

The Principles of Child-Friendly Justice

A child is defined as any human being below the age of 18.

The Convention on the Rights of the Child (CRC) constitutes a comprehensive listing of the obligations that States are prepared to recognise towards the child. A fundamental message of the CRC is that when the authorities of a State take decisions which affect children, the best interests of the children must be a primary consideration.

Every country in the world, with the exception of the USA and Somalia, has signed the Convention and declared their intention to implement it. However, all too often there is a breakdown between the intent and the implementation. We have a saying in Ireland that the road to hell is paved with good intentions. Good intentions are of little value unless they are converted into good practice.

States Parties should incorporate the principles of the CRC in separate, specialist legislation for children. Such incorporation should be at a constitutional level.

The principle that the best interests of children must be a primary consideration is particularly relevant to decisions taken by courts of law, administrative authorities, legislative bodies and both public and private social-welfare institutions.

All judicial and administrative institutions, and all persons acting in the name of these institutions, must treat the best interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to:

- Safeguard and promote the rights and best interests of the child;
- Secure for the child such guidance and correction as is necessary for the child's best interests and in the public interest.

Many children will come into contact or conflict with the law as victims, witnesses or offenders. It is important to keep children out of court to the extent possible. Where children are appearing as victims or witnesses their evidence should be gathered prior to the trial. Interviews might be carried out by trained police personnel, by a child psychologist or by a "youth investigator". The evidence may then be presented in court by way of audio or video tape or the investigator may testify on the child's behalf.

Where confrontation between the accused and witnesses is deemed necessary, this should, where possible, be done by way of video-link. In any event, particularly with young children, the Judge/Magistrate, rather than the defence, should undertake the re-examination.

Turning to children in conflict with the law arrangements must be made to ensure that the small minority of cases in which children are prosecuted in court are dealt with in a way which is compatible with the CRC. The European Court of Human Rights has ruled that, where children are prosecuted, arrangements must be such as to ensure that they can participate in the proceedings effectively.

It is important to note that words such as “conviction” and “sentence” should not be used. Diversionary programmes should be designed for first-time offenders. The death sentence and corporal punishment may not be used. The Legislation should offer special protection for young people such as additional safeguards when being interviewed by police, restrictions on police arrest powers and the right to privacy.

Every jurisdiction should have trained specialists who deal with children in conflict with the law at every stage of the process. In particular there should be specialist law enforcement agents who deal with young people, specialist social workers, specialist child advocates/lawyers and specialist Judges/Magistrates. All Police should receive training on children’s rights, child protection training and on how to communicate effectively with children and young people.

The overarching principal in dealing with young offenders is to try and rehabilitate the child for his/her own best interests and survival. Young people must be held accountable but *must* also be dealt with in a way that acknowledges their needs and gives them opportunities to develop in responsible, beneficial, and socially acceptable ways. Criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.

A child or young person who commits an offence should be dealt with in his/her home and community in so far as that is practicable and consonant with the need to ensure the safety of the public.

Diversion from court and custody should be the preferred option. To this end, some jurisdictions with an adversarial style have developed an increasing focus upon the use of restorative justice measures.

Any sanctions imposed on a child or young person who commits an offence should take the least restrictive form that is appropriate in the circumstances and the form most likely to maintain and promote the development of the child or young person within his or her family and family group.

In the UK, the Government’s own advisors acknowledge that the best approach is to keep teenagers out of court through early intervention and mentoring by co-ordinated teams of police and social workers tasked with drawing up workable goals for each individual. The decision to set up the Youth Justice Board in 1998 to help prevent young people offending was a particularly welcome one.

But the Board's success has been limited so far, and overall it is hard to see more preventative approaches towards youth crime being adopted in Britain, not only because public opinion remains suspicious of them, but also because the social services, on which these new approaches partly depend for their success, is not offering the requisite support - possibly because government has not resourced it to do so. Keeping children out of court requires effective cooperation on the part of all of the various agencies. The alternative is to put more and more children through the courts and into detention centres from which they all too often emerge unreformed and ready to re-offend.

In England, Wales and Northern Ireland the age of criminal responsibility is set at 10, the lowest in Western Europe (Scotland is currently in the process of raising their age of criminal responsibility to 12). This is unacceptable, is not compliant with the CRC and should be significantly increased. What flows from arrest, interview and the trial process is often poorly adapted to the immaturity of those very young people caught up in the system. The majority of offences concerning children are tried in the Youth Courts but serious cases, such as murder, or where an adult is a co-defendant, are sent to the Crown Court.

Sally O'Neill QC, one of the UK's leading barristers in criminal proceedings, says that the Old Bailey and other adult courts in England and Wales are ill-equipped for trying children charged with serious crimes. Scores of children, some as young as 10, face trial in adult courts each year. Many are cleared of any wrongdoing but their experience of the adult criminal justice system can cause irreparable harm while they are growing up. Those convicted can find the experience undermines their chances of rehabilitation. Ms O'Neill says: "At a time of heightened public concern over youth crime, we need to look again at the way in which the system treats witnesses, victims and defendants, an increasing number of whom are not even teenagers."

It is probably true to say that the majority of serious and persistent young offenders have mental health problems. It is worth noting that in Finland, where the age of criminal responsibility is 15, residential units catering for children with mental health problems offer 4,000 places, while in Britain the number is less than 1,200, even though the UK population is 10 times that of Finland's. In Northern Ireland evidence would indicate that a significant number of children who come into contact with the criminal justice system have been in care and/or have disabilities including learning disabilities.

Getting disruptive children off the streets, and away from the people whose lives they plague can be done far more efficiently if it is done with the intention of helping them instead of with the intention of punishing them.

Most people recognise that children who enter the child welfare system are often abused or neglected. They may have parents who are incarcerated, who abuse drugs

or alcohol, or who have other problems that keep them from parenting. There may be violence in the home that puts children in danger.

Many people fail to realise that offenders are victims also. Child welfare and juvenile justice are two sides of the same coin. They share the same family backgrounds - substance abuse, criminal behaviour, mental health problems, and domestic violence. Many young people transition directly from the child welfare system to the juvenile justice system. These youths are likely to enter the juvenile justice system at a younger age and remain therein for longer periods of time.

Family breakdown can victimize children in many ways. It can effectively deprive them of a parent. It can have them living in poverty. It can result in abuse. And it does all this without allowing them an adequate voice. Where children's rights are at stake, perhaps more than anywhere else, reactive legal solutions are inadequate. It takes proactive attitudes in lawyers and judges to bring children's problems to light and to find solutions to them.

Maud de Boer-Buquicchio speaking at the Stockholm conference on Child Friendly Justice last autumn said: "We must strive to make our courts a better, kinder and safer place for all children whether victims, witnesses or offenders".

Thomas Hammarberg (Council of Europe Commissioner for Human Rights) speaking at the same conference listed the core principles of a meaningful participation of children in courts:

- Adjusting judicial procedures to the needs of children as perpetrators, victims or witnesses;
- Ensuring children's influence on administrative or judicial decisions relating to themselves;
- Responding to the necessity of adequate training of public authorities directly in contact with children;
- Treating children with dignity and compassion and respecting their best interests.

Stefanie Schmahl (Council of Europe expert, Professor of Public International Law and European law) drew attention to the need for speedy procedures for cases involving children and the importance of guaranteeing equal access to justice for more vulnerable children (e.g. children in institutions, street children, children with disabilities, Roma children and children belonging to other minorities, indigenous children, girls).

Jean-Pierre Rosenczveig (President of the International Bureau for Children's Rights) noted that the child's right to be heard in judicial proceedings must be recognised as a core principle and not as a mere accepted possibility. He said it is important to create a legal framework and climate favourable towards the child's

participation. He highlighted the need to prepare for listening to the child through specialization, operational protocols and training.

Even when judges are aware that Article 12 of the CRC provides the legal underpinnings to young people's participation there is no guarantee that the child's voice will be heard. Judges consider a variety of factors in determining whether to hear from young people including age, maturity, potential for emotional harm to the young person, and the ability of the young person to express his or her own views. Many judges are reticent about speaking to young people directly and identify procedural rules, lack of training, lack of resources and lack of time as some of the barriers to young people's participation.

A recent review of practice in British Columbia, Canada, found that judges were generally unwilling to talk directly to children under 12. On the other hand judges in Germany will speak to children as young as four!

Age should not be a barrier to a child's right to participate fully in the justice process. Every child should be treated as a capable witness, subject to examination, and his or her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as his or her age and maturity allow the giving of intelligible and credible testimony, with or without communication aids and other assistance.

Most young people want decision-makers to listen to and consider their views. A trend that emerged from the young people's experiences in the courts in British Columbia is the difference that one caring adult, who listens to them, can make to their experience in the system. This corresponds with the reality that parents are often dealing with their own emotional needs and are sometimes unable to adequately support their children when their family breaks down.

Being a part of the process in a meaningful way involves more than simply asking a young person what they want – it involves informing them about what is going on and having an ongoing 'dialogue' that allows them to paint a full picture from their point of view.

Young people in British Columbia said that even when they were asked directly what they wanted, it was done in such a way that they "didn't know" or they felt they didn't have the information needed to say anything. Some also identified feeling cornered or pressured into answering.

To be part of the process in a safe environment involves not being placed in a situation where young people have to 'confront' their parents or caregivers. How can a child be expected to respond honestly to a question as to whether an adult is a suitable person to look after them when they know that they may well be going home with that individual on leaving the court?

Young people freely admit that family court processes are frightening and overwhelming – but they are not always good at admitting it while it is happening or reaching out for help.

Chief Justice Beverly McLachlin, Supreme Court of Canada, commenting on the survey of British Columbia's courts said there was a need for a change in attitudes and approaches to equip adults in the Family Justice System to support young people and their participation. She said there was a need for

- a. Approaching young people with trust, respect and understanding
- b. A common framework for professionals
- c. Education and training for decision-makers and those supporting young people
- d. Practice standards, screening and accreditation
- e. Monitoring and evaluation.

In 1999 the European Court of Human Rights ruled that the juveniles convicted of the murder of toddler Jamie Bulger were subjected to an "incomprehensible and intimidating" trial in 1993. In February 2000 the (then) Lord Chief Justice of England and Wales, Lord Bingham ordered that Crown court trials of children must be less formal and intimidating. Wigs and robes should not be worn in court and police should not appear in uniform unless for a good reason. Everyone in court should be placed on the same level, doing away with podiums and children cut off from their families and legal advisers.

Bingham said that the trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress. He said that children being tried in crown court should be able to sit with their families and have informal contact with their legal representatives as necessary. There should be frequent breaks in proceedings. Court attendance should be restricted to a small number who have an immediate and direct interest in the case.

Presiding Superior Court Judge Michael I. Jeffery (Second Judicial District, Barrow, Alaska) offers the following suggestions for more user-friendly court hearings (of adults and children)

- Realize that a person who appears to understand everything, and even says they understand, may not. There may be language problems and cultural misunderstandings about the justice system. There may be mental health problems.
- Slow down and check in with a person during an explanation of rights or similar hearing to make sure that the person knows what is going on. Pauses are probably necessary between different major points just to make sure the concepts sink in. When questions are being asked, pauses may be necessary for the person to respond in a manner that is comfortable and that will allow sharing of information that the person wants to say.

- Do not be afraid to stand up and move around – if appropriate; consider using visual aids, such as writing on large sheets of paper or on a wipe on/wipe off board to help the person focus.
- Be sensitive to your own cultural biases. Someone may not look at you directly. It may be the person is ignoring you. But, in that person's culture, it may be a sign of respect.
- Do not assume that the attorneys involved have had the time to explain what is needed to their clients in a way that the client can understand. There may have been a lack of time or a lack of understanding of a client's mental health problems ... it's the judge's responsibility to make sure the persons involved in the hearing understand what happened.
- Where possible, use plain English in what is said and what is written. Written forms should have places for a defendant or juvenile to initial so that the person focuses on each portion of the form. Concrete language is best. Having "white space" and easy to read type is helpful, even if it uses more paper! We need to avoid having the whole experience being a "blur" of words.
- When appropriate, check in with the lawyer's client about their personal schedule when setting a court hearing. The convenience of the judge and attorneys may not coincide with other factors like making sure that a child's hearing occurs after the school day.
- Bottom line: the goal of timely judicial decision making ("moving cases") must not displace having respect for the individual needs of people involved in the justice system to understand what is happening.

Judges and lawyers are at home in the court room. It is their place of work. It is easy to forget that court rooms are intimidating places to the uninitiated and can have a detrimental impact on children appearing there. It is therefore important to establish child friendly courts at all levels.

Let me summarise what I mean by "Child-Friendly Courts".

- There should be specialist children's courts with specialist Judges/Magistrates and court personnel trained in children's rights and how to communicate effectively with children.
- The court should sit in a different building or room or at different times from the normal court sessions.
- Since the vast majority of children coming before the courts are from deprived backgrounds legal advice should be provided at State expense.
- All lawyers representing children should be trained in children's rights and how to communicate effectively with children.
- Children should be dealt with in an informal setting which is not intimidating.
- No wigs or gowns should be worn.
- Child offenders should be allowed to sit with their parents or guardians.
- Child witnesses should be allowed to give evidence by way of a video link if such is available. If not they might be allowed to give evidence from behind a screen or

curtain, so that they can only be seen by the Judge/Magistrate and lawyers and not by the defendant.

- Judges/Magistrates and legal representatives should use child-friendly language which the child(ren) can understand.
- Judges/Magistrates should speak to children involved in their parents' separation cases or in care proceedings to ask their views, and tell them the court's decision.
- In all proceedings involving a child, nothing may be published which would allow the child to be identified. This includes photographs of the child or the child's family, the child's name, address, school etc.
- In all decisions regarding the upbringing of the child the court must avoid delay that may prejudice the welfare of the child.
- All Judges/Magistrates/lawyers and staff dealing with children should be checked for child protection purposes
- All Judges and Magistrates dealing with children's cases should welcome and actively encourage lawyers to argue international children's rights standards.

Some adjustments to the layout and facilities in the courtroom setting can lessen the impact on children who appear there. Changing the physical layout of the courtroom itself is generally within the discretion of the Judge/Magistrate. This might include asking for a screen or curtain or simply allowing the child witness to sit where he/she is not forced to look directly at the defendant. The Judge/Magistrate may prohibit people entering or leaving a court during a child's testimony, can require legal representatives to stay seated, can limit the length of time a child may testify and allow frequent breaks. Young children may be allowed to use dolls or drawings to assist them in giving evidence in abuse cases.

Additionally, court administration should ensure the provision of child-sized furniture. They should provide separate waiting areas for prosecution and defence witnesses. Snacks and activities for children, including children's television programmes and staffed playrooms should be available on site.

Where the child is before the court charged with an offence or where there may be a conflict of interest between the child and his or her parents or guardian, the child should be legally represented and if appropriate, given age and vulnerability, have a Guardian ad Litem appointed. When independent legal representation is necessary Legal Aid should be provided in the child's own name. Legal representatives should be chosen from a panel of those who have demonstrated that they are familiar with the relevant national and international instruments.

Judicial Officers, Court Welfare Officers, Social Workers, Police, Probation, Prosecution and Legal Counsels must all strive to deepen their knowledge and understanding of the guiding principals of promoting the best interest of the child.

What else should we be looking for in a Child Friendly Justice system?

- immediacy - providing a quick and consistent response;
- safety - improving victims' safety;
- accountability - allowing a quick response to violations of orders by monitoring compliance;
- consistency – the same Judge/Magistrate should stay with a case throughout, as far as possible so that he/she knows the history of the case. This should apply even when the child moves between justice, care and other branches of the legal process. Where another Judge/Magistrate has to take over the case the sharing of information is crucial so as to enable a coherent response;
- co-ordination – there should be a coordinated approach, respecting confidentiality, to the sharing of information between the various agencies;
- technology – access to computerised databases enables Judges/Magistrates to keep themselves informed regarding decisions in other courts and jurisdictions;
- court links – Where possible all matters impacting on a family should be dealt with in one court as this will help to ensure that the court is in possession of all available information. Where more than one court is dealing with a family – e.g. divorce proceedings in the High Court, care matters in the Family Proceedings Court, maintenance matters in the Domestic Proceedings Court – improved cross-referencing of cases is called for to allow a comprehensive response and to avoid the potential issues of inconsistency and conflicting judgements.
- Finally, the age of criminal responsibility set by each States Party should be CRC compliant.

Some of the points I have outlined (e.g. technology) have budgetary implications. Others (e.g. the raising of the age of criminal responsibility) would require new legislation. These would require time to resolve. Many of the proposed changes require neither resources nor legislation. All that is required is a change in attitudes and approaches. We don't need to wait until tomorrow to implement change. We can begin today.

Let us look briefly at one court which put these ideas into practice.

In 1997 the New York Times ran an article proclaiming that “Orleans Parish Juvenile Court” (New Orleans, Louisiana, USA) was *the most troubled in the nation*. A few years later the National Council of Juvenile and Family Court Judges (NCJFCJ) named this same court as a model court which courts throughout the US should try to emulate. How did this transformation come about?

Judge Ernestine Gray was appointed Chief Judge in 1997. She says that the problems were that hearings were not being held in a timely manner, and there were six different judges making decisions for the same family. The range of decisions in the various courts did not always complement one another – indeed sometimes they were contradictory. Judge Gray created a child protection division that assigned one judge

per case with the same judge seeing the family throughout the case. She put two judges in the child protection division so that the decisions were more consistent. There was no extra cost because there was no increase in staff. Staff were just “rearranged”.

She drew on the expertise of the NCJFCJ for technical support and insight from judges who are outstanding in the field. She got assistance from the American Bar Association in creating a cadre of lawyers who wanted to represent children. She provided training to help them feel more comfortable dealing with kids. With trained lawyers everything runs more smoothly.

She argued that children in foster care or in institutions need extra help because of their vulnerability. The courts must pay attention to their needs. She stressed in particular the need for high quality education.

In her view the majority of parents want to do the right thing for their children but they don't have the resources. The court has the responsibility to provide these resources – to provide support and services to get families back together as soon as possible. Money and resources are needed in order to maintain families. Judge's should come down off the bench, get into the community and talk about the need for resources for families.

She created a facilitation team (multi-disciplinary task force) with judges, lawyers and representatives from social services and the mental health community to discuss issues that come up in court and seek solutions.

Judge Gray says that, ideally, she would like to have a unified family court that deals with all issues related to a family. It would include separation, divorce and custody issues - all issues dealing with families would be in one place. She points out that frequently families are dealt with in many courts, and the court decisions are frequently at odds. Ideally there would be one person who would have all the information. It would make for better decisions that affect the entire family.

w.mccarney@btconnect.com