

Youth Justice Strategy

Theme 2 – Diversion

Discussion Document

Introduction

This paper is intended to facilitate discussion within the Steering Group on possible strategic objectives for the Youth Justice Strategy in relation to Theme 2 – Diversion. Following discussion and broad agreement on a set of draft strategic objectives, the next step will be to formulate a set of specific actions with specified responsibility for delivery within timescales as per the following template:

| Theme | Strategic objective | Action | Who and when |
|-----------|---------------------|--------|--------------|
| Diversion | A | | |
| | B | | |
| | C | | |
| | D | | |

Context

There is considerable overlap with many of the issues which feature under Theme 1, Prevention and Early Intervention, in particular the need for enhanced collaborative approaches between various agencies and community partners.

International Standards on Diversion

Article 40 (3) of the UN Convention on the Rights of the Child, states:

“Whenever appropriate and desirable, measures for dealing with such children [should be employed] without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”

However, UN and other international standards are clear that legal and procedural safeguards must also be in place in order to protect the rights of children.

The central requirements can be summarised as follows:

- Diversion from the formal criminal justice system should be a central part of the youth justice system
- Opportunities to divert young people should be explored at various stages throughout the criminal process

- Young people's legal and procedural rights should be safeguarded within any diversion process
- Diversion should be used only when there is compelling evidence that the child committed the alleged offence
- Diversion should not be limited only to first-time offenders or those who commit minor offences
- The young person must admit his/her part in the commission of the alleged offence, and consent to the diversionary measure being proposed by the authorities before diversion can take place. This must be given freely and voluntarily, fully informed and given in writing
- Young people are entitled to be adequately informed about the diversion system, and what the proposed diversionary measure entails, and the possible consequences of either admitting or refusing to admit responsibility to the offence, or giving their consent
- Young people must have an opportunity to receive legal advice before making admissions or giving the necessary consents
- No further legal consequences should follow for a child who successfully completes the diversionary measure; any records kept should not be used as a criminal record
- Professionals working with young people should be fully trained and qualified
- Young people must be treated in line with their best interests (Art. 3 CRC), have the opportunity to have their views heard (Art. 12 CRC), and to have their life and development protected

What do we mean by Diversion?

The new Youth Justice strategy needs to be clear about the intended purpose of Diversion. Is the objective to –

- make reparation for offences?
- improve life choices?
- prevent contact with formal Criminal Justice system?
- prevent future crime?
- or simply promote the best interests of the child?

Essentially, Diversion should involve policies and measures that attempt to address a situation where a young person has already had some degree of contact with the Justice system. This includes where the young person has committed an offence or where their peer group/family members are involved in criminal or anti-social behaviour.

In practice, Diversion involves actions by Gardaí, principally Juvenile Liaison Officers, (JLOs) and community partners, principally providers of Garda Youth Diversion Projects (GYDPs). The JLOs and GYDPs should be able to work with other agencies that can provide complementary supports to children and families.

Who do we want to divert?

In discussions on Prevention and Early Intervention, the Steering Group considered how mainstream services such as schools, social workers and family support programmes can provide enhanced coordinated support children and families with multiple disadvantages towards positive life choices. The discussion on Prevention and Early Intervention focussed on how supports are designed for the age-group under the general age of criminal responsibility (12).

In approaching Diversion, we are looking at much the same group of families and children but with a closer focus on those who have, in some way, come to Garda attention. This will include those considered for Diversion, (running at about 9,500 annually) and an undetermined number who may be “on the fringes” of criminal activity. A rough estimate of these might be attempted from participants in GYDPs where in the region of 40% are considered “secondary” referrals, i.e. an offence has not been confirmed. This would add a further 3,800, giving a total of 13,300 who might benefit from diversionary measures. Based on Census figures, this would equate to 3.5% of the approximately 375,000 thousand aged 12-17 years.

However, there is more to consider. Emerging issues include a need to consider how the overall Diversion system (in particular the community based projects) can address offending behaviour by children under 12, and some pilot initiatives for the 8-12 years group are being undertaken. Similarly, there is a strong impetus to develop diversionary measures as an alternative to prosecution and detention for some offenders over 18 years of age, in line with recommendations of the Strategic Review of Penal Policy (2014)¹. The relevance of Diversion for this age group is underlined by crime figures which show a peak for offending in late teenage and early twenties and developments in neuroscience which show that full neurological maturity does not occur until around the age of 24.

An important cohort who may be subject to diversionary measures are those who already have a significant history of offending but may benefit from special diversionary measures in the community to support different life choices. Therefore, the infrastructure for Diversion should overlap and align with measures to support re-integration of young offenders who have been in detention.

In light of the above discussion we could develop a much broader view of Diversion which encompasses the role of many agencies and community partners, and which would aim to support or intervene with a much larger number of children and young people.

How do we want to divert?

At present, diversion by Gardai is initiated after an offence is admitted and there is a *prima facie* case to support a prosecution. Key actions include

- Garda cautions

¹ *Strategic Review of Penal Policy – Recommendation 4 p.34*
<http://www.justice.ie/en/JELR/Strategic%20Review%20of%20Penal%20Policy.pdf/Files/Strategic%20Review%20of%20Penal%20Policy.pdf>

- JLO Supervision
- Referral to GYDPs (and related projects)*

**GYDPs include a broader cohort of participants, including many who have not committed an offence.*

If offending continues after these actions, the next step is prosecution and Court-imposed sanctions, including Detention.

Even though GYDPs may engage with a significant proportion of those on the fringes of criminal activity, there is scope for considering if the overall diversionary structures can provide a more nuanced and tiered approach. Given that there will be variations in the effective implementation of the existing measures, and that early engagement with the formal Justice system may increase the likelihood of continued offending behaviour, we should consider if we can build in more opportunities to divert people away from formal prosecution and Court procedures. The Bail Supervision Scheme which is currently being piloted is a relevant example.

So, as well developing the existing measures we can consider if there are other opportunities to allow for diversion from formal Criminal Justice processes. These might include “light touch” diversion for minor initial offending as well as possibilities within the formal Justice system. This might include deferral of prosecution or withdrawals of charges. Such measures could be subject to compliance with conditions (e.g. mentoring, participation in Education or GYDP etc.) This might also involve an informal pre-hearing of a case to determine if all reasonable diversionary measures have been attempted and if there is merit in further efforts in lieu of a full prosecution. Such a system could provide a sort of “backstop” to assess if the earlier parts of the diversion system had been effectively applied, or if the inclusion of other services or supports might support a better outcome. Of course, all of this would require careful consideration, including examples from other jurisdictions, but in principle we should try to include as many opportunities as possible for keeping young people out of the formal Justice system.

To achieve more than the existing systems and programmes, and to engage more effectively with the different groupings of young offenders discussed above, we could consider a continuum of Diversionary measures, (overlapping with post-detention measures), along the following lines set out on the attached table.

Legislation

The Children Act 2001 provides the existing basis for the Garda Diversion Programme. The existing ancillary support programmes such as GYDPs do not have a specific statutory basis. The Act provides for the consideration of cases for the Diversion programme by the Director of the Programme and, if accepted, the administration of Garda Cautions and supervision by a Juvenile Liaison Officer.

The current provisions in Section 23 of the Children Act require that admission to the Diversion programme is conditional on acceptance of responsibility for a crime or

anti-social behaviour. In practice, the approach taken to admission to the Garda Diversion Programme has evolved from the less formal procedures that were in place before the Children Act 2001. This included some situations where a young person was on the fringes of criminal activity and could be considered for Diversion even though an offence might not be confirmed. Garda procedures have since been tightened based on the need for a *prima facie* case that a child has committed an offence to allow for admission to the Diversion programme. This ensures that

- Diversion measures are directed only at those actually involved in crime (in accordance with international standards)
- Cases, which after examination are not suitable for diversion, have a reasonable prospect of successful prosecution

The development of this approach to Diversion was highlighted at meetings of the Policing Authority with the Garda Commissioner earlier this year, which focussed on lapses in Garda handling of cases deemed unsuitable for Diversion. During those discussions, concerns were raised that young people might escape diversion, prosecution or any other form of intervention due to the application of an evidential threshold for admission to the Diversion programme. While underlining the need for uniform and legally robust procedures to enable Gardaí operate the existing system, the Commissioner acknowledged that there are policy implications arising from the tightening of procedures for admission to the Diversion programme.

Other Issues

In addition to maximising the development of Diversionary measures there are a range of related issues which should be addressed as part of the new Youth Justice Strategy. Some of these also featured in the discussions of a Garda Review Group chaired by retired Judge Gillian Hussey, which completed its work earlier this year. While that review was conducted primarily for the Garda organisation, the relevant national policy issues are also discussed in document.

Approaching Reform

There is a clear need to realign policy, legislation and practice, drawing on the practical experience of An Garda Síochána, ODPP, IYJS, Probation Service and community partners in relation to the operation of the current systems.

It will also be important to take account of the views of the Policing Authority, which has conducted an in-depth examination of the handling of youth crime cases. In addition, the Garda Síochána Inspectorate has made specific recommendations on the development of a more integrated approaches to Diversion and Youth Justice services generally.

There is also a clear need to provide consistent and effective monitoring of the way diversion and other measures support (or not) the best interest of children who come in contact with the Justice system, and of society in general. The existing Monitoring Committee provided by Section 44 of the Children Act is not fully equipped and its remit is too narrowly focussed to achieve this. We can't simply focus on Diversion, as defined in the Children Act, as our response to youth crime –

we need to continually evaluate the combined contribution of all State and State-sponsored efforts.

The report of the Commission on the Future of Policing in Ireland (CoFPI) has redefined policing in terms of human rights and the prevention of harm. Diversionary measures align very well with these principles. The development of a future approach to Diversion will need to align with the implementation of the CoFPI report and the role of the (yet to be established) Policing and Community Safety Oversight Commission recommended by CoFPI.

A possible Strategic Approach

It is proposed that the new Youth Justice Strategy will significantly expand our view of Diversion, as discussed above, to encompass a range of policies and measures that attempt to address situations where a child or young person has already had some degree of contact with the Justice system.

The following set of draft strategic objectives and actions are proposed for discussion by the Steering Group with a view to inclusion in the new Strategy.

Principles and Priorities

- We will ensure that Diversion of Children and Young People from crime and anti-social behaviour is approached as a collaborative endeavour involving joint-agency actions to support behavioural change, with JLO and other Garda roles explicitly linked to other appropriate interventions and services, including GYDPs.
- We will ensure a close and sustained focus on children with patterns of serious and persistent offending
- We commit to the continual development of adequately resourced mechanisms to continually monitor and provide assessments, based on evidence (including the views of children and young people), of the contribution of diversionary and related interventions and measures to outcomes for children who might come in contact with the Justice system
- Ensure that a record of involvement in any Diversionary measures or programme does not disadvantage a person at a later stage, including in relation to Garda vetting.

Systems and Programmes

- We commit to the ongoing development and refinement of a range of diversionary measures, including community based programmes, which can be adapted as required to changing circumstances and emerging issues
- We will support close monitoring of the progression of all youth crime cases from initial contact with Gardaí through to prosecution in Court, including the provision of enhanced data on all aspects of the handling of youth crime, including Diversion
- We commit to the continuing development of efficient systems, supported by adequate resources, to enable prompt decision making, recognising that

significant time delays can equate to a lack of consequences for young offenders

- We will ensure that our systems provide for consequences and actions to deal with non-compliance with Diversion conditions
- We will ensure that systems will provide for the continuing application of appropriate diversion measures for young people when they turn 18
- We commit to the development of appropriate diversionary measures in relation to young adults between the ages of 18 and 24, and for children under the age of criminal responsibility.

Procedures and Practice

- We will establish decision-making processes for cases considered for Diversion which are guided by the principles underpinning the Youth Justice Strategy and benefit from necessary inputs from relevant agencies and experts.
- We will devise flexible procedures to address the circumstances of individual cases to support diversion from further criminal or anti-social activity, including
 - a level of discretion to Gardai to dispose of minor offences
 - enhanced support for the consideration of serious offences, including specialist and cross-agency inputs
 - appropriate responses to sexual offences, including the misuse of digital platforms
- We commit to the provision of clear and complete information, in an understandable way, to children and young people (and adult guardians) about the operation of any diversionary measures
- We will develop suitable review/appeal mechanisms open to children and young people and to victims of crime on decisions made in relation to the Diversion programme
- We commit to continually develop and refine the appropriate use of restorative practices, involving families of children and young people as well as victims of crime.
- We will support the provision of enhanced training to Gardai, including relevant specialised training and foundational programmes for all Gardai on working with children and young people and the practical application of diversionary principles.