to the diversion programme due to his failure to accept responsibility for all the charges in his appeal; the appellant maintained that the programme was never clearly explained to him. The child was not afforded independent legal advice**.** In the Court of Appeal, Hedigan J. stated that the appellant's failure to engage with the programme was regrettable and that if he had entered the programme, the case would have been more appropriately dealt with for everyone involved. The Court of Appeal upheld the overall sentence of imprisonment of five years, although it increased the suspended portion of that sentence.

Similarly, the consequences for failing to accept the diversion programme by a child who commits an offence under 18 years but tried after the child reaches 18 years is unlikely to lead to a prohibition of a trial. In *R.D v. DPP* [2018] IEHC 164, a child nearing his 17th birthday and before the court for an alleged charge for rape and oral rape, exercised his right to silence and refused to enter the diversion programme. When the matter came before the High Court by way of judicial review for failing to prosecute him before his 18th birthday, Barrett J. noted the conflict between upholding the best interests of the child and public policy considerations but he refused to grant an order for prohibition. The net effect was that the child lost the benefit of the Children Act 2001 and he was tried as an adult for offences committed while a child. In theory, a child who commits a sexual offence under 18 years but is charged over 18 years can be considered for diversion (*S v. The Director of the Garda Juvenile Diversion Programme* [2019] IEHC 796). However, recourse to diversion is rare in practice. While this research has noted that the Irish diversion programme has substantial experience in therapeutic interventions for children who have sexually offended and in grappling with solutions such as RJ options and cautions, the expertise is predominantly confined to the Dublin city area (Document 4).

[26] At the date of sentence in July 2016, the offender was 24 years old. The offences took place between 2004 and 2007 when he was between 12 and 14 years of age. The family became aware of the offences in 2007 but were not reported to the Gardaí until 2013.

Notwithstanding the benefits attached, the welfare model has been criticised by the justice/rights movement in that there are insufficient legal and judicial safeguards in a system of control based on welfare principles (Muncie 2008). Diversion has its critics also. Cohen (1979, 1985) observes that there is a danger that a wider social control will be exerted resulting in more rather than less children being drawn into the criminal justice system. However, diversion also serves as a valuable resource in respect of treatment for sexually abusive behaviours and innovative justice responses to juvenile sex offending, such as therapeutic treatment orders and RJ conferencing (Blackley and Bartels, 2018). One solution might be to have net-widening impact assessments followed by evaluations that monitor inadvertent net-widening interventions (Roberts, 2006).

The welfare system is rejected by those who also criticise the justice movement on the basis that welfare is by nature retrospective and, therefore, incapable of dealing with a child's future (Haines and Case, 2015). For the purposes of this thesis, welfare is analogous to best interests.[27] It is associated with the personal circumstances of the child including developmental needs rather than an attempt to relieve social injustice or address deprivation. The focus, therefore, is on rehabilitation with an emphasis on therapeutic interventions. At the same time, it is important to acknowledge that neurological developmental milestones are complex and teenage sexual offence problems are multi-faceted (Lambie, 2020).

3.5 Restorative Justice (RJ)

A dissatisfaction with the justice and welfare debate has led reformers to consider the merits of a third approach to the philosophies underlying youth justice, namely RJ (Naffine, 1993). The purpose of RJ is to bring together victims, offenders and their families to arrive at a solution related to the impact of the offence and the offending. There is no single definition of RJ (Hudson, 2002; Daly, 2008). It may mean different things to different people (Gelsthorpe, 2002). RJ covers a range of practices that can occur at various points during the criminal justice system (Cunneen and Goldson, 2015). In general terms, RJ aims to resolve conflict and to repair the harm done by crime by involving victims as well as offenders in the process. Core elements of RJ include informality and layperson active participation. However, at court stage or pre-sentence stage, RJ becomes more formal, professional and potentially coercive (Shapland *et al.* 2006). RJ gives victims a voice by which they can outline their harm and have

27 There are sixteen specific references to 'best interests' in the Children Act 2001 (O'Connor and Horgan, 2021).

a control over the treatment of the offenders "by helping to ensure that their experience is honoured, treated seriously and with respect, such that they gain some measure of justice" (McGlynn *et al.* 2012, p. 239).

There is considerable debate surrounding the use of RJ for juvenile sexual offences (Cossins, 2008; Daly, 2006, 2008, 2016; Daly *et al*. 2013; Hudson, 1998, 2002; McLendon, 2007, 2008; Strang and Braithwaite, 2002). The least controversial application of RJ is for minor and middle-seriousness offences of a routine nature committed by juveniles (Hudson, 2002). RJ for children is frequently represented by diversion, such as in Ireland, by cautioning and by family conferencing under the Garda diversion programme (Part 4 of the Children Act 2001 (Document 4). Section 78 of the Children Act 2001 provides for family conferencing ordered by the court although RJ is not mentioned in the Children Act 2001. RJ is also not explicitly mentioned in the UNCRC,[28] although its use has been supported and encouraged by the Committee on the Rights of the Child (ADJO, 2016). It has been argued that the fundamental concepts of RJ are at odds with a children's rights model of youth justice as required by international standards due to its lack of due process and whether children have sufficient maturity for remorse and reintegration (Lynch, 2010). In this respect, RJ approaches may trivialise violence, re-victimise and endanger the safety of victim survivors (McGlynn *et al.* 2012). The argument around empowerment of the victim through therapeutic aspects of RJ has taken place with little recognition of victim trauma (Stubbs, 2004) and the inability of conferencing to be a substitute for on-going trauma (Cossins, 2008). Therefore, there is a tension between the best interests of the two children (victim and offender) involved in the juvenile justice process (Lynch, 2018). The emotional intensity of RJ conferences has also the potential to fail victim expectations (Cossins, 2008).

From a political perspective, there is also a danger that RJ can blight the public sense of fairness if victims such as young children are unable to be involved or if under-resourced (O'Mahony *et al.* 2012). The issue of fairness and lack of resources was explored with the judges interviewed as part of the research for this thesis. While in theory, over 70% of judges interviewed were in favour of voluntary RJ including for sexual offences, many were of the view that it was a soft option and were, therefore, sceptical of its operation (Document 3). In reality, there is no evidence in Ireland (gleaned from judicial decisions) of restorative practices

28 The UN declaration on basic principles on the use of RJ programmes in criminal matters (2000).

or family conferencing practices for children who sexually offend. To address this deficit, the issue of family group conferencing (FGC) decisions as operate in NZ for juvenile sexual offending will be explored at a later point in the thesis. However, one is mindful that what works in one country may not work in another. The flexibility of the FGC model (Anderson and Parkinson, 2018) has led to its successful use in different jurisdictions such as in Northern Ireland where the Justice (Northern Ireland) Act 2002 provided for the introduction of the concept of youth conferences and youth conference orders (Campbell *et al.* 2006).

3.6 Literature review

A common strategy for dealing with children who sexually abuse is through the justice system. Punishment is often equated with the prevention of re-offending. However, this view is based on a stereotype which typifies child sexual abusers as male paedophiles who are strongly motivated to offend. In reality, however, there is little evidence to support this justice approach (Finkelhor, 2009). It is also of note that the justice system is not the only method of dealing with children who sexually abuse. While it is outside the scope of this thesis to explore the alternative methods such as medical models, it is notable that a high proportion of adolescents who sexually offend have prior involvement with the care system as well as histories of adversity, loss and insecure attachments (Hackett, 2014).

As outlined earlier, Hackett *et al.* (2014, p. 6). found that two-thirds of children who sexually abuse have experienced some form of abuse, with nearly half of that group (31%) having suffered sexual abuse; this figure is in line with other studies (Manocha and Mezey, 1998). In turn, the trauma experienced impacts negatively on a child's neurobiological development leading to other developmental problems such as poor peer relationships and significant deficits in self-regulatory control. A traditional one-size-fits-all approach to prevention is, therefore, not appropriate in juvenile justice (Rayment-McHugh, 2020).

As will be demonstrated in this thesis, existing Irish case law substantially concentrates on the issues in the form of a justice/welfare sentence. In contrast, a dominant theme of the literature is prioritising effective treatment for children who sexually offend (Walker *et al.* 2004; Ryan *et al.* 2011; Hackett, 2014; Grady *et al.* 2018). This thesis argues that there is scope for a combination of both treatment and rehabilitative punishment in judicial sentencing. It recognises denunciation of serious sexual crimes but does not accept retribution as a legitimate aim for juvenile sexual offending sentencing. In doing so, it does not advocate for a punitive justice or welfare model or a medical model of rehabilitation. It acknowledges that courts must

have a guiding philosophy underpinned by a series of child-friendly practice principles (Haines and Case, 2015; Williamson and Conroy, 2020). However, it also recognises the essential political nature of youth justice (Muncie and Goldson, 2006; Muncie, 2014; Goldson and Muncie, 2015) and the emotionally-charged atmosphere of serious sexual crimes (Banks, 2006). The criminal justice system has to deal within the political legislative agenda. However, it must do so within the context of the rule of law and international best practice. Under Irish law, this means recognising the absolute minimum standard if there is a conflict between rights and welfare; a child's rights must prevail in juvenile justice (*DPP (Murphy) v. P.T* [1999] 3 I.R. 254 and *Re DK, a Child* [2007] EEHC 488). This thesis argues for a social, legal model of sentencing recognising children's vulnerabilities and childhood issues (Bradley, 2009; Coates, 2016; Equality and Human Rights Commission, 2020; Sentencing Council, 2020; Ministry of Justice, 2020). It does so by merging and balancing rights and promoting a child's best interests within the framework of international best practice (Liefaard, 2015b).

As a starting point, the thesis acknowledges children in conflict with the law are inherently vulnerable. Courts must, therefore, recognise that children have underdeveloped capacities in comprehending harm as evidenced in recent developments in neuroscience (Arthur, 2016; Wishart, 2018; Crofts, 2019; Wake *et al.* 2021); these factors must be borne in mind at sentencing stage. The need for a holistic approach to sentencing is, therefore, obvious (Brown and Charles, 2019). The reality, however, is that many cases are settled by prosecution and defence before trial; cases are dealt with by diversion and the remit and discretion of the Director of Public Prosecution is beyond the control of the judge. In short, the judge is just one of a number of decision-makers within the criminal justice system.

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

3.7 Ireland's sentencing regime

The premise for this thesis is that an overly punitive approach to sentencing for young offenders in Ireland does not meet international standards (Liefaard, 2015b). Historically, the Irish juvenile justice system did not lend itself to an easy classification. While it has not reflected the English historical shifts between a punishment and welfare-orientated approach (Gelsthorpe and Lanskey, 2017) this has been largely due to legislative neglect in Ireland. The

Children Act 1908 was the primary legislation for juvenile justice in Ireland until the implementation of the Children Act 2001 (O'Connor, 2019).

Walsh (2016) asserts this has resulted in Irish juvenile justice historically leaning towards a justice model as distinct from a welfare model. Walsh contends that the Children Act 2001 offers the prospect of a more holistic model in which the welfare needs of young offenders could be managed without depriving them of due process protections. Ireland has a general low minimum age of criminal responsibility (MACR) of 12 years which is reduced to age 10 for very serious crimes such as rape, although in practice, no child under 12 years has ever been prosecuted (Department of Justice, 2021). With the exception of England and Wales, this is low by international standards.[29] Understanding the MACR in the criminal justice system is the starting point in ascertaining why on the one hand, children have the same rights as adults but have a different sentencing system. The latter is due to their lower cognitive and self-control mechanism including resistance to peer groups compared with adults. This combined with the developmental nature of children means "it is right that the youth justice system should have a different, more constructive, and caring approach than the adult criminal justice system, with a reduced level of penal response" (Ashworth, 2015, p. 399).

Therefore, section 96 of the Children Act 2001, reflecting Article 3 of the UNCRC, sets out that the best interests of the child must be the primary consideration in all actions relating to a child (LRC, 2020, para. 7.9). Translated into sentencing, the Irish Law Reform Commission quoting this writer's judgment in the case of *The People (DPP) v. TC* [2017] IEDC 7, outlined the current sentencing principles for children who commit crimes as follows:

> This necessitates a separate juvenile system which requires a different approach to the sentencing of children and young offenders. In *TC*, Judge O'Connor correctly pointed out that "Justice and welfare concerns are issues in any juvenile sentencing in criminal law matters and that while pre-trial and trial procedures should be governed primarily by justice considerations, welfare considerations should predominate once a child has been found guilty of an offence at the sentencing stage".

Notwithstanding this declaration, this thesis will explore and contrast case law with the empirical research to date which revealed that nearly all judges (Document 3) and YPPOs (Document 4) interviewed were of the view that the Irish juvenile justice system is a mixture

29 France, Germany, Italy, Norway, Sweden, Spain, Portugal, Australia, New Zealand, US.

of justice and welfare issues. In essence, it is necessary to evaluate whether any guidance can be ascertained as to the weight that should be attached to these welfare considerations in sentencing children and young persons for sexual crimes.

The next chapter will explore the rationale for sentencing children and young persons who sexually offend.

CHAPTER 4: THE RATIONALE FOR SENTENCING CHILDREN AND YOUNG PERSONS WHO SEXUALLY OFFEND

4.1 Introduction

Crime is a public wrong which entitles the state to prosecute, and in the event of a conviction to punish the wrongdoer. In this regard, the law presumes a person has autonomy and self-determination (O'Malley, 2016). A person's autonomy includes the right to have sexual relations provided that the person is of age and has sufficient capacity to engage in sexual intercourse and has the capacity to choose whether or not to engage in it. On the other hand, sexual violence amounts to a serious infringement of the victim's human rights. Sentencing, therefore, affords a justification for the State's authority to punish those who transgress the criminal law (LRC, 2020).

A traditional Aristotelian-Thomistic[30] view is that punishment restores an inequality between a criminal and society as a whole (Koritansky, 2019). However, there has been (for at least 100 years) a belief that the sentencing of youth offenders calls for principles that differ from those applicable to the sentencing of adults (Von Hirsch *et al.* 2009; *G v. DPP* [2014] IEHC 33). However, as O'Malley (2016, para. 2.24) notes:

> Punishment theorists usually advance and defend their preferred justifications with great conviction and tenacity. Legislators, judges and lawyers, by contrast, seldom devote much thought to the matter, at least in the abstract. Yet, every time a judge imposes a sentence for an offence, whatever its nature or gravity, he or she is motivated, consciously or subconsciously by some purpose.

Irish constitutional law requires sentences to be proportionate to the gravity of the offence and the circumstances of the individual (Hogan *et al.* 2018). This stance is also echoed in Article 40 (1) of the UNCRC and forcefully by the UNCRC General Comment No. 24 (2019) which states that a strictly punitive approach to sentencing is not appropriate and that personal issues such as mental health needs should be considered. However, in serious cases, the UNCRC allows consideration of the need for public safety and sanctions but even here, 'In the case of children, such considerations must weigh in favour of the child's right to have his/her best

30 Drawn from the philosophical stances of Aristotle and St Thomas Aquinas.

interests considered as a primary consideration and to promote his/her reintegration' (CRC/C/GC/24 para. 85).

The Irish Law Reform Commission report on suspended sentences has identified five main purposes of sentencing namely, deterrence; rehabilitation; punishment; reparation, and incapacitation (LRC, 2020). Case law reflects that the justice model of retribution and deterrence together with the welfare model of rehabilitation, are in practice the three main sentencing criteria in Ireland for children who sexually offend. The author's research has revealed that Irish judges are likely to embrace an adult structured sentence but with a significant proportionality discount coupled with a rehabilitative element for children who commit serious sexual offences (Document 3). In theory, therefore, proportionality determines the outcome of the sentence. Three-quarters of the judges interviewed felt that retribution should not be a factor in sentencing. Against that, one senior judge was of the view that retribution will always be a factor in very serious offences. Otherwise, judges would view that the proportionality test would be offended.

It is submitted that it is impossible to devise a one-size-fits-all solution for juvenile sexual offending although 83% of judges interviewed were of the view that the legislative requirements of section 96(5) of the Children Act 2001 were attainable (Document 4).[31]

4.2 Public policy and victim rights

Notwithstanding the purposes of sentencing for juvenile offending and sexual offending that are clearly set out in the Children Act 2001, there is also:

> … a wrestling competition between considerations of community safety and the importance of the possibility of rehabilitation of a child which is especially true when violent crimes are committed by children (Elliott *et al.* 2017, p. 750).

Historically, criminal law generally noted 'the opinions of the victim…about the appropriate level of sentence do not provide any sound basis for reassessing a sentence' (*R v. Nunn* [1996] 2 Cr App R (s) 136) and that 'sentencing is neither an exercise in vengeance nor the retaliation by victims on a defendant'(*People (DPP) v. M* [1994] 3 I.R.). However, as stated, section 96(5)

31 Section 96(5) of the Children Act 2001 as substituted by the section 136 of the Criminal Justice Act 2006, which states: 'When dealing with a child charged with an offence, a court shall have due regard to the child's best interests, the interests of the victim of the offence and the protection of society.'

of the Children Act 2001 clearly shows that there is a role for victims; the practicality of this will be explored.

The movement which recognises that victims have a right to participate in sentencing and diversion processes (Doak, 2005) was predominately influenced by sexual offending generally in Ireland. Thus, section 5 of the Criminal Justice Act 1993 made a formal provision for the introduction of victim impact evidence at sentencing (O'Malley, 2016). However, the list of sexual offences is extensive (Criminal Evidence Act 1992), and in serious juvenile sexual offending, the issues can become problematic such as offending by a child against a sibling. This in turn raises the complex question of how a child offender's best interests can be balanced with the rights of potential future victims (Lynch, 2018).[32]

This thesis will explore how the Children Act 2001 and international human rights law as a whole interacts to ascertain the true balancing and merging of rights and welfare as they affect children (Liefaard, 2015a). In this respect, international children's rights standards on youth justice are "an effective benchmark against which law, policy and practice can be measured" (Kilkelly, 2008, p.191). It is noteworthy that many judges, when interviewed, were empathic towards adolescence as a phase in a child's development (Document 3). This view is tested in the cases reviewed to ascertain if judicial practice and empathy are aligned. For example, Document 3 and Document 4 revealed that in contrast to the Garda diversion programme, RJ is rarely used as a sentencing option by Irish judges for children generally and never used for sexual crimes. However, judges were open to the idea 'in appropriate cases' where victim and offender can effectively participate in the process although not necessarily the sole determinant in the finalisation of a sentence (Document 3).

One of the most notable characteristics of child and youth sentencing is that in reality it is guided by a minimum and maximum chronological age of criminal responsibility rather than just a maturation test. In regard to serious sexual offences, there is a dearth of scholarship and jurisprudence in the area of sentencing for children and young adults. Age-appropriate responsibility is what is needed by the criminal justice system (Lynch, 2018). In other words, children who commit serious sexual offences are less culpable than adults. However, they are not without responsibility, but culpability is subject to maturation (Grisso *et al.* 2003; Lynch, 2018). Therefore, it is submitted, that children should not be viewed solely on grounds of their

32 More recently, the Victims' Rights Directive 2012/29/EU, in Ireland, and the Criminal Justice (Victims of Crime) Act 2017 extended this to both sentencing generally and to victim information.

status as a child or by the outcome of their actions. Rather, children should be judged on age and maturity grounds. This approach would facilitate an assessment of their underlying vulnerabilities and enable the targeting of the appropriate interventions and supports. The approach is in line with international human rights law and in particular with the UNCRC.

The next chapter (Chapter 5) will explore this theme further in the context of rights and welfare issues commencing with a spotlight on the UNCRC.

CHAPTER 5: RIGHTS AND WELFARE UNDER INTERNATIONAL STANDARDS

5.1 Introduction

The legal status of the child under international human rights law revolves around balancing the rights and best interests of a child within the broader context of child-friendly justice (Liefaard, 2015b). While international treaties and standards allow considerable flexibility to national legislature to introduce different legal systems, they all emphasise the importance of treating children who offend different to adults who offend. In addition, as international benchmarks of best practice, these instruments emphasise accountability in determination and that sentencing should take account of the vulnerability and immaturity of children who come into contact with the criminal justice system (Lynch, 2019).

It is appropriate, therefore, to take a closer look at the UNCRC and how child-friendly justice is conceptualised. The influences of the UNCRC on youth justice in various jurisdictions is explored and in particular its unique impact on legislation in Ireland as a dualist state.

5.2 The UNCRC

If, as Bingham (2011) states, the rule of law is like a lay religion, then perhaps the near universal acceptance of the UNCRC can be regarded as the commandments of the rule in any assessment of children rights and best interests (O'Connor, 2019). The UNCRC was adopted by the UN in 1989 and was ratified by all countries except the US. Ireland and the UK have also access to the Court of Human Rights pursuant to the ECHR.

Although Australia and NZ have ratified the UNCRC, they do not have similar regional courts to the ECHR as enjoyed by Ireland and the UK. The US signed the UNCRC in 1992 but has not ratified it. Ireland (again similar to the UK) adheres to what is described as the dualist approach to international law. This in effect means that the UNCRC operates at two levels in Ireland - the international level and the domestic level. Article 29.1-3 of the Irish Constitution 1937 accepts Ireland's obligations in its relations with other states known as the state-to-state level. Article 29(6) provided that the *Oireachtas* (Irish legislature) determines whether an international agreement has any legal effect as a matter of domestic law. The effect of dualism, as set out in Article 29.6, is that the UNCRC does not have any significant practical effect in

Irish domestic law unless and until the *Oireachtas* decides what effect that agreement should have (LRC, 2020). In this regard, the Children Act 2001 was drafted to give effect domestically and legislatively to the UNCRC.[33] However, the fact that the UNCRC cannot be invoked in the national courts in support of any claim means that a breach of its regulations attracts no formal sanction (Muncie, 2008). Articles 37 and 40(3) set out the UNCRC standards of juvenile justice and recognises the complexity of children's needs and fundamental human rights. It promotes as core principles the 'best interests' of the child, custody as a last resort, separation from adults and a process that respect the dignity of the child (Muncie, 2008). However, in regards to sexual abuse victims, many of whom are children, Article 19 is also particularly pertinent as it requires state parties to prevent and protect children from child abuse and neglect including sexual abuse (Masson, 2006).

UNCRC provisions should be read in the context of the UN non-binding supporting guidelines, such as the UN Standard Minimum Rules for the Administration of Justice (the Beijing Rules), the UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Rules), and the UN Guidelines for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) which are mentioned in the preamble to the UNCRC. For example, the principle of proportionality which is pertinent to sentencing is a key concept of the UN child-friendly justice defined in Article 5 of the Beijing Rules.

The Committee on the Rights of the Child and, in particular, General Comment No. 24 (2019), which has stated juvenile justice, should in addition to Articles 37 and 40(3) take into account the general principles enshrined in Articles 2 (non-discrimination), Article 3 (best interests), Article 6 (the right to life, survival and development), Article 12 (the right to be heard) and all other relevant articles of the UNCRC (Kilkelly, 2019). These include Article 4 (states to undertake to enact appropriate legislative changes) and Article 39 (reintegration of a child victim).

General Comment No. 24 (2019) also reveals that the UNCRC concept of best interests is now being interpreted in terms of prevailing standards and understanding of developments of children and young people. The relatively recent emergence of scientific developments in neuroscience concerning child development and brain development has informed the children's

33 At the international level, Ireland is subject to periodic reviews by the UNCRC and the Ombudsman for Children regularly comments on Ireland's level of compliance.

rights framework and international juvenile justice standards (Liefaard, 2020). In turn, this has led to a renewed interest in the concept of evolving capacity as envisaged by Article 5 of the UNCRC (Kilkelly, 2020).

The UNCRC does not state whether a welfare or a justice approach is preferable, but it does require certain safeguards to be in place no matter what system a county adopts. In particular, it promotes interventions without resorting to judicial proceedings. However, in the context of judicial proceedings, the whole thrust is towards a holistic view of sentencing which is flexible and pragmatic with an emphasis on rehabilitation rather than a punitive sentence. General Comment No. 24 (2019) also recognises that there is a consensus that in order to be effective and comprehensive reform of justice sector programmes must integrate formal and informal aspects in the exercise of justice. In this regard, the protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and RJ objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.

Specifically, regarding sentencing, General Comment No 24 emphasises proportionality which is not just to the offence but to the specific child personal circumstances, including his/her age and mental health. It acknowledges the long-term needs of society and the considerations of the need for public safety and sanctions in serious cases and emphatically states that 'A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC' (Article 85 of CRC/C/GC/24). A sentence should recognise the child's right to have his/her best interests considered as a primary consideration as well as promoting the child's reintegration (CRC/C/GC/24).

However, the UNCRC is now more than 30 years old and the world has dramatically changed over the decades. These changes include the use of the internet and social media by children and adolescents and the associated risks, the growth in neurobiological science and child developmental studies, and the fact that the concept of the nuclear family is now much broader.

5.2.1 Synergy of the UNCRC philosophy for sentencing

Drawing on the UNCRC philosophy, the following is suggested as an overall guiding framework for the sentencing of children in Ireland who sexually offend:

- A recognition in sentencing that detention is a last resort and for the shortest appropriate period of time (Article 37). Therefore, mandatory minimum sentences are incompatible with this principle as it offends against the child justice principle of proportionality.

- An acknowledgement that non-court sanctions such as diversion are preferable, but where court sanctions are imposed, there should be a preference for a community or family conference or where appropriate a RJ-orientated approach.

- A recognition of the minimum age of criminal responsibility (MACR) needs legislative change. Ireland has two ages of MACR namely age 10 for murder and rape and age 12 more generally. Recently, the CRC General Comment No. 24 (2019) stated that there is a clear preference for 14 years as the optimum MACR. This raises the issue of the age of the child when sentenced. Implicit in the UNCRC recognising the principle of equality before the law and explicit in General Comment No. 24 (2019) is that the age should be the date of the offence and not the date of the sentence. It is submitted in the absence of legislative change and in the context of neurobiological research, the Irish courts should recognise the concept of diminished capacity for children as an important and meaningful factor for consideration in sentencing. This approach would, therefore, be consistent with General Comment No. 24 (2019) Article 28 which states that children with neurobiological disorders should not be in the criminal justice system and if not excluded, they should be individually assessed.

- In Ireland, prosecutorial delay is a significant issue for judges when sentencing and is a focus in the case review. However, delayed guilty pleas such as a child coming to terms with his/her sexual offending are also significant factors. Therefore, a sentence should not hamper a child's full participation in his/her community, such as stigmatisation, social isolation, or negative publicity. In practice, this calls for an evaluation of ancillary orders such as compulsory registration of a child who sexually offends and post-supervision sexual offender orders.

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

- Rehabilitation is a core element the UNCRC sentencing philosophy. In the context of children who sexually offend, this will require multi-disciplinary expert reports in addition to probation reports (Document 4). It will also require expertise and training to ensure that there is no inadvertent disclosure of confidential information that might lead to the criminalisation of a child.

- Anonymity in the sentencing of children who sexually offend is essential. This includes adults sentenced for sexual crimes committed when the adult was under 18 years.[34]

- Children who sexually offend are more amenable to change particularly vis-à-vis their parents, guardians, families and responsible adults. To assist judges, a re-evaluation of the concept of evolving capacity and a multi-agency welfare approach is required.

- There should be a continuation approach in respect of a child detention sentence that would enable the child to remain in a specialised juvenile detention when the child reaches 18 years. At present, there are no facilities for children in Ireland at the threshold of 17/18 years of age or over 18 years of age in the Irish prison system.[35]

- Article 12 which outlines the right of a child to be heard is arguably as important in sentencing as it is during the criminal proceedings in obtaining a holistic view of the child's needs rather than simply viewing the child as an offender. A departure from adult sentencing is required and should go beyond a probation report that takes into account the voice of the child even if this process is facilitated by an intermediary.

- As cited earlier, the UNCRC is not directly enforceable by the Irish courts. At a minimum, the best interests principle as outlined in the preamble and Article 3 of the UNCRC should be considered by the courts in interpreting domestic law. In other words, the best interests principle cannot be interpreted in a vacuum; rather, it should be interpreted in harmony with the general principles of international law (*Neulinger v. Switzerland* (2010) 28 BHRC 706, para. 131).

[34] Under Irish law, adults accused of rape can only be publicly identified if convicted of rape unless the victim waives their anonymity. In other cases, such as sexual assault, there is not an automatic right to anonymity even where the adult was under 18 years at the date of the offence.
35 There was a facility in Wheatfield Prison (Dublin) for offenders aged 18-21 years. However, the facility was closed in view of the small number of persons detained within.

The cross-fertilisation between international children rights and the European standard-setting has resulted in more legal clarity on the procedural legal status of children, particularly with regard to children's involvement in formal court proceedings (Liefaard, 2020). In this regard, the UNCRC also influences regional rights authorities. The ECHR in its decisions frequently refer to the UNCRC in its interpretation of issues arising under the ECHR involving children and children's interests (Kilkelly, 2001).

5.3 The European Convention on Human Rights (ECHR) and European Union law

Baroness Hale[36] stated that the jurisprudence of the ECHR makes it clear that it expects national authorities to apply Article 3(1) of the UNCRC and treat the best interests of the child as a primary consideration (*ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2011] UKSC 4). However, in the context of case law, the nebulous nature of 'best interests' makes its application difficult (Kilkelly, 2015). In addition, the ECHR contains few specific references to the rights and welfare of the child. There has been cross-fertilization between international children rights standards such as the UNCRC and case law of the ECHR and, therefore, an increasingly uniform inter-jurisdictional approach towards deciding cases affecting children and their rights (Liefaard, 2015b; European Union Agency for Fundamental Rights, 2015; Kilkelly, 2001). Arguably, the references to the rights and welfare of the child are predominately concerned with procedural issues as a fair trial (Article 6) and as demonstrated in a child's participation in the trial (*T v. UK* no 24724/94 and *V v. UK* no 24888/94, both 16th December 1999).

Article 5 of the ECHR (right to liberty and security) read in the context of Article 40(1) of the UNCRC (best interests of the child) and Article 40(3)(b) (alternatives to detention) is of relevance in the area of types of sentencing.

Article 12 of the UNCRC, referring to the voice of the child, is incorporated as a right into the Irish Constitution. However, there appears to be a reluctance on the part of the ECHR to refer to Article 12 (Kilkelly, 2015) and the constitutional application in Ireland is concerned with family law and child care issues rather than criminal law. From a sentencing point of view, the voice of the child is, therefore, confined to a secondary probation report for a defendant and victim impact statements or reports from victims. It is presumed that the reluctance to refer to

36 Baroness Hale of Richmond served as President of the Supreme Court of the UK from 2017 until her retirement in 2020.

the voice of the child for child defendants in sentencing is to prevent a child from self-incriminating himself/herself. This stance is more a statement about the adult nature of sentencing than the holistic welfare view of sentencing as envisaged by the Children Act 2001. Many child defendants are also victims of domestic violence including sexual abuse, which in a sentencing context can lead to the perception by many children, that their own prior trauma was not considered by the judge (Document 4).

The interface between the UNCRC and the ECHR can be found in the Guidelines to Child-Friendly Justice[37] which promotes juvenile justice rights in formal proceedings and in the alternative to court proceedings in a holistic way. It also reflects international standards which have been incorporated into EU legislation (Liefaard and Kilkelly, 2018). The case of *Pupino v. Italy*[38] emphasises the need for effective participation by children in courts and the CJEU is a mechanism whereby individual rights will be upheld even against national courts.

The significance of the UNCRC to this thesis is that it provides a common European standard of child-friendly justice and the European Court uses it as a key point of reference (Liefaard, 2015b). From an Irish legal procedural point of view, the ECHR Act 2003 (No. 20 of 2003) has empowered the courts to have full regard to the case law of the ECHR. Its domestic incorporation is, however, at a sub-constitutional level; this means that while the courts are empowered to make a declaration of incompatibility where a statutory provision is in breach of a Convention right, it does not affect the validity of the law. It still remains a matter for the *Oireachtas* (Irish legislature) to determine whether to amend the law. This is in contrast with a declaration of unconstitutionality under the Irish Constitution which involves a declaration that the law is invalid and cannot any longer be enforced (LRC, 2020). This approach is in contrast to EU law which is an exception to the dualist approach as it provides a set of legal rules that are usually justiciable in each of the member states which can be invoked in national courts as well as between states.[39]

[37] Adopted by the Committee of Minsters in 2010.
[38] EUR-Lex - 62003CJ0105 - EN - EUR-Lex (europa.eu).
39 The Charter of Fundamental Rights of the European Union was proclaimed by the EU institutions and politically approved by the Member States on 7 December, 2000 and incorporated into the Lisbon Treaty on 1 December, 2009. Article 47 provides the right to a fair trial; Article 48 recognises the presumption of innocence and the right of defence; Article 49 provides that no one shall be held guilty of any criminal offence on account of an act or omissions which did not constitute a criminal offence at the time; Article 50 notes the right not to be tried or punished twice in criminal proceedings for the same offence.

The next chapter (Chapter 6) examines how international law has impacted Irish legislative sentencing in the context of the justice/welfare paradigm. A spotlight is placed on the Children Act 2001 and the guiding principles underpinning sentencing of children who sexually offend.

CHAPTER 6: DEVELOPING A RIGHTS OR WELFARE COMPLIANT DOMESTIC SENTENCING STRUCTURE – IDENTIFYING THE KEY ELEMENTS WITHINA JUSTICE/WELFARE PARADIGM

6.1 Introduction

As outlined in the previous chapter, the UNCRC does not state with absolute clarity whether it favours a rights-based or a welfare-orientated approach to juvenile justice. However, the underpinning child-centred, best interests' philosophy of the UNCRC permeates the key tenets of the UNCRC; both the philosophy and the tenets emphasise rehabilitation, detention as a last resort, and the holistic, developmental needs of the child in the context of sentencing. In Ireland, the entire thrust of the Children Act 2001 was modelled on the UNCRC. In a parliamentary debate concerning the Children Bill 1999, the then Minister for Justice stated that he was anxious to avoid mistakes made in other countries which wedded the legislation to a particular system. The Minister stated that the justice system should not have priority over the needs and misdeeds of children (O'Donoghue, 2000). It is, therefore, timely to analyse the main legislative provisions that guide judges in sentencing children for sexual offences.

6.2 The Children Act 2001 and sentencing justice and welfare paradigm

The Children Act 2001 (the Act) codified the juvenile justice law governing interactions between children below the age of 18 years in a detailed and modern framework to comply with the UNCRC (O'Malley 2016). It was heavily influenced by international juvenile justice best practice and in particular by the family group conference (FGC) trailblazing developments in the field of youth justice in NZ (Lynch, 2012, 2021). The Act was designed to underpin the future development of the juvenile justice system in Ireland in response to changing circumstances in a way not anticipated at the time (O'Donoghue, 2000). It placed on a statutory basis the diversion programme and probation-led family conferencing as well as creating a Children Court in Ireland (Kilkelly, 2014).

The hybrid nature of the Irish youth system which embraces both justice and welfare concepts raises questions as to what principles should guide its development and implementation (Kilkelly, 2006). However, both O'Malley (2016) and Walsh (2005) state that the principles of the Act are heavily biased towards rehabilitation and, therefore, "rehabilitation takes centre stage in the punishment of a child for a criminal offence" (Walsh, 2005, p. 190).

Section 96 of the Act requires:

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

Section 96 combined with the principles, such as detention is a measure of last resort (Section 143),[40] the emphasis in Section 99 on a probation and welfare report before sentencing, the alternatives to detention such as the 10 community sanctions[41], collectively create a substantial welfare ethos. The welfare aspect is particularly pronounced for summary and minor indicatable offences in the Children Court where Part 8 of the Act authorises the judge to request the attendance of a representative of the Child and Family Agency (Tusla) to attend court. It also allows a court for example to dismiss a case on its merits analogous to the abolished *doli incapax* presumption[42] for a child under 14 years of age provided that the judge, having had due regard to the child's age and level of maturity, determines that the child did not have a full understanding of what was involved in the commission of the offence (section 52(3) the Act). Reflecting the cross-over between welfare and rights, the Act allows the Children Court judge to direct Tusla under section 77 of the Act to convene a family welfare conference to consider if care and protection orders are needed.

A family welfare conference under Section 77 of the Children Act 2001 represents the interface between welfare and justice. However, it is rarely used in practice by judges in Ireland. One exception is the case of *DPP v. AB* [2017] IEDC 12. AB was a child in special care under the inherent jurisdiction of the High Court. The child was a victim of abuse, including sexual offending, and a detention sanction (which was refused) would have resulted in the child losing

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

41 10 community sanctions provided for under sections 115-141 of the Children Act 2001: 1) Community Service Order; 2) Day Centre Order; 3) Probation Supervision Order; 4) Probation (Training or Activities Programme) Order; 5) Probation (Intensive Supervision) Order, section 125 of the Children Act 2001; 6) Probation (Residential Supervision) Order; 7) Suitable Person (Care and Supervision) Order; 8) Mentor (Family Support) Order; 9) Restriction on Movement Order; and 10) Dual Order (combination of two orders for example Probation and a Restriction of Movement order).

42 The presumption of *doli incapax*, meant 'incapable of committing an evil". Section 52 (3) of the Children Act 2001 states: *"The rebuttable presumption under any rule of law, namely, that a child who is not less than 7 but under 14 years of age is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong, is abolished."*

the benefit of very high therapeutic special care as criminal detention take precedence over care orders even if made by the High Court.

Section 78 of the Act is the only reference to a legislative RJ-type sentence for children. It allows a Children Court judge to direct the probation and welfare service to arrange for the convening of a family conference in respect of the child. This, unlike the conference under section 77, is a type of RJ conference modelled on the NZ model (Donoghue, 2000). Court statistics have revealed that family conferences are rarely used by the courts. However, the most recent strategic plan of the Department of Justice (2021, p.33) states that "Family Conferencing could be the catalyst for addressing the personal welfare and circumstances of the child."

The most significant welfare aspect of sentencing in the Children Court is the importance of probation and welfare reports. Section 99 of the Act 2001 permits a court to order a report from a probation and welfare officer in every case. However, it mandates it in the case of a detention order or a community sanction. While obtaining a report is mandatory irrespective of a child's wishes (*Allen v. Governor of St Patrick's Institution* [2012] IEHC 517), the Act is silent on the content of the report. Therefore, a lack of co-operation by a child can result in a meaningless report and the acceptance of same is according to the High Court within a court's discretion (*Mooney v. Governor of St Patrick's Institution* [2009] IEHC 522). It is submitted that this decision is somewhat at variance with concept of child-friendly justice which recognises that participation in proceedings also requires a child's views to be heard on the possible sanctions.

The rights and best interests of the child does not require that the child's views determine the sentence but that the child is aware of the possible outcomes (Liefaard, 2015a). While this issue could be alleviated by the child's lawyer-assistance (The Netherlands Supreme Court HR 28 Augustus 2012.NJ 2012 .506 m.nt. 5.5 (Neth); Liefaard, 2015a), it is also problematic where the lawyer and judges lack appropriate specialised training (O'Connor, 2019). In this regard, the court should also consider any additional supports available for a troubled child which need to be dealt with in a child-appropriate way (Haines and Case, 2015).

Therefore, while the purpose of a probation and welfare reports is to ensure that the needs of the child are addressed, this research has demonstrated that it may not be sufficient in sexual abuse cases where specialised therapeutic interventions and treatments such as the AIM project

are required.[43] A probation welfare report may need to be supplemented with a psychologist report or psychiatrist report (Document 4). The practical dangers of obtaining additional welfare type reports are that they can reveal information such as other undisclosed potential offences which would breach of a child's presumption of innocence, which is challenging in an adversarial criminal justice system as operates in Ireland. A solution would be for the judiciary and the legal professional bodies to draw up appropriate guidelines.

However, even where a custodial sentence is imposed, the welfare considerations are strong in the Act. Thus, section 158 of the Act now provides "the principal object of children detention schools is to provide appropriate educational, training and other programmes and facilities for children",[44] together with providing care for the child, preserving and develop satisfactory relationships between the child and their families and promoting reintegration into society. Therefore, while 'welfare' is the dominant legislative feature of the Act in regards to the principles of sentencing, the principle is challenged in practice in regard to victim rights, many of whom in sexual offending cases are also children. In this respect, it is not unreasonable to assume that the best interests principle is also applicable to child victims bearing in mind the provisions of the UNCRC (Lynch, 2018).

6.3 Sexual offences

Since the entry into force of the Criminal Law (Sexual Offences) Act 2017, Ireland has a reasonably comprehensive code of sexual offences. However, it still lacks a consolidated sexual offences statute (O'Malley, 2020).[45] The Sex Offenders Act 2001 introduced several measures regarding the supervision and control of convicted sex offenders. It provided for the imposition of notification requirements, post-release supervision and sex offender orders.

Under the Criminal Justice (Sexual Offences) Act 2006, the legal age of consent to sexual relations is 17 years which is high by international standards. It is not a defence for a charge of indecent assault to prove that a child under 15 years consented (section 14 of the Criminal (Amendment) Act 1935). The position of a child in the 15 to 17 years age category is unclear but in general, consent can be a defence to proceedings where the defendant is younger or not

43 Other treatment approaches include group work, individual work, behavioural interventions and family work (Hackett *et al*. 2006).
44 Original section 158 substituted by the Criminal Justice Act 2006.
45 O'Malley (2020, p. 4) states: "The substantive law on sexual offences is now quite modern and comprehensive, especially with the enactment of the Criminal Law (Sexual Offences) Act 2017, but many of the key procedural provisions, such as those relating to anonymity, date back to the 1980s and 1990s."

less than 2 years older. Thus, for example, a male aged 19 years would not have a defence if the female is aged 16 years notwithstanding consent.[46] However, if the conduct is consensual, it will generally lack exploitation and grooming associated with adult defilement of a child; youth is a mitigation factor in sentencing (O'Malley, 2013). Nevertheless, a child or young adult can find themselves liable to Garda notification requirements and a criminal record. In theory, as O'Malley (2013) asserts, two 14-year-old children, irrespective of gender, engaged in sexual touching, either or both of them could be convicted of sexual assault. A prosecution is unlikely, however, in these circumstances assuming that the activity was entirely consensual but it still remains a legal possibility.

In general, much depends on prosecutorial discretion, which allows the prosecution to decide whether or not to proceed with a prosecution in relation to a specific charge. An example of this would be where a person may properly be charged with sexual assault even where there is evidence to suggest a more serious charge such as rape or aggravated assault might be brought instead such as occurred in the case of (*K.M v. DPP* [1994] 1 I.R. 514).[47]

In *D(M) (A Minor) v. Ireland* [2012] IESC 10, [2012] 2 I.L.R.M 305, the accused was 15 years at the time he committed the sexual offences and the victim was 14 years. The case decided that the Director of Public Prosecutions (DPP) had discretion to bring a prosecution under section 2 or section 3 of the Criminal law (Sexual Offences) Act 2006. The Supreme Court noted that this was an appropriate exercise of prosecutorial discretion; the accused was convicted for the sexual offences with the lower penalty under Section 3 of the Act.

A controversial anomaly (section 5 Criminal Law (Sexual Offences) Act 2006) provides that in consensual heterosexual intercourse between children under 17 years of age, only the male can be prosecuted. It does not apply to other sexual activity. The constitutionality of this section was upheld by the Irish Supreme Court in *D(M) (A Minor*) *v. Ireland* [2012] IESC 10, [2012] 2 I.L.R.M 305. It has been suggested that, however well-intentioned in seeking to prevent the stigmatisation or prosecution of pregnant teenagers, it serves to re-enforce outdated patriarchal values (Doyle, 2011; Leahy and Fitzgerald O'Reilly, 2018) and "it is a matter that should be dealt with outside the criminal law" (Leahy and Fitzgerald O'Reilly, 2018, p. 81). It could also

46 Section 17 Criminal Law (Sexual Offences) Act 2017, amending section 3 of the Criminal Justice Act 2006.
47 *K.M v. DPP* [1994] 1 I.R. 514.was a judicial review, the applicant was 13 years and was indicted on four counts of sexual assault, two against SW at a time when she was 8 years old and two against JW who was 11 years old. Morris J. prohibited the trial against SW only on the basis of the evidence.

be argued that it reflects a legislative gender and sexual orientation bias. How Irish Courts interpret this legislation in practice requires exploration and is, therefore, appropriate to begin by examining the framework of the Irish courts.

In summary Ireland has a comprehensive modern Children Act in compliance with the UNCRC. In contrast to NZ for example, it has a statutory diversion programme. It enjoys stable political environment which has not been subject historically to shifts in public attitudes to the justice welfare debate in youth justice. It has a Constitution and an active Supreme Court. It has access to the ECHR and the EUCJ which have reinforced the development of children's developmental and procedural rights. In theory, this means Ireland should be a model country internationally for judicial activism in developing a holistic approach to determination of juvenile sexual offending. However, it has been hampered by the absence of a comprehensive consolidated sexual offences legislation which is intelligible to children. It is now timely to examine how the Irish judicial structure impacts on these developments.

The next chapter (Chapter 7) will present an overview of the Irish court system with a particular focus on the Children Court and matters directly relevant to child sexual offending and sentencing. Some key implications for the training and education of judges are also explored.

CHAPTER 7: FRAMEWORK OF IRISH JUVENILE COURT SYSTEM

In Ireland, there are five distinct court jurisdictions that can affect a child. An overview of the courts in Ireland is presented in Figure 1. The High Court, the Court of Appeal and the Supreme Court are collectively known as the Superior Courts.

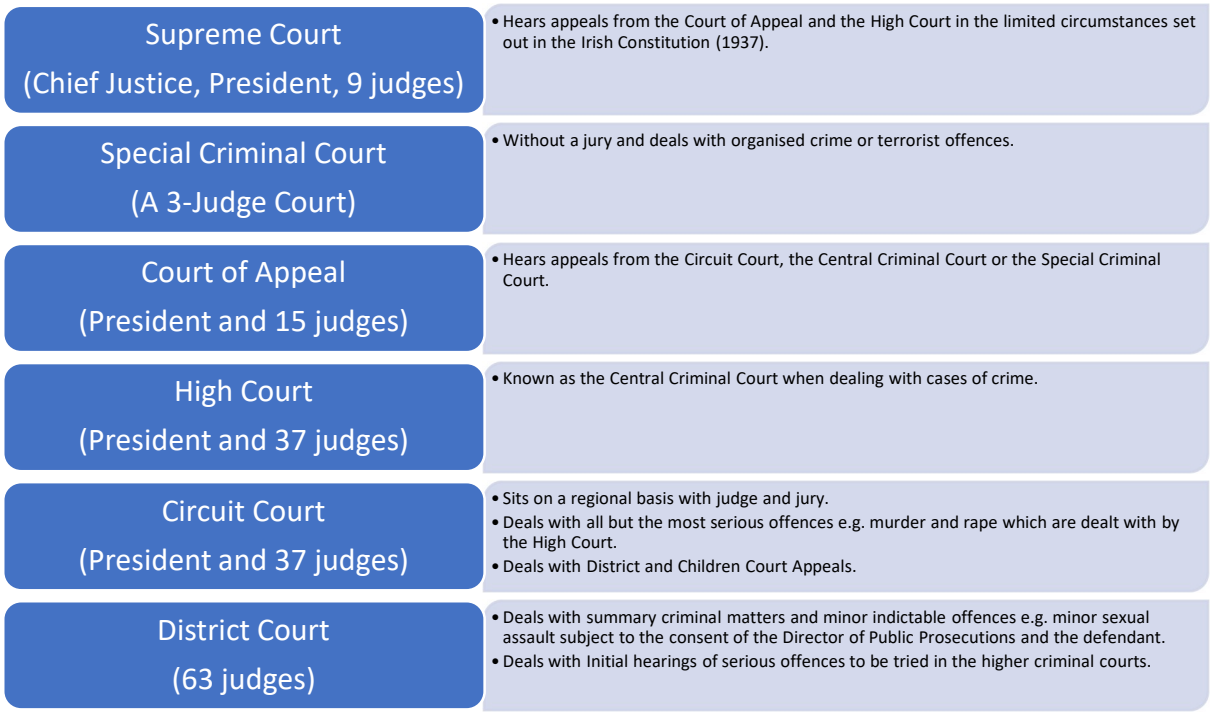

Figure 1 An Overview of the Court Structure in Ireland

7.1 The Children Court

Section 71 of the Act designates the District Court as the only Children Court for all summary and most indictable offences for children under 18 years of age. In regards to juvenile sexual offending, for children sentenced under 18 years, all summary trials for sexual offences are dealt with in the Children Court. In theory, all other indictable sexual offences (except rape) can be dealt with in either the Children Court or the Circuit Court. Rape charges are dealt solely

in the Central Criminal Court.[48] The discretion afforded to the judge to accept or reject jurisdiction for indictable offences under section 75 of the Act is considerable. In practice however, its operation is uncertain. First, the wording is somewhat ambiguous in that it states the offence must be minor unless the child pleads guilty. However, the discretion as regards the adjudication is left to the judge, the only caveat being that the age and maturity of the child is to be taken into account in the assessment.[49] Secondly, the absence of guidelines can result in different interpretations by different District Court judges particularly as there are 25 Court Districts and 63 District Court judges.

7.2 Role of the judge in the Children Court

The Children Court is designed to meet the specific needs of children. In light of the particular complexity of youth justice law and the multifaceted needs of young people involved in the criminal justice system, the children most in need of specialised legal support are arguably receiving the lowest quality of legal representation (Wake *et al.* 2021). This imposes a particular burden on the judge whose role goes beyond that of deciding guilt, innocence and sentence. As Kilkelly (2005, p.47) notes:

> In the absence of an alternative administrative body, the judge co-ordinates the various state agencies involved in the administration of youth justice, and orders enquiries about the availability of places of detention, temporary accommodation, access to assessment, treatment and therapeutic facilities, and vocational and educational programme.

48 Children Court: All summary charges and subject to section 75 Children Act 2001 with any indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter; District Court Adult: Sexual assault triable summarily i.e., where they are minor offence; Circuit Court Adult and Child: hears 1) Sexual assault then prosecuted on indictment; 2) child pornography offences; 3) defilement offences involving certain sexual acts with a child under the age of 15 years); 4) defilement offences involving certain sexual acts with a child under the age of 17 years); 5) incest; 6) child exploitation offences under sections. 3 to 8 of the Criminal Law (Sexual Offences) Act 2017; 7) sexual acts committed against a person with a mental disability contrary to ss. 22 of the 2017; 8) sexual act committed by a person in authority with a child aged between 17- and 18-years contrary to section 18 of the 2017 Act; High Court Adult and Child: Rape common law and section 4 Criminal Law (Rape) (Amendment) Act 1990.

49 Section 75 of the Children Act 2001 states: "*(1) Subject to subsection (3), the Court may deal summarily with a child charged with any indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, unless the Court is of opinion that the offence does not constitute a minor offence fit to be tried summarily or, where the child wishes to plead guilty, to be dealt with summarily; (2) In deciding whether to try or deal with a child summarily for an indictable offence, the Court shall also take account of—(a) the age and level of maturity of the child concerned, and (b) any other facts that it considers relevant; (3) The Court shall not deal summarily with an indictable offence where the child, on being informed by the Court of his or her right to be tried by a jury, does not consent to the case being so dealt with.*"

From a sentencing point of view, section 96 of the Act is clear that children have a right to be heard when charged with offences. However, Kilkelly (2005; 2008) observed in her research that in the majority of cases there is little interaction between the child and the judge.

7.3 Sentencing in the Children Court

All judges follow the principle of proportionality in sentencing in that both the personal circumstances as well as the facts influence the sentence. However, Children Court judges also have the additional option to apply a pragmatic, flexible and individualised sentence for children bearing in mind the extensive welfare provisions generally under the Act, particularly under parts 7 and 8 of the Act which are only applicable to the Children Court. [50] This is also tempered by limitations on the maximum detention sentence of one year on each charge and two years in total for a combination of offences (section 149 of the Act). [51] However, a non-acceptance of an indictable charge by a Children Court judge exposes a child to the potential of a much harsher sentencing system in the Circuit Court.

7.4 General sentencing guidance in respect of all children

In accordance with the Supreme Court decision in *People (DPP) v. M* [1994] 3 IR 306, Irish judges are obliged to follow "a staged or two-tier approach to sentencing in which the judge firstly identifies a presumptively appropriate sentence before moving on to apply any mitigation to reach the final sentence" (Brown 2020, p. 165). Superior Court sentencing guidance is largely discretionary (O'Malley 2016). While judges are allowed discretion, they exercise it in accordance with settled principles or informed judgment. For example, mitigation (adjusting the sentence downwards) factors can apply such as a guilty plea (*DPP v. Tiernan* [1988] I.R. 250); Section 29 (1) Criminal Justice Act 1999; O'Malley, 2016) and the personal circumstances such as the youth of the offender.

In contrast to the Children Court, sentencing in the Circuit Court and Central Criminal Court are in practice more structured as to the facts and settled principles of sentencing generally than just the focus of the person. For this reason, their focus is more justice-orientated in their final sentence outcome than the considerable welfare ethos of the Children Court. An example of this occurred in the case of *People (DPP) v. Keane* [2007] IECCA 119 where the defendant aged 18 years of age, a first-time offender, gained entry to the victim's house early one morning

50 For example, section 76(c) dismissal of case against a child under 14 in certain circumstances, section 77 Family Welfare Conference, section 78 Family Conference.
51 Section 149 Children Act 2001, substituted by section 141 of the Criminal Justice Act 2006.

and had intercourse with the victim. The Court of Criminal Appeal in emphasising the seriousness of the offence considered "there were no circumstances relating either to the offence or to the respondent himself, that would have justified the sentencing judge even considering any sentence other than a custodial one" (Brown, 2020, p. 182). More recently in *DPP v. VT* [2021] IECA 117, Edwards, J. observed in a case where a child pleaded guilty to one count of defilement of a 15-year-old girl and where there were significant mitigation factors including, a no risk of re-offending and a prosecution delay as follows:

> We think in the circumstances that this was a case in which a custodial term was unavoidable, notwithstanding that the appellant was only 15 years and months [sic], or thereabouts, at the time of committing the offence. We see nothing wrong in the sentencing judge's observation that, had the appellant been sentenced as an adult, the appropriate headline sentence would have been one of five years (para. 38).

It is important to re-emphasise that some children may enter the courts system because they have not accepted the diversion programme. Non-acceptance of responsibility without legal advice by a child can result in a child facing a significant custodial sentence if convicted after trial by judge and jury. However, as O'Malley posits:

> There is no Irish guideline judgment on the sentencing of sex offences. We must rely instead on some general principles enunciated for the most part in leading judgment on sentencing for rape. Developments in other jurisdictions, notably New Zealand and England and Wales, show that sentence ranges or starting points can quite feasibly be established, for individual offences at least (O'Malley, 2016, p. 366).[52]

The Irish legislative requirements for sentencing as opposed to procedural rights are substantially welfare-orientated even if judges are struggling to find solutions within this legislative framework.

7.5 Training and education of judges

Section 72 of the Act provides that 'A judge of the District Court shall, before transacting business in the Children Court, participate in any relevant course of training or education which may be required by the President of the District Court.' While there is no judicial training in

52 The Judicial Council Act 2019 provides for the establishment of a sentencing Guidelines and Information Committee ("SGIC") by the Judicial Council. It appears the guidelines are issued by the SGIC and are then adopted by the Judicial Council and Irish judges are required to have regard to them. However, in contrast to the position in England and Wales, there is no requirement that judges must follow them (Brown, 2020).

juvenile sexual offending sentencing to date (O'Connor, 2019), it is acknowledged there is now a judicial manual of which this writer was the principal author.[53]

Therefore, judges are substantially dependent on probation and welfare reports (O'Connor, 2019) prepared by YPPOs to assist with formulating a sentence. Only some YPPOs have the requisite training or expertise in juvenile sexual offences (Document 4) resulting in a dependence on other professionals such as psychologists, if available, and contacted by the court. In addition, except for Dublin City,[54] where this occurs, the Children Court must sit in different rooms and at different times than the ordinary District Court, which can have a significant impact on the extent to which young people can participate in proceedings (Kilkelly, 2006).

Studies have found that there is a lack of compliance by judges of the Children Court with the obligations of the Act and this non-compliance was widespread (Carroll *et al.* 2007; Kilkelly, 2008). Similar to findings of the report by Kennedy (1970), children did not participate in the proceedings in a meaningful way (Kilkelly 2008). Kilkelly has noted that the problems with non-implementation of the Act related to a lack of guidance and a failure to set standards.[55]

It is noticeable that many Irish sentences such as suspended sentences, adjourned supervision,[56] contributions to the Poor Box,[57] Peace Bonds[58] are not based on concepts contained in the Act nor on any other legislative basis. Instead, they were designed for adult offenders. It is, therefore, pertinent to ascertain if other jurisdictions have elicited a realistic response to some key issues identified in the case review to sentencing which have eluded the Irish Courts.

In summary, this chapter raises two contextual issues. Firstly, it appears that the approach of the Irish judiciary although robust, stable and relatively non-punitive is currently playing catch-

[53] Her Hon Judge Rosemary Horgan assisted with other aspects of the Juvenile Justice Manual.
54 Which has a full-time court in Smithfield in Dublin City, children are accommodated in adult court buildings in Ireland.
55 To address this deficit in part, I (as a judge) was instrumental in compiling a Bench Book for the Judiciary entitled *Children Court Bench Book*, created in 2015.
56 An interim court order that focuses on the supervisory role of the court as an active instrument in the rehabilitation process until the case is disposed of. The child is usually on bail during the process.
57 A person who has been charged with a minor criminal offence, usually a first-time offender, may be given one chance to avoid a criminal record by contributing to charity through the court poor box. The Court Poor Box is used most often in the District Court.
58 An order to bind a person over to keep the peace and be of good behaviour. This involves recognisance (or monetary bond) for a nominal sum for a period of time. If the child has further criminal convictions during the time stated in the order, the child must pay that sum of money or face detention. In practice, this does not happen. Its significance is that the child has a criminal record.

up with international best practice by historically aligning itself with a pre-UNCRC justice system in its sentencing policies. Secondly, the question arises as to why it is failing to embrace a judicial activism which could pave the way to substantial reforms in respect of a post-UNCRC ethos. To tackle these questions, it is appropriate to look at jurisdictions which have engaged in judicial activism at different levels and intensity and which may provide possible solutions.

The next chapter (Chapter 8) will explore how the justice-welfare paradigm manifests itself in case law relating to juvenile sexual sentencing in a number of jurisdictions. A particular focus is placed on the NZ youth justice sentencing system in light of the country's progressive, child-centred approach, and the lessons that might be learnt in the context of judicial reform in Ireland vis-à-vis the sentencing of children who sexually offend. Current lacunae were highlighted in Chapter 7 and will be addressed in Chapter 8 by drawing on international case law in particular.

CHAPTER 8: REALISATION OF RIGHTS/JUSTICE AND WELFARE IN JUVENILE SEXUAL SENTENCING IN DIVERSE JURISDICTIONS

8.1 Introduction

In light of the analysis in Chapter 7 of the justice/welfare paradigm in the Irish context, this chapter looks towards other jurisdictions with a view to bringing a greater sense of coherence to sentencing in youth justice sexual offending in Ireland. The bedrock of the Irish youth justice system is set out in the Children Act 2001(the Act). The welfare model is particularly obvious in the high rate of diversion (Document 2). However, as Chapter 6 has demonstrated, the welfare model in sentencing is extensively provided for in the Act whereas Chapter 7 has noted a reticence by the Irish judiciary to embrace change even where it has been legislatively provided for. It is worth noting that 27% of the judiciary interviewed felt that the existing adversarial juvenile justice system should be replaced with an inquisitorial system. One radical solution to facilitate this would be to introduce the Nordic *Barnahus* Model (NBM). The NBM model is governed by the one-door principle whereby professionals would adjust to the child's needs reducing the risk of secondary victimisation that occurs with repeated interviews by multiple professionals and court hearings (Johansson *et al.* 2017). However, it is also important to be pragmatic as to what can be achieved by such a model. While a comparative welfare model such as NBC or the Scottish Hearings system is worthy of further research, it is unlikely to be introduced in Ireland in current times. Instead, this Chapter proposes to evaluate extracts from youth justice jurisprudence in three jurisdictions that could inform the Irish judiciary and which would not require judges to cast aside the current legislative model.

It is suggested that the trailblazer of common law jurisdictions is New Zealand (NZ). This is because NZ operates a unique approach to youth justice, whereby the youth court judges have effectively developed a strong child-friendly disposal format for finalising matters relating to offences (Lynch, 2012). A similar system could facilitate Children Court judges in Ireland in developing youth justice jurisprudence. The US Supreme Court has the potential to inform the Irish Appellate Courts in developing a robust constitutional response to the use of neuroscience developments in youth justice sentencing. Finally, the English Court of Appeal has found solutions to a lacuna in the legislation as regards sentencing of children who have reached the age of 18 years. Sentencing in Ireland is complicated by the fact that many children

who commit sexual crimes as children are tried as adults and by different sentencing courts leading to different outcomes for different children in different courts.

8.2 The United States of America (US)

However, despite the US not having ratified the UNCRC, the perception of extreme punitiveness of youth justice sentencing in the US is "also is at the forefront of many community-based interventions involving subsidised probation, mentoring and community justice" (Muncie and Goldson, 2006, p. 3). Specifically, in regards to juvenile sexual offending, current knowledge has been in development since the mid-1980s following the establishment of early intervention programmes to address adolescent sexual offending (Hackett, 2014).[59] Such programmes focus on individual rehabilitation rather than just deterrence and incapacity (Rosberg, 2015). Academics frequently observe US Supreme Court decisions as constituting public policy (Mancini and Mears, 2013). From an Irish perspective, US jurisprudence has had an impact on Irish Superior Court judicial thinking on constitutional rights such as the right to a fair trial (*DPP v. Byrne* [1994] 2 I.R. 236 at 246 per Finlay CJ. referring to the US Supreme Court case of *Baker v. Wingo* (1972) 407 US 514). Since *United States v. Kent* 383 US 541 (1966) and in *Re Gault* 387 U.S.1 (1967), a child's due process rights as opposed to a penal welfare juvenile justice system have been recognised. Notwithstanding this, the US judicial system has not always been child-friendly when it came to sentencing. For example, in *State v. Green* 502, S.E 2d 819.833-34 (N.C.1998) a 13-year-old sex offender in North Carolina was subjected to a mandatory life sentence, thus abandoning the rehabilitative nature of youth justice. This prompted calls for the US Supreme Court to look at punishment as well as process (Morrissey, 1999), and not to extend sex offender laws to children (Klein, 2016).

Of particular significance are innovations by the US Supreme Court in youth sentencing starting with the case of *Roper v. Simmons* US 551 (2001) ("Roper"); *Graham v. Florida* 560.U.S.48 (2010) ("Graham"); and *Miller v. Alabama* 132 S, Ct 2455 (2012) ("Miller"). These cases represent a radical assessment of psychological and neurobiological research and the consequent legal implications for sentencing (Maroney, 2014). Thus, *Roper* emphasised that juveniles still struggle to define their own unique identity which means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably

59 The Office of Juvenile Justice and Delinquency Prevention ("OJJDP") developed a new framework of juvenile justice known as Balanced and Restorative Justice ("BARJ") for the probation services; there is also a comprehensive strategy on prevention and early intervention and a Juvenile Detention Alternatives Initiative (JDAI) concentrating on the overuse of detention centres and expedition of court cases.

depraved character. The *Graham* case took up this theme and emphasised that children are less culpable than adults due to their underdeveloped brains and characters, while *Miller* reasoned that children are constitutionally different from adults for purposes of sentencing. While the US Supreme Court has drawn a clear distinction in how the criminal justice system treats adults and children, it is timely now to consider how a judicial system approaches the sentencing of young people who sexually offend and are entering adulthood.

8.3 England and Wales

Traditionally, like Ireland, judges in England and Wales have enjoyed wide judicial discretion in sentencing generally. However, there have been significant divergent developments in regards to sanctioning children and young people for sexual offences. The English approach is heavily influenced by formal guidelines, which at the time of writing, do not exist in Ireland, but are likely emerge in the near future following the Judicial Council Act 2019.[60] In a recent ex *tempore* judgment of the Irish Court of Appeal, *DPP v. D* (delivered on the 4 March 2021), Edwards J. referred to the approach of the Sentencing Council for England Wales and stated that while it could not be determinative in the Irish jurisdiction, nevertheless it is a useful comparative approach.[61] It is outside the scope of this thesis to examine the English juvenile justice system but rather it is proposed to refer to recent decisions of the Court of Appeal of England and Wales which may influence Irish decisions in the course of the Irish case review. In this regard, it is important to stress that The Court of Appeal of England and Wales decisions are not binding on Irish courts although they are frequently quoted in Irish Superior Courts in an advisory capacity. Therefore, the approach to sentencing children who have sexually abused and who have turned 18 years or become young adults is informative for the Central Criminal court and the Appellate Courts in the absence of legislative guidance. This matter is discussed further at a later point.

8.4 New Zealand (NZ)

There has been increasing recognition of treatment programmes for adolescent sex offenders in NZ though, like in many countries, this treatment and research has historically lagged behind the developments in the US (Lambie *et al.* 2001). That said, novel pathways of dealing with

60 The Judicial Council was established on 17 December 2019 pursuant to the Judicial Council Act 2019 which provided for a Sentencing Guidelines Committee.

[61]Woulfe J. referred to this judgment in the Court of Appeal decision *DPP v. B.H* [2021] IECA129 and approved of the approach.

sexual offence sentencing are being addressed in NZ and Australia but are slow to be addressed in Ireland and England (Keenan, 2017). Most juvenile offending, including serious offences and sexual offences, are dealt with through some form of diversion. However, unlike Ireland, NZ does not have a statutory diversion programme (Lynch, 2019). In relation to disposal for juvenile sexual offences, as will be demonstrated, most cases are dealt thorough the youth court (Lynch and Peirse-O'Byrne, 2016) where approximately 50% of Youth Court cases are marked proved but also result in a discharge. This means the child/young person is left without a charge or a formal order against them (Lynch, 2016). Therefore, the NZ cases are considered to shed light on sentencing options for the Irish Courts and also provide valuable insights into the treatment of ethnic groups in the justice system (Muncie and Goldson, 2006).

The NZ youth justice system is embodied in the Children, Young Persons and Their Families Act 1989,[62] and is regarded as a model for other jurisdictions (Lynch, 2012). It attempts to provide an effective resolution which aims to address a young person's accountability[63] acknowledging the child's needs and also addressing the causes of offending (Lynch 2016). Re-integration, RJ, diversion and family empowerment are strong components of its ethos (Morris and Maxwell, 1993). The goal of family empowerment is central to the NZ youth justice system. It is primarily achieved through the Family Group Conference (FGC) which has links to the *whanau* (extended family) links of the Maori culture. The family, therefore, have a direct role in the consensus decision-making process (Rangaiah *et al.* 1988; Love, 2000; Lynch, 2012). Measures must involve the victim and have proper regard to their rights and interests. The family conferencing concept directly influenced the Irish legislative equivalent (O'Donoghue, 2000). It is also adopted in Australian states and other jurisdictions such as Northern Ireland with varying degrees of success (Lynch, 2012). Specifically, in respect of sexual offences, the treatment programmes for sexually abusive children, have traditionally had a considerable emphasis on family-based community programmes. There is also a view that treatment programmes now need to be modified to take account of recent research (Lambie and Seymour, 2006).

62 Oranga Tamariki Act 1989; Children's and Young People's Well-being Act 1989 (Public Act 1989 No 24) - replaced, on 14 July 2017, by section 5 of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.
63 Children aged 10-13 are regarded as separate to young person's 14-16, while 17-year-olds are excluded from the Youth Court Jurisdiction CYPF Act.

According to Lynch (2019, p. 256), "Many of the principles in the Oranga Tamariki Act dealing with outcomes are an amalgamation of the long-standing justice and welfare approaches." Family Group Conferencing (FGC) plays a pivotal role in the youth court outcomes and arguments in the NZ Youth Court revolve around whether a judge will apply a section 282 or a section 283(a) of Oranga Tamarika Act 1989 as a discharge on completion of a FGC. The essential difference is that section 282 is a complete and unconditional discharge whereas a section 283(a) discharge leaves a record for the Youth Court even though there would be no other order or penalty. While no direct analogy can be made with Ireland, a judge in Ireland could conceivably use a discharge following a successful family conference (FC) completion under section 78 of the Children Act 2001. Specifically, the judge may, following a successful FC either dismiss the charges on their merits, mark the charges proved but struck out, or attach an alternative sanction under section 98 of the Children Act 2001.

In *Police v JYC Porirua* CRI-2006-291-115, 12 March 2007, a young person abused a preschool child while his mother was absent from home whereas in *Police Youth Aid v CJK* [2014] NZYC 344 a 16-year-old made an intimate recording of two young children in a swimming pool. Both cases, although sexual offence cases, are examples of section 282 discharges i.e. no conviction and no record.

On the other hand, the following three cases are examples of section 283(a) discharges marking for the offender a record of being in the Youth Court but incurring no other order or penalty:

> In *New Zealand Police v. OV* [2018] NZYC 490, OV was aged 18 at the date of the sentence. *OV* admitted sexually violating a 14-year-old victim and raping a 16-year-old victim when he was also aged 16.
>
> In *Queen v. NB* [2019] NZYC 225, *NB* was under 15, and his sister (the victim) was under six years. The offences involved pornography, "licking his sister's vagina and anus and having both vaginal and anal intercourse". *NB* successfully completed his FGC plan, which involved completing a therapy mentoring and 100 hours of community work.
>
> In *Queen v. SQ* [2019] NZYC 627, SQ (when aged 17) faced charges of sexual violation by rape and attempted sexual violation connection of a relative. At an FGC session, it was agreed that SQ engage in therapeutic processes with constant court supervision.

8.4.1 Transfer to the District Court

In rare cases, where the offences are serious, the court may be requested by the Crown to transfer from the Youth Court to the District Court where a custodial sentence is also unlikely. In *Queen v. FY* [2018] NZYC 500, the two victims were boys aged 12 and 14. In regards to the 14-year-old boy, the offence involved anal penetration on more than one occasion, and the victim suffered anal injury. In regards to the 12-year-old boy, he suffered a similar injury but at a lesser level. At the time of committing these offences, *FY* was before the court subject to a plan in relation to charges of indecent assault and assault with intent to injure an eight-year-old girl. The judge acknowledged "it is clear that a rehabilitative sentence is called for" but was not satisfied that *FY* had taken full responsibility (para. 33). *FY* was convicted of the offences, and the case transferred to the District Court with a request for a pre-sentence report to address in particular intense supervision.

However, it is rare in practice for cases to be sent to the District Court as the *Queen v. LH* [2018] NZYC 470 demonstrates. *LH* was aged 14 at the time of an assault with intent to injure, sexual violation, rape and threat to kill on a 30-year-old victim. He was aged 15 at the time of the court hearing. In refusing an application by the Crown to transfer the case to the District Court, the judge felt the period that *LH* might spend in custody and the rehabilitative measures imposed in the youth court would be similar to the District Court. Lynch (2019) demonstrates that a section 282 discharge has been developed in a welfare model by the NZ youth court judges in a way that was not contemplated in the original legislation. However, its effect is in danger of being eroded. For example, recent legislation allows a young person's DNA to be retained for up to four years.[64]

8.5 Summary

This chapter discussed the welfare and accountability policies underlying youth justice outcomes in the NZ Youth Court and illustrated by case law how these policies could be adopted by Children Court judges in Ireland. In contrast to adult systems, judicial activism is acceptable in youth justice at all levels of the judiciary. To an extent, this is a worldwide phenomenon. Therefore, even jurisdictions with a strong justice ethos such as the US and England can, at a senior judicial level, provide guidance on how anomalies in youth justice sentencing for sexual offences might be addressed. Australia and Northern Ireland are two

[64] An amendment in 2009 Criminal Investigations (Bodily Samples) Act 1995.

common-law jurisdictions that provide further examples of family conferencing. In Australia, even where community protection is deemed important, the focus on rehabilitation "appears as a common thread when sentencing juvenile sex offenders" (Blackley and Bartels, 2018, p. 7).

A step back is taken in the next chapter (Chapter 9) to consider how the Irish youth justice system deals with contemporary challenges and tensions in the justice and welfare debate for sexual offences. Sentencing barriers, complications, and options available to the judiciary are explored together with the quest for a rationale in sentencing (no admission of guilt).

CHAPTER 9: IRISH CASE LAW ANALYSIS

9.1 Sentencing Format

Almost exclusively, sentencing format in Ireland comprises oral statements by a trial judge. However, an examination of transcripts of judgments of the Central Criminal Court which is the only court that produces transcripts reveals that judges take great care in setting out their reasons for sentencing although invariably, this is done in a legal language which is not child-friendly. This is in sharp contrast to the language in the NZ Youth Court judgments observed.

9.2 Offenders under 18 years (Statistics in Ireland)

To analyse Ireland's approach to sentencing, the first task is to examine existing statistical data. Regretfully, Ireland does not have sufficient sentencing data available to inform key decisions on sentencing guideline design and implementation (Guilfoyle and Marder, 2020). Notwithstanding the limited court data available, an analysis of this data reveals some worrying issues for sentencing. The Court Service Annual Report statistics for the period 2013-2019 shows an average of approximately nine sexual offence cases (Courts Service of Ireland, 2019). While no information is given as to the nature of other charges, it is assumed that they predominantly relate to sexual assault, or sexual pornography bearing in mind the jurisdiction of the Children Court which cannot deal with rape cases. To take as an example, the figures from the Courts Service 2019[65] reveal that 12 cases were finalised, of which, six were dismissed or struck out, six received a sentence, two received a community sanction such as a probation bond, two received a suspended detention sentence and two others are not specified.[66] Neither the Director of Public Prosecutions nor the Probation Service provide specific figures for juvenile sexual offending.[67] The low number of cases in the Children Court may be regarded as surprising as:

- Under section 75 of the Act, the court has the discretion to retain all indictable cases except rape;

65 The sexual offence figures for children from the Court Service Annual Reports 2013-2019 for each of the following years are as follows: 2013 – 12 cases 9 defendants; 2014 - 12 cases; 2015-3 cases; 2016-9 cases; 2017-6 cases; 2018-13 cases, 2019-12 cases. It should be noted the Court Service Annual Report 2019 Annual report mixes up sexual offences with public order offences confirmed to me by the Court Service on 3 December 2020.
66 But they could for example, relate to a fine, a peace bond, a contribution to the poor box.
67 The Probation Service recorded a total of 553 cases for all juvenile offending for 12-17-year-olds and 27,241 offences for 18-24-year-olds in 2019.

- The additional welfare sentencing provisions under parts 7 and 8 of the Act which are not available to the adult Circuit and Central Criminal Court;
- The inherent restriction of custodial sentences, which are limited to a maximum of one year for each offence (or two years for the totality of offences); and
- While delay is a significant issue in the juvenile sexual offending cases generally, cases are progressed substantially more quickly in the Children Court compared with adult courts due to its relative informality.

There are no easy answers to the issue arising. Undoubtedly, this may be due in part to the high diversion rate (Document 4). It also a factor that many children may have aged out by the time they reach court. In this regard, it perhaps is unsurprising that Hackett *et al.* (2005) found 56% of services across Ireland and the four jurisdictions in the UK had worked with children who had not been charged with any offence (Erooga and Masson, 2006). However, it is also possible that all parties involved are not using the Children Court for juvenile sexual offences. Therefore, refining the question, one must ask: is there is a lack of trust in the existing Children Court system by prosecution, defence and lawyers and judges to adequately assess the seriousness of juvenile sexual offences from the perspective of alleged offenders, victims, and public policy? Central to this issue is the inexperience of lawyers and the lack of training and education of lawyers and judges (Kilkelly, 2006), although the matter is also a significant issue in England (Youth Justice Legal Centre, 2015; A'Court and Arthur, 2020).[68]

The statistics for the other courts do not offer a breakdown of juvenile sexual offences as distinct from adult offences. That in itself is a significant deficit in the State's understanding of juvenile sexual offending.[69] However, the Courts Service Annual reports do indicate that sexual offences generally are a significant portion of Circuit Court cases (almost 12% in 2019) and a very substantial portion of the Central Criminal court cases (over 80% in 2019). In this regard, it is worth repeating (dealt with extensively in Document 2, and will be further dealt with at a later point) that many juveniles are tried as adults due to the nature of delay in the

68 See also *R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt* [2017] EWCA 1228; Toolkits' (The Advocate's Gateway) www.theadvocatesgateway.org/toolkits.

69 The Court service provided figures for the Youth Justice Manual by O'Connor and Horgan of 11 children prosecuted in 2019. Of that number, five children had proceedings sent forward to a Higher Court. Four young persons were sent to the Circuit Court and one was sent to the Central Criminal Court. However, it is not possible to verify the accuracy of these figures and it takes no account of children who have become adults at the date of sentencing for offences committed under 18. It is also contradictory with other figures in the official Court Service Annual Report 2019.

investigation and judicial process together with the delay in victims and offenders coming to terms with the abuse. However, these excuses are somewhat challenged when one considers the effectiveness of the Garda diversion programme, notwithstanding that a court process, particularly in complex cases, is inevitably more cumbersome.

9.2.1 Children under 18 years - Case Law

Legally, a child becomes an adult overnight, but the research accepts in reality that transition from child to adult is a gradual process (Liefaard, 2012). However, the change in date can have a dramatic effect for sentencing even where a child offended prior to their 18th birthday but is sentenced after that birthday. In effect, the child loses the benefit of the Act and is effectively sentenced as an adult with considerable mitigation to an adult sentence (Document 2).

A number of Irish cases are worth considering starting with *DPP v. FN* (unreported transcript, 19 January 2021, Central Criminal Court, Coffey J.) and is proffered as an example of a sentence that could apply in any Irish trial court jurisdiction for juvenile sexual offending. It is acknowledged in *FN* that the child had his legal rights (due process, jury trial) and welfare considered by the sentencing judge. The case was hampered by the child's unwillingness to accept his criminal behaviour. In this case, the defendant child was convicted of sexual assault by a jury.[70] The defendant child was 14 years at the date of the offence and aged 16 at the date of the trial. However, the trial judge accepted based on professional evidence that the defendant child had the maturity of a 10-year-old. The victim was six years old at the time of the offence. The judge noted the incident left the victim traumatised and also had a significant impact on all members of the victim's family.

In imposing a sentence, the judge held that the sexual assault was at the lower end of the scale of gravity and did not warrant a detention and supervision order. The judge referred to the extensive welfare sentencing provisions of the Act and by way of a community sanction, imposed probation supervision with a number of conditions attached including residing with his parents and no unsupervised contact with children more than a year younger than himself. Although the sentence is in line with one of the ten Community Sanctions in the Act, [71] it is

70The reason why the case was in the Central Criminal Court is that the defendant was charged with a more serious charge but acquitted of same by the jury.

[71] See section 6(1): The Children Act 2001 and sentencing justice and welfare paradigm (p.50) of this document.

also a sentence that directly follows section 1(2) of the Probation of Offenders Act 1907.[72] However, in Ireland, the sentencing criteria of rehabilitation deterrence and retribution for sentencing children generally are frequently amalgamated into a sentence for children who sexually offend with a sanction that is not linked to those available under the Children Act 2001 but could include other offences such as road traffic and theft charges. Of particular concern is that many children are held on remand in detention awaiting a trial.[73]

The absence of family related conferences in judicial sentences might be regarded as surprising considering the overwhelming success of the Bail Support Pilot Scheme, which operated in the Children Court in Dublin. It required a model of intervention which was based on a multi-systemic therapy and, therefore, family-based (Naughton *et al.* 2019). When this experience is added to the success of the NIAPP programme[74] and its ongoing work with children and young people who have exhibited harmful sexual behaviour and their families (Grady *et al.* 2018), it provides an opportunity for creative sentencing incorporating rehabilitation and accountability.

Judges (when interviewed) were generally empathic about the welfare issues and frequently referred to the transient nature of adolescence and the experimental nature of children (Document 3). It is resoundingly clear from the research that there is a dearth of knowledge of teenage developmental issues and of sentencing options for sexual offences sentencing (Document 3). This dearth of knowledge was only partially alleviated by the expertise of some urban YPPOs (Document 4). This is particularly problematic in understanding the nature of recent scientific brain research, alternative community sanctions, therapeutic interventions and RJ type solutions. To balance that argument, there is also a significant deficit in resources and a legislative cliff edge when children reach 18 years which is particularly problematic in the context of sentencing of young persons who sexually offend.

In regards to the imposition of a custodial sentence for serious sexual offences, judges were evenly divided as to whether the gravity of the offence or alternatively, the concept of detention as a last resort should be the primary consideration. However, irrespective of which side of the justice-welfare debate judges seemed to rest, it appears that all judges were prepared to admit

72 This Act is still in force in Ireland. However there is General Scheme - Criminal Justice (Community Sanctions) Bill (PDF-294KB which if enacted will replace the Probation of Offenders Act 1907.
73 By way of a snapshot of the 75 young people in Oberstown Children Detention Campus: from January to March 2019, 44 were on detention orders and 31 were on remand orders (Oberstown Children Detention Campus, 2021).
74 National Inter-Agency Prevention Programme (NIAPP) for teenagers (under 18 years of age) who sexually offend.

that they took welfare issues into account in devising a sentence and significantly 83% of judges felt that sentencing for sexual crimes was no different in this respect. However, sentencing is individualistic to the person as well as the crime (*DPP v. M* [1994] 2 I.L.R.M. 541) and, therefore, a judge needs to be aware of the personal circumstances of the child offender being sentenced for serious sexual offences (*The People (DPP*) *v. McCormack* [2000] 4 I.R. 356)[75] and adults (*DPP v. McC* [2008] 2 I.R.92) so as to make an appropriate censure order (Sentencing Council, 2017).

From a practical point of view, this means a sentencing judge must carry out a careful analysis of aggravating and mitigating circumstances so as to arrive at a sentence appropriate for each individual defendant (*DPP v. Finn* [2009] IECCA 96), Finnegan J.). However, sexual assault offences for children can take many different forms and can occur in many different circumstances. As such, it is very difficult to derive general sentencing principles from decided cases (O'Malley, 2006). The age and maturity of the child are important factors in deciding the type of sentence as opposed to the issue of guilt or innocence. Important also is the admission of guilt, and cooperation with the investigation and in certain circumstance the attitude of the victim to the child's offence (*The People (DPP) v. McCormack* [2000] 4 I.R. 356).

Prior to the abolition of suspended sentences for children as a result of the Court of Appeal decision in *DPP v. AS* [2017] IECA 310, there was an almost total judicial reliance on suspended sentences as a mechanism for sentencing children. Many were wholly suspended but in cases where the sexual offence was at the higher end of the scale such as rape or very serious assault they were part suspended as part of a larger custodial sentence. A number of cases illustrate this point:

- In *DPP v. LD* [2018] IECA 54 Edwards J. (Court of Appeal) upheld a Circuit Court conviction of a child who received two and a half years detention suspended for three years in circumstances where there was one act of defilement. The injured party was 10/11 years old, and the defendant was 15/16 years old at time of offence.

- In *DPP v. FP* [2016] IECA 187, the defendant pleaded guilty to an offence of sexual assault at the age of 17 years. At the time of the offence, he was 15 years old and the

75 The Court of Criminal Appeal was an appellate court for criminal cases in Ireland which existed from 1924 until 2014. Under the Court of Appeal Act 2014, the Court of Appeal was given the "appellate jurisdiction" previously exercised by the Court of Criminal Appeal.

victim was eight years old. However, he was sentenced when he was 18 years old despite having admitted to the Gardaí on the day that he had committed the offence that he had done so. The Court of Appeal held the sentence of detention of two and a half years with the final six months suspended was excessive. In lieu thereof, it imposed a two year fully suspended sentence on the basis the defendant had completed a very serious programme of rehabilitation with the support and assistance of his parents. The only condition attached to the suspension was that he keeps the peace and be of good behaviour. In assessing the sentence, the court referred to the principles in *Roper v. Simmons* 543 US 551 (2005) as well as section 96 of the Children Act 2001. What is particularly significant about this case is that if the child had been prosecuted on the date of admission, he could have been dealt with as a child and subject to section 75 of the Act by the Children Court. It is also a case that would have been suitable for the diversion programme.

While children who sexually offend are a heterogeneous group, it is clear many children are in the care of the State or have particular vulnerabilities, as these two recent court cases illustrate:

- In *DPP v. A.B* (unreported transcript, 5 November 2019, Central Criminal Court, McDermott J.), the defendant, who was aged 14 at the time of the offence, pleaded guilty to one count of defilement and three counts of sexual assault against his niece, who was 7/8 years of age at the time. In imposing a three-year suspended sentence, the judge noted the age of the child at the time of the offence, and the chaotic family environment of upbringing, including instances of sexual abuse and domestic violence.

- In *DPP v. S.M.D.* (unreported judgment, 29 September 2015, Circuit Court), the defendant pleaded guilty to one count of attempted defilement and to one count of sexual assault. The defendant was 16 years of age at the time of the offence, and the injured party was 13 years of age. Both parties were in the care of the State at the time of the offence. The injured party invited the defendant into her room where the sexual acts occurred. The defendant received a two-year sentence, suspended on condition that he engage with addiction counselling and subject himself to urine screening, on a monthly basis and that he attends the sex offender's treatment programme for two years.

9.2.2 Part-suspended sentence

However, even where there was a custodial sentence imposed, a portion was suspended as one of the factors was used to encourage rehabilitation. An example of this occurred in *DPP v. E.H* [2017] IECA 249. The defendant was fourteen years at the time of the offence and was just over 16 years at the time of the sentence. The victim, who was a half-sister, was just short of her ninth birthday at the time of the offence. The indictment contained 41 counts, including rape and sexual assault. The defendant entered an early plea of guilty and was sentenced to a four-year detention period with the final 12 months suspended. What concerned the Court of Appeal was the structuring of the sentences so as to take account the best interest of the child. In the original sentence, the child would spend some time in an adult prison. Consequently, the Court of Appeal varied the sentence so that the child would remain in Oberstown Child Detention Centre[76] until the child reached 18 and half years (the maximum period a child can remain in a child detention centre in Ireland).

9.2.3 Custodial sentence

Recently, the Court of Appeal in *DPP v. J. Mc.D* [2021] IECA 31 upheld a four-year sentence imposed in the Central Criminal Court together with an order providing for two years post-release supervision in the case of a defilement and rape. The appellant, then a teenage boy, was 16 and a half years old and the victim, then a pre-teenage girl, was 12 and a half years old. The victim was subject to humiliation. The Court of Appeal commented that the sentence was a 50% reduction in an adult sentence.

9.3 Sentencing young adults who commit an offence as a child

The relevant age of the child for the purposes of sentencing gives rise to the question: is it the date of the offence or the date of conviction/sentence? The tenor of the Children Act 2001, such as the penalty provisions of Part 9 of the Act[77] refers to 'the child' and 'parents or guardians'. For example, section 96(3) of the Act stipulates that the age and maturity of a child are important factors for a court when considering appropriate sanctions or a sentence for them. O'Malley (2016) argues that this implies that those under the age of 18 at the date of conviction must be sentenced as children. A difficulty arises when the child offender reaches the age of majority by the time of conviction and sentence, despite having committed the offence as a

76Oberstown Child Detention Centre is the only child detention centre in Ireland which has a high therapeutic and educational emphasis compared with the level of emphasis in an adult prison in Ireland.
77 Powers of courts in relation to child offenders.

child. On the one hand, the principle of Irish sentencing law requires that a sentence be proportionate to the gravity of the offence and the personal circumstances of the offender and the UNCRC General Comment No. 24 (2019) could not be clearer when it states: "The Committee reminds States parties that the relevant age is the age at the time of the commission of the offence" (Article 20). On the other hand, the practical issues arising from the loss of the Children Act 2001 are profound, as in England and Wales (Just for Kids, 2021), as the child will become an adult in the eyes of the law. Thus, while the Law Reform Commission may observe that a well-established principle of sentencing an adult for an offence committed during childhood, the penalty is much the same as a child (LRC, 2020), is only partly correct. In reality, it is a significant factor only but sentencing takes place at the date of conviction. As McDermott J. in the Irish High Court cogently notes:

> … it seems that many of the factors which are addressed under the Children Act will likely be considered at the sentencing stage of any young adult convicted of a serious offence committed when he/she was under eighteen years. Thus, a sentencing court will have regard to the age of the applicant in this case both at the time of the alleged commission of the offence and, if convicted, at the time of sentencing (*DPP v. M.S.*, 2018] IEHC 285).[78]

The Youth Justice Strategy 2021-2027 recognises that legislative change is required to allow the Children Court to hear cases of young persons over 18 years of age in relation to offences committed when under 18 years (Department of Justice, 2021). Such change would be welcomed by the judiciary [Document 3] given that it was recommended by the Law Reform Commission (LRC, 2020) in its report on suspended sentences.

9.3.1 Over 18 years at the date of the offence

As outlined at an earlier point, a child sentenced after his 18th birthday is currently sentenced as an adult. The question, therefore, arises: is the age of 18 years a cliff edge for sentencing? Guidance from the Court of Appeal was outlined in *DPP v. D.M* [2019] IECA 147, where the child had just crossed the threshold of 18 years. Here the victim was 14 years of age and the appellant was 19 years. Baker J. stated: 'We agree with the proposition advanced by counsel for the respondent in reliance on the authority of *The People (DPP) v. Conroy* [2018] IECA 350*,* that the age of the child is a core consideration in assessing the seriousness of the offence'

78 This dictum was approved by Twomey J. in *A.B v. DPP* [2019] IEHC 214.

(para. 38). The judge favoured suspending a portion of the five-year sentence to one year: 'The suspension of some or all of a sentence may incentivise continued desistence in an offender who is at low risk of re-offending and his continued reform and rehabilitation' (para. 85).

9.3.2 Factors affecting a sentence for serious offences

In *DPP v. Lukaszewicz* [2019] IECA 65, the Court of Appeal held that the trial court had struck a permissible balance in imposing a sentence of five years imprisonment with the final two years suspended on certain conditions. The defendant was aged 16 at the time of the rape and aged 19 at the date of sentence. The court also made a post-release supervision order. The victim, in this case, was a year younger than the accused.

However, where rehabilitation has already taken place, it appears the court may take a more benign view as evidenced in *DPP v. F.P* [2017] IECA 206. In this case, the defendant pleaded guilty to the sexual assault of an eight-year-old girl when he was 15 years of age. He was charged when he was 17 years when he also pleaded guilty. However, he was over 18 years when he was sentenced by the trial judge to a term of detention (which in reality was prison) of two and a half years with the final six months suspended. The Court of Appeal noted that the defendant had successfully completed a rehabilitation programme in regards to his sexual behaviour. The court held there was no need to impose a period of post-release supervision or suspend any period of detention on special terms. Accordingly, the court imposed a two-year sentence fully suspended on the defendant's own bond to be of good behaviour.

One of the few judgments that referred to the UNCRC in sentencing in this regard is *DPP v. J.H.* [2017] IECA 206 (Mahon J.). The appellant pleaded guilty to two charges of sexual assault and two of rape. He had no previous convictions and co-operated with the investigation. At the time of the offences, the female complainant was eleven years old while the appellant was fifteen years. As of the date of sentence, their respective ages were 19 years and 23 years. Mahon J. made a number of references to the immaturity of a 15 year old and in this regard referred to section 143 of the Children Act 2001, which he stated mirrors Article 37 of the UNCRC and the principle of detention being a last resort.[79] In contrast to the trial judge who

79 Section 143(b) of the Children Act 2001 states: "*No child shall be deprived of his or her liberty unlawful or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*"

imposed a four-year sentence with the final two years was suspended, the Court of Appeal reduced the sentence to an 18-month sentence with the final six months suspended.

The difference in age between a child and a young adult will not automatically give rise to a different sentence. The case of *DPP v. Jimmy O'Brien and Shane Folan* [2015] IECA 230 involved the gang rape and sexual assault of a woman and was a jury trial. Mr O'Brien was 18 years and Mr Folan was 16 years at the time the offences were carried out. In the Court of Appeal, Mahon J. held that owing to the serious and degrading nature of offences committed, he did not differentiate between the sentences handed down to the co-accused despite their two-year age gap. He confirmed the original ten-year sentences handed down by the trial judge for the rape, but suspended the final 12 months for a period of three years. In doing so, he noted that rehabilitation is an important consideration in any case but when the offender is very young, it should be given greater consideration. Where the offending commences during childhood but continues into his early adulthood, it appears a part-suspended sentence will be considered. In *DPP v. M.H* [2014] IECA 19, the Court of Appeal reduced the trial judge's sentence from nine years imprisonment with the final three years suspended to one of seven years with the final three years suspended; this took into account the sexual offences that took place when the accused was a child but continued into his early adulthood.

It can thus be seen that the Irish judiciary prefer to adopt suspended sentences in mitigation as an integral part of the rehabilitative portion of a sentence for children and young adults who sexually abuse. The efficiency of suspended sentences for children has been questioned (Osborough, 1982) with a recommendation that its use should be discontinued (Committee of Inquiry into the Penal System, 1985). It is submitted that the difficulties of suspended sentences for children is the risk of activation of a suspended sentence which could occur if the child has become an adult and for an offence of lesser magnitude. It is also doubtful if a teenager (oftentimes very vulnerable) can evaluate the sword of Damocles around the risk of reactivation in the same way as a mature adult. Therefore, it is not surprising that the Law Reform Commission rejected suspended sentences as an option and preferred other options such as deferred detention or reviewable sentences in very serious cases (LRC, 2020). A difficulty arises, however, when the child reaches 18 years, in that a much more limited deferred detention option is available (section 100 of the Criminal Justice Act 2006). In those circumstances, a suspended sentence is invariably preferred by the sentencing court.

9.4 Addressing problematic issues in sentencing for serious offences

9.4.1 Detention and supervision orders

Before considering recent options for serious offences, it is pertinent to point out that section 151 of the Children Act 2001 provides for detention and supervision orders. While the concept of a child receiving a lesser sentence by way of probation assistance after detention is laudable, the practical difficulty for sexual offences is that both the detention and supervision must be an equal 50% of the total sentence. In addition, the supervision aspect cannot be enforced once the child reaches 18 years. For example, a child of 17 years receiving a two-year detention and supervision sentence would only serve the detention aspect. Many children who commit offences have multiple charges and a creative judge taking a global sentence for all charges, could impose a custodial sentence on one charge and a separate probation bond on another charge which could extend beyond 18 years. However, the position in practice is unsatisfactory for sexual offences due to the complex nature of the offences and rehabilitation.

9.4.2 Development of reviewable sentences

Although the Children Act 2001 is silent on mandatory sentences, it is submitted that even in murder cases, they do not apply in Irish law (O'Malley 2016). This is in keeping with the General Comment No. 24 (2019) where it states that 'Mandatory minimum sentences are incompatible with the child justice principle of proportionality and with the requirement that detention is to be a measure of last resort' (CRC/C/GC/24, Article 78). In one respect, the Irish Courts have been creative in the absence of legislative reform. Thus, while the Supreme Court indicated in *People (DPP) v. Finn* [2001] 2 I.R 25 that a reviewable sentence was undesirable for an adult sentence, a court can impose a reviewable sentence on a child on indictment (O'Malley, 2016). This practice was approved by the Law Reform Commission (LRC, 2020).[80]

Two recent cases considered the effects of reviewable sentences:

- *DPP v. Boy A and B* (unreported transcript, 5 November 2019 McDermott J.):
  The victim was sexually assaulted and brutally murdered. After a trial by a judge and jury, Boy A was convicted of murder and aggravated sexual assault. Boy B was convicted of murder. At the time of the offences, both boys were approximately 13

80 Reviewable sentences were also accepted as an option by the courts in applying the Children Act 1908 per (O'Malley 2016); *State (O) v. O'Brien* [1973] IR 50; *People (DPP) v. VW (a minor)*) unreported Central Criminal Court 23 March 1998); *DPP v. S(A)* (unreported, Court of Criminal Appeal 27 March 1998); *(DPP) v. G* [2005] IECCA75 decided after the enactment of the Children Act 2001.

years old but at the date of sentence were 15 years. McDermott J. sentenced Boy A to the mandatory sentence of life detention with a review after 12 years for the offence of murder. After considering mitigation, Boy A was also sentenced to eight years detention for sexual assault to be served concurrently with the murder charge. Boy B was sentenced to 15 years detention with review after eight years as there was no evidence that Boy B took part in the sexual assault.

- *DPP v. MS* (A Minor) [2020] IECA 178:
  MS (aged 15 years at the time of the offence) pleaded guilty to the attempted murder of an older woman he had met on social media. Although not a sexual assault, the nature of the offence which occurred on a rendezvous, where the child cut the victim's throat with no attempt to seek assistance was akin to the seriousness of a very serious sexual assault. The child was still under 18 years at the date of the sentence. The trial judge acknowledged the child offender was suffering from a severe mental illness and that this was a substantial mitigation factor. The judge determined the proportionate sentence to be one of 11 years detention. He remarked that if he had had the option, he would have part-suspended the sentence, making *MS* subject to very close supervision in the community by the Probation Service and the psychiatric services. Instead, the trial judge imposed a review of the sentence after five years and increased to seven years on appeal. In approving a reviewable sentence as a legitimate option for a trial judge in sentencing a child for serious crimes, the President of the Court of Appeal observed that the existence of a review date means that there is a target date for the young respondent to work towards. On that review date, several options would be open to the judge conducting the review. One possibility is that the review might not result in the release of the respondent. Another possibility is that the judge might decide to suspend the balance of the sentence then unserved, either from that point, or from some date in the future.

9.4.3 Deferred detention

Deferred detention as an alternative to a reviewable sentence is provided for in section 144 of the Children Act of 2001. However, the court must be satisfied that detention is the only suitable way of dealing with a child, but after hearing evidence from a parent or guardian, it can defer the sentence if it is in the interests of justice to defer a detention order. A deferred detention is accompanied by probation supervision and other such conditions as the court deems appropriate during the deferred period. On the resumed hearing date, the court can impose the sentence, suspend it or apply a community sanction (*DPP v. TC* [2017] IEDC 7).[81]

In *DPP v. JA E* (transcript, 24 July 2019, Central Criminal Court, White J.) both the defendant and the victim (who were uncle and nephew) were children under 18 years.[82] The offences consisted of oral and anal rape. In this regard, the defendant had difficulty accepting the count in relation to anal rape. A letter of apology was furnished and the defendant was assessed at a low level of risk of offending. The Central Criminal Court imposed a three-year sentence but deferred the detention for 10 months to allow a further assessment by way of probation report.

In *DPP v. NN* (transcript, 30 July 2019, Central Criminal Court, White J.), the defendant was aged 15 years (at time of offence). The two victims were cousins aged 13 years and 14 years respectively. At the time of the sentence, the defendant was aged 17. The charges comprised sexual exploitation of two cousins and two rapes. In sentencing, the judge noted the plea of guilty, the very positive reports by both the probation and welfare service and of Athrú (an organisation dealing with sexual crimes or deviant behaviour of children). The judge observed that if the charge had been sexual exploitation alone, he stated that the offences could have been dealt with by diversion. However, in view of the rape charges, he felt the appropriate sentence was a five-year sentence but deferred its implementation for 12 months. He also noted that the defendant was to be monitored by the probation service and by Athrú and observed that if the reports were positive at the resumed hearing date, he would impose a community sanction in lieu of detention.

[81] Prior to the *TC* case, it appears that deferred detention orders were only used where there was no place for the child in a child detention school (section 144(4) of the Children Act 2001).
82Their exact ages were not furnished in the transcript.

9.5 Barriers to sentencing for sexual offences

Addressing children's rights is not the same as addressing adult rights. Therefore, while children's participatory rights are central to a modern child-friendly judicial system, this chapter contends that the current process is unsatisfactory in that many children lose their rights as children due to the nature of a legal system that is meant to protect them. In this regard, it is pertinent to repeat that any consideration of international children's rights law emphasises that deprivation of children rights must be limited to the absolute minimum (Liefaard, 2019).

9.5.1 Legal aid

Children's rights issues are an established part of juvenile justice and there are specific challenges that need to recognised in order to enhance the protection of children in conflict with the law and to secure a fair and child-specific approach (Liefaard and Kilkelly, 2018; Liefaard, 2020). Therefore, the role of the lawyer for sentencing is central and legal aid is provided as of right by legislation[83] and by case law.[84] In an adversarial justice system, it is tempting to suggest that their role is to one to distinguish between legal guilt and factual guilt in the legal process (Keenan, 2017). The reality is that the challenges go beyond that for sentencing in juvenile justice and requires a robust understanding of the legal process. The case of *DPP v. D'Arcy* (Unreported, Court of Criminal Appeal, July 23 1997)[85] demonstrated how judicial discretion depends very much on legal submissions.[86]

More recently, in the case of *DPP v. K.D* [2016] IECA 341, the Court of Appeal quashed a detention conviction for three years imprisonment, suspended for a period of five years of a 17-year-old. The defendant was convicted of the offence of engaging in a sexual act with a child under the age of 15 years. The Court of Appeal accepted that the Circuit Court trial judge had erred in admitting into evidence matters emanating from interviews conducted by *An*

83 Article 40 (2)(b)(ii) the UNCRC; Article 49-53 General Comment No. 24 (2019) on children's rights in the child justice system CRC /C/GC/24; the Criminal Justice (Legal Aid) Act 1962; section 57(2) of the Children Act 2001 Gardaí must inform a child of his right to a lawyer on arrest, section 60 of the Children Act 2001.
84 *State (Healy) v. Donoghue* [1976] I.R. 325; *Joyce v. Judge Brady and DPP* [2011] 3 I.R. 376; *Tighe (A Minor) v. Haughton and Others* [2011] IEHC 64.
85 The Court of Criminal Appeal (an appellate court for criminal cases in Ireland) which existed from 1924 until 2014. Under the Court of Appeal Act 2014, the Court of Appeal was given the appellate jurisdiction previously exercised by the Court of Criminal Appeal.
86 In *DPP v. D'Arcy,* a 16-year-old child was interviewed in custody by three Gardaí at the same time. This was a breach of the Custody Regulation which imposes a limit of two. Nonetheless, the Court of Criminal appeal considered that this admitted breach of the regulations did not warrant the exclusion of inculpatory statements made by the child in the course of the interview. The key issue was as to whether the interview was oppressive or unfair. Since there was no suggestion that it was not oppressive or unfair, the court considered that it was a matter for the trial judges to exercise their discretion to admit the statements.

Garda Síochána where the said interviews were conducted in the absence of a parent or guardian. The conviction was, therefore, quashed.[87] It is axiomatic that children value being heard (Kilkelly, 2010), and for this, they require good legal representation (Beijing Rules 22.1[88] and Article 112 CRC Committee 24 (CRC/C/GC/24)). However, the reality is that many Gardaí and defence lawyers lack adequate training which imposes an additional responsibility on the judge dealing with children to ensure a fair sentence (Kilkelly, 2005; O'Connor, 2019). Thus, for example, the traditional lawyer sees his role as 'getting his client off' on the individual case before the court (Finlay, 1985). However, in the context of complex adolescent sexual offending, unless the underlying child issues are addressed, this traditional approach may not be in the best interests of the child such as for example exposing the child to further prosecutions. One must also balance the paradigm shift in human rights law codified in the UNCRC, which recognises the legal status of children as right holders, rather than a mere object of care and protection arising from their vulnerability. The chapter will now proceed to explore legal rights in the context of procedural rights for children which can ultimately affect the sentence itself.

9.5.2 Due process

Prior to sentencing, a judge's role in Ireland in child sexual offending cases is largely confined to overseeing court procedures to ensure a fair trial. In the common law model, cases are heard according to a strict adherence to prescribed rules of evidence and criminal procedure. This procedure is known as due process. In this regard, children have a dual status in that they are not fully autonomous and have the status of a child, but they are also under the UNCRC and international best practice entitled to the same due process and procedural rights as an adult in the same position (Hollingsworth, 2013; Lynch, 2018).

Central to the concept of due process is the presumption of innocence which is recognised as a universal principle.[89] As Keenan (2017, p. 46) asserts:

87 The Court of Appeal deemed the role of responsible adult, was not fulfilled in circumstances where a Peace Commissioner (a person who holds an honorary title for taking statutory declarations, witnessing signatures) attended.

88 UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") adopted by General Assembly resolution 40/33 of 29 November 1985.

89 Article 38 Irish Constitution; Article 11 of UN Universal Declaration of Human Rights; Article 6(2) ECHR; Article 40 UNCRC.

> The concept of justice for common law practitioners, therefore, lies in the process of law rather than the outcome. It is presumed that by observing a regulated procedure that is fair in all respects, a just solution will be realised.

The practicalities of the process are that lawyers argue before the High Court that the trial court judge failed to follow established procedure rather than deal with the merits of the sentence. In practical terms, for juvenile justice, this has meant on the one hand that judicial review is an active ingredient of juvenile justice in that the High Court supervises a trial court including the Children Court to ensure that it makes decisions in accordance with the law. On the other hand, it is primarily concerned with the decision-making process rather than with the substance of the decision (Delany *et al.* 2012).[90] Domestically, Article 38(1) of the Irish Constitution guarantees a defendant's right to a fair trial, and this is also an established part of international treaties. Thus, for example, Article 40 of the UNCRC, Article 6 (the fair trial provision) (Kilkelly, 2008) and Article 47 Charter of Fundamental Rights make the situation abundantly clear. However, this thesis demonstrates that in the case of children, there is danger in a judicial review, it can turn into a futile review of blameworthy prosecutorial delay.[91]

9.5.3 The effects of due process

The importance of due process for a fair trial for a child and responding to the need for a child to participate in the proceedings was notably demonstrated in the ECHR case of *T and v. UK* [2000] 30 EHRR 121. Here, the ECHR required adaptations to the procedure in criminal trials for young persons in England and Wales so that they could effectively participate in the trial process. In Ireland, the outdated and inadequate powers in the Children Act 1908 to vindicate children's rights particularly those children at risk in the care of the state (Walsh, 2005) were sharply exposed in various reports including the Ryan Report (2009). The Children Act 2001 was meant to remedy this defect. It is proffered, for example, that a failure by a Children Court judge to hold a jurisdictional hearing under section 75 of the Children Act 2001 is a serious derogation of a child's rights in that a child would be denied the option to have his case heard by the Children Court. However, there appears to be no reported case law on this issue.

90 Order 84 of the Rules of the Superior Courts.

91 The Procedural Safeguards for Children Directive (Directive 2016/800/EU), transposed into national law, requires a right of information and attendance, certain rights in cases involving deprivation of liberty including legal assistance, treatment of cases, and ensuring a high level of qualification for those who deal with juvenile offenders. However, Ireland (like the UK) have not opted into this Directive and, it does not apply to Denmark (Cras, 2016).

Yet, the current dependence on due process in an adversarial setting for children is not without its challenges for final sentencing. It is noteworthy that when Irish judges were interviewed (Document 4), only 20% of judges believed that the existing adversarial system, with its strong dependence on judicial review, to be satisfactory for children. In contrast, a clear majority (53%) favoured a combination of adversarial and inquisitorial system, thus allowing the judge an input into the investigation.[92] However, the danger of an inquisitorial-type enquiry was revealed in *W.M v. The Child and Family Agency* [2017] IEHC 587. The case was a judicial review arising out of a public law child protection risk assessment carried out by The Child and Family Agency (Tusla) on an offender. The matter was an historical abuse case between a brother who admitted to sexually abusing his sister when he was 17 years and she was 11 years. McDermott J. noted that:

> The court is not satisfied that the procedures required in a child protection assessment of risk which is largely investigative in nature should approach those of a criminal or civil trial…The purpose and duty of the respondent in child protection matters is to investigate and make a timely assessment of risk to children whose welfare is paramount (per Butler-Sloss L.J. in *Regina v. Harrow LBC* [1990] 3 All ER 12 at pp 16-17) (para.73).[93]

One of the frequent practical difficulties with judicial review is that if the court challenge is unsuccessful, the sentencing is delayed, risking a child ageing out and receiving an adult sentence including an adult prison sentence for a crime committed as a child. In *Freeman v. Governor of Wheatfield* [2016] IECA 342, an adolescent received a four-month sentence in the Children Court. Due to an alleged defect in the warrant, the High Court released him, but this decision was reversed by the Court of Appeal which held:

> In the circumstances of this case, where the respondent was released from prison by order of the High Court approximately two weeks into serving a legitimately imposed a four-month prison sentence…and where this court has reversed that decision, albeit at a point in time well after the said four-month period has passed the un-served period of that sentence remains live, and the respondent continues to be subject to it (para. 26).[94]

92 Just over 25% favoured a pure inquisitorial system.
93 This case follows the reasoning of Barr J. in *M.Q. v. Gleeson* [1998] 4 IR 85 and Hedigan J. in *N.I. v. The Health Service Executive* [2010] IEHC 159 who held the Health Service Executive role in investigating is not an administration of justice.
94 Freeman -v- Governor of Wheatfield Prison [2015] IEHC 615 (09 October 2015) High Court. Freeman -v- Governor of Wheatfiled (Place of Detention) (No.2) [2016] IECA 342 (16 November 2016) Court of Appeal.

In summary, it is accepted that the current judicial review process has the potential to vindicate children's rights, but it also has the potential to make matters worse for a child in sentencing. What is needed is a strong legislative intervention to reform the law, in line with international best practice (Waldron *et al.* 2009). It is now proposed to analyse one of the most frequent challenges for judicial reviews, namely, the issue of prosecution delay.

9.5.4 Prosecution delay

The Beijing Rules (the UN Standard Minimum Rules for the Administration of Juvenile Justice, adopted in 1985) provide that a criminal case against a child "…shall from the outset be handled expeditiously and without any unnecessary delay." Article 40 UNCRC provides that every child alleged or accused of having committed an offence is entitled to certain minimum guarantees, including to have the matter determined without delay.

In *DPP v. P. O'C.* [2006] 3 I.R. 238, the Supreme Court held in a charge concerning an adult sexual assault that while a trial court has an inherent jurisdiction to protect its trial process from abuse, it does not have an inherent jurisdiction to consider a pre-trial issue of delay. The correct procedure is to apply to the High Court for judicial review. More recently, in *K D v. DPP* [2017] IECA 53, the Court of Appeal also held that a trial judge does not have jurisdiction to stop a prosecution on the grounds of delay alone. It could only be stopped if an irredeemable injustice would be caused to the defendant of such gravity that it would be fundamentally unjust to allow the matter to go to a jury.

The Irish courts have consistently emphasised the importance of expedition in criminal proceedings involving young defendants. For example, in *BF v. DPP* [2001] 1 I.R. 656. Geoghegan J. in the Supreme Court noted that in the case of a criminal offence alleged to have been committed by a child or young person as in this case, that there is a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial, having regard to the obvious sensitivities involved. Murray CJ. clarified that the real issue in the delay in the prosecution of sex offences against children was not where the delay blame lay but in the issue of a fair trial. The test, therefore, is: 'Whether there is a real or a serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay.' (*PM v. Malone* [2006] 3 I.R. 575 [622]).

Examples of the effect of prosecution delay resulting in an unfair trial are the loss of the benefit of the Children Act 2001, where a child has effectively aged out. This results in the child no longer being able to make representations to the Children Court to retain jurisdiction (section 75), loss of anonymity (section 252) expunging of the record in most cases (section 258), *DPP v. Donoghue* [2014] 2 IR 762, and an automatic right to a probation report before the imposition of a custodial sentence or community sanction (section 99 Children Act 2001).

One of the strongest judgments outlying the issue of prosecution delay was the High Court case of *G v. DPP* [2014] IEHC 33 where it recognised that the child who committed a rape crime just short of his 16th birthday was not the same as the adult aged 20 who was being tried. In prohibiting the trial, the judge recognised that childhood is by definition a transient status, and the Court stated that:

> …these aspects of personality are still developing means that intervention at an early stage, rather than a purely punitive approach, may assist in a positive outcome as the child reaches adulthood (para. 92).[95]

It could be argued that behavioural and neurobiological research findings have influenced recent judicial thinking (O'Malley, 2016). However, *G v. DPP* [2014] IEHC 33 represents the high watermark of judicial discretion in prohibiting trial due to delay. Therefore, while the Irish Supreme Court has recognised the right to a speedy trial for children, the concept is, in reality, vague in that it is almost impossible to determine with precision the circumstances in which a court will prohibit a trial. It is only in exceptional circumstances that a trial will be prohibited by way of judicial review. This in turn has implications for the capacity of a court to intervene effectively and to promote the rehabilitation of a child who has offended. Since the 2014 Supreme case of *Donoghue v. DPP* (which post-dated G v. DPP [2014] IEHC 33), only the recent case of *Sean Furlong v DPP* [2021] IEHC 326 has been successful in prohibiting a trial where a child was being charged for a crime alleged committed when the child under 18 years. It effectively has meant in the past that child sex offenders not only lose the benefits of the Children Act 2001 but are at risk of receiving adult sentences.[96] This was recently demonstrated

95 This comment reflects Article 10 of General Comment No. 10 CRC/C/GC/10 2007 which has now been replaced by General Comment No. 24 (2019).

96 Recent cases where the trial was not prohibited: *Ryan v. DPP* [2018] IEHC 44; *RD v. DPP* [2018] IEHC 164; *MS v. DPP* [2018] IEHC 285 charge of rape .at the date of the alleged offence was aged 15 years and 11 months. He was charged when he was aged 18 years; *DPP v. SW* [2018] IEHC 364; *T.G. v. DPP* [2019] IEHC 303; In *A.B. v. DPP* [2019] IEHC 214; *L.E. v. DPP* [2019] IEHC 471; *Dos Santos v. DPP* [2020] IEHC 252; *Wilde v. DPP* [2020] IEHC 385.

in *DPP v. VT* [2021] IECA 117 where Edwards J. in the Court of Appeal stated that there will always be some margin of appreciation in delay issues. In that case, a male child of 15 years who pleaded guilty to one count of defilement of a 15-year old girl received an 18 month sentence the day before his 18th birthday. Although sentenced as a child, he will effectively spend a portion of his sentence in an adult prison.

A synthesis of the judicial rationale of these judgments is two-fold: Firstly, in the investigation of these serious cases, the prosecution should be afforded reasonable time to prepare for a trial. Secondly, even where prosecution delay is established by the courts, the balance of convenience frequently lies in proceeding with the trial rather than prohibiting the trial as demonstrated in *Daly v. DPP* [2014] IEHC 405 and *SW v. DPP* [2018] IEHC 364. In the latter case, the applicant was charged with an assault when he was aged 15 but appeared before the court after he was 18. The court accepted that there was a culpable prosecutorial delay, but the balance of convenience lay in proceeding with the trial.

Specifically, in relation to sexual offences, in *MS v. DPP* [2018] IEHC 285, at the date of the alleged offence of rape, *MS* was aged 15 years and 11 months. He was charged when he was aged 18 years. In refusing to prohibit the trial, McDermott J. referred to the fact the applicant never displayed a willingness to admit to the offence and, therefore, could not have qualified as a suitable candidate under the diversion programme.

The issue of children coming to terms with their sexual behaviour and the lack of legal advice at the diversion stage does not appear to have been addressed in any judgment. One speculation is that it may not have been raised as a submission by defence lawyers. While mental health issues can be taken into consideration as mitigation in sentencing (*DPP v. Owen Power* [2014] IECA 37), they are not grounds for prohibiting a trial as demonstrated in *L.E. v. DPP* [2019] IEHC 47. In this case, Simons J. held that the medical condition of an applicant aged 15 years would have to be wholly exceptional to justify an order of prohibition. Yet as this thesis has demonstrated, the issue of female teenagers sexually offending are likely to be dealt by the mental health or care system rather than the justice system (Document 4).

In summary, the ethos from the judicial review decisions is that prosecutorial delay is best dealt with by the trial judge though in reality, it would also be rare for a trial judge to stop a trial. This means that the issue of delay is effectively one for mitigation for sentencing which can vary according to the age of the child. There are now very few applications for restraint of trial

by way of judicial review leading O'Malley (2020, p. 114) to posit that "the number may be expected to decline even further". An example of mitigation can be observed from the English Court of Appeal decision in *R v. Hayward and Weaving* [2019] 8 WLUK 118 where the Court of Appeal found that the delay of 11 months between the offence and sentence although significant was not due to the young defendant's fault. It noted that the young adults had matured significantly during that intervening period, The Court of Appeal held that the imposition of an immediate 11-month custodial sentence should have been entirely suspended. However, as the young people had already served most of the sentence by the time the appeal was heard, the court substituted a six-month sentence for the original the 11-month sentences, and the appellants were immediately released from custody. Some recent developments in England and Wales relating to the sentencing of children who have turned 18 years have been noted by the Irish courts and are likely to be further mentioned.

9.5.5 England and Wales Court of Appeal: Recent developments

The approach to sentencing for serious offences in England and Wales for a young person who has turned 18 set out in *R v. Ghafoor* [2002] EWCA Crim 1857 is frequently quoted in Irish courts as having persuasive authority such as for example in *DPP v. J.H.* [2017] IECA 206.
In *R v. Ghafoor* [2002] EWCA Crim 1857, the court held that the starting point for sentencing for a defendant who crosses a relevant age threshold between the date of the commission of the offence and the date of conviction is not the maximum sentence that could lawfully have been imposed, but the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence. However, in this regard, it is important to note that the principal distinction between England and Wales and Ireland is that statutorily binding guidelines exist for juvenile sexual offending in England and Wales (Sentencing Council, 2017). No such guidelines exist in Ireland.

The *Ghafoor* approach has been supplemented by guidance in the Definitive Guideline for the Sentencing of Children and Young People (Sentencing Council, 2017). The combined approach can be summarised as follows: culpability should be judged considering the young adult defendant's age at the time of the offence, notwithstanding he or she being 18 years at the time of sentence. In practice, this means, that while it is not an inflexible rule, it will in reality rarely be appropriate for a court to impose a more severe sentence than the maximum that the court could have imposed at the time the offence was committed (Sentencing Council, 2017).

Since 2018, the Lord Chief Justice[97] has offered a new approach to the issues concerning a child over 18 years who commits a crime. The importance of the change is that it recognises that young adults between the ages of 18 years and 25 years must be given consideration for special treatment as opposed being treated as mature adults. This is now enshrined in the UK sentencing guidelines (Janes *et al.* 2020). The first case to outline the new sentencing approach in *R v. Clark* [2018] 1 Cr. App. R. (S.) 52 involved a teenage boy who kidnapped, falsely imprisoned and threatened the victim with weapons. In the course of his judgment, Lord Chief Justice observed:

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

In the Irish case of *DPP v. MW* [2020] 1ECA 272, Kennedy J. referred to *R v. Clarke* and the quotation from the Lord Chief Justice (paragraph 26) as a legal submission from the defence barrister. The *MW* case concerned a series of sexual assaults carried out over a four-year period when MW was aged between 17 and 22 years. The victim was his cousin aged between six and 11 at the time. At the time of sentence, *MW* was aged 31 years. In the course of her judgment Kennedy J. outlined in the case of *MW* that youth is an extenuating factor which reduces his moral culpability and impacts on the headline sentence. In other words, it is a headline mitigating factor only.[98]

R v. Clarke was followed by *R v. Hobbs* [2018] 2 Cr App R(S) 36, where Holroyd J. observed that the modern approach to sentencing required the court to 'look carefully at the age, maturity and progress of the young offender in each case'. The case significantly outlined that the principles that applied to young offenders under 18 years also applied to young people who offend in early adulthood but are far from the maturity of adults.[99] From a sexual offending

97 The Lord Burnett of Maldon.

[98] The five-year headline sentence was reduced to four years. after allowance for mitigation. The final year of the four-year sentence was suspended for three years. In addition, the court separately imposed a two years post-release supervision Order pursuant to the Sex Offenders Act 2001.

99*R v. Hobbs* [2018] 2 Cr App R(S) 36 involved manslaughter of a man who had burned to death after the defendants had ignited a flare in the car in which he was sleeping. In the course of his judgement.

sentencing viewpoint, this logic was applied in *R v. Balogun* [2018] EWCA Crim 2933, whereby the defendant was convicted of a campaign of rape against teenage girls. Issues which might be regarded as aggravating factors in an adult sentence were put into context in *R v. Quartey* [2019] EWCA Crim 374 which involved a gang murder, an inhumane and savage attack. The Lord Chief Justice drew specific attention to the appellant's background of falling out of mainstream education and into gang-based behaviour which he interpreted this as indicative of immaturity and a lack of strength to resist peer pressure.[100]

In *R v. T* [2020] EWCA Crim 822, the Court of Appeal has stated that trial courts need to take a pragmatic approach to sentencing in circumstances where a child nearing his 18th birthday and thereby recognising the age and maturity of the child (YJLC, 2021). This case involved a complex multi-party case, where delays due to the prosecution decision to make an allocation of resources for other child defendants had the potential to adversely affect a child nearing his 18th birthday.

However, a pragmatic approach to youth sexual offending is uncomfortable for sentencing analysis consistency, but it does have its attractions for individual child defendants. As YPPOs in this doctoral research observed, there is a danger in formulating statutory guidelines that inexperienced judges may be tempted to stick rigidly to them irrespective of the circumstances of the case (Document 4). Yet, despite the variance in methodology between Irish and UK courts, the overall subjective impression is that custodial sentences in Ireland for sexual crimes for young persons over 18 years are no harsher than those ultimately decided by the UK courts. However, one would have to examine the statistics (which are not available in Ireland) to provide robust evidence for the latter observation.

100 Cases where the new test was applied: *R v. Ake* [2018] EWCA Crim 392 -stabbing causing life threatening injuries; *R v. Gordon* [2020] 4 WLR 49–Manslaughter. Kicked and stamped on a victim who had been stabbed; *R v. Daniels* [2019] EWCA Crim 296; Death by Dangerous Driving involving joy riding in a residential area; *R v. Ford (AJ)* [2019] EWCA Crim 1757 -gang related domestic burglaries; *R v. Zakaria Mohammed* [2019] EWCA Crim 1881 –trafficking of children to deal drugs. Sentences are not reduced where the crime shows a particular level of sophistication, such as in *R v. Raja Mohammed* and *R v. Assaf* [2020] 1 Cr. App. R (S) 3.

9.6 Sentencing Complications

9.6.1 Sentencing for historic sexual abuse

The emergence of the phenomenon of allegations of historic child sexual has been a significant feature in the Irish courts in recent years. The issue is partly due to the fact that sexual abuse of children was not generally recognised in society until recent years and also partly due to the fact that young victims have been shown frequently to be unable to make a complaint and/or pursue it for many years afterwards.[101] For the courts, this gives rise to two conflicting issues. On the one hand, there is a significant imperative in seeking to ensure that cases of serious alleged wrongdoing are considered on their merits. However, it is also necessary to protect the requirements of due process and a fair trial. Finding the proper balance between these competing demands has exercised Irish case law which has mainly focused on the trial process, and it is submitted has had serious consequences for the sentencing process for adults convicted of sexual crimes when juveniles. There is no formal limitation period. A charge can occur whenever there is sufficient credible evidence to support them (O'Malley, 2013). Indeed, many complaints are never reported and of those that are reported, very few of them lead to convictions (Daly and Bouhours, 2010).

However, it is recognised that one of the consequences of the sexual abuse of a child at a young age is that the victim would frequently be unable to make a complaint and to pursue it for many years afterwards. This was particularly so at a time when the phenomenon of sexual abuse of children was not generally recognised in society. The lapse of time, however, between an allegation of abuse, a complaint, and any trial poses problems for the fairness of the process, or as O'Malley posits "there remains the troubling question of whether persons claiming to have been abused in the past should be able to choose the moment of accusation" (O'Malley, 2013, p. vii). Essentially, each case is highly fact-specific and involves a cumulative assessment of a number of different factors. The question of finding the proper balance between these competing demands and putting in place appropriate procedures to enable courts to determine where that balance lies in the circumstances of any particular case have been much discussed as the case law has developed over recent years.

In *S.H. v. DPP* [2006] 3 I.R. 575, in the Supreme Court, Murray C.J. concluded that the real issue in historic cases of sexual offences was whether or not there was a real or serious risk that

101 *DPP v. C.C.* [2019] IESC 94 (judgments Charleton J., Clarke CJ., O' Donnell J., and O 'Malley J.).

the accused, by reason of the delay, would not obtain a fair trial. This theme was elaborated by O'Donnell J. in *DPP v. C.C*. [2019] IESC 94 where he stressed that the question is not whether the trial judge believes a guilty verdict to be appropriate, but whether any verdict of guilt, if arrived at, could be considered to have been achieved by a process considered just and fair.

Historical sexual abuse cases can lead to anomalies as to what are the appropriate standards to apply. For example, in *PP v. Judges of the Circuit Court* [2019] IESC 26, the Supreme Court in a majority decision (3-2) refused to grant an order of prohibition in respect of criminal charges of gross indecency allegedly committed 40 years earlier by an adult teacher with a boy of 16 years old. At the date of the offence, homosexual activities were illegal under the relevant legislation. However, the age of consent for sexual relations was 16 years rather than 17 years as it was on the court date. The court's reasoning was that it was not open for the accused to challenge the constitutionality of the legislation on the basis that it criminalised sexual activity between consenting adult males at the date of the offence.

9.6.2 Family commitments complicate the justice/welfare process

In *Minister for Justice and Equality v. PK* [2016] IECA 303, an application for a European arrest warrant was made in respect of an historic sexual assault case. The injured party was six years and the Court of Appeal estimated that the respondent was probably 13 years of age when the sexual assault occurred. The respondent was 36 years of age when the warrant was executed. One of his four children, a daughter who suffered from Asperger syndrome, had been subject to a serious sexual assault just before the court hearing. The respondent was very involved in her care. The Court of Appeal stated that the starting point for consideration is that the public interest in ensuring that extradition arrangements are honoured is very high and that while the impact of a possible sentence on the family situation of the respondent may weigh heavily on a trial judge for sentencing, it was not one for the Irish jurisdiction to consider. The court, therefore, rejected the view that the surrender would contravene the private and family rights referred to in Article 41 of the Irish Constitution and Article 8 of the ECHR and acceded to the request for execution of the warrant.

9.7 The Quest for a rationale in sentencing

9.7.1 Personal circumstances

The research indicates that the personal circumstances of children who commit sexual offences are complex. However, many children who exhibit risky sexual behaviour have had adverse life experiences, personal and health issues and developmental challenges in their lives (Balfe *et al.* 2015). Studies have also suggested that drug addiction and mental health disorders that put children at risk for offending may also result in engaging in risky sexual behaviours (Robbins, 2004; Yap *et al.* 2020). Yet apart from this writer's decision in *DPP v. TC* [2017] IEDC 7 which was a non-sexual abuse case, there are few reported decisions that deal with personal issues of children or young adults. One exception was in *DPP v. Conroy* [2018] IECA 350. Here the appellant had just turned 19 years and the victim was 14 and a half years at the time of the offence but had difficulties with education and a speech defect. The offence was defilement of a child under 15 years. A custodial sentence of four years with the final year suspended was imposed by the Circuit Court but reduced to two years by the Court of Appeal.

However, two decisions make it clear that personal circumstances are considered in practice, i.e. in unreported decisions. In *DPP v. M* [1994] 3 I.R. 306, the Supreme Court clarified that any sentence must consider personal circumstances as well as the offence. In that case, the adult offender had pleaded guilty to a substantial number of serious sexual offences. He had joined a religious order at age 13 as a result of which he had a very protected and unnatural and isolated youth. When Denham J. considered the plea of guilty was the most important factor, she stated that the sentence should also consider the personal circumstances, including the age of the offender, thereby pitting it beyond a just deserts policy. In addition, Edwards J. holds that a judge has a significant margin of appreciation (Edwards, 2019). However, this margin of appreciation in sentencing is a distributive principle even for children in that it seeks to guide the judges to make a correct sentence without belonging to any particular philosophy. In short, it guides the sentence but does not analyse why the sentence is justified in the first place (O'Malley, 2013). In reality, therefore, it is difficult to evaluate how Irish judges evaluate personal circumstances in a case. This is unfortunate as internationally research into neurological as well as psychological issues has shown that age limits do not align with the capacity of children (Schmidt *et al.* 2020).

9.7.2 Non-abusive sexual offences

While age difference alone should not ordinarily be used to determine the presence or absence of abuse, the closer in age children are, the more likely the sexual activity will be viewed as non-problematic. However, Irish law has determined that for children over 15 years, the maximum age difference should be two years. In theory, this means that two children under 14 years who engage in sexual activity could be both prosecuted, though in reality it is unlikely (O'Malley, 2013).

In a County Clare (Ireland) case in 2019, the accused pleaded guilty to the defilement of a child aged under 17 years old. He was then 18 years and had consensual sexual intercourse with a 15-year old girl. The two had met first through Facebook when the girl was aged 14, and the boy was 17 years. The judge noted that the accused misrepresented his age to the victim before the sexual act. He imposed a two-year suspended sentence subject to the supervision of the probation service. The judge noted that the defendant (who at the date of sentence) was 21 years already had the severe sanction of also being placed on the Sex Offenders register as a result of the defilement offence, that he was a talented footballer and had already suffered the collateral damage of not being able to pursue a soccer opportunity overseas due to his bail conditions (Deegan, 2019).

9.7.3 Online offences and social media

Discussion on young offenders engaging in online offences to the extent that teenagers become inappropriately sexualised has captured the media attention. For example, the aggravated sexual assault and murder of Ana Kriégel (14 years of age) on 14 May 2018 in Ireland so shocked the Irish public that in the absence of any other logical reason, the public tried to rationalise it by the exposure of Boy A (aged 13) to extreme pornography (O'Connell, 2019). Yet "relatively little research has been published about the incidence, characteristics, motivations and needs of children who engage on technology-facilitated harmful sexual behaviours" (Hackett, 2014, p. 55).

In this regard, pornography can occur via social media or through electronic devices (Department of Children and Youth Affairs, 2017). A related issue is sexting which covers a wide variety of circumstances *R (CL) v. chief Constable of Greater Manchester Police* [2018] EWHC 3333(Admin). Sexting generally involves creating, sharing, sending or posting sexually explicit messages or images on mobile phones or other electronic devices (Mori *et al*. 2020). While Irish law does not differentiate between consensual teenage sexting and non-consensual

sexting (Arthur, 2019),[102] proceedings may only be brought with the consent of the Director of Public Prosecutions, thereby recognising the sensitivity of such cases. Much of pornographic juvenile offending is capable of being dealt with by the diversion programme, but as this thesis has observed, complications arise when the child reaches 18 years. In *S v. The Director of the Garda Juvenile Diversion Programme and DPP* [2019] IEHC 7, the defendant was aged 17 at the time he initiated an 11-year old girl on social media and requested a young boy to send pornographic images of himself via a mobile application. After the parents of the young boy found out about the offences, the Gardaí executed a search warrant of the family home. *S* was formally arrested several months later, but at this stage, he had reached the age of majority.[103] Since the offences occurred before *S* reached the age of majority, the Court held that he was a child for the purposes of the Children Act 2001 and, therefore, fulfilled the statutory criteria governing admission to the diversion programme under Part 4 of the Children Act 2001. However, the Court also noted it would not intervene to set aside a decision of its Director of the diversion programme on the merits unless an applicant for judicial review can establish that the decision is unreasonable or irrational. As Hackett (2014, p. 56) has observed:

> … given the frequency with which young people use the internet and social media platforms to meet sexual needs or for sexual expression, young people whose sexual behaviour online causes them to come into contact with law enforcement agencies as offenders are relatively rare.[104]

A recent Garda diversion programme review confirms this position; in all of the cases reviewed, the children were in a relationship and did not require any further input, such as cautioning by them (Document 4). However, a review of Irish case law demonstrates that social media can be an aggravating or a complicating factor in assessing a sentence for sexual offences by a child offender. Thus, while the use of online social networks is a factor among all age groups (*DPP v. Jason Moore* [2020] IECA 24), the complicating factor is that many of the victims of online abuse are children (Dowdell *et al.* 2011). Appendix 2 provides some examples. More recently, revenge pornography has been used to coerce, threaten, harass,

102 Section 8 of the Criminal law (Sexual Offences) Act 2007 sets out offences in relation to the use of information technology.
103 He was charged with a number of offences under the Child Trafficking and Pornography Act 1998, including sexual exploitation of a child and possession of child pornography for the purpose of distribution and sale.
104 In the calendar years 2010 and 2011 in England and Wales, 51 young males and one female aged between 10 and 17 years were given a reprimand or warning as a result of offence of possession of indecent photographs or pseudo-photographs or prohibited images of children (Hackett, 2014).

objectify and abuse persons known to the victim (Henry *et al.* 2017). It is timely now to look at the issue of child victims, the 'other' child.

9.8 The other child

The most significant challenge for judges identified from the semi-structured interviews (Document 3) and from the literature review is to apply a sentence that promotes rehabilitation and accountability for the child defendant but also provides justice and safety for victims and the public (Blackley and Bartels, 2018). In addition, the literature indicates that a significant portion of child sexual offending also involves younger children as victims (Ryan *et al.* 2011; Lynch, 2018), including children from the same household as the child offenders. One of the unfortunate side effects is the idea of what Hackett calls the victim to offender cycle whereby individuals abused in childhood go on to complete the cycle by victimising others (Hackett, 2014). However, the evidence also suggests that most victims of sexual abuse do not go on to abuse others (Salter *et al.* 2003; Hackett, 2015; McNeish and Scott, 2018).

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

Securing justice for victim survivors of sexual violence can become a rallying cry for politicians. This 'justice gap' requires an examination of how victims of sexual violence conceptualise the justice system (McGlynn and Westmarland, 2019). Historically, criminal law is a public action between the state and the offender rather than an act between the offender and the victim. The nature of the offence and the offender's personal circumstances are key issues. However, since the Criminal Justice Act 1993,[105] the general impact of a crime on a victim is a factor in sentencing for sexual crimes. As observed earlier (Document 3), the balancing of these public and private issues was explored in interviews for this thesis with 83% of judges stating that they could balance them. However, when it comes to analysing sentencing decisions, the interests of victims are more problematic. In addition, there is a paucity of

105 Under section 5 of the Criminal Justice Act 1993, as amended by Part 2 of the Criminal Procedures Act 2010.

international guidance and any guidance that exists focuses primarily on child witnesses,[106] as opposed to sentencing (Lynch, 2018). In the course of a trial for sexual abuse, a child's evidence may be crucially important. Historically, this was problematic but since the Criminal Evidence Act 1992 (section 27), a child under 14 years of age can give unsworn evidence (O'Malley, 2020).

Frequently the perceived 'safe' approach to sentencing the child is to give a custodial sentence and thereby remove the child from the family for a period of time. However, this is not always evaluated if it is desirable for the victim, the child offender and their families. Child victims are unlikely to be effective self-advocates (Mercer *et al.* 2015). Although a victim impact statement can be made directly by the victim to the court, where the victim of the offence is a child under 14 years, the child or his or her parent or guardian may give evidence as to the effect of the offence on the child.

In addition, a victim impact report written by a family member (which is broadly defined)[107] furnishing an assessment of the effects of the offence on the victim may also be furnished to the court before sentencing. While judges take cognisance of victims, there is a dearth of research on how the changing conceptualisation of the role of victims influences the judicial process, including the final sentence bearing in mind that many children (both victims and perpetrators) have learning and speech and language issues (Lynch, 2018). O'Malley (2016) suggests that the sole purpose of victim impact evidence is to assist the sentencing court but not obligating the court to increase the sentence because of victim impact.

In *People (DPP*) *v. McCormack* [2000] 4 I.R. 356, the defendant aged 17 pleaded guilty to aggravated sexual assault and attempted rape. The victim was aged 22 and requested the court not to impose a custodial sentence. The Court of Criminal Appeal agreed and cited it as one special mitigation circumstances of the case. However, in *DPP v. B.L* (transcript, 20 July 2019, Central Criminal Court), White J. stated in relation to a 16-year-old victim and a defendant aged 17 at the time of the rape there had to be an element of a custodial sentence for the defendant because of the seriousness of this offence and the impact on the victim.

106 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime ECOSOC Resolution 2005/20.

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

The effects of a victim impact statement or report are occasionally revealed in the Court of Appeal decisions. For example, in *DPP v. Conroy* [2018] IECA 350,[108] the court noted in a defilement case of a child under 15 years:

> …the Circuit Court Judge pointed out that the victim impact report conveyed the pain, isolation and emotional turmoil that the complainant had suffered and her loss of trust and her efforts to cope with what occurred. The Judge commented that it was no exaggeration to say that the complainant's recovery will be a lengthy and difficult one (para. 8).

In *DPP v. J Mc.D* (unreported transcript, 17 October 2019, Central Criminal) White J. referred to a defendant (aged 16) who initiated sexual contact in an area where other young boys could take photographs. The judge regarded this element of cruelty on the victim as an aggravating factor for sentencing. However, a complicating factor is that much sexual abuse is not revealed for a long period after the event and the limited empirical evidence relates to child victims who are mature adults at the date of sentencing. Frequently they express frustrations with the criminal justice process generally and see the sentence as part of an overall defective process.

Recently, in the Circuit Court in *DPP v. Kenneth Tracey* 2020 (unreported), a 48-year-old man received a four-year suspended sentence for repeatedly and regularly sexually abusing his neighbour in a series of assaults that began when he was aged 15 and the victim was aged four years. The abuse continued for three and a half years. In assessing mitigation, the judge acknowledged the accused's very low cognitive abilities. However, the victim saw it differently:

> During this period, I have felt isolated as a victim. I have not been offered access to any of the free services that he has been given access to. I have not been given support services or professional services while the accused has been given access to free legal aid, barristers, solicitors, psychiatric services, psychiatric reports to name just a few (Maguire, 2020; McKibbin *et al*. 2017).

108 The background to the Conroy case was the defendant was aged 19 years and the victim was aged 14½, which involved oral sex when the victim was inebriated and was traumatised by it. The Court of Appeal balanced the defendant's significant personal issues, early apology plea of guilty, and model behaviour in prison with the effect on the victim and reduced the Circuit Court judge's net sentence of four years with the final year suspended to a two-year sentence.

Sexual violence is different from other offending behaviours in that in many cases, there will be some relationship between the victim and the offender (Mercer *et al.* 2015). In this regard, one of the significant victim issues is sibling sexual abuse.

9.8.1 Sibling sexual abuse (SSA)

While empirical research on SSA is scarce (Finkelhor, 1983), data from the US indicates it is a significant issue with at least 2.3% of children victimised by a sibling compared with 0.12%, who were sexually abused by an adult family member (US Department of Health and Human Services, 2016). SSA can also create significant collateral damage for the wider family who themselves may end up as victims. In this regard, many YPPOs interviewed for this thesis were of the view that much depends on how courts deal with victim impact statements, and in particular, the consequences of making a statement by the victim should not necessarily mean a harsher sentence for the offending child (Document 4). It should be borne in mind that many child offenders are themselves victims (Hackett *et al.* 2013), which may only become apparent when the child has sexually offended (Document 4). In general, the vulnerability of the victim, such as the young age of the victim will be seen as a breach of trust and is an aggravating matter in sentencing (*The People (DPP) v. R.B.* [2006] IESC 33, [2006] 4 I.R. Denham J.). Two recent Court of Appeal decisions illustrate current judicial responses to this sensitive issue:

- In *DPP v. Brian Butler* [2018] IECA 70, the defendant pleaded guilty on the day of trial to charges of three rapes and seven sexual assault against his sister who subsequently suffered suicidal ideation. The offending conduct began when the defendant was aged 15 and his sister was ten years old and continued for two years. While the defendant co-operated with therapeutic interventions, the court noted that he lacked sufficient victim empathy. The Court of Appeal imposed a six-year sentence with the final two years suspended provided that the defendant engaged in therapeutic services.

- In *DPP v. NM* [2020] [34CJA/19], the defendant and the victim were step-brothers. The victim was sexually abused and raped from the age of 7/8 to the age of 14 years. The defendant was 17 years when the abuse commenced, and 24 years when it ceased. The trial judge imposed a sentence of nine years imprisonment with the final two years suspended. The Court of Appeal upheld the sentence, though observing that in their view it was a very lenient one.

9.8.2 Taking therapy into account in sentencing

Participation in the criminal justice system should not be seen as a substitute for therapy (Doak, 2011). It can be particularly injurious to the psychological well-being of victims, especially children in the cases of rape and sexual assault (Doak, 2008). Nevertheless, where the therapy involves the offender, the courts will take the issue into account in the final sentence. In *DPP v. S.D* (transcript, 1 April 2019, Central Criminal Court, White J.), a 14-year-old child was convicted of numerous rapes and sexual assaults perpetrated against his eight-year-old stepsister. The judge took the assessment report into account in framing a sentence and deciding. The judge noted it included an appropriate treatment plan, and guidance on how best to deal with level of contact he should have with the family in the context of treatment.

9.9 Sentencing – The quest for a rationale (No admission of guilt)

In the vast majority of cases reviewed, there was a plea of guilty. Only a small minority of sexual abuse cases go to trial. While an absence of a plea of guilty is not an aggravating factor, in reality, it will deprive a defendant of a significant mitigation in a sentence. In regards to juvenile sexual offending, it is worth reiterating that many children who sexually offend have difficulty coming to terms with the offence. This is compounded by a dearth of training among legal practitioners and the complete absence of legal advice in cases referred to diversion.

In *DPP v. Jack Kirwan* [2017] IECA 83, the defendant was sentenced on one count of sexual assault and burglary to two years imprisonment. He was aged 17 at the time of the incident. He had no prior or subsequent convictions and good family support There was an almost eight years gap between committing that offence and coming to trial. However, the Court of Appeal held in the absence of a plea of guilty and of remorse, the defendant was denied 'the most valuable mitigation that arises when it comes to sentencing sex offenders' and upheld the sentence.

9.10 Summary

Chapter 9 has addressed the two key doctoral research questions around how children's rights and needs are currently assessed by the Irish judiciary in their sentencing of children and young persons for sexual offences and the types of improvements that might be considered to ensure that sentencing complies fully with international child-friendly justice and best practice. Both questions are interrelated and clearly located within the justice/welfare paradigm. The chapter has shown that traditionally both the sentencing decision and the process of sentencing of children for sexual offences in Ireland has mirrored justice-oriented approaches used for adult

sex offenders despite significant differences in age, developmental needs and maturity levels. Judges have historically relied on suspended sentences as opposed to options that are available under the Children Act 2001 such as community sanctions and family conferencing. Particularly problematic is the sentencing of children who have offended as children but have reached the age of 18 at the date of sentence. The sentencing issues are compounded by prosecution delay, lack of resources, inadequate legal training for judges and advocates and a legal process which in theory is meant to assist the child who has offended but in practice may hinder a welfare sentence for an offender and re-victimise young victims. Case law (Court of Appeal) in England and Wales as outlined in this chapter offers helpful insights into some recent developments in the area of judicial innovations such as reviewable sentences and deferred detention; it is suggested that these innovations are worthy of consideration by the Irish judiciary in the context of juvenile sexual offending, further compliance with the UNCRC and with the spirit and provisions of Ireland's Children Act 2001.

The final chapter (Chapter 10) draws all the chapters together towards the development of a new holistic model for sentencing in Ireland that will reflect the UNCRC child-friendly orientation underpinning the Children Act 2001 and which, in turn, could serve as a model of best practice in juvenile sexual crime sentencing for other jurisdictions. Chapter 10 presents a summary of the research findings and recommendations for the future in the context of reform in juvenile justice relating to child sexual offending and sentencing. Some final conclusions grounded in the research and in the author's own reflexivity on the justice/welfare paradigm in the area of sentencing are also offered.

CHAPTER 10: SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

10.1 Introduction

There is limited available data and research on Irish youth justice sentencing for sexual crimes. This research provides a unique analysis of the existing approaches to judicial sentencing for juvenile sexual offending in Ireland. It explores a number of targeted sentencing alternatives in a number of jurisdictions that would assist in providing guidance for the Irish judiciary. The aim of this thesis is, therefore, to provide a roadmap for reform in sentencing for juvenile sexual offending in compliance with international best practice.

Ireland has a progressive Children Act 2001 and strongly reflects the tenor of the UNCRC. Bearing in mind that only 20% of the Irish judiciary were satisfied with the existing adversarial system and less than half of the judges (43.75%) were positive about the 2001 Act (Document 3), the temptation, therefore, might be to cast aside the existing legal model and move to a more welfare holistic model such as the Nordic *Barnahus* Model. However, deeper reflection on the matter is required. While judges are largely empathic (89% of judges felt that children who committed sexual crimes could be rehabilitated) and nearly all judges (95%) felt that the need to consider a child's welfare needs in sentencing was important (Document 3), a substantial problem remains; there is a need to reform existing sentencing policy. Whilst policy reform is primarily the domain of the Irish legislature, meaningful sentencing is also contingent on an empirically-grounded understanding of Irish youth justice sentencing practices (the domain of the judiciary). It should be noted that the recently formed Judicial Council (Ireland) with statutory powers[109] established the Sentencing Guidelines and Information Committee and provides a uniquely historic opportunity for the Irish judiciary to influence policy reform in a meaningful way most especially in the area of sentencing.

However, judges have not used the Children Act 2001 provisions to its full potential (Kilkelly 2014). In addition, while many judges express their dissatisfaction with the Children Act 2001, this arises because a large portion of judges feel that it is trying to achieve too much and that it is not a matter of additional judicial powers (Document 3). Indeed, the nostalgia for a benign welfare Children Act 1908 is all too evident in the case law reviewed as expressed by the extensive use of probation bonds and suspended sentences and the limited use of use

[109] The Judicial Council Act 2019 (No. 33 of 2019).

community sanctions and family conferencing. In marked contrast, NZ which arguably has less favourable legislation (for example, its diversion programme unlike Ireland's, is non-statutory) has led the way globally in judicial activism. But even conservative jurisdictions such as the US and England, which are reluctant to intervene with reforms in the absence of legislation around adult sentencing, have managed to integrate neuroscientific research and best practice in their juvenile justice systems although to a lesser extent than NZ.

To take one example, nearly two-thirds of Irish judges felt that the law should be changed, so that sentencing should be determined at the age the child committed the offence rather than at the date of sentence (Document 4), a factor reflected in both the Law Reform Commission report (LRC, 2020) and the most recent youth justice strategy (Department of Justice, 2021). An obvious question arises around the reluctance of the judiciary to effect the change given that the matter is a judicial matter, and not a legislative one. There are however, some green shoots as demonstrated by the introduction of reviewable sentences and the use of deferred detention orders (s144 Children Act 2001). This is largely attributable to the recent emergence of a specialist judiciary at the Central Criminal Court level resulting from sentencing of very high-profile youth cases. The greatest change required is in the composition of the Children Court judiciary which is wedded to a structure that is almost a hundred years old in the Courts Act 1924. Other changes required have been highlighted in the preceding chapters.

This final chapter will present a summary of the findings and main conclusions. Some key recommendations and presented in an integrated manner with the findings. It is hoped that the recommendations will guide future reform, judicial practice, and research in the area of child sexual offending and juvenile justice and place Ireland further up the judicial activism scale.

10.2 Summary of findings

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

1) The absence of court data;
2) Failure to take account of personal issues such as neuroscientific insights concerning the development and maturation of young persons who sexually offend;
3) Lack of judicial training and specialisation in youth justice;

4) Appropriate sentences for sexual offences that is hampered by inadequate resources;
5) Delays in the youth justice system resulting in children who offend being sentenced as adults.

10.2.1 Absence of court data

Firstly, the absence of court data from the Courts Service, the Director of Public Prosecutions and the Probation Service make it very difficult to evaluate judicial decisions in sentencing for sexual offences. This is further exacerbated by the absence of written judicial decisions by trial judges as exists in the NZ justice system. In the absence of court data, it is submitted that children in Ireland who sexually offend, their victims and the public, risk being ill-informed of the reasons for the court's decision in sentencing matters. The situation is made even more acute in the context of a failure to take account of personal issues and neuroscientific evidence relating to children who sexually offend.

10.2.2 Failure to take account of personal issues such as scientific insights concerning the development and maturation of adolescents who sexually offend

A second key finding in this research is that while the age and maturity of the child is recognised, it is done so within an adult justice status model. While the courts do take the age of the child into consideration as a mitigating factor and promote the development of the child in sentencing, it is done so according to the child's chronological age. There is an absence of an analysis of personal childhood issues, neuroscientific developments and mental health concerns that may be particularly pertinent to the child in question. This failure is particularly unfortunate in the case of children who are sentenced for sexual offences. Children are not a homogeneous group. There are also defined sub-groups in this grouping and unlike other areas of youth crime, children who sexually offend respond well to child-appropriate therapeutic treatment (Blackley and Bartels, 2018). Similarly, sentencing is challenged when it comes to dealing with victims, most of whom are also children. In this respect, child victims including siblings are frequently exposed to revealing their own vulnerability in an adult adversarial court process and in victim impact statements thus further exacerbating their trauma. Contrary to international standards, the voice of the child is not heard overall in the sentencing process in Ireland. Judges are unaware of a child's maturation and neurobiological issues until sentencing due to the adversarial manner of the current court system. Even then, there is currently a total dependence on probation officer reports to fill the information gap which can result in

children's issues not being appropriately addressed in the sentencing process. Lack of training and specialisation among the judiciary is a further finding of this doctoral research.

10.2.3 Lack of judicial training and specialisation in youth justice

Sentencing policy is currently a variant of an adult model. This is particularly noticeable in the number of suspended sentences issued in juvenile cases in Ireland. While the Children Act 2001 (Section 29 and 78) has an emphasis on family conferencing, it is presently confined in the case of sexual offending to the statutory diversion programme (unlike NZ where diversion does not have a statutory basis). Furthermore, youth justice sentencing is largely instinctive judicial analysis leading to inconsistencies in sentencing and the situation is not helped by the lack of judicial guidance or guidelines (O'Connor, 2019). There is also a lack of training and specialisation among judges in the context of youth justice. It is significant that in the 25 District Court venues, YPPOs observed a wide variation of judicial sentencing practice across the country (Document 4). The absence of specialisation and training is also evident in the poor representation from the lawyers who represent children. This is demonstrated for example in this thesis by their advocacy of inappropriate court sanctions such as suspended sentences or the pursuit of fruitless judicial review processes. The latter reflects unnecessary confrontational approaches rather than a more respectful and child-friendly approach.

10.2.4 Appropriate sentences hampered by inadequate resources

As a fourth key finding, this thesis has demonstrated that the absence of legal aid for children charged with sexual offences and who are offered diversion can have dramatic consequences for a child who refuses diversion. Case law has demonstrated that it can result in a custodial sentence for a child which could otherwise have been avoided. There is also a wide variation in the facilities available to judges of the Children Court in the 25 District Court Districts in Ireland. Dublin is the only district to have a full-time Children Court with trained YPPOs to assess therapeutic interventions and with access to comprehensive facilitates such as Day Centres required for community sanctions. Inevitably, District Court judges in rural districts who run a busy adult civil, family and criminal law system have limited time to devote to the complexities of juvenile sexual offending. This may mean that despite the discretion afforded to the Children Court judge under section 75 of the Children Act 2001, juvenile sexual offences are frequently transferred to the adult court such as the Circuit Court for sentencing.

10.2.5 Delay and children who age-out

A fifth finding in this research relates to delays in court processes which can manifest as a prosecution delay, historical abuse delay, judicial review or in the time required for a child or

a victim to come to terms with the offence. Such delay results in cases of child sexual offending being dealt with as adult sexual offending; the child ages-out of childhood (at 18 years of age) and accordingly loses the benefits of the Children Act 2001. The cliff edge of adulthood at 18 years of age in current sentencing approaches in Ireland is harsh in light of international standards for a young adult irrespective of when the offence was committed. Children who sexually offend and who age-out by the time their case comes to court are unfortunately sentenced as adult sex offenders. As this thesis has shown, sentencing in youth justice is a very complex and deeply problematic area.

10.2.6 Sentencing and recommendations

In sentencing children and young persons who commit sexual crimes, judges are obliged to deal with a number of competing but divergent demands.[110] Firstly, a young offender's crime, personal life history, risk assessment and rehabilitation compete with the process of repairing harm to victims, many of whom are vulnerable children. Secondly, young victims and young offenders frequently have to navigate a life changing experience including severe trauma in a largely adult criminal justice system. Thirdly, the political and media agenda frequently demand a robust justice approach centring on retribution, incapacitation and protection of society (Lambie, 2009; Hackett, 2014). Yet most studies acknowledge the relatively low rates of sexual recidivism, "with non-sexual recidivism being nearly twice as great" (Lambie, 2009, p. 162).

The Irish sentencing process has demonstrated considerable nostalgia for a jurisprudence embedded in the 20th century working of the Children Act 1908. This is evidenced by the existing framework of sentences and by a legal process that has not yet adapted to academic research and post-UNCRC developments such as neuroscientific child development. This is compounded by the lack of statistical court data and limited written court decisions on juvenile sexual offending. Judges also struggle to evaluate the maturation of children in sentencing. The current MACR[111] of 12 years (or 10 years in the case of rape) negates the scientific and developmental evidence regarding the capacity of children leading to the adultification of children (Goldson, 2013). This is an area requiring legislative change. However, in the absence of such change, Irish courts should evaluate the positive experience of other common law

110 Section 96(5) of the Children Act 2001, as substituted by Criminal Justice Act 2006, states: *"When dealing with a child charged with an offence, a court shall have due regard to the child's best interests, the interests of the victim of the offence and the protection of society."*
111 Minimum age of criminal responsibility.

countries notwithstanding that this may risk being labelled 'cherry-picking' (Nelken, 2019). The perceived paucity of existing sentencing options in the existing Irish legal system has resulted in Irish judges resorting to a benign rehabilitative sentencing regime based on an adult model. In this scenario, the judge takes a headline sentence and reduces the detention aspect by such matters as a plea of guilty and young age of the offender. This is done in concert with the lawyers appearing before them who frequently advocate for such a sentence. All of this is exacerbated by the inadequate training and education of judges and lawyers (Kilkelly, 2006; Liefaard and Kilkelly, 2018; O'Connor, 2019). The result is that frequently the offender, the victim, the public and the judges are dissatisfied with the court sentence and the process. This in turn has implications for the legitimacy of the juvenile justice system and the judiciary to uphold the rule of law.

Considerable progress has been made by the Irish judiciary in recognising the principle of detention being a last resort and the need to promote rehabilitation in sentencing generally (IYJS, 2014; Oberstown Children Detention Campus, 2021). This is evidenced by the low number of children in detention in recent years and by the creativity of judges in devising sentences,[112] such as reviewable sentences which are child-orientated even if they lack legislative back up.

However, overall, victim and child offender needs are not being met in the current sentencing regime in Irish courts. Instead, secondary victimisation (Reyneke and Kruger, 2006; Tandon, 2007; Beijer and Liefaard, 2011) is a real possibility due to the adult like adversarial court criminal justice process for victims and offenders. For example, adult adversarial cross examination[113] is not suitable for vulnerable children (Westcott and Page, 2002; Ashworth, 2015; Spencer and Lamb, 2012; *R.* v. *Lubemba* [2014] EWCA Crim 2064). Furthermore, many child offender rights and victim rights are being disenfranchised due to the delays in the prosecution investigations and the length of the court process. What is needed, therefore, is a redefinition of the Irish sentencing model for juvenile sexual offences that is not exclusively wedded to a 19th or 20th century justice/welfare concepts. Therefore, sentencing for sexual offences needs to recognise that children's rights and needs are progressing and changing rapidly. It means moving beyond the philosophy that underpinned the now abolished concept

112 As opposed to merely applying the law (Bingham, 2000).
113 to practical, evidence-based guidance on vulnerable witnesses and defendants. It has been endorsed in court judgments including, *TI v. Bromley Youth Court* [2020] EWHC 1204 (Admin); *R v. Stephen Hamilton* [2014] EWCA Crim 1555; *R v Lubemba* [2015] 1 W.L.R. 1579.

of *doli incapax*[114] and to embrace the concept of the evolving capacity of children (Article 5, UNCRC). This requires holistic sentences which should be incorporated into sentencing practice recognising the role of scientific developments and academic research in the area.

This will also necessitate the courts in conjunction with the prosecution and defence lawyers referring suitable cases back to diversion, particularly where the child was not aware of their legal rights when first offered diversion. If this is not possible, RJ practices in sentencing should be explored. The most challenging issue in this regard is the need to develop a new family conference model[115] and RJ type sentence programmes in conjunction with the relevant multi-welfare agencies such as probation, diversion and Tusla. While NZ and Northern Ireland experiences may not offer perfect templates, they do afford good comparator examples. This in turn calls for robust victim and family supports to enable an effective system particularly in SSA. The principle that children and young people are best cared for in their own family is also applicable. In SSA, therefore, the orthodoxy that requires all interfamilial abusers should be removed from the home is too prescriptive. Children have a right to be sentenced in an environment that recognises their right to be treated in the least restrictive setting while also recognising the need to acknowledge sibling and community safety (Banks, 2006; Erooga and Masson, 2006). Overall, the rationale for sentencing need to be intelligible not just to an appellate court but also to the child defendant, child victim, their families, and the wider public. This, therefore, requires written sentences such as exist in NZ Youth Courts (Lynch, 2021) and which are subject to public scrutiny.

10.3 Legislative changes and recommendations

Legislative changes relevant to judges involved in sentencing children and young persons who sexually offend have implications for the courts in relation to all types of sentences. In particular, mandatory training for Children Court judges as set out in section 72 of the Children Act 2001[116] should be fully implemented and applied to all judges who interact with children

[114] The presumption of *doli incapax* was historically part of common law. Its aim was to protect immature children from criminal responsibility. Children aged less than 7 were considered incapable of committing a crime and thus conclusively *doli incapax*. Between the ages of 7 and 14, the presumption of *doli incapax* was rebuttable (Lynch, 2011). It was abolished in Ireland by section 52(3) Children Act 2001.

115 Section 78 of the Children Act 2001.

116 Requirement for transacting business in Children Court. Section 72(1) of the Children Act 2001 states: *"Subject to subsection (2), a judge of the District Court shall, before transacting business in the Children Court, participate in any relevant course of training or education which may be required by the President of the District Court. (2) Subsection (1) shall apply only in relation to judges of the District Court appointed on or after 15 December, 1995."*

in the courts. The jurisdiction of the Children Court under section 75 of the Children Act 2001 needs to be increased. It is submitted that the onus should now be put on the Children Court judge to accept all indictable sexual offences unless the child elects to go for a trial by a judge and jury in the Circuit Court. Importantly, any new legislation should recognise the MACR of age 14, the emerging issues of evolving capacity, and the defence of diminished capacity for young persons. In compliance with the ethos of General Condition 24 CRC, this results in a substantial departure from the existing judicial recognition of youth as a mitigation factor for custodial sentences in serious sexual offending. Instead, it calls for child sentences in all cases which are child- and issue-specific rather than offence-specific.

It is submitted that the mandatory requirements of probation reports under section 99 and the principle of rehabilitation as set out in section 96 of the Children Act 2001 should legislatively be amended to include all sentences for young persons over 18 years until age 21.[117] There is a recognition implicit in the UNCRC and explicit in General Comment No. 24 (2019) that the date of the offence should be the determining factor in sentencing. This requires legislative change. A deferred detention under section 144 and detention[118] and supervision orders under section 151 of the Children Act 2001[119] should allow for flexibility in sentencing. In keeping with the spirit of General Comment No. 24 (2019), child justice systems should also extend protection to children over 18 years in keeping with the developmental and neuroscience evidence that shows that brain development continues into the early twenties. Under Irish law, as it stands, the victim in a trial for a sexual assault offence is entitled to anonymity. This should be extended to all those young persons who are charged with sexual assault offences to bring it in line with Children Act 2001 (O'Malley, 2021).

[117] In accordance with the commendation outlined in Article 42 in General Comment No. 24 (2019).
118 Section 144 of the 2001 Act empowers the sentencing court to impose a deferred detention order. In such a case, a detention order is specified, but the imposition of this order is deferred to a later date (LRC 2020).
119 Section 151(1) of the 2001 Act provides that: "*where a sentencing court is satisfied that detention is the only suitable way of dealing with a child who is between 16 and 18 year of age it may, instead of making a children detention order, make a detention and supervision order."* This order is defined in the Act as providing for a period of detention in a children detention centre followed by supervision in the community provided by the Probation and Welfare Service. Half of the total sentence must be spent in a detention centre with the other half being served under supervision (LRC 2020).

10.4 Resources and recommendations

Many court venues are still unsuitable for children, and the court venues should be adopted for children court hearings. The court venue has particular implications for both young victims and offenders in respect of sexual offences due to the nature of the crime and the vulnerability of the young persons involved. The existing ten community sanctions (provided for under sections 115-141 of the Children Act 2001) requires resources to implement them. For example, a day centre order is generally not available outside Dublin due to a dearth of centres outside Dublin, a fact the Youth Strategy 2021-2027 recognises needs addressing (Department of Justice, 2021). Greater transparency would assist, for example, through the furnishing of written sentences in all cases regarding a community sanction or detention. However, this will have implications for increased resourcing of the system.

While there are a few residential units in the UK dealing with children in the care system who require specialised therapeutic work, there are no such units in Ireland. A child requiring this specialised treatment needs to be sent to the UK. Where residential care is not needed, a specialised child foster carer system needs to be developed. The resources need to be ongoing as there is a danger that children who sexually abuse but have successfully navigated a rehabilitation may flounder if services are withdrawn from them at too early a stage (Banks, 2006). A key to enhancing a child's resilience is to develop their coping skills which requires a commitment to an approach where all the support agencies and the courts are aligned. Resilience is a process, not a personality trait and requires competent professionals to carry out this work (Hackett, 2006).

10.5 A new Children Court recommendation

Regretfully, the indications are that existing juvenile sexual offending sentencing in Ireland is 'justice by geography'. It would seem to depend on the judge and geographical location of the court hearing (Document 4). Ireland, since 1924, has 25 District Court[120] venues which also double as the Children Court (Document 2, Document 3). This doctoral research has revealed that the level of experience and practice of judges in relation to juvenile sexual offences varies (Document 3). It is proffered that there should be eight regional venues organised on the Circuit Court model but with appropriate child-friendly courts and resources.[121] Funding for public transport should be available where required, as suggested in Scotland's Kilbrandon Report

[120] See Chapter Seven. **Error! Reference source not found.**
[121] *Ibid*.

(Scottish Home and Health Department, 1964). A trained panel of judges should be assigned to the Children Court, and the principal judge authorised to issue practice directions and sentencing guidelines for sexual and other offences. In addition, the new model would facilitate an inter-agency discussion such as with Tusla, the YPPO Service, the Director of the Diversion Programme and the various therapeutic interventions used in the area of sexual offending.

All appeals from the Children Court involving a form of custodial sentence should be heard by the three judges of the Court of Appeal rather than the Circuit Court. This will provide consistency with existing jury trials. It will also provide transparency as to sentencing in that the anonymised judgments will be published. Non-custodial sentences are rarely appealed but discretion could be granted to the Court of Appeal to admit a non-custodial appeal.[122] An example would be a point of law of public importance.

Legal aid for lawyers practising in the Children Court should be linked to training and accreditation. In addition, the current practice of multiple solicitors acting for a child to maximise legal aid for the solicitor should be actively discouraged. As the vast majority of court work for children in the criminal justice system is legally-aided, this will facilitate a specialised legal force in the new eight court venues.

10.6 Conclusions

The underlying philosophy of this thesis is that children who seriously sexually offend should be dealt in a specialised judicial system which respects justice rights and welfare in compliance with the underlying ethos of the UNCRC and international best practice. The existing quasi adult model of sentencing of juvenile sexual sentencing which mitigates the harshest effects of an adult sentence needs to be changed. In doing so, the courts must acknowledge that children though developmentally immature are capable of reform. This model must also address the needs of victims and recognise that needs are complex as evidenced by SSA. Family conferencing, therapeutic interventions, and family involvement are necessary. A community sanction combined with therapeutic interventions tailored to the individual child's needs will obviate the necessity for a custodial sentence even in the most serious of cases. Individuality in sentencing should be tailored to the child rather than the perceptions of the individual judge.

122 This will leave the Circuit Court to deal with non-custodial Children Court appeals and with jury trials. It is submitted that it would be too unwieldly to have minor sentences e.g. public order sentences dealt with by the Court of Appeal. As outlined above, there should be mandatory training for all judges who deal with children.

Therefore, a specialised judiciary is a necessity. Finally, this thesis acknowledges that a wider comparative work on how different legal systems deal with the issue is needed. In this respect, the author's involvement in a pan-European project as cited earlier is a start.

There are always different ways of constructing an appropriate justice or welfare model of juvenile sentencing for sexual offences in a postmodern ideal. In this respect, it is acknowledged that it is problematic to dwell too deeply on theory and thereby misread postmodernist phenomena for admission of factual data (Foucault, 2019; Lamb and Plocha, 2014). Foucault's assertion that judges do not judge alone and that 'parallel judges' such as psychiatric or psychological experts and persons implementing the sentences have multiplied (Foucault, 1977) could lead to a cynical and pessimistic view. However, to do justice to the sentencing model, it is necessary to engage with facts and also resist the temptation to reduce those facts to theoretical abstractions.

One conundrum encountered in this research was that there is limited clarity from existing courts data. In addition, juvenile judicial sentencing in regards to sexual offending is hidden behind a veil of court invisibility, such as the in-camera rule and a dearth of written decisions. However, literature suggests with appropriate interventions such as multi-systemic therapy (MST) that the recidivism rate for sexual offending is low (Cherry and O'Shea, 2006). Sentences should take into account the stage of development of the child who has offended and, therefore, be proportionate to their risks and needs (Lambie, 2009; Hackett, 2014).

Case law has been employed in conjunction with international standards and existing research with judges and YPPOs to afford an understanding of choices available for judges. It is proffered that this thesis has shown that children and young persons who sexually abuse are not a homogenous group. In discussing subgroups that offend, sentencing options emerge which are individualised for the child offender and which are outside the existing adult model.

Overall, I argue that the universality of the UNCRC and its continued development in a child-friendly justice system (Liefaard and Kilkelly, 2018) as most recently evidenced by General Comment No. 24 (2019), offers a minimum rather than a maximum standard. This also necessitates the implementation of a comprehensive specialist juvenile justice system. In the absence of reform, sentencing for juvenile sexual crimes will languish in a political vacuum as evidenced by Ireland's 20th century historical neglect. It is submitted that a specialist system

will also create its own momentum for reform and in turn will inform a political agenda. The most recent youth justice strategy 2021-2027 (Department of Justice, 2021) recognises the need for legislative changes to the Children Act 2001 to reflect appropriate sentencing in line with the level and maturity of the child including alignment of its provisions with other provisions such as sexual offences. However, it is not radical enough in this writer's view. Judges need empathy to understand juvenile sexual offending from a child offender's point of view. This requires an adequately resourced, specialist youth justice system, however uncomfortable that may be for those with resourcing responsibilities.

This thesis has illuminated the profound complexities involved in the domain of sentencing of sexual offences in the Irish youth justice system. It is a case of "half the numbers, twice the complexity" (Lynch, 2021b) in comparison to the justice system more generally. The skilful mediation of the justice/welfare dichotomy in judicial discretion is central to this complexity in a way that upholds Ireland's commitment to the UNCRC, to child-friendly justice, and to public policy considerations.

REFERENCES

A'Court, B. & Arthur, R. (2020). The role of lawyers in supporting young people in the criminal justice system: balancing economic survival and children's rights. *Journal of Social Welfare and Family Law*, 42(4), 498–515.

Abrams, L. (2013). Juvenile justice at a crossroads: Science, evidence, and twenty-first century reform. *Social Service Review,* 87(4), 725-752.

Alder, C. & Wundersitz, J. (1994). New directions in juvenile justice reform in Australia. In: C. Alder and J. Wundersitz (Eds.), *Family conferencing and juvenile justice: The way forward or misplaced optimism (*pp. 1-13). Canberra: Australian Institute of Criminology.

Anderson, M. & Parkinson, K. (2018). Balancing justice and welfare needs in family group conferences for children with harmful sexual behavior: The HSB-FGC Framework. *Journal of child sexual abuse*, 27(5), 490-509.

Arthur, R. (2016). Exploring childhood, criminal responsibility and the evolving capacities of the child. *Northern Ireland Legal Quarterly,* 67(3), 69-82.

Arthur, R. (2019). Regulating youth sexuality, agency and citizenship: developing a coherent criminal justice response to youth sexting. *King's Law Journal,* 30(3), 377-395.

Ashurst, L. & McAlinden, A. (2015). Young people, peer-to-peer grooming and sexual offending: Understanding and responding to harmful sexual behaviour within a social media society. *Probation Journal,* 62(4), 374-388.

Ashworth, A. (2015). *Sentencing and criminal justice.* Cambridge, London: Cambridge University Press.

Asquith, S. (2002). Justice, retribution and children. In: J. Muncie, G. Hughes and E. McLaughlin (Eds.), *Youth Justice: Critical Readings* (pp. 275-283). London: Sage.

Atkinson, P. & Coffey, A. (2004). Analysing documentary realities. In: D. Sullivan (Ed.), *Qualitative research: Theory, method and practice (*pp. 56-75). *2* ed. London: Sage.

Austin, J. & Krisberg, B. (2002). Wider, stronger and different nets: the dialectics of criminal justice reform. In: J. Muncie, G. Hughes and E. McLaughlin (Eds.), *Youth Justice: Critical Readings* (pp. 258-274). London: Sage.

Balfe, M., Gallagher, B., Masson, H., Balfe, S., Brugha, R. & Hackett, S. (2015). Internet child sex offenders' concerns about online security and their use of identity protection technologies: a review. *Child abuse review*, 24(6), 427-439.

Banks, N. (2006). Placement, provision and placement decisions. In: M. Erooga and H. Masson (Eds.), *Children and young people who sexually abuse others: Current developments and practice response (*pp. 99-109). London: Routledge.

Beijer, A. & Liefaard, T. (2011). A Bermuda triangle-balancing protection, Participation and proof in criminal proceedings affecting child victims and witnesses. *Utrecht Law Review,* 7, 70.

Bernuz Beneitez, M. & Dumortier, E. (2018). Why children obey the law: Rethinking juvenile justice and children's rights in Europe through procedural justice. *Youth Justice,* 18(1), pp. 34-51.

Bingham, T. (2000). *The business of judging: Selected essays and speeches: 1985-1999*. New York: Oxford University Press.

Bingham, T. (2011). *The rule of law.* London: Penguin.

Blackley, R. & Bartels, L. (2018). The sentencing and treatment of juvenile sex offenders in Australia. *Trends & issues in crime and criminal justice,* 555. Canberra: Australian Institute of Criminology.

Borduin, C. & Schaeffer, C. (2002). Multisystemic treatment of juvenile sexual offenders: A progress report. *Journal of Psychology & Human Sexuality,* 13(3-4), 25-42.

Bradley, R. H. L. (2009). *Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system (The Bradley Report).* London: Department of Health: Author.

British Medical Association (BMA). (2015). *Assessment of Mental Capacity.* London: Author.

Brown, A. & Charles, A. (2019). The minimum age of criminal responsibility: The need for a holistic approach. *Youth Justice,* 1-19.

Brown, G. (2017). *Criminal sentencing as practical wisdom.* London: Bloomsbury Publishing.

Brown, G. (2020). *Sentencing rape: A comparative analysis.* London: Bloomsbury Publishing.

Burke, R.H. (2018). An introduction to criminological theory. London: Routledge.

Calder, M., Hanks, H. & Epps, K. (1997). *Juveniles and children who sexually abuse: A guide to risk assessment.* Dorset: Russell House.

Campbell, C., Devlin, R., O' Mahony, D., Doak, J., Jackson, J., Corrigan, T. & McEvoy, K. (2006). *Evaluation of the Northern Ireland Youth Conferencing Service. NIO Research and Statistical Series: Report No. 12.* Queens University (Institute of Criminology and Criminal Justice, School of Law), Belfast: Northern Ireland Office (Statistics and Research Branch).

Campbell, F., Booth, A., Hackett, S. & Sutton, A. (2020). Young people who display harmful sexual behaviors and their families: a qualitative systematic review of their experiences of professional interventions. *Trauma, Violence, & Abuse,* 21(3), 456-469.

Carroll, J., Meehan, E. & McPhillips, S. (2007). *The children court: A national study.* Dublin: Association for Criminal Justice Research and Development Limited.

Cavadino, M. & Dignan, J. (2006). Penal policy and political economy. *Criminology & Criminal Justice,* 6(4), 435-456.

Central Statistics Office (CSO). (2020). *Recorded Crime Victims 2019 and Suspected Offenders 2018. Press Statemen.* [Online] Available at: https://www.cso.ie/en/csolatestnews/pressreleases/2020pressreleases/pressstatementrecordedcrimevictims2019andsuspectedoffenders2018/ [Accessed 18 January 2021].

Charleton, P., McDermott, P.A., Herlihy, C. & Byrne, S. (2020). *Charleton and McDermott's Criminal Law and Evidence.* 2 ed. Dublin: Butterworths.

Chaffin, M. (2008). Our minds are made up - Don't confuse us with the facts: Commentary on policies concerning children with sexual behavior problems and juvenile sex offenders. *Child maltreatment,* 13(2), 110-121.

Cherry, C. & O'Shea, D. (2006). Therapeutic work with families of young people who sexually abuse. In: M. Erooga and H. Masson (Eds.), *Children and young people who sexually abuse others. Current developments and practice responses* (pp. 222-236). London: Routledge.

Coates, D. S. (2016). *Unlocking potential: A review of education in prison (The Coates' Report).* Ministry of Justice: Author.

Cohen, S. (1979). Community control - new utopia. *New Society,* 47(858), 609-611.

Cohen, J. & Norton, D. (2018) June. FGCs in the youth justice system. In: D. Edwards and Kate Parkinson (Eds.), *Family Group Conferences in Social Work: Involving Families in Social Care Decision Making* (p. 169). Bristol: Policy Press (Bristol University Press).

Committee of Inquiry into the Penal System. (1985). *Report of the committee of Inquiry into the penal system.* Dublin: The Stationery Office.

Cossins, A. (2008). Restorative justice and child sex offences: The theory and the practice. *The British Journal of Criminology,* 48(3), 359-378.

Council of Europe. (2012). *Guidelines of the committee of ministers of the Council of Europe on child-friendly justice (Vol. 5),* Strasbourg: Council of Europe Publishing.

Courts Service. (2019). *Courts Service Annual Report 2019,* Department of Justice and Equality, Dublin: Author

Cras, S. (2016). The Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings: genesis and descriptive comments relating to selected articles. *Eucrim,* 2, 109-120.

CRC/C/GC/10. (2007). *General comment No. 10: Children's Rights in Juvenile Justice,* United Nations: Committee on the Rights of the Child.

CRC/C/GC/20. (2016). *General comment No. 20: Implementation of the rights of the child during adolescence,* United Nations: Committee on the Rights of the Child.

Crofts, T. (2019). Will Australia raise the minimum age of criminal responsibility? *Criminal Law Journal,* 43(1), 26-40.

Cunneen, C. & Goldson, B. (2015). Restorative justice? A critical analysis . In: B. Goldson and J. Muncie (Eds.), *Youth crime and justice.* 2 ed. London: Sage.

Daly, K. (2006). The limits of restorative justice. In: D Sullivan and L. Tifft (Eds.), *Handbook of restorative justice. A global perspective (*pp.134-143). London and NY: Routledge.

Daly, K. (2008). Girls, peer violence, and restorative justice. *Australian & New Zealand Journal of Criminology,* 41(1), 109-137.

Daly, K. (2016). What is restorative justice? Fresh answers to a vexed question. *Victims & Offenders,* 11(1), 9-29.

Daly, K. & Bouhours, B. (2010). Rape and attrition in the legal process: A comparative analysis of five countries. Crime and justice, 39(1), 565-650.

Daly, K., Bouhours, B., Broadhurst, R. & Loh, N. (2013). Youth sex offending, recidivism and restorative justice: Comparing court and conference cases. *Australian & New Zealand Journal of Criminology,* 46(2), 241-267.

Delmage, E. (2012). *Timely justice: Turning 18. #01 legal guides.* London: Youth Justice Legal Centre.

Delmage, E. (2013). The minimum age of criminal responsibility: A medico-legal perspective. *Youth Justice,* 13(2), 102-110.

Department of Children and Youth Affairs. (2017). *Children first: National guidance for the protection and welfare of children,* Dublin: Author.

Department of Children Equality Disability Integration and Youth. (2019). *Special care units.* [Online] Available at: https://www.gov.ie/en/policy-information/118b86-special-care-units/. [Accessed 21 November 2020].

Department of Health. (2019). *National sexual health strategy 2015–2020.* [Online] Available at: https://www.gov.ie/en/policy-information/8feae9-national-sexual-health-strategy/ [Accessed 21 March 2021].

Department of Justice. (2021). *Youth Justice Strategy 2021-2027*. [Online] Available at http://www.justice.ie/en/JELR/Pages/Youth_Justice_Strategy [Accessed 17 April 2021].

Dickon Reppuci, N. & Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior,* 27(4), 333-363.

Doak, J. (2005). Victims' rights in criminal trials: Prospects for participation. *Journal of Law and Society,* 32, 294-316.

Doak, J. (2008). *Victims' rights, human rights and criminal justice: Reconceiving the role of third parties.* Oxford: Hart Publishing.

Doak, J. (2011). The therapeutic dimension of transitional justice: Emotional repair and victim satisfaction in international trials and truth commissions. *International Criminal Law Review,* 11(2), 263-298.

Dobinson, I. & John, F. (2017). Legal research as qualitative research. In: M. McConville and W.H. Chui (Eds.), *Research Methods for Law* (pp. 18-47). 2 ed. Edinburgh: Edinburgh University Press.

Dooley, B., O'Connor, C., Fitzgerald, A. & O'Reilly, A. (2019). *My world survey 2: The national survey of youth mental health,* Dublin: University College Dublin.

Dowdell, E., Burgess, A. & Flores, J. (2011). Online social networking patterns among adolescents, young adults, and sexual offenders. *AJN The American Journal of Nursing,* 111(7), 28-36.

Doyle, D. (2011). "Guilty sexual predator" and the "innocent comely maiden": Gender, paternalism and the pregnancy Factor. *Irish Criminal Law Journal,* 21, 36-40.

Edwards, M. J. (2019). Sentencing methodology-towards improved reasoning in sentencing. *Irish Judicial Studies Journal,* 3, 40-54.

Egan, R. & Hawkes, G. (2012). Sexuality, youth and the perils of endangered innocence: How history can help us get past the panic. *Gender and Education,* 24(3), 269-284.

Eleuteri, S., Aladino, V. & Verrastro, V. (2017). Identity, relationships, sexuality, and risky behaviors of adolescents in the context of social media. *Sexual and Relationship Therapy,* 32(3-4), 354-365.

Elliott, J. D. & Limoges, A. M. (2017). Deserts, determinacy, and adolescent development in the juvenile court. *South Dakota Law Review,* 62(3), 750.

Equality and Human Rights Commission. (2020). *Findings and recommendations: Inclusive justice: A system designed for all.* Dublin: Author.

Erooga, M. & Masson, H. (Eds.). (2006). *Children and young people who sexually abuse others: Current developments and practice responses.* London: Routledge.

European Union Agency for Fundamental Rights and Council of Europe. (2015). *Handbook on European law relating to the rights of the child.* Luxembourg: Publications Office of the European Union.

Fanniff, A. & Kolko, D. (2012). Victim age-based subtypes of juveniles adjudicated for sexual offenses: Comparisons across domains in an outpatient sample. *Sexual Abuse,* 24(3), 224-264.

Finkelhor, D. (2009). The prevention of childhood sexual abuse. *The Future of Children*, 19 (2), 169-194.

Finkelhor, D., Gelles, R., Hotalink, G. & Murray, S. (Eds.). (1983). *Common features of family abuse. The dark side of families: Current family violence research,* 1 ed. Thousand Oaks, CA: Sage.

Finkelhor, D., Ormrod, R. & Chaffin, M. (2009). *Juveniles who commit sex offenses against minors. Juvenile Justice Bulletin.* Harrisburg, PA: Office of Juvenile Justice and Delinquency Prevention.

Finlay, F. (2012). *Submission on behalf of inclusion Ireland from the joint committee on justice, defence and equality to the mental capacity legislation debate.* Dublin: Author.

Flanagan, K. (2003). Intervention with sexually abusive young people in Australia and New Zealand. *Journal of Sexual Aggression,* 9(2), 135-149.

Fortune, C. (2018). The good lives model: A strength-based approach for youth offenders. Aggression and violent behavior. *Aggression and violent behavior,* 38, 21-30.

Foucault, M. (2019). *The history of sexuality: 1: the will to knowledge.* London: Penguin.

Freckelton, I. (2016). Foetal alcohol spectrum disorders, expert evidence and the unreliability of admissions during police interviews: Pora v The Queen [2015] UKPC 9 (Lord Kerr, Dame Sian Elias, Lord Reed, Lord Hughes, Lord Toulson). *Psychiatry, Psychology and Law,* 23(2), 173-183.

Irish Examiner. (2019). Judge: '*Would be unfair' to impose jail term on man who defiled girl, 15 during sleep.* [Online] Available at: https://www.irishexaminer.com/news/arid-30936331.html. [Accessed 22 May 2021].

Gelsthorpe, L. (2002). Restorative youth justice: The last vestiges of welfare. In: J. Muncie, G. Hughes, E. McLaughlin (Eds.) *Youth Justice: Critical Readings* (pp.238-54). 1 ed. London: Sage.

Gelsthorpe, L. & Lanskey, C. (2017). Youth Justice in England and Wales. *Michigan Law Review* 115 (8), 1365-1391.

Giofriddo, J. (2007). Thinking like a lawyer: The heuristics of case synthesis. *Texas Tech Law Review,* 40 (1), 1-36.

Goldson, B. (2013). Unsafe, unjust and harmful to wider society: Grounds for raising the minimum age of criminal responsibility in England and Wales. *Youth justice*, 13(2), 111-130.

Goldson, B. & Muncie, J. (2015). *Youth crime and justice.* 2 ed. London: Sage.

Grady, S., Cherry, J., Tallon, M., Tunney, C. & Reilly, G. (2018). An exploration of the treatment expectations and experiences of adolescents who have sexually abused. *Journal of sexual aggression*, 24(1), 80-98.

Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N.D. and Schwartz, R. (2019). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. In: K. McLachlan (Ed.), *Clinical Forensic Psychology and Law* (pp. 401-432). London: Routledge.

Guilfoyle, E. & Marder, I. (2020). Using data to design and monitor sentencing guidelines: The case of Ireland. *Common Law World Review,* 1-17.

Hackett, S. (2006). The personal and professional context to work with children and young people who have sexually abused. In: M. Erooga and H. Masson (Eds.), *Children and young people who sexually abuse others* (pp. 259-270). London: Routledge.

Hackett, S. (2014). *Children and young people with harmful sexual behaviours.* Dartington, London: Research in Practice.

Hackett, S., Balfe, M., Masson, H. and Phillips, J. (2014). Family responses to young people who have sexually abused: Anger, ambivalence and acceptance. *Children and Society*, 28(2), 128-139.

Hackett, S., Masson, H. & Phillips, S. (2005). *Services for young people who sexually abuse: a report on mapping and exploring services for young people who have sexually abused others,* London: Youth Justice Board for England and Wales.

Hackett, S., Masson, H. & Phillips, S. (2006). Exploring consensus in practice with youth who are sexually abusive: Findings from a Delphi study of practitioner views in the United Kingdom and the Republic of Ireland. *Child Maltreatment,* 11(2), 146-156.

Hackett, S., Phillips, J., Masson, H. and Balfe, M. (2013). Individual, family and abuse characteristics of 700 British child and adolescent sexual abusers. *Child Abuse Review*, 22(4), 232-245.

Haines, K. & Case, S. (2015). *Positive youth justice: Children first, offenders second.* Bristol: Policy Press and Bristol University Press.

Hales, H., Holt, C., Delmage, E. & Lengua, C. (2019). What next for adolescent forensic mental health research? *Criminal Behaviour and Mental Health,* 29(4), 196-206.

Hartley, C. & Somerville, L. (2015). The neuroscience of adolescent decision-making. *Current opinion in behavioral sciences,* 5, 108-115.

Henry, N., Powell, A. & Flynn, A. (2017). *Not just 'revenge pornography': Australians' experiences of image-based abuse. A summary reports,* Melbourne: RMIT University.

Hockey, J. (1993). Research methods - researching peers and familiar settings. *Research papers in Education,* 8(2), 199-225.

Hogan, G., Whyte, G., Kenny, D. & Wlash, R. (2018). *Kelly: The Irish Constitution.* 5 ed. London: Bloomsbury.

Hollingsworth, K. (2013). Theorising children's rights in youth justice: the significance of autonomy and foundational rights. *The Modern Law Review,* 76(6), 1046-1069.

Hudson, B. (1998). Restorative justice: The challenge of sexual and racial violence. *Journal of law and society,* 25(2), 237-256.

Hudson, B. (2002). Restorative justice and gendered violence: Diversion or effective justice? *British Journal of Criminology,* 42(3), 616-634.

Hutchinson, T. & Duncan, N. (2012). Defining and Describing what we do: Doctrinal legal research. *Deakin Law Review,* 17(1), 83-119.

Independent Parliamentarians' Inquiry. (2014). *Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court,Chaired by Lord Carlile of Berriew CBE QC.* [Online] Available at: http://michaelsieff-foundation.org.uk/content/inquiry_into_the_operation_and_effectiveness_of_the_youth_court-uk-carlile-inquiry [Accessed 25 May 2021].

Irish Youth Justice Service (IYJS). (2014). *Tackling Youth Justice Action Plan 2014-2018.* [Online]. Available at: https://www.gov.ie/en/publication/48a751-youth-justice-action-plan-2014-2018/. [Accessed 23 May 2020].

Janes, L., Emanuel, D. & Mawer, C., 2020. Sentencing young adults–getting it right first time, Webinar slides. 20 July. [Online] Available at: https://www.lccsa.org.uk/sentencing-young-adults-getting-it-right-first-time-webinar-4pm-wednesday-22nd-july-2020/. [Accessed 9 May 2021].

Johansson, S., Stefansen, K., Bakketeig, E. & Kaldal, A. (2017). *Collaborating against child abuse: Exploring the Nordic Barnahus model.* Dordrecht, The Netherlands: Springer Nature.

Just for Kids. (2021). *Timely Justice: Turning 18 A briefing on the impact of turning 18 in the criminal justice system.* [Online] Available at: https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20(June%202020).pdf [Accessed 25 May 2021].

Juvenile Sentencing Project. (2021). *Overview of Supreme Court Decisions.* [Online] Available at: https://juvenilesentencingproject.org/us-supreme-court-decisions/ [Accessed 24 May 2021].

Keenan, M. (2017). Criminal justice, restorative justice, sexual violence and the rule of law. In: E. Zinsstag and M. Keenan (Eds.), *Restorative Responses to Sexual Violence. Legal, social and thereapeutic dimensions* (pp. 44-68). London: Routledge.

Kennedy, E. (1970). *Reformatory and industrial schools system report (The Kennedy Report).* Department of Health: The Stationery Office.

Kennedy, R. (2016). Doctrinal Analysis: The Real Law in Action. In: L. Cahillane and J. Schweppe (Eds.), *Legal Research Methods: Principles and Praciticalities* (pp. 21-30). Dublin: Clarus Press.

Kilcommins, S. (2016). Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings. In: In: L. Cahillane and J. Schweppe (Eds.), *Legal Research Methods: Principles and Praciticalities* (pp. 7-19) Dublin: Clarus Press.

Kilkelly, U. (2001). The best of both worlds for children's rights - Interpreting the European convention on human rights in the light of the UN convention on the rights of the child. *Human Rights Quarterly,* 23(2), 308-326.

Kilkelly, U. (2005). *The children's court: A children's rights audit: An analysis of the extent to which the children's court operates in line with national and international standards.* Cork: University College Cork.

Kilkelly, U. (2006). *Youth justice in Ireland: Tough lives, rough justice.* Newbridge, Co Kildare, Ireland: Irish Academic Press.

Kilkelly, U. (2014). Diverging or emerging from law? The practice of youth justice in Ireland. *Youth Justice,* 14(3), 212-225.

Kilkelly, U. (2015). The CRC in litigation under the ECHR. In: T. Liefaard and J.E. Doek (Eds.), *Litigating the rights of the child. The UN convention on the rights of the child in domestic and international jurisprudence* (pp. 193-209). Dordrecht, The Netherlands: Springer.

Kilkelly, U. (2019). The UN convention on the rights of the child: incremental and transformative approaches to legal implementation. *The International Journal of Human Rights,* 23(3), 323-337.

Kilkelly, U. (2020). “Evolving capacities” and “parental guidance” in the context of youth justice: Testing the application of Article 5 of the convention on the rights of the child. *The International Journal of Children's Rights,* 28(3), 500-520.

Kilkelly, U., Legaz, F., Goñi, C. & Foussard, C. (2011). Measures of deprivation of liberty for young offenders: how to enrich international standards in juvenile justice and promote alternatives to detention in Europe. *Brussels: International Juvenile Justice Observatory.*

Killean, R., Dowds, E. & McAlinden, A. (2021). *Sexual violence on trial: local and comparative perspectives.* London: Routledge.

Klein, S. (2016). The new unconstitutionality of juvenile sex offender registration: Suspending the presumption of constitutionality for laws that burden juvenile offenders. Michigan Law Review, 115 (8), 1365-1391.

Koritansky, P. (2019). Retributive justice and natural law. The thomist. *A Speculative Quarterly Review,* 83(3), 407-435.

Lacey, N. (1996). Normative reconstruction in socio-legal theory. *Social & Legal Studies,* 5(2), 131-157.

Lamb, S. & Plocha, A. (2014). Sexuality in childhood. In: D. L. Tolman and L. M. Diamond, *APA handbook of sexuality and psychology, Vol. 1: Person-based approaches* (pp. 415-432). Washington, USA: American Psychological Association.

Lambie, I. (2009). Young people with sexual behaviour problems: towards positive and healthy relationships. In: K. Geldard, *Practical interventions for young people at risk* (pp. 156-166). Thousand Oaks, CA: Sage.

Lambie, I., McCarthy, J., Dixon, H. & Mortensen, D. (2001). Ten years of adolescent sexual offender treatment in New Zealand: Past practices and future directions. *Psychiatry, Psychology and Law,* 8(2), 187-196.

Lambie, I. & Seymour, F. (2006). One size does not fit all: Future directions for the treatment of sexually abusive youth in New Zealand. *Journal of Sexual Aggression,* 12(2), 175-187.

Lambie, L. (2020). *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand.* [Online] Aukland, NZ: The Office of the Prime Minister's Chief Science Advisor. Available at: https://doi.org/10.17608/k6.OPMCSA.12279278.v1. [Accessed 11 March 2021].

Leahy, S. & Fitzgerald O'Reilly, M. (2018). *Sexual offending in Ireland: Laws, procedures and punishment.* Dublin:Clarus Press.

Liefaard, T. (2012). Juveniles in transition from juvenile justice to adult criminal justice. In: M. Hoeve, P.H. van der Laan and R. Loeber (Eds.), *Persisters and desisters in crime from adolescence into adulthood. Explanation, prevention and punishment* (pp. 159-199). London: Routledge.

Liefaard, T. (2015a). Child-friendly justice: protection and participation of children in the justice system. *Temp. L. Rev,* 88, 905.

Liefaard, T. (2015b). Juvenile justice from an international children's rights perspective. In: W Vandenhole, E. Desmet, D. Reynaert and S. Lembrechts (Eds.), *Routledge international handbook of children's rights studies* (pp. 234-256), Abingdon, Oxfordshire: Routledge.

Liefaard, T. (2019). Deprivation of liberty of children. In: U. Kilkelly and T. Liefaard (Eds.), *International human rights of children* (pp. 321-357). Singapore: Springer.

Liefaard, T. (2020). Child-friendly justice and procedural safeguards for children in criminal proceedings: New momentum for children in conflict with the law? *Bergen Journal of Criminal Law & Criminal Justice,* 8(1), 17.

Liefaard, T. & Kilkelly, U. (2018a). Child-friendly justice: past, present and future. In: B. Goldson (Ed.), *Juvenile justice in Europe: Past, present and future* (pp. 77-93). Abingdon, Oxfordshire: Routledge.

Liefaard, T. & Kilkelly, U. (2018b). Child-friendly justice. In: B. Goldson (Ed.), *Juvenile justice in Europe: Past, present and future* (pp. 57-73). Abingdon, Oxfordshire: Routledge.

London, K., Bruck, M., Wright, D. & Cecil, S. (2008). Review of the contemporary literature on how children report sexual abuse to others: Findings, methodological issues, and implications for forensic interviewers. *Memory,* 16(1), 29-47.

Love, C. (2000). Family group conferencing: Cultural origins, sharing, and appropriation - A Maori reflection. In: G Burford and J. Hudson (Eds.), *Family group conferencing: New directions in community-centered child and family practice (*pp. 15-30), 1 ed. Boca Raton: Routledge.

Law Reform Commission (LRC). (2020). *Report on suspended sentences.* Dublin: Author.

Lynch, N. (2010). Restorative justice through a children's rights lens. *The International Journal of Children's Rights,* 18(2), 161-183.

Lynch, N. (2012). Playing catch-up? Recent reform of New Zealand's youth justice system. *Criminology & Criminal Justice,* 12(5), 507-526.

Lynch, N. (2016). Neurodisability in the youth justice system in New Zealand: How vulnerability intersects with justice. Dyslexia Foundation of New Zealand. Summarising the contributions of participants at the 2016 Neurodisabilities Forum, 12 May. Wellington: Victoria University of Wellington Legal Research Paper No. 16/2018. [Online] Available at: https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2869502. [Accessed 30 January 2021].

Lynch, N. (2018). The other child –The rights of the child victim in the youth justice system. *The International Journal of Children's Rights,* 26(2), 228-250.

Lynch, N. (2019). *Youth Justice in New Zealand*. 3 ed. New Zealand: Thomas Reuters.

Lynch, N. (2021a). Presentation at Conference, 'The Children Act at 20; Reflections on Progress and the Future', University College Cork. [Online]. 8 July. Available at: https://conference.ucc.ie/the-children-act-2001-at-20-reflections-on-progress-[Accessed 8 July 2021].

Lynch, N. (2021b). Personal correspondence (email) from Dr Nessa Lynch, Associate Professor, Faculty of Law, Victoria University of Wellington to the author. 26 May 2021.

Lynch, N. & Peirse-O'Byrne, K. (2016). Criminal Records in the Youth Jurisdiction. *New Zealand Law Journal,* 362.

Maguire, P. (2020). *Difference in age between defendant and victim.* [Online]. Available at: https://www.thejournal.ie/suspended-sentence-for-man-who-repeatedly-abused-neighbour-in-assaults-that-began-when-she-was-4-5151678-Jul2020/ [Accessed 20 May 2021].

Mancini, C. & Mears, D. (2013). US Supreme Court decisions and sex offender legislation: Evidence of evidence-based policy? *The Journal of Criminal Law and Criminology,* 1115-1153.

Manocha, K. & Mezey, G. (1998). British adolescents who sexually abuse: A descriptive study. *The Journal of Forensic Psychiatry,* 9(3), 588-608.

Maroney, T. (2014). *The once and future juvenile brain. Choosing the future for juvenile justice.* New York: New York University Press.

Masson, H. (2006). Policy, law and organisational contexts in the United Kingdom. In: M. Erooga and H. Masson (Eds.), *Children and young people who sexually abuse others: Current developments and practice responses* (pp. 18-30). London: Routledge.

Mc Kay, S. (2021). *Victim impact statements must be taken seriously.* [Online]. Available at: https://www.irishtimes.com/opinion/undue-leniency-still-shown-to-men-who-are-violent-towards-women-1.4480325 [Accessed 21 May 2021].

McAlinden, A. (2007). *The shaming of sexual offenders: Risk, retribution and reintegration.* London: Bloomsbury Publishing.

McAlinden, A. (2008). Restorative justice as a response to sexual offending - Addressing the failings of current punitive approaches. *Sexual offender treatment,* 3(1), 1-12.

McAlinden, A. (2012). The governance of sexual offending across Europe: Penal policies, political economies and the institutionalization of risk. *Punishment & Society,* 14(2), 166-192.

McAlinden, A. (2018). *Children as 'risk': Sexual exploitation and abuse by children and young people.* Cambridge, London: Cambridge University Press.

McAra, L. & McVie, S. (2018). Transformations in youth crime and justice across Europe: Evidencing the case for diversion. In: B. Goldson (Ed.), *Juvenile Justice in Europe. Past, present and future* (pp. 73-103). London: Routledge.

McConville, M. & Chui, W. H. (Eds.) (2017). *Research methods for law.* 2 ed. Edinburgh: Edinburgh University Press.

McDermott, P. & Robinson, T. (2003). *Children Act 2001.* Dublin: Thomson Round Hall..

McGlynn, C., Westmarland, N. & Godden, N. (2012). 'I just wanted him to hear me': Sexual violence and the possibilities of restorative justice. *Journal of Law and Society,* 39(2), 213-240.

McGlynn, C. & Westmarland, N. (2019). Kaleidoscopic justice: sexual violence and victim-survivors' perceptions of justice. *Social & Legal Studies,* 28(2), 179-201.

McKibbin, G., Humphreys, C. & Hamilton, B. (2017). Talking about child sexual abuse would have helped me": Young people who sexually abused reflect on preventing harmful sexual behavior. *Child Abuse & Neglect,* 70, 210-221.

McNeish, D. & Scott, S. (2018). *Key messages from research on children and young people who display harmful sexual behaviour.* Ilford, Essex: Centre of Expertise on Child Sexual Abuse.

Mercer, V., Sten Madesen, K., Keenan, M. & Zinsstag, E. (2015). *Doing restorative justice in cases of sexual violence: A practice guide.* Leuven: Leuven Institute of Criminology, University of Leuven.

Ministry of Justice and Youth Justice Board for England and Wales. (2019). *Standards for children in the youth justice system*. [Online] Available at: https://www.gov.uk/government/publications/national-standards-for-youth-justice-services. [Accessed 21 May 2021].

Ministry of Justice. (2020). *A smarter approach to sentencing.* London: Ministry of Justice. [Online]. Available at: https://www.gov.uk/government/publications/a-smarter-approach-to-sentencing. [Accessed 24 May 2021].

Ministry of Justice and Youth Justice Board for England and Wales. (2021). *Youth justice annual statistics for 2019 to 2020 for England and Wales.* [Online] Available at: https://www.gov.uk/government/statistics/youth-justice-statistics-2019-to-2020 [Accessed 21 May 2021].

Mori, C., Cooke, J.E., Temple, J.R., Ly, A., Lu, Y., Anderson, N., Rash, C. & Madigan, S. (2020). The prevalence of sexting behaviours among emerging adults: A meta-analysis. Archives of Sexual Behavior, *Arch Sex Behav*, 49(4),1103-1119.

Morris, A. & Maxwell, G. (1993). Juvenile justice in New Zealand: A new paradigm. *Australian & New Zealand Journal of Criminology,* 26(1), 72-90.

Morrissey, P. (1999). Do the adult crime, do the adult time: Due process and cruel and unusual implications for a 13-year-old sex offender sentenced to life imprisonment in State v. Green. Villa. *Law Review,* 44, 707.

Mukherjee, S. (2020). Millennium women: Sexual challenges in the digital era. *Indian Journal of Health, Sexuality & Culture,* 6(1).

Muncie, J. (2001). Policy transfers and 'what works': Some reflections on comparative youth justice. *Youth Justice,*1(3), 27-35.

Muncie, J. (2008). The punitive turn 'in juvenile justice: Cultures of control and rights compliance in Western Europe and the USA. *Youth Justice,* 8(2), 107-121.

Muncie, J. (2014). *Youth and Crime.* 4 ed. London: Sage.

Muncie, J. & Goldson, B. (2006). England and Wales: The new correctionalism. In: J. Muncie and B. Goldson (Eds.)*, Comparative youth justice* (pp. 34-47). London: Sage.

Muncie, J., Hughes, G. & McLaughlin, E. (Eds.) (2002). *Youth justice: critical readings.* London: Sage.

Naffine, N. (1992). Children in the children's court: Can there be rights without a remedy?. *International Journal of Law, Policy and the Family,* 6(1), 76-97.

Naffine, N. (1993). *Philosophies of juvenile justice. Juvenile justice: Debating the issues.* Sydney: Allen & Unwin.

Naughton, C., Redmond, S. & Coonan, B. (2019). *Evaluation of the bail supervision scheme for Children (Pilot Scheme).* [Online] Available at: www.iprt.ie/latest-news/iprt-welcomes-findings-of-bail-supervision-scheme-evaluation [Accessed 8 May 2021].

Nelken, D. (2019). *Understanding and learning from other systems of juvenile justice in Europe.* Oxon and New York: Routledge.

Nisbet, I. (2012). *Challenges in the assessment and sentencing of young people who have committed sexual offences.* Paper presented at 'Doing Justice for Young People: Issues and Challenges for Judicial Administration in Australia and New Zealand Conference*,* Brisbane, Australia 23 - 25 August.

Nolan, A. & Smith, E. (2020). *Talking about sex and sexual behaviour of young adults in Ireland.* Dublin: The Economic and Social Research Institute.

Oberstown Children Detention Campus. (2021). *Oberstown Detention Statistics.* [Online] Available at: https://www.oberstown.com/campus-stats/ [Accessed 24 May 2021].

O'Brien, W. (2011). Youth justice: Challenges in responding to young people convicted of sexual offences. *Deakin Law Review,*16, 133.

O'Callaghan, D. (2004). *Adolescents with intellectual disabilities who sexually harm. Intervention design and implementation.* In: G. O'Reilly, W. L. Marshall, A. Carr and Beckett, R. C. (Eds.), *The handbook of clinicical intervention with young people who sexually abuse* (pp. 345- 368). London: Psychology Press.

O'Connell, J. (2019). *Anna Kriégel murder- what is it about bullying, porn and boys.* [Online] Available at: https://www.irishtimes.com/life-and-style/health-family/ana-kri%C3%A9gel-murder-what-it-taught-us-about-bullying-porn-and-boys. [Accessed 24 May 2021].

O'Connor, J. (Document 2). *The Irish juvenile courts system – a critical exploration of its assessment of justice and welfare issues with particular regard to sexual offences*. Document 2 (2018): Professional Doctorate Programme, Nottingham Trent University. Unpublished.

O'Connor, J. (2019). Reflections on the justice and welfare debate for children in the criminal justice system. *Judicial Studies Institute Journal,* 1(1), 19-39.

O'Connor, J. (Document 3). *A critical examination of the Irish judges' assessment of justice and welfare issues with particular regard to sexual offences.* Document 3 (2019): Professional Doctorate Programme, Nottingham Trent University. Unpublished.

O'Connor, J. (Document 4). Explorting young people's probation officers' perspectives in respect of child sexual offennding in the context of 'welfare' and 'justice' in Irish youth justice. Document 4 (2020): Professional Doctorate Programme, Nottingham Trent University. Unpublished.

O'Connor, J. & Horgan, R. (2021). *Youth Justice Manual.* Dublin: Judicial Researchers Office (Restricted), Courts Service.

O' Donoghue, J. (2000). *Dáil Eireann Debates Vol 518 No Wednesday.* 12th April. Dublin. Available at: https://www.oireachtas.ie/en/debates/debate/dail/2000-04-12/7/. [Accessed 31 January 2021].

O'Donovan, D. (2006). Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls. In: L. Cahillane and J. Schweppe (Eds.), *Legal Research Methods: Principles and Practicalities* (pp. 107-129). Dublin: Clarus Press.

O'Mahony, D., Doak, J. & Clamp, K. (2012). The politics of youth justice reform in post-conflict societies: mainstreaming restorative justice in Northern Ireland and South Africa. *Irish Legal Quarterly,* 63(2), 269-290.

O'Malley, T. (2008). Principles of Sentencing: Towards a European Conversation. Paper delivered at Leiden University Law School Conference, 'The Limits of the Criminal Law' (Vol. 23). Leiden University, Netherlands.

O'Malley, T. (2013). *Sexual offences: Law, policy, and punishment.* 2 ed. Dublin: Round Hall

O'Malley, T. (2016). *Sentencing law and practice.* 3 ed. Dublin: Roundhall.

O'Malley. T. (2020). *Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences.* [Online] Available at: http://www.justice.ie/en/JELR/Pages/O'Malley_Report. [Accessed 22 May 2021].

Ombudsman for Children. (2015). *Advice of the Ombudsman for Children on the General Scheme of the Criminal Law (Sexual Offences) Bill 2014.* [Online] Available at: http://www.oco.ie/app/uploads/2015/07/OCO-Advice-on-the-Criminal-Law-Sexual-Offences-Bill-2014 [Accessed 4 May 2021].

Osborough, W. (1982). A Damocles' sword guaranteed Irish: The suspended sentence in the Republic of Ireland. *Irish Juris,* 17(2), 221-256.

Paris, M. (2016). The comparative method in legal research: The art of justifying choices: In: L. Cahillane and J. Schweppe (Eds.), *Legal Research Methods: Principles and Practicalities* (pp. 39-55). Dublin: Clarus Press.

Pope, C. & Mays. C. (2020). *Qualitative research in health care.* 4 ed. London: Wiley Blackwell.

Pratt, J. (1989). Corporatism: the third model of juvenile justice. *The British Journal of Criminology,* 29(3), 236-254.

Pratt, J. (1993). Welfare and justice: incompatible philosophies. In: F. Gale, N. Naffine and J. Wundersitz (Eds.), *Philosophies of juvenile justice. Juvenile Justice: Debating the Issues* (pp. 38-51). Aukland, NZ: Allen & Unwin.

Print, B., O'Callaghan, D., Erooga, M. & Masson, H. (1999). *Working in groups with young men who have sexually abused others.* London: Routledge.

Rap, S. (2013). *The participation of juvenile defendants in the youth court. A comparative study of juvenile justice procedures in Europe*, Unpublished doctoral dissertation, Utrecht University.

Rayment-McHugh, S. (2020). The uneven distribution of child sexual abuse. In: I. Bryce and W. Petheric, *Child Sexual Abuse: Forensic Issues in Evidence, Impact, and Management.* (pp. 375-390). London: Academic Press.

Reyneke, J. & Kruger, H. (2006). Sexual Offences Courts: better justice for children? *Journal for Juridical Science,* 31(2), 73-107.

Rhyner, K., Uhl, C. & Terrance, C. (2018). Are teens being unfairly punished? Applying the dual systems model of adolescent risk-taking to sexting among adolescents. *Youth justice,* 18(1), 52-66.

Righthand, S. and Welch, C. (2001). *Juveniles who have sexually offended: A review of the professional literature,* Harrisburg, PA: Office of Juvenile Justice and Delinquency Prevention.

Robbins, R. N. & Bryan, A. (2004). Relationships between future orientation, impulsive sensation seeking, and risk behaviour among adjudicated adolescents. *Journal of adolescent research,* 19(4), 428-445.

Roberts, L. a. I. D. (2006). Timely intervention or trapping minnows? The potential for a range of net-widening effects in Australian drug diversion initiatives. *Psychiatry, psychology and law,,* 13(2), 220-231.

Roberts, P. (2017). Interdisciplinarity in legal research. In: McConville, M. and Chui, W.H. (Eds.), *Research Methods for Law* (pp. 90-134). Edinburgh: Edinburgh University Press.

Rosberg, B. (2015). Rediscovering the juvenile justice ideal in the united states. In: J. Muncie and B. Goldson (Eds.), *Youth crime and justice* (pp. 6-18). 2 ed. London: Sage.

Ryan, G., Leversee, T. & Lane, S. (2011). *Juvenile sexual offending: Causes, consequences, and correction.* New Jersey, US: John Wiley & Sons.

Salter, D., McMillan, D., Richards, M., Talbot, T., Hodges, J., Bentovim, A., Hastings, R., Stevenson, J. & Skuse, D. (2003). Development of sexually abusive behaviour in sexually victimised males: a longitudinal study. The Lancet, 361(9356), 471-476.

Sawyer, S., Azzopardi, P. & Parton, G. (2018). The age of adolescence. *The Lancet Child & Adolescent Health,* 2(3), 223-228.

Schmidt, E., Rap, S. & Liefaard, T. (2020). Young adults in the justice system: the interplay between scientific insights, legal reform and implementation in practice in The Netherlands. *Youth Justice.* [Online] Available at: https://doi.org/10.1177%2F1473225419897316. [Accessed 3 May 2021].

Schmidt, E. & Pierce, V. (2004). *Fact Sheet. What Research Shows About. Female Adolescent Sex Offender.* [Online] Available at: https://www.ojp.gov/ncjrs/virtual-library/abstracts/what-research-shows-about-female-adolescent-sex-offenders [Accessed 31 March 2021].

Scottish Home and Health Department. (1964). *Children and Young Persons: Scotland. (Kilbrandon Report)*. Edinburgh: HMSO.

Sentencing Council. (2017). *Sentencing children and young people: Definitive guideline.* [Online]. Available at: https://www.sentencingcouncil.org.uk/publications/item/sentencing-children-and-young-people-definitive-guideline/ [Accessed 31 March 2021].

Sentencing Council. (2020). *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments.* [Online]. Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Definitive-Guide_FINAL_WEB.pdf [Accessed 31 March 2021].

Shapland, J., Atkinson, A., Atkinson, H., Colledge, E., Dignan, J., Howes, M., Johnstone, J., Robinson, G. & Sorsby, A. (2006). Situating restorative justice within criminal justice. *Theoretical Criminology,* 10(4), 505-532.

Smith, D. (2012). *A new response to youth crime.* London: Routledge.

Spencer, J. & Lamb, M. (2012). *Children and cross-examination: Time to change the rules?* London: Bloomsbury Publishing.

Steinberg, L. (2008). A social neuroscience perspective on adolescent risk-taking. *Developmental review,* 28(1), 78-106.

Strang, H. & Braithwaite, J. (2002). *Restorative justice and family violence.* Cambridge, London: Cambridge University Press.

Stubbs, J. (2004). *Restorative justice, domestic violence and family violence.* University of New South Wales, Sydney: Australian Domestic and Family Violence Clearinghouse.

Tamanaha, B. (2006). *Law as a means to an end: threat to the rule of law.* London, Cambridge: Cambridge University Press.

Tandon, N. (2007). Secondary victimization of children by the media: an analysis of perceptions of victims and journalists. *International Journal of Criminal Justice Sciences,* 2(2), 119-135.

Taylor, J. (2003). Children and young people accused of child sexual abuse: A study within a community. *Journal of Sexual Aggression,* 9(1), 57-70.

Tiller, E. H. & Cross, F. B. (2006). What is legal doctrine. *Northwestern University Law Review,* 100 (1), 517-522.

Vizard, E. (2002). *The assessment of young sexual abusers.* London: Russell House Publishing.

Vizard, E. & Usiskin, J. (2006). Individual psychotherapy for young sexual abusers of other children. In: M. Erooga and H. Massons (Eds.), *Children and young people who sexually abuse others* (pp. 153-166). London: Routledge.

Vizard, E., Hickey, N., French, L. and McCrory, E. (2007). Children and adolescents who present with sexually abusive behaviour: A UK descriptive study. *The Journal of Forensic Psychiatry & Psychology*, 18(1), 59-73.

Von Hirsch, A., Ashworth, A. & Roberts, J. (2009). *Principled sentencing: Readings on theory and policy.* Oxford: Hart.

Wake, N., Arthur, R., Crofts, T. & Lambert, S. (2021). Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation. *Public Law,* 1, 145-162.

Waldron, J., Cheng, H. & Chen, C. (2009). The core of the case against judicial review. *US-China Law Review*, 6, 29-33.

Walker, D., McGovern, S., Poey, E. & Otis, K. (2004). Treatment effectiveness for male adolescent sexual offenders: A meta-analysis and review. *Journal of child sexual abuse,* 13(4), 281-293.

Walsh, D. (2005). *Juvenile justice.* Dublin: Thomson Round Hall.

Walsh, D. (2008). Balancing due process values with welfare objectives in juvenile justice procedure: some strengths and weaknesses in the Irish approach. *Youth Studies Ireland,* 3(2), 3-17.

Walsh, D. (2016). Raising the age of criminal responsibility in the Republic of Ireland: a legacy of vested interests and political expediency. *Northern Ireland Legal Quarterly, 67*, 373-382.

Weithorn, L. A. (2017). A constitutional jurisprudence of children's vulnerability. Hastings Law Journal, 69, 179. [Online] Available at: https://repository.uchastings.edu/faculty_scholarship/1559.

Westcott, H. & Page, M. (2002). Cross-examination, sexual abuse and child witness identity. *Child Abuse Review: Journal of the British Association for the Study and Prevention of Child Abuse and Neglect,* 11(3), 137-152.

World Health Organisation (WHO). (2006). *Defining Sexual Health.* New York: Author.

Williams, J. (2015). *England and Wales. In Litigating the Rights of the Child.* Dordrecht, The Netherlands: Springer.

Williamson, H. & Conroy, M. (2020). *Youth Work and Social Pedagogy. Working with Young People: A Social Pedagogy Perspective from Europe and Latin America.* In: X. Úcar, P. Soler-Masó and A. Planas-llad (Eds.), *Working with Young People: A Social Pedagogy Perspective from Europe and Latin America* (pp. 235-241). New York: Oxford University Press.

Wilson, G. (2017). Comparative legal scholarship. In: McConville, M. and Chui, W.H. (Eds.), *Research Methods for Law* (pp. 163-179). 2 ed. Edinburgh: Edinburgh University Press.

Wishart, H. (2018). Young minds, old legal problems: can neuroscience fill the void? Young offenders and the Age of Criminal Responsibility Bill - promise and perils. *J. Crim. L,* 82(4).

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LIST OF LEGISLATION

Children, Young Persons and Their Families Act 1989 (New Zealand)

Children Act 2001

Children Act 1908

Criminal (Amendment) Act 1935

Criminal Evidence Act 1992

Criminal Justice Act 1999

Criminal Justice Act 1993

Criminal Justice (Sexual Offences) Act 2006

Criminal Law (Sexual Offences) Act 2017

Criminal Procedures Act 2010

European Convention on Human Rights Act 2003

General Comment No. 24 (2019) (CRC/C/GC/24)

Judicial Council Act 2019

Oranga Tameika Act 1989 (New Zealand)

Probation of Offenders Act 1907

United Nations Convention of the Rights of the Child 1989

LIST OF CASE LAW

CASE LAW (IRELAND)

DPP v. JS [2015] IECA 254

DPP v. KD [2016] IECA 341

DPP v. Keane [2007] IECCA 119

DPP v. LD [2018] IECA 54

DPP v. Lukaszewicz [2019] IECA 65

DPP v. M [1994] 3 I.R

DPP v. McC [2008] 2 I.R.92

DPP v. MH [2014] IECA 19

DPP v. McCormack [2000] 4 I.R. 356

DPP v. MS (A Minor) [2020] IECA 178

DPP v. MW [2020] 1ECA 272

DPP v. NM [2020] [34CJA/19], Irish Court of Appeal

DPP v. NN (transcript, 30 July 2019, Central Criminal Court, White J.)

DPP v. Owen Power [2014] IECA 37

DPP v. PO'C [2006] 3 I.R. 238

DPP (Murphy) v. P.T [1999] 3 I.R. 254

DPP v. MS [2018] IEHC 285

DPP v. SD (transcript, 1 April 2019, Central Criminal Court, White J.)

DPP v. TC [2017] IEDC 7

DPP v. Tiernan [1988] I.R. 250

DPP v. VT [2021] IECA 117

Freeman v. Governor of Wheatfield [2016] IECA 342

G v. Director of Public Prosecutions [2014] IEHC 33

KD v. DPP [2017] IECA 53

KM v. DPP [1994] 1 I.R. 514

LE v. DPP [2019] IEHC 47

Norris v. Attorney General [1984] I.R. 36

McGee v. Attorney General [1974] I.R. 284

Minister for Justice and Equality v. PK [2016] IECA 303

Mooney v. Governor of St Patrick's Institution [2009] IEHC 522

MS v. DPP [2018] IEHC 285

PM v. Malone [2006] 3 I.R. 575

PP v. Judges of the Circuit Court [2019] IESC 26

Re A Ward of Court (No 2) [1996] 2 I.R. 79).
RD v. DPP [2018] IEHC 164
S v. Director of the Garda Juvenile Diversion Programme [2019] IEHC 796
Sean Furlong v DPP [2021] IEHC 326
SH. v. DPP [2006] 3 I.R. 575
SW v. DPP [2018] IEHC 364
The People (DPP) v. R.B. [2006] IESC 33, [2006] 4 I.R.
WM v. The Child and Family Agency [2017] IEHC 587

CASE LAW (EUROPEAN CASES)

Dickson v. UK (Application 44362/04) [2007] All ER (D) 59
*Golder v. UK App No 4451/70, A/*18 [1975] ECHR 1
T and V. UK [2000] 30 EHRR 121

CASE LAW (ENGLAND AND WALES)

A Local Authority v. JB [2020] EWCA Civ 735
B v. A Local Authority [2019] EWCA Civ 913
R v. Nunn [1996] 2 Cr App R (s) 136
ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) [2011] UKSC 4
R v. Hayward and Weaving [2019] 8 WLUK 118
R v. Ghafoor [2002] EWCA Crim 1857
R v. Clark [2018] 1 Cr. App. R. (S.) 52
R v. Hobbs [2018] 2 Cr App R(S) 36
R v. Balogun [2018] EWCA Crim 2933
R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt [2017] EWCA 1228
R v Stephen Hamilton [2014] EWCA Crim 1555
R v. T [2020] EWCA Crim 822
R (CL) v. Chief Constable of Greater Manchester Police [2018] EWHC 3333(Admin)
Regina v. Harrow LBC [1990] 3 All ER 12
R. v. Lubemba [2014] EWCA Crim 2064
R v. Quartey [2019] EWCA Crim 374

TI v. Bromley Youth Court [2020] EWHC 1204 (Admin)

X City Council v MB, NB and MAB [2006] EWHC 168 *(Fam)*

CASE LAW (AUSTRALIA AND NEW ZEALAND)

OH v. Driessen (No. 2) [2015] ACTSC 354

New Zealand Police v. OV [2018] NZYC 490

Queen v. NB [2019] NZYC 225

Queen v. SQ [2019] NZYC 627

Queen v. FY [2018] NZYC 500

Queen v. LH [2018] NZYC 470

Tena Pora v. The Queen [2015] UKPC 9

CASE LAW (THE NETHERLANDS)

The Netherlands Supreme Court HR 28 Augustus [2012]. NJ [2012] .506 m.nt. 5.5 (Neth)

CASE LAW (UNITED STATES OF AMERICA)

Baker v. Wingo (1972) 407 US 514)

Re Gault 387 U.S.1 (1967)

Graham v. Florida 560.U.S.48 (2010)

Miller v. Alabama 132 S, Ct 2455 (2012)

Roper v. Simmons US 551 (2001)

State v. Green 502, S.E 2d 819.833-34 (N.C.1998)

United States v. Kent 383 US 541 (1966)

APPENDIX ONE

Summary of statistical data relating to reported sexual offences, 2018-2020[123]

A reduction of 10.5% is noted in the overall number of reported sexual offences in 2019-2020. This may be attributed to the restrictions on public and private gatherings during the COVID-19 pandemic, and the reality that a victim may have had to live with an offender/s during lockdown periods.

Child offenders comprise almost 20% of all offenders associated with sexual offences in 2020, a slightly higher figure than in 2019.

In approximately 95% of sexual offences reported between 2018 and 2020 that had a child offender and at least one associated injured party, the injured party was also age 17 or under.

Children in the 13-17 years age range feature consistently high in the child offender category.

Child pornography offences involving a child offender increased in 2020; the impact of increased screen time during the pandemic lockdown/s cannot be ruled out in considerations.

Child pornography offences had the largest number of female offenders. These offences usually involved the creation/circulation of offensive images and required no physical contact with the injured party/parties.

The number of individual child offenders decreased by 12.6% in 2020.

Sexual assault is the most commonly reported sexual offence in 2018, 2019, and 2020, representing almost half of all incidents.

Sexual assault, rape (s. 4)[124], and child pornography offences, amounted to a slightly larger proportion of offences involving a child offender than offences involving only adult offender/s.

Rape of a female and indecency offences were proportionally less represented in incidents involving a child offender.

Both reporting and detection of sexual offences took longer for incidents where a child offender was involved in comparison compared to situations where the offender was an adult.

It should be noted that crime counting rules are applied to all data collated by the PULSE data recording system used by *An Garda Síochána* (Ireland). This is particularly significant in cases where there are multiple offences involving the same offender/s and injured party/parties; such cases are counted as one incident.

[123] Statistical data from *An Garda Síochána* Analyst Unit, Dublin, made available on 3 June 2021 to this author for the purposes of his doctoral research. Summary of statistics prepared by author.
[124] Pursuant to Section 4 of the Criminal Law (Rape) (Amendment) Act 1990.

APPENDIX TWO

Online offences and social media: Some examples from case law

In *DPP v. D.M* [2019] IECA 147, at the time of the offence of defilement, the defendant was 19 years of age and the complainant girl was 14 years (but was 13 years at the time of the exploitation offences). Much of the evidence arose out of communication between the offender and the victim on Facebook, Messenger and Skype, involving deliberate sexualisation and manipulation and breach of trust of the complainant over a period of six months. The Court of Appeal reduced the trial judge's sentence of six and a half years to a custodial sentence of five years with the final year suspended on terms.

In *DPP v. J.S* [2015] IECA 254, the accused used social media to contact three teenage girls and was subsequently convicted of sexual offending. The court held that social media engagement was an aggravating factor.

In *DPP v. NN* (transcript, 30 July 2019, Central Criminal Court), White J. referred to the five-year-old defendant's addiction to pornography on smart-phones as a significant issue in the sexual crime.

In *DPP v. B.L* (transcript, 20 July 2019, Central Criminal Court), White J. observed that the defendant was:

> a very immature young man with a lack of parental direction… It's clear that (the Defendant) received his sexual experience through pornography. And effectively formed quite immature sexual attitudes, which I think are of serious concern to the wider society, if young men are learning about sexual relationships through violent pornography when they are immature …