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**Garda Diversion of Young Offenders:  
An Unreasonable Threat to Due Process Rights?  
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**Abstract**

Diversion programmes play a significant role in the field of youth justice, as an alternative to the conventional court process, which aim to prevent the entry of the child into the formal justice system. The long-established practice of diverting certain young offenders from prosecution ensures that children are not drawn into the criminal justice system and are not given a criminal record (Goldson, 2000: 35). A non-statutory diversion programme entitled the Garda Liaison Scheme was established in Ireland in 1963, which diverted less serious young offenders from prosecution (Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme, 2003, para. 3.1). This scheme was placed on a statutory footing by part 4 of the Children Act 2001, an Act which represents a major reform of the law pertaining to young justice. Whilst a diversion programme has been established under part 8 of the Act which concerns those juveniles who are being prosecuted for a crime, this article will concentrate solely on the pre-trial diversion programme, given the particular issues of due process which arise in this regard.

## **Introduction**

This article seeks to establish whether the purported benefits of the Garda diversion programme outweigh any infringements on the rights of the child. Firstly, a brief elucidation of the salient provisions of part 4 will be given. Then the application of the Programme to date will be examined, to establish the measure of success of the scheme. Next, the issue of whether traditional due process rights are relevant or necessary in the context of the Garda diversion programme will be explored. Whether the factors differentiating the diversion programme from court proceedings are so significant as to warrant the application of a modified rights framework which departs from the conventional due process model will be assessed. Finally, a proposed legislative amendment which would permit the fact of participation in the diversion programme to be cited in court and which has the capacity to alter the tenor of the debate in a fundamental sense will be considered.

## **The Diversion Programme**

While there is no absolute right to be admitted to the diversion programme, section 18 of the Act states that any child (that is, any individual less than 18 years of age) who has committed an offence and accepts responsibility for his criminal behaviour shall be considered for admission unless the interests of society otherwise require. Section 23 stresses that for a child to be admitted, he must accept responsibility, consent to the process, and have attained the age of criminal responsibility (section 52 of the Act raised the age of criminal responsibility to 12 years, and imposed a rebuttable presumption that a child who is not less than 12 but under 14 years of age is incapable of committing an offence). The participation of the child in the programme must be in his best interests and not inconsistent with the interests of society and any victim.

Section 25 of the Act provides for the issuance of an informal or formal caution to every child admitted to the programme. An informal caution is administered by a juvenile liaison officer (JLO) in a Garda Síochána station or in the child's home. A JLO is a Garda who receives special training in the area of youth justice, and works mainly in plain clothes (O'Dwyer, 2002: 159). A formal caution is usually administered in a Garda Síochána station

by a member of the Garda Síochána not below the rank of inspector or by a JLO. Both an informal and formal caution must occur in the presence of the child's parents or guardian. A formal caution generally entails supervision of the child for 12 months. Furthermore, under section 26, the victim may be invited to attend the administration of a formal caution, at which the child may be invited to apologise and make reparation.

Section 29 facilitates the convening of a family group conference (an FGC), a method of dealing with youth crime first propounded in New Zealand with the enactment of the Children, Young Persons and their Families Act 1989 (Hassall, 1996). Section 32 states that the conference is to be attended by the child and his parents, while the victim and other individuals may also be invited. The conference seeks to mediate between the victim and the offender, and thus incorporates a restorative justice element. The restorative model proposes that crime should be treated holistically, as a conflict between members of a community, where the locus of justice is not a courtroom but rather the community of the transgressor (Johnstone, 2002: 11). The presence of the victim is not vital, but is seen as significant in making the child recognise his offence, and in influencing the future behaviour of the child. The conference seeks to establish why the child became involved in criminal behaviour that gave rise to his or her admission to the programme, and discusses how the child may be prevented from becoming involved in such behaviour in the future. The FGC considers whether the period or level of supervision of the child should be varied taking into account the educational or employment circumstances of the child, his leisure activities, his family relationship and his attitude to the programme, the offence and the victim (section 38). Furthermore, an action plan, including provision for an apology or reparation to the victim, or participation by the child in a particular activity or training course, is formulated at the conference under section 39. The conference may reconvene to consider compliance with the terms of the action plan.

An incentive to participate in the Garda diversion programme is provided by section 48 which renders inadmissible in subsequent court proceedings an admission of responsibility, or evidence of participation in the Programme.

Nevertheless, as will be detailed, a proposed amendment to this provision would remove this impetus to participate, and would alter the concept of diversion on which the programme purports to be predicated.

### **The Success of the Programme**

Prior to the commencement of part 4 of the Children Act in May 2002, an evaluation of the pilot programme of cautions and conference for juvenile offenders was carried out by the Garda Research Unit (O'Dwyer, 2001). This research, which examined 68 cases in the pilot programme, suggests that the initiative should be expanded. Various elements of the pilot programme were assessed and the general conclusions reached were positive. The involvement of the offenders in the process was deemed to be good, while the participation of the offender's family and the victim was even higher (pp19-20). The involvement in decision-making was also higher for the other participants than for offenders (p20). However, positive average changes were reported in the demeanour of the offenders, although some negative changes in behaviour were also recorded. The greatest average changes were recorded in respect of feeling remorse, accepting responsibility and being apologetic, and feeling self-conscious (pp23-4). The offender was able to make up for what he did in the majority of cases, and also accepted responsibility for his behaviour. Moreover, most offenders demonstrated that they understood how the victim felt, and indicated that they were sorry. Furthermore, the vast majority admitted that their behaviour was wrong, and undertook to stay out of trouble in the future (pp26-7). In addition to the positive feedback recorded as regards the offenders, victim satisfaction was also high, with 95% of victims indicating their satisfaction with the programme (p29).

A committee to monitor the effectiveness of the programme and review all aspects of its operation was established in accordance with section 44 of the Act. The 2003 Report of the Committee indicates that a total of 147 restorative cautions and conferences took place from May 2002 to the end of 2003 (Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme, 2003: 17). As a total of 1,568 formal cautions were administered in 2003 alone, along with 7,240 informal cautions, it is evident that restorative cautions and conferences represent a tiny proportion

of the cases dealt with by the police in the context of juvenile crime (p13). This fact may be explained by the additional time required to hold such cautions and conferences, given the need to engage with the participants and the preparation required (p11). As noted in the report, research is required to examine the level of recidivism among children who participate in the Diversion Programme.

The paucity of statistical analysis concerning the diversion programme means that the effectiveness of the approach is uncertain. However, the review of the pilot programme indicates a degree of success in terms of participation and involvement in the programme. Nevertheless, it is questionable whether the potential benefits of the scheme justify any possible infringements on the due process rights of the child.

### **The Due Process Rights of the Child**

In the context of court proceedings involving children, certain due process rights and basic procedural safeguards must be respected, as outlined in article 40 of the UN Convention on the Rights of the Child (CRC) and article 7 of the UN Standard Minimum Rules for the Administration of Juvenile Justice. The preservation of such rights is necessitated by the need to safeguard the dignity and the human rights of the child in the face of inherently punitive and coercive judicial proceedings. The possibility of a custodial sanction being imposed after the judicial process and the serious curtailment of rights associated with a penal sentence indicate that the upholding of due process rights is imperative. Article 40(3)(b) of the CRC provides that the child's human rights and legal safeguards must be fully respected during non-judicial measures for dealing with children who are accused of having committed a crime or who have done so. Nevertheless, it is questionable whether the same due process rights apply in the context of the diversion programme as do in judicial proceedings, given that the outcome of the programme does not have the capacity to restrict so acutely the rights of the child. Furthermore, the benefits associated with the diversion programme, including its informal nature and the capacity for frank and direct conversation between the offender and the victim, may warrant the application of altered standards. By examining three specific rights, namely

the right to the presumption of innocence, the right to legal representation, and the right to an independent and impartial hearing, this article determines the extent to which the Garda diversion programme erodes the rights of the accused child, and seeks to establish whether this can be justified given the considerable benefits which accrue from the application of such an approach.

### **Presumption of Innocence**

The first due process right of the child to be considered which may be compromised by the Garda diversion programme is the presumption of innocence. While the importance of this right in court proceedings is apparent, given the possibility of a custodial sentence being imposed, its significance is less clear in the context of the diversion programme. Section 18 of the 2001 Act provides that consideration for admission to the programme is dependent on the child accepting responsibility for his criminal behaviour. In addition, under section 30(2), the consent of the child is required before a caution is administered, while the consent of his parent or guardian is required for the convening of a conference with the child's views being ascertained in this regard. These requirements indicate that the child waives his right to the presumption of innocence by declaring his guilt before entering the programme, a confession which rarely occurs in the presence of a lawyer. In addition, this disclosure may not be sufficient to convict the child of the offence in court, as it may not indicate the intention of the child at the time of the offence, and so avoids the legal requirement of *mens rea* or intent to commit the offence (Cunneen, 2003: 189; Johnstone, 2002: 30, 34).

It may be argued that the presumption of innocence is an indispensable right which ensures that a vulnerable child is not coerced into making a false statement, either by a desire to protect a friend, or to end the interview with the police. As it is conceivable that a child may refuse to cooperate with the Gardaí in the stressful and oppressive surroundings of the station, the presumption of innocence ensures that this reticence is not interpreted as an expression of guilt. Furthermore, the reality of the child's consent to participate is also problematic, given that significant pressure may be exerted on him to partake in the programme by his parents or by the police (Ashworth, 2002: 587; Dumortier, 2000: 6). The application of the right to

the presumption of innocence in the context of the programme protects the child from such coercion.

Conversely, it may be claimed that applying the presumption of innocence in the context of diversion does not protect the child, but rather stymies the aim of the programme. In the traditional adversarial system, the defendant, even if responsible for the offence of which he is accused, may be advised to plead not guilty so as to exploit a legal lacuna or technicality. Such a strategy may prevent the offender, if in fact guilty, from accepting moral responsibility for the crime. The acknowledgement of responsibility for an offence and the resultant dialogue between the offender and the victim lies at the core of restorative justice which underpins the diversion programme. The aim of the programme is to divert the child from future offending, and this is only possible if the child takes responsibility for and acknowledges the consequences of his actions. In addition, the argument that the child's admission may not be adequate to secure a conviction in the courts fails to consider that the diversion programme differs from a judicial process both in its aims and its outcome, and therefore that the application of modified standards is acceptable in this regard.

Any reservations about the pressure brought to bear on a child to admit guilt or to consent to participation may be assuaged by section 23 of the 2001 Act which permits the child to avail of legal advice before being admitted to the diversion programme, as provided for in issue no. 12 of the UN Preliminary Draft Elements of a Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (ECOSOC Res. 2000/14). The meeting with the lawyer serves as an appropriate forum at which the guilt of the child can be discussed and any issues in this regard aired. At this juncture, if the child has falsely confessed, he may retract his statement and explain his reasons for not telling the truth.

### **Legal Representation**

While the child is entitled to consult a lawyer before the initiation of the diversion programme, there is no right to be represented by a lawyer during the course of an FGC. While the basis for the former entitlement



is understandable, given the restriction on the right to the presumption of innocence, it is questionable whether legal representation throughout the course of a conference is necessary to protect the rights of the child. In favour of such an approach, it may be argued that the police, the victim, and the family of the accused may represent a formidable and potentially punitive group, against whom the child needs support. The pressure exerted on the child may be excessive, and a lawyer, acting on behalf of the child, would ensure that the child is not subjected to an overly stressful confrontation. In addition, the issue of proportionality is pertinent in this regard, as the participants to the conference, including the victim and the police, determine the length or level of supervision of the child under section 38 and formulate an action plan according to section 39(1). A disproportionately onerous action plan could be devised in the FGC, due to the input of a retaliatory victim or police officer (Dignan, 1999: 56). The presence of a lawyer arguably acts as a bulwark against the imposition of an excessively burdensome action plan, and guards against the development of an oppressive atmosphere in the conference.

However, as Hudson *et al.* note, a system of formal legal representation impedes the ability of victims and offenders to talk directly to each other (Hudson *et al.*, 1996: 230). The success of the diversion programme is predicated on the notion of frank and direct communication; therefore, the programme should strive for face-to-face discussion, so as to aid the healing process for the victim and to discourage re-offending by the child by personalising the effects of his actions. FGCs seek to fully involve all the parties to a crime, in contrast to the formal justice system in which the offender and victim can become peripheral due to the dominant role played by legal professionals (Jackson, 1998: 38). Therefore, permitting a lawyer to represent the child during an FGC would have a detrimental effect on the dynamic of the conference, and would negate the conference's beneficial elements. The child would be likely to avoid true participation in the conference and would not contribute in a meaningful way. Furthermore, the presence of a lawyer would be likely to import a degree of formality to the proceedings, due to the manner in which she may instruct her client, and also due to the use of legal terminology.

Although it is feasible that the proportionality of the final action plan may be compromised by the input of the police and the victim, the attendance of a lawyer at an FGC is not the most efficacious means of guarding against this possibility. A reasonable and effective way to ensure that the rights of the child are safeguarded throughout the conference and that the outcome is proportionate, without jeopardising the core aims of the programme, would be to facilitate the attendance of an independent advocate at the FGC. This advocate would not adopt the adversarial role of a lawyer, but would rather assist and guide the child in a non-confrontational manner so as not to imperil the fundamental objectives of the diversion programme. This compromise ensures the adequate protection of the child's rights, but does not threaten the informality of the conference and its concomitant benefits.

### **Independent and Impartial Hearing**

The right of the child to an independent and impartial hearing is the final right to be considered. It is arguable that this fundamental principle, which is provided for in the context of judicial hearings in article 40(2)(b)(iii) of the CRC, is threatened by the active role played by the Garda Síochána in the diversion process. The facilitator of the FGC, who convenes the conference, decides where it is to be held and bears responsible for determining who attends the conference, is either the juvenile liaison officer or another member of the Gardai (sections 31-33). Considerable benefits accrue from specifically using trained JLOs, due to their knowledge of the law and their credibility with young people (O'Dwyer, 2001: 43). Moreover, section 46(1) provides that each facilitator shall receive adequate and appropriate training to ensure the proper and efficient discharge of his duties. This provision may prove sufficient in ensuring that the facilitators act appropriately and in an unpartisan manner. Furthermore, as McCold highlights, a police-based model is regarded as more serious by the participants when compared with a process facilitated by a volunteer mediator, and the police are more likely to be successful in securing compliance with the action plan (McCold, 1998: 11).

Despite these advantages of the police-led model of diversion, it is questionable whether a police officer can satisfy the U.N. Basic Principles on Restorative Justice which stress that “facilitator” means a fair and impartial third party (ECOSOC Res. 2000/14). The central role played by the police in both the investigation and the quasi-adjudication of the offence represents a basic conflict of interest compromises the right of the child to a fair and neutral hearing. A similar worry has been expressed by Goldson in the context of the diversion scheme in place in England and Wales, where the decision whether to issue a reprimand, a final warning or to prosecute under the Crime and Disorder Act 1998 is vested solely in the police (Goldson, 2000:37, 38). Although the training given to each facilitator may improve the likelihood of his remaining impartial, the police may adopt authoritarian tactics in dealing with the young offender. Indeed, there is significant potential for the facilitator to become the leader of the conference and thus renege his disinterested role, as indicated by the research conducted by O’Mahony and Doak (O’Mahony and Doak, 2004: 490). In contrast, empirical evidence collated by McCold refutes the claim that police may be incapable of being neutral facilitators and may fall into controlling behaviour patterns (McCold, 1998: 8).

To ensure that the right of the child to an independent and impartial hearing is not threatened, it is imperative that the role of the police is strictly circumscribed. Whilst it is evident that many members of the Gardaí have a wealth of experience in the area of diversion and youth justice, the danger posed to the rights of the child is sufficiently strong to necessitate the participation of an external facilitator, perhaps a community representative, trained in mediation. Although it is conceded that this would also pose difficulties, as picking individuals who are properly representative of the community is itself a challenging task (Crawford and Newburn, 2002: 482 *et seq.*), the importance of preserving the independence of the facilitator and of the conference cannot be understated. Permitting the JLO to attend the FGC and to play an active role in the formulation of the action plan would operate as a sufficient compromise, which would retain the gravity of the conference by the presence of a police officer, yet ensure that the pivotal role of facilitator remains non-aligned.

It has been argued that the restriction on the presumption of innocence is not so serious as to warrant the alteration of the diversion programme. Moreover, the limitation on the right to legal representation may be mitigated by the attendance of an independent advocate at the FGC. Finally, it has been suggested that to ensure the protection of the right of the child to an independent and impartial hearing, the role of facilitator should be adopted by a specially trained individual from outside the ranks of the Gardaí. However, the possible rescission of the important safeguard in the Children Act 2001 concerning the admissibility of evidence relating to the diversion programme may necessitate the revision of the preceding arguments on the importance of traditional due process rights in the context of the Garda diversion programme.

### **Admissibility of Evidence Concerning the Diversion Programme**

As previously noted, section 48 of the 2001 Act precludes the admissibility in criminal proceedings of evidence concerning the acceptance of responsibility for an offence or the participation of a child in the Diversion Programme. However, section 31 of the Criminal Justice Bill 2004 seeks to amend this protection, by providing that where a court is considering a sentence to be imposed in respect of an offence committed by a child after participating in the diversion programme, the prosecution may inform it of the child's acceptance of responsibility, the offending behaviour, or the child's involvement in the programme. The adoption of this proposed amendment would, in essence, alter the core precept of the programme, *viz.* to divert the child from the formal criminal justice process.

Permitting evidence which pertains to diversion to be mentioned in court compromises the aims of the programme, as it would result in the programme becoming the first stage in, rather than an alternative to, the formal justice process. If the scheme becomes, to all intents and purposes, an element of the formal system, then it is arguable that no compromise can be reached *vis-à-vis* due process rights. If participation in the programme may be cited in court at a later stage, this may have serious repercussions for the child, in that involvement in the programme may result in a more serious sentence being passed. Therefore, if this fundamental alteration to the programme is

enacted, the child must accrue identical due process rights to those applicable in the courtroom.

### **Conclusion**

This article, by focusing on three specific rights, examined whether the Garda diversion programme unduly threatens the due process rights of the young offender. The aim of a diversion programme based on the precepts of restorative justice is to move away from the formalised courtroom environment and to replace it with an alternative method of dealing with youth crime. The insistence on and imposition of traditional legal rights locates the process in the adversarial model, and thwarts true restorative and constructive dialogue by concern for formalistic legal entitlements. Furthermore, it has been demonstrated that not all conventional due process rights are necessary to guarantee the protection of the child's dignity and rights in the programme. Nevertheless, it is imperative to ensure that the benefits associated with the diversion programme are not negated by the possibility that participation in the programme may be cited in court. The adoption of the proposed amendment would alter the programme in an essential way, and would necessitate the imposition of traditional due process rights.

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