



# Challenges in the Future of Restorative Youth Justice in Ireland: Minimising Intervention, Maximising Participation

Youth Justice

1–25

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Ian D. Marder  and Louise Forde 

## Abstract

While restorative approaches encompass a small proportion of youth justice practices in Ireland, the new Youth Justice Strategy (2021–2027) aims to include more victims in restorative justice, expand family conferencing and train youth justice professionals in restorative practices. This article discusses the legal, policy and practice contexts of these developments, considering how Ireland has defined, used and researched restorative youth justice to date. It situates the ongoing efforts to meet victims' and children's needs, and to change criminal justice cultures, in the international criminological and legal literature on minimum intervention and child participation, analysing the possibilities and challenges facing restorative youth justice in Ireland.

## Keywords

child participation, minimum intervention, restorative justice, restorative practices, youth justice

## Introduction

Youth justice in Ireland is often considered progressive – relative, at least, to more punitive approaches in other developed, common law jurisdictions (Convery and Seymour, 2016). In particular, Ireland's rate of child detention is low, and there is a substantial emphasis on the statutory, police-led diversion scheme – the Garda Youth Diversion Programme – that is considered strong by international standards, if not without its flaws (Kilkelly, 2011).

Youth diversion is governed by the Children Act 2001, as amended, which sets out the core priorities and requirements for the treatment of children in conflict with the law. Beyond providing a statutory basis for diversion, the Children Act outlines procedural protections during investigation and prosecution, and sentencing principles and options.

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## Corresponding author:

Ian D. Marder, School of Law and Criminology, Maynooth University, Room 54, New House, Maynooth W23 F2H6, Co. Kildare, Ireland.

Email: [ian.marder@mu.ie](mailto:ian.marder@mu.ie)

It provides that children are entitled to the same rights as adults before the law, criminal proceedings should not be used solely for care and protection and penalties should promote the child's development and cause as little interference as possible with their legitimate activities. These principles seek to ensure that Ireland's generally 'justice'-based youth justice system is not excessively punitive, and that it accounts for children's individual circumstances. As discussed elsewhere, this Act also introduced police- and probation-led restorative processes into law for the first time (Forde, 2018; Marder, 2019). The term 'restorative', however, is notably absent from the Act, which provides that police specialists (Juvenile Liaison Officers, or JLOs) can invite victims to youth cautions (s.26) or organise 'conferences' (with or without victims present) alongside a caution (s.29). The Children Court can also direct that a (probation-led) 'family conference' (s.78) develop an action plan as an alternative to traditional court proceedings.

In recent years, criminal justice in Ireland has been in a state of flux, from which youth justice has not been immune. In Hamilton's (2019: 15) assessment of Irish criminal justice culture, 'we are living through a time of unprecedented change for the Irish criminal justice system', with growing pressure on policymakers and practitioners to engage with research(ers) and evidence and ensure convergence with European standards and norms (Hamilton, 2022). This contextualises ongoing work to develop restorative justice in Ireland (Department of Justice, 2021a; Government of Ireland, 2020) since a new Council of Europe (2018) Recommendation on restorative justice stipulated that all those harmed by, and responsible for, crime should be enabled to decide whether to participate in such a process.

This article is concerned specifically with the implications of these developments for children in conflict with the law, and particularly with allusions to restorative justice and restorative practices in Ireland's Youth Justice Strategy (2021–2027) (Department of Justice, 2021b). The Strategy's guiding principles reflect Ireland's main international obligations under the United Nations Convention on the Rights of the Child (UNCRC), including commitments to ensure 'respect for [children's] rights, in a way that strengthens their capacity for positive participation in community life [and] reinforces respect for the human rights and freedoms of others' (p. 4). Striking a further progressive tone, it says that 'young people in conflict with the law will be treated as children first' (p. 7). Most importantly for the present discussion, the Strategy supports the greater use of restorative processes involving children and their victims and/or families and wider practitioner training in restorative practices to support 'child/family centred' (p. 23) ways of working.

The implications of these developments depend on how the term 'restorative' is interpreted and applied. On one hand, using restorative justice and restorative practices with children in conflict with the law (or 'restorative youth justice') can support diversion, enable child participation and build beneficial forms of social capital (Chapman et al., 2015). On the other hand, research suggests that this can perpetuate the inequitable and excessive qualities of youth justice, even consolidating professionals' power over vulnerable, criminalised children (Suzuki and Wood, 2018). Restorative practices likewise can be critiqued as nebulous – or, at least, as complex to operationalise and to evaluate (Brown, 2021). Given these concepts' centrality to reform efforts in Ireland and beyond, we must

consider how to maximise and measure the benefits, and minimise the risks, of restorative youth justice.

The article begins by analysing, in light of international children's rights law, how Ireland has defined 'restorative' in domestic law and policy, and applied it in practice. While several actors in Irish youth justice claim to use restorative justice and restorative practices, these concepts' elasticity and the lack of research on their implementation mean that we know little about their delivery. The following sections analyse provisions in the Youth Justice Strategy referring to restorative justice and practices, and consider the challenges relating to this work. These include how to balance the potential intensity of restorative processes against the goal of minimising intervention, and the need to focus restorative practices on enabling child participation. A child-centred approach requires Ireland to use restorative youth justice in ways that account for children's inherent and individual vulnerabilities and that reduce what McAra and McVie (2010: 7) refer to as 'adversarial agency contact'.

## **Restorative Justice and Children's Rights – The International Framework**

Many international agreements now strongly promote the development of restorative justice in criminal justice (Council of Europe, 2018; European Union, 2012, 2020; United Nations, 2002, 2020). For example, the Council of Europe (2018) Recommendation concerning restorative justice in criminal matters provides that European jurisdictions should make restorative justice 'generally available', for all offence types and at all stages of the criminal justice process (Rules 18–19). It states that restorative justice will 'often take the form of a dialogue (whether direct or indirect) between the victim and the offender' (Rule 4), but promotes a flexible approach: restorative principles can apply to interventions beyond victim dialogue (Rule 59), and be used proactively to 'build and maintain relationships [and] a restorative culture' in criminal justice (Rule 61). It also asks that restorative services individualise their practices (Rule 15), stipulates that the core restorative principles are participation and repairing harm (Rule 13) and outlines protections for participants relating to the procedures and outcomes.

Rule 24 notes that, when a child participates, a parent, guardian or appropriate adult has 'the right to attend any proceedings to ensure that their rights are upheld', and that 'any special regulations and legal safeguards governing [children's] participation in legal proceedings' also apply to restorative justice. That is, States must take into account children's special status under the law and developmental needs, and adapt the use of restorative justice accordingly. Beyond this, however, the Recommendation contains few provisions concerning children's unique needs.

While the UNCRC does not specifically mention restorative justice, Article 40 of the UNCRC is clear that the youth justice system should seek to ensure that children are treated with dignity and respect for their rights, in an age- and developmentally appropriate manner, which seeks to reinforce respect for the rights and freedoms of others as well as supporting the child to assume a constructive role in society. The UN Committee on the Rights of the Child (2007, 2019) has been broadly supportive of restorative justice

approaches, although some scholars (e.g. Lynch, 2010) contend this endorsement has been given somewhat uncritically, without considering the degree to which its use complies with children's rights standards. It is clear that children also have procedural rights stemming from Article 40(2) and Article 40(3)(b), and a right to be heard arising from Article 12 of the Convention. These rights must be respected in restorative justice to be compliant with the international standards. For example, wherever diversionary measures, including restorative justice, are taken, the Convention is clear that human rights and legal safeguards must be fully respected. Furthermore, Article 40(4) reiterates the need for justice outcomes to be proportionate to both the circumstances of the child and to the offence. However, neither the children's rights nor restorative justice frameworks specify how to reconcile these with the position in the latter that all victims and offenders should have a right to decide whether restorative justice is right for them, and to determine outcomes on a case-by-case basis, within certain parameters. This leaves governments, criminal justice institutions and restorative justice providers with considerable discretion to determine how to marry the protections and goals in both frameworks when designing and delivering restorative justice.

In theory, the international legal framework provides flexibility to offer a range of restorative responses to youth offending, enabling participation without risking excessive intervention. However, restorative justice research frequently observes a gap between theory and practice, as the dominant goals and rationales of justice professionals and institutions come into conflict with restorative justice principles and standards of practice. For example, criminal justice actors may prioritise efficient case closure, offender desistance and victim compensation, thereby precluding stakeholders from defining the processes and outcomes that best meet their needs (Daly, 2003; Marder, 2020a). This means that restorative justice presents similar risks for children as traditional justice processes.

Restorative justice has considerable potential to respond to offending behaviour by children in an age and developmentally appropriate way, and to fulfil the objectives set out in Article 40(1) of the UNCRC. The potential benefits arising from restorative youth justice – such as diverting children from formal criminal proceedings and reducing detention (Hamilton et al., 2016) – makes it worthwhile to pursue a child-friendly, rights-compliant model of practice. Yet, the threats to children's rights from potentially coercive, disempowering and disproportionate approaches require concerted attention to ensure that restorative youth justice complies with procedural rights and the UNCRC's core principles, while accounting for the interests of children, society and victims (Lynch, 2010; Moore and Mitchell, 2009, 2011).

## **Conceptualising 'Restorative Youth Justice' in Ireland**

Broadly speaking, restorative youth justice is conceptualised in three ways in Ireland. First, a child can participate in a restorative justice process involving dialogue (face-to-face or indirect) with the victim(s) of their offence. A JLO can facilitate such a process under s.26 or s.29 of the Children Act 2001, following the decision to admit a child to the Diversion Programme. Young Persons' Probation (YPP) can also facilitate victim-offender dialogue when the Children Court orders a 'family conference' under s.78 of that Act, or if a child is

under probation supervision and their YPP Officer believes it to be appropriate to offer this option to the parties. There is also a community-based organisation (CBO) to which YPP refers children for victim empathy work that can lead to victim dialogue, although this is only available in one region of Ireland (Quigley et al., 2015).

The second conceptualisation is that each body above, in assessing whether restorative justice is possible, may bring the young person and their family and any other persons together for a (family) conference – a restorative process that does not require their victim. In principle, this involves a similar conversation regarding who was affected, the reasons behind their offending, and what might prevent it happening again (O’Dwyer and Payne, 2016). As we explain later, the 2001 Act suggests this model, involving families and professionals but not victims, is effectively the default approach to conferencing in Ireland (Kilkelly, 2014).

The third, much broader conception is of restorative *practices* as a set of values and skills that can be used proactively to build positive relationships, as well as reactively to enable participatory and harm-focused responses to conflict and harm. A recent mapping exercise (O’Dwyer et al., 2021) found that this understanding of ‘restorative’ is increasingly taking hold in Irish youth justice. Indeed, many police and probation officers and youth workers who operate in youth justice are already (or soon will be) trained in restorative practices. Some operating in this arena even report that their cultures align with restorative principles (Monitoring Committee, 2021; Oberstown, 2021), although such assertions have not been verified empirically. This conception of ‘restorative’ differs radically from the previous two, extending the term much further than using dialogic processes in response to individual offences. Instead, it incorporates a philosophy of practice and a wider set of skills and language (O’Dwyer, 2021) in an attempt to manifest the theory that by adopting restorative principles in their work, practitioners can transform their institutional and occupational cultures (Gavrielides, 2007).

These three conceptualisations represent something of a synthesis of the disparate and vague references to ‘restorative’ found across Irish law and policy, and the practices that many contend fall under a restorative umbrella in Ireland. These laws, policies and practices are examined in more depth below. It is important first to note that, as is typical in Ireland (Hamilton, 2019), there are insufficient published data or independent studies to enable a detailed assessment of how relevant professionals understand and use restorative justice in their work. For example, an early evaluation of the Diversion Programme’s restorative components aside (O’Dwyer, 2006, in O’Dwyer and Payne, 2016), academics have not observed police-led youth cautions, nor assessed police attitudes to restorative justice. The Diversion Programme’s annual report also only mentions the number of ‘restorative events’, without detailing how many involved victims or outcome agreements, who else participated (or declined to participate), or levels of reoffending, compliance or satisfaction (Monitoring Committee, 2021). While two projects (Kennedy and Seymour, 2018; Leonard and Kenny, 2011) involved observations of YPP conferences, the Probation Service only publishes the number of cases delivered. There is no research published involving observation of their adult restorative interventions.

One recent study, which has been published but is yet to be peer reviewed (O’Dwyer et al., 2021), involved criminal justice agencies providing statistical data on their levels of

restorative justice (some, for the first time), and producing both qualitative statements and case studies to illustrate the ways they use restorative justice, but which may lack reliability and generalisability. Overall, we know little regarding the *nature* of the activities recorded as ‘restorative’, including the extent to which they adhere to core standards and values that ensure the safety and effectiveness of restorative processes. From a children’s rights perspective, it is problematic that few studies explore children’s experiences of these interventions and the effect on their rights (Quigley et al., 2015). This is significant due to the conceptual elasticity of restorative justice, and the diversity of ways that practitioners can understand and apply restorative justice in practice (Calkin, 2021; McCold, 2000).

In the absence of a substantial body of evidence from which to draw conclusions about its use in Ireland, it is necessary to consider the details and possible implications of existing laws and policies, alongside what little we do know about their implementation and research from other jurisdictions, to contextualise our analysis of the new Youth Justice Strategy.

## Restorative Youth Justice in Irish Law and Policy

Conferences under the Children Act – irrespective of which agency facilitates them or whether a victim participates – are intended to follow a similar format, outlined in the legislation. The core aim of the conference is to draw up an action plan for the child, which can be monitored for compliance. Notably, the victim’s presence does not change the purpose of the conference. If the victim is involved, conferences can involve discussion of their concerns, and s.39 of the Act suggests some victim-focused provisions that plans can include, such as reparation or apologies. Aligning with the rehabilitative focus of restorative cautions elsewhere (Hoyle et al., 2002), however, repairing harm to the victim is not the primary goal, and s.39 permits outcomes aimed at preventing reoffending (Kilkelly, 2014). This reflects the fact that the legislation provides for family-centred – rather than victim–offender – conferencing, with the ‘restorative’ designation made in policy after the law was enacted (Kilkelly, 2014).

The facilitator’s obligations *vis-à-vis* invitations further indicate that conferences are generally intended to be offender-oriented: the Act permits, but does not require, facilitators to invite the victim (and a support person) to attend. As such, facilitators can decide not to invite the victim. The minimum attendees are the child and a guardian or relative, and facilitators may invite any other persons whom they believe will ‘make a positive contribution to the conference’, excluding those whose participation they deem will ‘not be in the best interests of the conference’ (s.32).

This legal framework reflects two main dynamics of the Irish conferencing system. First, it is indicative of an interpretation of restorative justice that is dialogic and procedural, but that is focused on an offender (the causes of the offending and their future behaviour), as opposed to articulating an equal focus on victims’ needs. Recent international guidelines promote the idea of restorative justice as a process that does not prioritise the needs of one party over those of the other (Council of Europe, 2018; Marder, 2020b). Whether this is concordant with children’s rights, however, may be questioned.

Kilkelly (2014), for example, contends that centring the child (and their family) is a protective measure for the child, and is intentional within the Children Act. Pertinently, research with police facilitators in England suggests that forces that emphasised the victim in restorative processes risked their officers becoming less concerned about offenders' experiences (Marder, 2020a).

That conferences do not require victims has a theoretical advantage of facilitating a child and their family to participate, without a (vengeful) victim causing an unwarranted level of penal intensity (Suzuki and Wood, 2018). It also avoids excluding children from accessing restorative justice because of an unwilling victim (Marder, 2020a). This approach may be more conducive to realising the rights of children in conflict with the law than if victims were always invited. Yet, this reflects institutionalised models of restorative justice elsewhere, in which the offender is prioritised by default: not for their protection, but because justice interventions generally, and the police cautioning process specifically, are offender-focused (Hoyle et al., 2002). This imbalance in service provision informs ongoing efforts across Europe to meet victims' needs – including, as in the Youth Justice Strategy, through restorative processes. Questions remain as to how to support victims without creating undue risks for children, which is even more complicated when the victim, too, is a child (Gal, 2011).

Second, to a greater degree than in New Zealand and other jurisdictions that operate similar models, Irish conferences are highly discretionary. Not only (like in New Zealand) do facilitators retain considerable control over the process (e.g. who to invite, whether to suggest outcomes, preparation, etc.) but whether to offer the process is also discretionary; in New Zealand, a family group conference is a central, and at several points a mandatory, feature of their youth justice process (Lynch, 2007). Moreover, New Zealand facilitators have greater recording requirements and are subject to oversight arrangements that Ireland lacks (Murray, 2012), an example of what Hamilton (2019) refers to as the primacy of discretion in Irish criminal justice.

The significance of this lies in the private, unsupervised nature of restorative justice processes. Conference facilitation, like policing and probation practices generally, is a discretionary exercise. This permits unwarranted inconsistencies, with one's experience of the process dependent on facilitators' attitudes towards oneself or one's offence, or regarding the aims of the process. Discretion necessarily means that restorative justice reflects cultural traits and prejudices that pervade criminal justice, but are anathema to restorative justice and equity principles. For example, Daly (2003) and Barnes (2015) suggested that mainstreaming restorative justice caused it to reflect organisational routines and goals. Shapland et al. (2017) found that police officers responsible for offering restorative justice perceived a relationship between its appropriateness and the perpetrator's social class, while Hoyle et al. (2002), Cutress (2015) and Marder (2020a) found that pressures on police officers to finalise cases quickly were an impediment to dialogue. Given the relationship between the benefits of restorative justice and the manner in which it is facilitated (Shapland et al., 2011), facilitator discretion presents a risk to children, especially those from marginalised groups. At the same time, discretion and informality in restorative justice can permit facilitators to meet the participants' unique needs, in ways that traditional criminal justice processes cannot (Tiarks, 2019).

Aside from the Children Act 2001, restorative justice appears in several policies, strategies and statutes that predate the new Strategy. For example, the previous (2014–2018) Youth Justice Action Plan committed ‘to promote and increase the use of community measures, including restorative justice, for young people who offend’ (Department of Justice, 2014: 21) as one of five ‘high-level goals’. Here, we can see the beginnings of a more victim-oriented restorative justice conception: this goal envisages ‘further developing services to victims through the expansion of restorative justice initiatives’ (p. 21). An evaluation of that Action Plan found many challenges and inconsistencies with its implementation, particularly with regard to the under-use of court-ordered family conferencing provisions (Kilkelly and Forde, 2019). The previous Action Plan also refers to restorative practices, one action being to ‘drive a restorative practice ethos [. . .] across the youth justice system’ (p. 23) via training and including more victims in restorative justice. The interchangeable use of ‘restorative justice’ and ‘restorative practice’ can make their interpretation, implementation and evaluation challenging (Calkin, 2021).

More recently, Ireland sought to transpose the EU Victims’ Directive into domestic law via the Criminal Justice (Victims of Crime) Act 2017. This introduced provisions on restorative justice, creating uncertainty as to its interaction with the Children Act. The relevant sections: define restorative justice as involving a victim and an offender (s.2); state that the police ‘shall offer’ victims information about restorative justice ‘where available’ (s.7); outline the restorative justice procedure and protections for participants (s.26); and amend the Children Act 2001 by creating obligations on facilitators to prevent secondary victimisation and to provide information (s.32). Defining restorative justice as involving the victim develops the Irish conception of restorative justice as something that focuses on both parties, not that prioritises offender desistance. However, it is ambiguous as to whether its provisions apply to processes in which a victim does not participate. Furthermore, s.26(6) states that s.26 provisions do not ‘affect the operation’ of the 2001 Act, but it remains unclear whether these s.26 protections apply to non-statutory uses of restorative justice with children, such as pre-/post-sentence by YPP and CBOs. Finally, s.7 is not subject to the same caveats as s.26, implying that the victim is entitled to information about restorative justice whenever a child is cautioned or charged (Marder, 2019) – although research suggests that most victims are not offered the opportunity to participate (O’Dwyer et al., 2021).

Notably, recent strategies promise to enhance the availability of restorative justice in Ireland. The Programme for Government (Government of Ireland, 2020: 86) pledged to ‘work with all criminal justice agencies to build capacity to deliver restorative justice’, while the subsequent Action Plan from the Department of Justice (2021b) committed to publish proposals to develop restorative justice at all stages of the criminal justice process. Another report committed to ‘scope requirements’ to provide restorative services for vulnerable victims (Department of Justice, 2020). As with the Victims of Crime Act, however, the relationship between these developments and restorative youth justice is unclear. The latest Diversion Programme report also states an intention to increase restorative youth cautions, describing a project that uses ‘briefings [for] JLOs and Garda management’ to ‘enhance the awareness, development and use of restorative justice’ (Monitoring Committee, 2021: 16). The report also alludes to a (seemingly unpublished) restorative



justice strategy ‘developed in 2019 [. . .] to ensure restoration of restorative cautions to 2017 levels’. This implies a rather limited aspiration: 3.99 per cent of cautions were recorded as ‘restorative’ in 2017, with none (as the next section explains) involving victims. Still, these statements indicate a belief, at the policy level, that restorative justice should be more accessible.

## **Delivering Restorative Youth Justice in Ireland in Practice**

The available data indicate that practice does not reflect the Children Act’s vision in relation to conferencing (Kilkelly, 2014). For example, the percentage of youth cautions recorded as restorative fell from a peak of just 8.46 per cent in 2012, to 1.63 per cent in 2019 (Monitoring Committee, 2013, 2021) despite the fact that JLOs receive both 60 hours of mediation training and 3 days of restorative practices training (Monitoring Committee, 2018). This 2019 figure represents just 125 restorative cautions – in a year that also saw 6960 informal cautions and 4046 formal cautions delivered by police (Monitoring Committee, 2021: 3). Research is yet to clarify the barriers to restorative cautions in Ireland, although tensions between restorative justice and police cultures (such as the reluctance to relinquish control and the pressure to close cases rapidly) were observed elsewhere (Clamp and Paterson, 2017; Marder, 2020a). The Courts also appear reluctant to use their statutory powers to order conferences as an alternative to traditional proceedings, with seven court-ordered conferences in 2019 – despite 4077 orders made in relation to juvenile crime that year (Courts Service, 2020). YPP delivered seven further ‘restorative interventions’ alongside supervision that year (O’Dwyer et al., 2021), out of a total of 673 referrals to the Probation Service (2021). A CBO, Le Chéile, also engaged 31 children, referred by YPP, in its restorative justice service in 2019 (O’Dwyer et al., 2021).

It is clear that restorative justice processes play only a marginal role in youth justice in Ireland in practice. Beyond this, however, we know little about the *nature* of the practices that the police and probation record as restorative. For example, information on victim participation is patchy. Of the 14 probation-led cases in 2019, two court-ordered cases and four post-sentence cases involved victims (half directly, half indirectly) (O’Dwyer et al., 2021). Of Le Chéile’s 31 cases, nine involved victims (four directly, five indirectly). In total, YPP and Le Chéile used restorative processes with 45 cases, one-third of which involved a victim in some way. Beyond this, one of two studies of family conferences did not include cases with victims (Kennedy and Seymour, 2018). The other observed six cases, four of which included victims (Leonard and Kenny, 2011). This concluded that international best practice was being observed: there was significant participation from all parties, victims were involved in all decisions and given a chance to speak, and children were treated fairly and their reintegration, prioritised. Whether these findings were representative of wider practices, and whether services could maintain this level of quality if conferencing were mainstream, remains uncertain.

The 125 restorative cautions may dwarf the number of restorative processes delivered during or following a court process, but the report from which these figures were gleaned did not specify the proportion that involved victims. The only information on victim involvement in recent cautions comes from the 2017 report (Monitoring Committee,

2018). There were 477 ‘restorative cautions’ that year, none of which involved victims, as the police came to terms with the ‘resource implication[s]’ caused by ‘increased obligations’ towards victims under the Victims of Crime Act 2017: to prevent secondary victimisation (p. 20). That a need to prevent secondary victimisation was seen as new and precipitated an institutional pause on victim involvement further indicates an offender-oriented interpretation of restorative justice. While victims seem to be increasingly prominent in the framing (if not the practice) of restorative justice, the lack of data and qualitative research examining participants’ experiences of conferences hampers efforts to understand how these services try to balance the parties’ needs when using restorative justice, and whether it is achieving its goals and respecting participants’ rights.

The experience in Ireland mirrors that across Europe: providing training and legal support for restorative justice neither ensures its widespread use in the short term, nor prevents a medium-term decline in cases following a post-introduction boost (Dünkel et al., 2015). Ultimately, tensions remain between restorative justice and existing institutional goals, priorities and ways of working, which act as a barrier to mainstreaming restorative justice processes (United Nations, 2020).

The cultural barriers to implementing restorative justice have steered its advocates in justice and other sectors towards the broader concept of restorative practices. This aims to give practitioners the skills and language to adopt restorative values in day-to-day practices, so that citizens experience the theoretical benefits of restorative justice (e.g. participation, fair treatment) in all interactions with justice professionals, while sensitising the system to restorative principles (Calkin, 2021). Beyond the aforementioned training of JLOs, youth workers in Garda Youth Diversion Projects (GYDPs) – localised youth work bodies to which police can refer children – started this training in 2021 (delayed from 2020 after COVID-19) (O’Dwyer et al., 2021). The training does not focus on conference facilitation, but on restorative values, ‘restorative language’ and other ways of interacting with children to prevent harm, enable child participation and build positive relationships.

Some GYDPs already report using restorative practices, one asserting that their proficiency in ‘restorative language, circles and meetings has helped to improve the quality of our encounters with young people [and] to create better, more valued relationships’ (O’Dwyer et al., 2021). Oberstown, the sole place of youth detention in Ireland, trained residents in restorative practices in 2017, before training its staff more recently (O’Dwyer et al., 2021) as part of a new focus on building relationships between their staff and children as a harm-prevention measure (Centre for Effective Services, 2017; Childhood Development Initiative, 2020). Oberstown’s (2021) website asserts ‘all care is child-centred and based on participative and restorative practice’. Again, no independent studies have assessed the level and nature of Oberstown’s restorative practices work, nor the extent of any consequent cultural change. At least on paper, however, the language used and the time and funding invested, indicate a desire to use restorative practices to achieve these goals.

Beyond the education sector, little research explores the effectiveness of restorative practices at changing the culture of youth services (Brown, 2021). In terms of restorative justice, however, there are decades of (more and less optimistic) accounts of its bearing on

children's experiences of criminal justice. In theory, both can enable child participation and reduce the need for unnecessarily intensive interventions, aligning with children's rights and research evidence on participation, individualisation and parsimony. Yet, the benefits and risks are so dependent on implementation that data and research are central to making a reasoned judgement on their use. Empirical work is urgently required to explore how justice professionals understand and use restorative justice and practices with children in Ireland. Meanwhile, we can consider how the new Youth Justice Strategy frames these concepts, and whether this corresponds with legal standards and evidence on restorative youth justice from elsewhere.

## **Developing Restorative Youth Justice in Ireland: Opportunities and Challenges**

### *Restorative justice and restorative practices in the new Youth Justice Strategy 2021–2027*

Scholars have commented that the overall model of youth justice in a jurisdiction can act as a filter that affects restorative justice implementation (Smith and Gray, 2019). As such, provisions in the Youth Justice Strategy (Department of Justice, 2021b) relating to restorative justice (with and without victims) and restorative practices can be understood in light of its broader aims and guiding principles. Its principles (p. 4) apply at every stage of the criminal justice process. They state that all actions should both strengthen children's capacity for positive participation in the community, and promote respect for others' rights and freedoms. Diversion should be used to the maximum extent possible, while any measures should take into account the best interests of the child, be proportionate and appropriate, and cause as little interference as possible with children's legitimate interests and pursuits, taking the least restrictive form appropriate in the circumstances. Children should also be enabled to participate actively at all stages of contact with youth justice processes. These principles reflect the core children's rights principles in the UNCRC and provide a strong basis for restorative youth justice by indicating the potential to minimise coercive intervention and enable participation, in line with UNCRC Article 12.

In this context, the Strategy incorporates provisions on the development of restorative justice, both with and without victims. Under one guiding principle on 'victims of crime' (p. 5), it states: 'victims of crime, including child victims of crime, and those who have themselves become criminalised, should have an opportunity to have their voices heard, and, where appropriate, to take part in restorative processes'. Such an explicit recognition that young perpetrators and victims overlap is welcome, given the tendency of youth justice policies to ignore clear links between victimisation and offending (Smith and Ecob, 2007). This is valuable in framing restorative justice, given its potential to either overcome or perpetuate victim–offender dichotomies, and other legal constructions that isolate offending from its social context (McAlister and Carr, 2014). This also continues Ireland's trend towards emphasising victims in restorative justice.

The Strategy proposes to modify the 2001 Act to encourage court-ordered family conferences. It states that 'provisions on family conferencing [are] much underused' (p. 33),

and that legal revisions could ‘require that reasons be given for not using restorative or collaborative approaches’ and permit YPP Officers to ‘say whether a collaborative plan/conference is appropriate’ (p. 34). Either change may nudge the judiciary at least to consider restorative justice in each case, as might the establishment of multi-agency procedures to facilitate restorative processes when children are deemed unsuitable for (police) diversion (p. 23). Whether this produces more or less intervention and opportunities for child participation will still depend on how those with the discretion to offer and deliver restorative justice interpret and use it in practice – hence the centrality of training and monitoring to implementation.

Restorative practices are also mentioned several times within the Strategy, with reference to collaborative service delivery (p. 21), youth diversion (p. 23) and the ‘strengthen[ing] and rebrand[ing]’ of the GYDPs as ‘support projects for those most at risk’ of engaging in serious or prolific offending (p. 24, 42). While this breadth of prospective applications obliquely implies that restorative practices are a skillset that can be used across youth justice work, the Strategy lacks a clear explanation of the concept. The closest it comes to a definition is when it lists restorative practices as an example of a ‘child/family centred approach’ (p. 21, 23). A recent UNICEF report defines the ‘child-centred’ approach as one that will (1) prioritise children’s needs and interests, (2) individualise services according to each child’s unique qualities and (3) enable children to voice concerns and to participate actively (Bruckauf and Cook, 2017). This echoes the Council of Europe’s (2018) restorative principles, in which participation in identifying and meeting needs is central to a restorative culture.

A child-centred restorative justice approach holds implicit the idea that the rights of children involved in such processes will be respected in implementation. Implementation remains contingent, however, on articulating how youth justice workers and specialist police and probation officers should interpret and use restorative practices in accordance with child-centred justice principles – particularly those of minimising intervention and enabling participation. These are salient challenges in the debate on restorative youth justice both because they are goals of restorative justice, and because the wider youth justice literature and legal framework support their prioritisation in youth justice reform.

### *Challenge 1: Minimising intervention*

The need to minimise the intervention experienced by children in conflict with the law, while still providing useful youth work and justice interventions where necessary, contextualises efforts to implement restorative justice and restorative practices in youth justice. The Edinburgh Study on Youth Transitions and Crime – a longitudinal study tracking around 4300 children for over 10 years – found that diversion was more effective than prosecution at facilitating desistance (McAra and McVie, 2010, 2013). More recently, a systematic review by Wilson et al. (2018) similarly found police-led diversion more likely reduces future offending by low-risk children than prosecution. One remaining concern – that formal diversion may be stigmatising and unduly intensive, relative to entirely informal resolution – underpins recent calls for the Youth Diversion Programme to focus on high-need children and divert others from processing altogether (Kilkelly, 2018).

Finally, imprisoning children is criminogenic, while community-based alternatives are more likely to support desistance (Lambie and Randell, 2013). Thus, to avoid propagating criminogenic inequalities and forms of social exclusion, we must eschew punitive outcomes and avoid escalating children into adversarial processes wherever possible.

This has implications for when and how restorative justice is delivered. That is, relative to the alternatives, whether restorative justice results in more or less intensive outcomes, or is experienced as a more or less intensive process, is dependent on what would have happened otherwise. As Acorn (2018) succinctly asked: restorative justice compared with what?

First, a restorative process can minimise intervention if it de-escalates a child from a harsher outcome – for example, if the child avoids a criminal record or prison sentence following the successful use of restorative justice. As such, it is notable that the Strategy links the expansion of court-ordered family conferences to the ‘strike out’, whereby a person who pleads or is found guilty does not receive a criminal conviction, nor any obligations. Leaving aside the point that the procedures of investigation and prosecution can be experienced as punishing in themselves (Feeley, 1979), it is clear that a child’s interests are not best served by a punitive sentence or the ongoing stigma of a formal conviction. Yet, for restorative justice to reduce penal intensity in this manner, it must be the case that the child would have received a conviction or harsher penalty otherwise, but is spared this because of their successful participation in restorative justice. Cases deemed to be near the threshold of a higher sanction – such as those where the child is on the cusp of a custodial sentence or a criminal record – are thus especially suitable for a restorative process that might result in a less intrusive process or punitive outcome.

This exemplifies the potentially complex relationship between restorative justice and existing justice procedures, and the importance of implementation. Silva’s (2017) research in Colorado found a relationship between the introduction of diversionary restorative justice, and the down-tariffing of children who would have received a community sentence previously. The impact on incarceration was limited, with most children who benefitted unlikely to have been imprisoned. Yet, novel interventions that seek to reduce outcome severity may up-tariff instead, as Guilfoyle (2021) suggests occurred with community sentences in England and Wales. To minimise intervention within Irish youth justice, court-ordered conferences must focus on children who face detention or another severe penalty otherwise; those whose offences and needs merit a strike out should receive such an outcome without additional intrusion. This is particularly important as restorative processes can result in children being subject to rehabilitative or reparative outcomes as part of the conference agreement. These may be experienced as intensive, involve greater obligations than a child would otherwise have faced (McAlister and Carr, 2014), and vary between similar cases (Tiarks, 2019), raising questions of proportionality, consistency and the overall intensity of a penal experience. There is also little to prevent a judge drawing negative inferences from an unsuccessful restorative justice process or non-compliance with agreed outcomes, potentially resulting in harsher, more disproportionate sentences.

Second, the research suggests that children can experience restorative processes as intense, depending on their needs and vulnerabilities, the participants’ identities and behaviours, and process delivery. Facilitators can act aggressively, dominate the process

and blame, shame or degrade children (Young, 2001). Furthermore, children who have language or learning impairments or are from lower social classes could be disadvantaged in a process that is contingent on expression (Hayes and Snow, 2013; Riley and Hayes, 2018) and favours middle-class forms of communication (Willis, 2020). Wood (2020) asks whether the accountability demanded of young people in restorative justice is redundant among those with a history of trauma and exclusion from economic and social capital. Children might struggle to express and reflect on their needs when confused and inclined ‘to do or say whatever [they think] needs to be said and done’ (Wood and Suzuki, 2020: 913). There are concerns regarding how children experience other participants: in a ‘room full of adults’ (Haines, 1998: 99), children might feel intimidated, too nervous to express emotions and remorse, and under pressure to agree to outcomes or to apologise (McAlister and Carr, 2014; Suzuki and Wood, 2018). Finally, whether a victim attends or not, participating parents may be ineffective supporters, or their weak social bonds with the child may help explain the offending in the first place (Wood and Suzuki, 2020).

There is also much research indicating the potential of restorative justice to aid in minimising intervention. Aside from diverting children from more intensive processes, facilitated dialogue with a victim may initiate or support desistance – thus avoiding punitive and adversarial experiences in the future (Bouffard et al., 2017; Robinson and Shapland, 2008) – while many victims go into restorative justice with pro-social motives to support the other person(s), especially if they are young (Van Camp and Wemmers, 2013). Yet, while the new Strategy contends that ‘upholding the best interest of the child (as defined above) is consistent with upholding the interests of society and vindicating the rights of victims’ (p. 33), the fact remains that these interests can clash. The informality of restorative justice and the punitive undercurrent of existing justice cultures can act in tandem to make restorative justice dangerously intense for the powerless.

### *Challenge 2: Enabling participation*

The need to enable participation relates to both restorative justice and restorative practices. The Strategy reflects Article 12 of the UNCRC, under which children have a right to be heard in matters affecting them. It also aligns with a focus on child participation in Ireland, exemplified by the National Strategy on Children and Young People’s Participation in Decision-Making (Department of Children and Youth Affairs, 2015). This section outlines some benefits of child participation, the barriers to child participation within restorative justice, and the potential for restorative practices to support a more participatory approach to youth justice.

Restorative justice assumes that we should enable those affected by a crime to participate in the response (Christie, 1977). The Council of Europe (2018) lists ‘stakeholder participation’ among its two ‘core principles’ of restorative justice (alongside ‘repairing harm’). Participation must be based on free and informed consent, and is characterised by dialogue between the parties who are ‘encouraged and supported to express their needs and to have these satisfied as far as possible’ (Rule 15), and who may determine agreements ‘as far as possible [. . .] based on the parties’ own ideas’ (Rule 52). Research in

numerous settings evidences child participation as improving children's outcomes and experiences. It can help children feel control over their lives and respected by others, cope with stresses and crises, and develop competencies, including resilience and self-esteem (Gal and Duramy, 2015). Participation also means children are more likely to experience the process as fair and to follow the decision made (Hall et al., 2015; Kohm, 2015). Those decisions may also be better if they incorporate children's ideas, creative solutions and valid views about their own interests, which may differ from adult professionals' assumptions (Bessel, 2015; Morag and Sorek, 2015).

As noted above, however, young people face significant barriers to participating meaningfully in restorative justice spaces, which rely on the ability to communicate effectively in a narrative, verbal form, within an emotional, stressful and intimidating setting (Bolitho, 2012; Lount et al., 2018; Riley and Hayes, 2018). This can be compounded when children experience other vulnerabilities. Children with communication difficulties and other neurodisabilities are typically over-represented in youth justice systems (Anderson et al., 2016; Baidawi and Piquero, 2021; Lount et al., 2017; Snow and Powell, 2011). While detailed information is not available about the extent of these issues among children in the Irish youth justice system, it has been found, for example, that children with attention-deficit hyperactivity disorder are overrepresented (Quigley and Gavin, 2018), and that 23 per cent of children in Oberstown had a diagnosed learning disability in the first quarter of 2019 (Oberstown Children Detention Campus, 2019). Another recent study in Ireland found that children often experience difficulties understanding and engaging in interviews in a police station – another space that relies on verbal expression (Forde and Kilkelly, 2021). This inability to communicate effectively can limit the potential benefits of restorative justice, and lead to a feeling of powerlessness among young people (Lount et al., 2018). Hence, in their critique of Christie's (1977) theory that crime is a form of property that professionals 'steal' from its 'rightful' owners, Wood and Suzuki (2020) ask whether children can realistically 'own' the conflict emerging from their offence. Research stresses that positive outcomes are more likely if facilitators fully prepare and follow up with participating children (Chapman et al., 2015; Suzuki and Wood, 2017), although high case-loads and institutional-cultural pressures can stop practitioners from investing sufficient time and resources in every case (Barnes, 2015; Marder, 2020a). Guidance from the Committee on the Rights of the Child (2019: para. 123) stresses the importance of specialist training for youth justice professionals. For restorative justice, this means that professionals should be trained in children's rights and factors affecting child development, if a child-centred and children's rights-compliant form of restorative justice is to be successfully implemented.

In presenting restorative practices as an overarching philosophy of practice, those who posit a definition often focus on its relational dimension (Calkin, 2021; Hopkins, 2015a; O'Dwyer, 2021). At the same time, commentators usually outline some participatory practices (e.g. circles and restorative questions) when describing how professionals can work 'restoratively' with persons over whom they have authority, or for whose welfare they are responsible. Circles are dialogic processes characterised by a group of persons sitting together in a circle, and the right to speak (or pass) revolving sequentially around those present. The structures of this process – that participants may not interrupt or

interject until their turn to speak – support participation by equalising voices and reducing power imbalances, permitting participants to articulate their thoughts and feelings in response to a question and engage in collective decision-making (Stuart and Pranis, 2006). The aim is to structure dialogue to enable equal participation irrespective of the participants – including in a family conferencing setting, among mixed groups of professionals and citizens (such as group work or decision-making in youth detention) or for professional consultations on organisational change (Council of Europe, 2018). Similarly, professionals can be trained to use restorative questions – open-ended questions that help professionals empower others to identify their needs and how these can be met – in one-to-one settings.

Studies on restorative practice implementation in youth (non-justice) settings (such as schools and child protection) often find the potential to de-escalate conflicts and enable participation. In the United Kingdom, for example, Leeds Children’s Services trained all its social workers in restorative practices to help families identify plans that would reduce children being taken into care. The evaluation (Mason et al., 2017) found that the number of children taken into care after training fell 21 per cent, but rose 1 per cent nationally. Similarly, a systematic review of research on restorative practices in schools found that most research observes a decline in the use of suspensions and other punitive measures (e.g. behavioural referrals), when schools use restorative processes to facilitate collective decision-making and de-escalation after harm (Weber and Vereenoghe, 2020). Restorative practices in Irish youth justice could have similar results, but a level of rigour yet to be seen in Irish criminological research (e.g. using cluster-randomised control trials) is needed to analyse the impact of this work (Acosta et al., 2016; Brown, 2021).

In lieu of such studies, whether restorative practices training facilitates participation (or, as in the Strategy, ‘child/family centred’ practices), likely depends on how it is understood and used. Every youth worker involved in police-led diversion is receiving training in restorative questioning and circles (O’Dwyer et al., 2021), while JLOs and Oberstown staff have received similar training. Yet, research in English prisons found that those trained in restorative practices can often confuse it with restorative justice, and are unsure how to implement their training (Calkin, 2021), even when their training is in-depth and accompanied by high levels of leadership commitment.

The nebulous, theoretical and multidimensional characteristics of restorative practices make implementation difficult in large, bureaucratic institutions with highly embedded existing rationales. Power imbalances between youth justice professionals and children in conflict with the law are acute, and a lack of meaningful participation by children can threaten the effectiveness and legitimacy of the process. Professionals can lack the skills or inclination to relinquish control, and are often subject to institutional pressures not to do so (Marder, 2020a). Indeed, while the Strategy lists *Meitheal* – a multi-agency model that seeks to involve children and families in problem-solving and avoid escalation into child protection – as another child/family centred process, a recent study found that its intensity and formality were barriers to participation and empowerment (Healy and Rodriguez, 2019).

These barriers, compounded when children experience a communication or other difficulty, mean that an effective system for facilitating meaningful participation is essential.



While a number of theoretical models that aim to support and encourage child participation exist, such as Shier's (2001) pathways to participation and Hart's (1992) ladder of participation, Ireland adopted Lundy's (2007) model of participation through the National Strategy on Children and Young People's Participation in Decision-Making (Department of Children and Youth Affairs, 2015). This highlights that participation is facilitated by ensuring that children have space, voice, audience and influence. Given the challenges in restorative justice spaces discussed above, the effort involved in ensuring children's participation is meaningful is considerable. Whether in receipt of restorative practices training or not, professionals have the discretion to retain or relinquish control as they see fit. Thus, supportive and administrative structures must also be revised to encourage participatory approaches and facilitate cultural change, and professional training must be adequate, ongoing and measured – not rushed or undertaken in the absence of follow up and evaluation (Committee on the Rights of the Child, 2019).

### **Conclusion: The Potential of Restorative Justice Within a Child-Centred Youth Justice Culture**

Experience from other jurisdictions demonstrates that restorative justice can be used in ways that are child-centred and developmentally appropriate, or that breach children's rights (Lynch, 2010). The Youth Justice Strategy (2021–2027) signals a renewed commitment to restorative youth justice in Ireland, as indicated by provisions to increase the use of restorative justice at various points of a child's contact with youth justice and to train professionals in restorative practices. Its guiding principles align with international children's rights standards, 'provid[ing] a lens through which youth justice policy is to be understood, delivered, assessed and monitored' (Department of Justice, 2021a). This means that it is timely to consider how restorative youth justice operates in Ireland, and how its development can be child rights-compliant (Gal, 2021).

We know little about practice in Ireland given the dearth of research and, despite the apparent emphasis placed on restorative approaches by various youth justice actors, there is reason to believe that restorative justice remains under-used and highly discretionary. The vision in the Children Act is not reflected in practice, and its future now interconnects with victims' and restorative justice policies. Children's experiences of restorative justice may change if mainstreaming decreases quality or victims play a greater role. The growing role of victims must also not come at the expense of the involvement of the family, their centrality being a key advantage of the statutory framing of youth conferencing in Ireland (Kilkelly, 2014). However, international legal frameworks and research evidence are clear that we must minimise the intensity of justice and maximise child participation to support desistance and improve children's experience of public services. As such, restorative justice processes must be limited in their intensity, prioritise children's rights and used to divert children from punitive outcomes (such as imprisonment and criminal records) and adversarial processes (such as court). Beyond the criminal procedure, restorative practices should aim to promote more participatory and collaborative forms of decision-making across youth justice practice.

Much depends, however, on how these ideas are understood and applied. There is a need for definitional clarity around both so that institutions, practitioners and citizens can understand precisely the Department of Justice's intentions. This would enable practitioners to adopt a more strategic and consistent approach to facilitation that adheres to international standards for children in conflict with the law generally, and restorative justice delivery in particular. Legal issues relating to diversion – such as the desirability of legal advice pre-diversion and during the restorative process – were highlighted previously, but remain unresolved in Ireland (Becroft, 2012; Brennan, 2012; Campbell, 2005; Hopkins, 2015b; Lynch, 2007). Training and human resources are essential across all youth justice, ensuring that professionals have knowledge of children's rights, child development, the needs of marginalised and vulnerable groups, and the available diversionary procedures, *inter alia* (Committee on the Rights of the Child, 2019; International Juvenile Justice Observatory, 2018). Restorative justice facilitators and practitioners must be afforded the time and skills to deliver safe, meaningful participation, adequately prepared for and followed up (Haines and Case, 2015), that supports children to comply with action plans without responsabilising them for the structural barriers to engagement and desistance that are beyond their control (Smith and Gray, 2019). In its recent Practical Guide to Implementing Restorative Justice with Children, the International Juvenile Justice Observatory (2018) note a number of further considerations when working with children, relating to language, posture, tone of voice and clothing. This highlights the level of specialism and forethought required for (restorative) justice to be child-friendly. Like all justice services, restorative justice providers must also build the capacity and flexibility to meet the needs of neurodivergent and culturally and linguistically diverse populations.

There is a pressing need to monitor and evaluate restorative justice and restorative practices' outcomes. Independent data collection and analysis are essential, given the risk that discretion results in discriminatory outcomes. For example, research in Australia found that Aboriginal and Torres Strait Islander children were much less likely to benefit from these measures as compared with non-indigenous children (Cunneen et al., 2021). Services must record and publish quantitative data regarding the types of cases involving restorative justice, the reasons why cases are deemed inappropriate, demographics of participants, case outcomes, and the reasons why children fail to comply with agreements. National guidelines on restorative justice can incorporate minimum recording requirements, and detail specific regulations as to its use with children to avoid discrimination and to articulate what rights compliance looks like. Researchers must have access to data and be invited to observe and interview practitioners and participants to support monitoring and evaluation, including on the effectiveness of training, the gaps between policy and practice, and the ways in which services can constantly improve and adhere to international law and evidence. This will help develop the scientific understanding of the impact of this work on children and its appropriate role in youth justice reform, and provide conceptual clarity as to the meaning of restorative justice and restorative practices in the Irish context. Children should participate in designing and conducting this research, in line with Article 12 of the UNCRC.

While minimally punitive in its rhetoric, the Strategy's emphasis on ever-earlier intervention may give pause for thought. 'For me', the responsible Minister contends in a

foreword, ‘a key priority is prevention and early intervention’ (p. 1). His later remark, that ‘we should be engaging young people at risk before they enter the justice system’ (p. 1), reflects an action to identify the ‘estimated [. . .] 1000 children [. . .] at risk of becoming serious offenders’ (p. 24). Those youth workers who usually focus on children who are admitted to the Diversion Programme will be responsible for engaging with children aged 8–11 years, although Ireland’s age of criminal responsibility is (generally) 12 years. Yet, McAra and McVie (2010, 2013) also observed that identifying and intervening early with at-risk children, even informed by welfarist concerns, can have a labelling effect that makes entrenchment in criminal justice more likely going forward. As such, while welcoming elements of the Strategy, the Irish Penal Reform Trust (2021) expressed unease that support for young children with complex needs is emerging from a justice (rather than a child or schools) strategy. The desire to help and concern for children’s welfare is essential, but not enough. Practices must also be evidence-based, and should be justice-led only when absolutely necessary.

Used to their full potential, restorative justice and restorative practices can help reduce children’s exposure to adversarial and punitive approaches. Yet, they need also not to perpetuate the falsehood that (justice) professionals know best and intervention is always the answer. Entrenchment in the system is as or more criminogenic as the structural and developmental factors that help explain youth crime in the first place, but which, for the vast majority of children, become much less influential by young adulthood – without the need for formal, state intervention (McAra and McVie, 2010, 2013). Policymakers and professionals must balance their desire to help and protect, with the reality that the options available to them for action are not always helpful or protective. To the extent that restorative youth justice gives them the language and the tools to de-escalate and collaborate with children, these concepts can enable a child-centred and rights-compliant future.

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### ORCID iDs

Ian D. Marder  <https://orcid.org/0000-0003-3293-7730>

Louise Forde  <https://orcid.org/0000-0003-1826-5616>

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### Author biographies

Dr. Ian D. Marder joined the Maynooth School of Law and Criminology, Maynooth University, as Assistant Professor in Criminology in May 2018. His research focuses on restorative justice, restorative practices, sentencing and criminal justice reform.

Dr. Louise Forde joined Brunel Law School, Brunel University London, as Lecturer in Law in September 2020. Her research interests lie primarily in the areas of youth justice and children’s rights law.