

# making rights real for children:

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A Children's Rights  
Audit of Irish Law

CHILDREN'S  
RIGHTS  
ALLIANCE

Uniting Voices For Children



**The Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.**

Ag Eisteacht  
Alcohol Action Ireland  
Alliance Against Cutsbacks in Education  
Amnesty International Ireland  
Arc Adoption  
The Ark, A Cultural Centre for Children  
ASH Ireland  
Assoc. for Criminal Justice Research and Development (ACJRD)  
Association of Secondary Teachers Ireland (ASTI)  
ATD Fourth World - Ireland Ltd  
Atheist Ireland  
Barnardos  
Barretstown Camp  
BeLonG To Youth Services  
Bessborough Centre  
Carr's Child and Family Services  
Catholic Guides of Ireland  
Childhood Development Initiative  
Children in Hospital Ireland  
City of Dublin YMCA  
COPE Galway  
Cork Life Centre  
Crosscare  
Dental Health Foundation  
DIT - School of Social Sciences & Legal Studies  
Down Syndrome Ireland  
Dublin Rape Crisis Centre  
Dun Laoghaire Refugee Project  
Early Childhood Ireland  
Educate Together  
School of Education UCD  
EPIC  
Focus Ireland  
Forbairt Naionraí Teoranta  
Foróige  
Gaelscoileanna Teo  
GLEN - Gay and Lesbian Equality Network  
Headstrong - The National Centre for Youth Mental Health  
Healthy Food for All  
Immigrant Council of Ireland  
Inclusion Ireland  
Independent Hospitals Association of Ireland  
Inspire Ireland  
Institute of Community Health Nursing  
Institute of Guidance Counsellors  
International Adoption Association  
Irish Association of Social Care Workers (IASCW)  
Irish Association of Social Workers  
Irish Association of Suicidology  
Irish Autism Action  
Irish Centre for Human Rights, NUI Galway  
Irish Congress of Trade Unions (ICTU)  
Irish Council for Civil Liberties (ICCL)

Irish Foster Care Association  
Irish Girl Guides  
Irish Heart Foundation  
Irish National Teachers Organisation (INTO)  
Irish Penal Reform Trust  
Irish Premature Babies  
Irish Primary Principals Network  
Irish Refugee Council  
Irish Second Level Students' Union (ISSU)  
Irish Society for the Prevention of Cruelty to Children  
Irish Traveller Movement  
Irish Youth Foundation (IYF)  
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National Childhood Network  
National Organisation for the Treatment of Abusers (NOTA)  
National Parents Council Post Primary  
National Parents Council Primary  
National Youth Council of Ireland  
One Family  
One in Four  
Parentline  
Parentstop  
Pavee Point  
Peter McVerry Trust  
Rape Crisis Network Ireland (RCNI)  
Realt Beag  
SAFE Ireland  
Saoirse Housing Association  
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Simon Communities of Ireland  
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The UNESCO Child and Family Research Centre, NUI Galway  
The Guardian Children's Project  
The Prevention and Early Intervention Network  
Treoir  
UNICEF Ireland  
Unmarried and Separated Families of Ireland  
youngballymun  
Youth Advocate Programme Ireland (YAP)  
Youth Work Ireland

**We would like to thank our partners in helping to produce **Making Rights Real for Children: A Children's Rights Audit of Irish Law** including the Public Interest Law Alliance (PILA) and members of the legal community.**

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## About this publication

The Children's Rights Alliance and the Law Centre for Children and Young People have come together to develop this unique publication *Making Rights Real for Children: A Children's Rights Audit of Irish Law*. We initiated this project to capitalise on the achievements of the 2012 Children's Referendum, which strengthened children's rights in the Irish Constitution.

This report builds on an initial study conducted by Professor Ursula Kilkelly on behalf of the Ombudsman for Children, *Barriers to the Realisation of Children's Rights in Ireland*, published in 2007. Each chapter is authored by a different legal expert in their field and has been peer reviewed. The result is a solid picture of the current legal protection that exists for children in Ireland as well as an overview of the gaps that remain in the recognition of their rights. There is a firm focus on the UN Convention on the Rights of the Child, the European Convention on Human Rights and the Constitution. Recommendations are made to further strengthen children's rights taking account of existing jurisprudence and practice. Proposals given provide a concrete foundation for future law reform.

In essence, this is a timely and relevant stock take of Irish law to guide law makers, policy makers, government and other stakeholders on where further action is needed to legislate to protect children's rights in Ireland, as well as to identifying potential areas for future litigation.

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## Introduction

### Professor Ursula Kilkelly

The UN Convention on the Rights of the Child (CRC) is well established as the most important, comprehensive international law recognising the rights of children under 18 years. Notable in its breadth of provision, the CRC's many articles cover children's rights in all aspects of their lives from education, to healthcare, to parental care. It provides for the rights of children in particular circumstances, like children in conflict with the law, children with disabilities and migrant and refugee children, and although it acknowledges the important role played by children's families it recognises the child as the rights holder and the State as the ultimate duty bearer. The CRC has been supplemented by many other international treaties from the Council of Europe, the United Nations and the European Union and there is now extensive, detailed guidance available to States as to how to give effect to children's rights in practice. Important additions here include the European Guidelines on Child-friendly Justice, adopted by the Council of Europe in 2010, and the 18 General Comments adopted to date by the United Nations Committee on the Rights of the Child. States cannot be said to lack meaningful benchmarks against which their treatment of children can be measured.

When Ireland became a party to the Convention on the Rights of the Child in 1992, it undertook under Article 4 to take all measures to implement CRC rights. Building on this obligation, the Committee on the Rights of the Child has noted the importance of giving the provisions of the CRC effect at national level through legal measures of implementation. Research has shown the increasing extent to which States Parties to the CRC have given express protection in national law to the Convention's provisions and that giving constitutional expression to children's rights is now a growing trend. National law and policy that serves to promote and protect children's rights does not simply serve to implement the CRC in theory, it also supports the better implementation of children's rights in practice.

According to research, States in which national laws make strong legal provision for children's rights and in which children's rights are legally enforceable are also those in which children's rights are most likely to be protected. Although non-legal measures are also important to give rights practical effect, there is nonetheless a correlation between strong legal provision for children's rights and the extent to which those rights are enjoyed by children in practice.

Following its ratification of the CRC in 1992, Ireland initially saw very slow progress in the incorporation of the CRC into Irish law. For example, the Education Act 1998 made few references to children's rights other than the right to education already protected by the Irish Constitution and although the Non-Fatal Offences Against the Person Act 1997 made provision for the right of the 16 year old child to consent to certain medical

treatment it did not address the more general principle of the child's right to participate in decision making.

However, more recent years have seen some important advances in the reform of Irish law, some of which has been in line with the CRC. For instance, the enactment of the Children Act 2001 dealing with children in conflict with the law made welcome provision for the principle of detention as a measure of last resort (Art 37 CRC) and the right of children to be heard in criminal proceedings (Art 12 CRC). The enactment of the Children and Family Relationships Act 2015 saw the incorporation into private family law of CRC general principles on the best interests of the child (Art 3 CRC) and the right of the child to have a say in decision-making (Art 12 CRC) and 2015 also saw the enactment of the decision of the people in 2012 to insert into the Irish Constitution a provision dedicated to children. At the same time, large areas of national law are silent on children's rights.

Areas like immigration law and socio-economic rights, such as housing and welfare support, continue to lack express provision for children's rights and children continue to be denied full access to equality law (on the ground of age), nor can they litigate in their own right. There is much still to be achieved in the realisation of children's rights in Irish law.

This publication by the Children's Rights Alliance with the Law Centre for Children and Young People is a very welcome addition to the literature on the implementation of the CRC in Ireland. Following the well-established approach of comparing Irish law and policy with the standards in the CRC, the Audit's contribution is to bring together traditional areas of child law – like alternative care, family law and youth justice – with areas that are less often considered from a children's rights perspective. Sections addressing the children's rights issues concerning welfare and material deprivation and immigration and asylum law are particularly important. In this way, the Audit highlights areas of particular importance to especially vulnerable children, while the focus on non-discrimination and children's access to justice reflects rights of importance to all children.

It is well established that in order to improve compliance with children's rights a thorough and detailed assessment of the current state of implementation is essential. I would like to congratulate the two organisations involved with this publication in bringing together the many authors whose expertise fills its pages. It will make an important resource for everyone seeking to advance children's rights in Ireland.

**Professor Ursula Kilkelly** is the Dean of the School of Law at University College Cork where she also directs the Child Law Clinic. She is a Board member of the Law Centre for Children and Young People.

# CHAPTER 1:

## Non-Discrimination and Equality

Eilis Barry, BL

### 1.1 INTRODUCTION

Equality is a highly contested and controversial concept, '[t]here are different shades of equality',<sup>1</sup> it can mean widely different things, whether it is viewed as the most fundamental of human rights, the 'sovereign virtue' or a vague nebulous concept.<sup>2</sup> It can be linked to a minimalist equality of opportunity or a more substantive equality of outcome.

The issue of equality and the rights of children is very wide ranging. The language of equality and children featured famously in the promises contained in the Proclamation of 1916 to '[guarantee] religious and civil liberty, equal rights and equal opportunities to all its citizens' and to '[cherish] all of the children of the nation equally'. It also features in Article 2 of the UN Convention on the Rights of The Child (hereinafter the CRC) which provides that State Parties shall respect and ensure the rights set forth in the Convention 'without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

There is a complex web of regulation in relation to equality and protection against discrimination in Irish law. The panoply of legal instruments include but are not limited to Bunreacht na hÉireann, EC law, including treaty provisions, the EU Charter of Fundamental Rights, and EU anti-discrimination Directives. It further includes the domestic equality legislation in the form of the Employment Equality Acts 1998 to 2011 (hereinafter referred to as the EEA), the Equal Status Acts 2000 to 2012 (hereinafter referred to as the ESA).<sup>3</sup> There are also anti-discrimination provisions in other domestic legislation such as the Education Acts.<sup>4</sup>

While children are largely absent from these overlapping and intersecting legal instruments, they nonetheless benefit to varying extents from the provisions that are of general application.

There will be a particular focus in this chapter on the provisions of the ESA, which apply generally and are not explicitly aimed at children. A striking feature of the ESA is that it is one of the few pieces of domestic legislation that provides legally enforceable rights for children, in areas such as education, housing and services for children with disabilities. These rights are comparatively easy to enforce at least at first instance before the

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1 Colin Harvey, 'The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland', in Colin Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford Hart 2001).

2 See further, Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) See further, Margurete Bolger, Claire Bruton and Cliona Kimber, *Employment Equality Law* (Roundhall 2012) Chapter 1 and O Cinnéide, 'Aspirations Unfulfilled: The Equality Right in Irish law' (2010) IHRLR 41.

3 And also the discrimination provisions in s 19 of the Intoxicating Liquor Act 2003.

4 For example s6(c) of the Education Act 1998 provides that every person concerned in the implementation of the Act shall have regard to a number of objects including 'to promote equality of access to and participation in education.'

Equality Tribunal, which was the quasi-judicial body established to investigate hear and decide the majority of claims under the equality legislation. The chapter will highlight provisions that have particular relevance to Traveller and Roma children and children with disabilities. The significant exemptions and other provisions in the ESA, which limit the potential of the ESA in the area of equality rights for children, will be highlighted. There will also be a reference to the new positive duty imposed on public bodies by section 42 of the Irish Human Rights and Equality Commission Act 2014.

## 1.2 THE IRISH CONSTITUTIONAL CONCEPT OF EQUALITY

The natural starting point for any discussion on equality is the guarantee in Article 40.1 of Bunreacht na hÉireann that 'all citizens shall, as human persons, be held equal before the law'.<sup>5</sup> Article 40.1 may in theory grant a high level of protection to the right to equality of treatment, but in actuality its interpretation and application by the Courts does not afford much potential for the enforcement of equality rights in the realm of economic, social and cultural rights that may have particular relevance to children. Ó Cinnéide has commented that:

Irish constitutional law has rarely benefited disadvantaged or unpopular minority groups in society. Homosexuals, non-nationals, members of the Traveller community and the disabled have found it difficult to secure any constitutional foothold to challenge discriminatory legislation or policy.<sup>6</sup>

Doyle argues that in interpreting Article 40.1 the courts have adopted a restrictive concept of equality and that they have interpreted that conception in a restrictive way.<sup>7</sup> They have regularly adopted an interpretation of the phrase 'as human persons' which practically foreclosed all equality arguments. The courts consistently subordinated the equality guarantee to other norms in the Constitution. Finally, the courts evolved tests for the infringement of Article 40.1 which required deference to legislative judgment, for instance, not only as to whether there was a good reason to derogate from equality.

The elevation of property rights over the equality principle can be seen in the Employment Equality Bill reference, where the Supreme Court found that private employers could not be required to bear 'excessive burdens' by the legislative requirement to make reasonable accommodation for disabled persons.<sup>8</sup> The absence of any consideration of the right to equality and the State interest in preventing

discrimination is striking in the majority judgments in the *Portmarnock Golf Club case*.<sup>9</sup> The marginal role afforded to equality is most evident in the recent judgment in *Fleming v Ireland*,<sup>10</sup> where the Supreme Court found rather starkly, that as there is no right to commit suicide, 'so issues, such as discrimination do not arise; nor do values such as dignity, equality or any other principle under the Constitution, apply to the situation'. Indeed it would appear from the Supreme Court judgment in *Fleming* that there are substantial difficulties in interpreting Article 40.1 in a way that would extend the principle of equal treatment before the law to indirect discrimination.

This is in stark contrast to the EU Anti-Discrimination Directives, which contain provisions on discrimination, including explicit provisions on indirect discrimination. They also contain provisions on harassment, victimisation and a shifting onus of proof and positive action. These provisions are mirrored in the implementation of domestic equality legislation.

The differences between the Irish Constitutional model and the European concept of equality can also be seen in their scope, content, the extent and level of available defences, allowable exemptions and justifications. There is a notable emphasis on effective remedies and enforcement in the case law of the Court of Justice of the European Union (CJEU), which is very evident in the case law of the Equality Tribunal and the Labour Court in decisions on claims under the domestic equality legislation. These differences mean that it may be preferable to give some consideration to constructing an equality claim in respect of children as a claim under the ESA.

This difference between the Irish Constitutional model of equality and the European concept of anti-discrimination is most stark when the superior courts interpret statutory definitions contained in the provisions of the ESA. This is evident in the recent judgment of the Supreme Court in *Stokes v Christian Brothers High School Clonmel*,<sup>11</sup> which considered a claim of indirect discrimination on the Traveller ground under the ESA, concerning the controversial issue of schools admissions policies. It is noticeable that the judgment, which sets a high bar for proving indirect discrimination, makes no reference to the considerable case law of the CJEU on indirect discrimination.

In formulating an equality claim in respect of children, the concern would be that the Constitution is less used as a sword to successfully fight anti-discrimination claims, but more as a shield to defend anti-discrimination claims. It is a cause of concern for the discourse of equality and children that such a marginal and subordinated role is allocated to equality in the Constitutional order of values.

5 The equality guarantee in Article 40.1° of Bunreacht na hÉireann muted than the for example the Article 9(3) of the South African Constitution and s15 of the Canadian Charter for Rights and Freedoms.

6 Ó Cinnéide (n2) 55-56.

7 Oran Doyle, *Constitutional Equality Law* (Roundhall 2004).

8 *In Re Employment Equality Bill 1996* [1997] 2 IR 321.

9 *Equality Authority v Portmarnock Golf Club & ors* [2009] IESC 73.

10 *Fleming v Ireland* [2013] IESC 19.

11 *Stokes v Christian Brothers High Scholl Clonmel* [2015] ELR113.

There have not been a large number of cases involving the equality guarantee and the rights of a child per se. In her dissenting judgment in *DG v Eastern Health Board*,<sup>12</sup> Denham noted that the Constitution clearly envisages equality being affected by differences in capacity. Thus, the mere fact that an order for detention made in respect of the applicant could not be made in respect of an adult does not per se render it unconstitutional. However, she went on to hold that the detention of a child for his own protection in a penal as opposed to a childcare institution did violate the child's right to equality.<sup>13</sup>

Deference to the legislative judgment is evident in *Byrne (a minor) v Director of Oberstown School*<sup>14</sup> where Hogan J. invoked Article 40.1 and found that young offenders detained at Oberstown School were entitled to the same remission in their sentences as young offenders detained in St Patrick's Institution. He found that a custodial regime, which brings about such a sharp difference in terms of the release dates of offenders simply because of the location of the place where they served their period of detention, engages the application of the equality guarantee. He stated that such a starkly different treatment of otherwise similarly situated young offenders could be objectively justified if it could be shown that the detention at Oberstown was essentially different and served fundamentally different purposes in terms of criminal justice policy than detention regimes operating elsewhere within the juvenile justice system. He accepted fully the laudable goals, aims and aspirations of Oberstown and accepted further that the applicant could probably personally benefit from an extended stay in such a controlled environment. However, he found that the language and structure of the Act entirely negatives any argument that Oberstown is essentially different in this respect from other detention centres.<sup>15</sup>

### 1.3 THE EU CHARTER OF FUNDAMENTAL RIGHTS

Within the wider EU Framework, the Equality Chapter in the Charter of Fundamental Rights of the European Union (hereinafter the Charter) contains the guarantee of equality before the law in Article 20. The non-discrimination provisions in Article 21.1

prohibit 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'.<sup>16</sup>

It is noteworthy that the provisions in relation to the rights of children are included in the Equality Chapter of the Charter. Article 24 provides that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be considered. The inclusion of a specific provision on children in the Charter is symbolic and represents a significant new phase in the EU's relations with children. Furthermore, the rights provide an additional framework within which to examine policies and decisions concerning children.

The rights provided for in the Charter should not be overstated as their justiciability may be limited and it will be some time before their full potential is realised. The rights are confined to situations falling within the scope of EU law.<sup>17</sup> However, the Charter is undeniably applicable in areas that come within the scope of the EU anti-discrimination Directives. These Directives are implemented into Irish law by the equality legislation; in particular, the ESA implements the Race Directive and the Gender Goods and Services Directive. Therefore the Charter has resonance in the provisions of the ESA that implement the Race and Gender Goods and Services Directives.

#### The EU Anti-Discrimination Directives- Pregnancy, Work Life Balance

The Gender Recast Directive, the Race Directive and the Framework Employment Directive prohibit discrimination, harassment and victimisation in employment, self-employment, pay and pensions on the grounds of gender, race and ethnic origin, disability, age, sexual orientation and religion. The scope of the EEA 1998-2004 primarily matches<sup>18</sup> the scope of the Gender Employment Directive and the Framework Directive and the employment-related provisions of the Race Directive.

At first glance the employment-related provisions of the EU directives would not seem to have any relevance in relation to the equality rights of children. However, a number of EU directives are the source of much of the obligations in relation to family friendly rights, such as minimum periods of maternity leave, rights to adequate allowances while on maternity leave, protection for workers who are breastfeeding, parental leave and force majeure entitlement. The Recast Gender Directive and the significant body of case law of the European Court of Justice (ECJ) provide for significant protection against

12 *DG v Eastern Health Board* [1997] IESC 7.

13 *ibid.* 'A deprivation of liberty by placement in a child care institution carries with it the concept of the welfare of the child. A prison does not. Thus the inequality suffered by the child by being placed in a penal institution in such circumstances relative to the position of an adult is unconstitutional, the applicant's right to equality has been breached by this order. The rationale which exempts a child care institution does not apply. Further, approaching the matter as to equality between children, it must be queried whether a child from a different background, who brought a civil action, would find himself ordered to be detained in a penal institution.'

14 *Byrne (a minor) v Director of Oberstown School* [2013] IEHC 562.

15 *ibid.* He emphasised that s96(1) b of the Children Act 2001 prohibits the sentencing court from differentiating between offenders in terms of sentence in order 'to provide any assistance or service needed to care for or protect a child'.

16 There are also significant provision in this chapter on cultural, linguistic and religious diversity in Article 22, equality between men and women in Article 23, and the integration of person with disabilities in Article 26.

17 In *C-617/10 Åklagaren v. Hans Åkerberg Fransson* (7 May 2013) para19 the Court of Justice has made clear that the Charter is 'applicable in all situations governed by European Union law, but not outside such situations'.

18 With the exception of pensions which is dealt with in the Social Welfare (Miscellaneous Provisions) Act 2004.



discrimination for pregnant employees and in relation to maternity leave. The case law of the ECJ has stressed the principle of protecting the special relationship between mothers and babies in the vulnerable period following pregnancy and childbirth.<sup>19</sup> However, this principle was not evident in the recent judgments of the ECJ that surrogate mothers were not entitled to maternity leave.<sup>20</sup>

The breadth of the protection afforded by Anti-Discrimination Directives can be seen in how discrimination has been interpreted by the CJEU. In *Coleman v Attridge Law*,<sup>21</sup> the claimant was the mother of a disabled child who claimed that she had been subject to direct disability discrimination by her employer because of treatment that was attributable to the fact that she was the primary carer of her disabled child. The CJEU held that the Framework Directive must be interpreted to protect people subject to discrimination or harassment on grounds of their association with a disabled person.

The *National Policy Framework for Children and Young People* contains commitments to evaluate policy on how families are supported. The Minister for Justice and Equality has noted that in that context maternity, parental and carer's leave are pivotal. She also noted that parental leave is key in supporting early learners.<sup>22</sup> It is intended that the proposed Family Leave Bill 2015 will contain provisions on paternity leave and/or shared maternity leave. This is welcome and long overdue though it is important that maternity rights are not diluted in the process. The proposed Bill also provides an opportunity to consider the introduction of maternity leave in the case of surrogate mothers. It also provides a chance to consider a more comprehensive range of family friendly measures, such as a statutory right to request flexible working, equivalent to the rights recently introduced in the UK.<sup>23</sup>

### Beyond Work-Services, Education and Housing

Two of the EU anti-discrimination Directives extend beyond employment into areas that have particular relevance for children. The scope of the Race Directive is the broadest extending the prohibition of discrimination on race and ethnic origin beyond the employment arena to social protection, social security and healthcare, social advantage, education, goods and services and housing. It would have particular relevance for migrant children, Roma and Traveller children. The Gender Goods and Services Directive is narrower than the Race Directive but extends to the provision of goods and services.

19 C-116/06 *Sari Kiiski v Tampereen kaupunki* (20 September 2007).

20 Case C- 167/12 CD V ST (18 March 2014) and Case C-363/12 Z v A *Government and the Board of Management of a Community School* (18 March 2014).

21 Case C-303/06 *Coleman v Attridge Law* (17 July 2008).

22 Department of Justice and Equality, 'The speech of the Minister for Justice, Equality and Law Reform at the Families and Work: A Chance for Change Conference 25/9/2014' <<http://www.justice.ie/en/JELR/Pages/SP14000255>> accessed 14 July 2015.

23 Children and Families Act 2014 (United Kingdom) Part 9 and the Flexible Working Regulations 2014 SI 1398.

## 1.4 THE POTENTIAL OF THE ESA FOR THE REALISATION OF EQUALITY RIGHTS FOR CHILDREN

The content scope, onus of proof and remedies contained in the ESA makes it a meaningful first port of call for the enforcement of equality rights concerning children. The scope of the ESA is both broader and in some critical respects narrower than that required by the Race Directive and Gender Goods and Services Directive. The European concept of equality nonetheless shapes the interpretation of these provisions in the ESA and sets the standards for interpretation of concepts such as discrimination and harassment and other general and non-ground specific provisions of the ESA.<sup>24</sup>

The specified grounds of discrimination in the ESA go beyond the grounds of gender and race to include the grounds of civil status, family status, age, sexual orientation, disability, religion and members of the Traveller community. The ESA prohibits discrimination, harassment and victimisation on all of the nine discriminatory grounds in the provision of goods and services, accommodation and education.<sup>25</sup> It requires the reasonable accommodation of people with disabilities. It allows broad positive action measures. The legislation established the Equality Authority, which has now been merged with the Irish Human Rights and Equality Commission. It also established the Equality Tribunal which has recently been merged with the Workplace Relations Commission.<sup>26</sup>

### The Discriminatory Grounds

As above noted, the EEA and the ESA contain nine discriminatory grounds: gender, civil status, family status, sexual orientation, religion, age, disability, race and membership of The Traveller community. However a ground that may have most relevance to children, a socio-economic ground is not contained in the legislation. There is no generalist 'other status' ground. The Charter, CRC and European Convention on Human Rights (ECHR) contain a number of additional grounds, which are not contained in the domestic equality legislation, namely, the grounds of language, political or other opinion social origin, property, birth or other status.

24 *Dean v Dublin City Council* (CC, 15 April 2008) concerned a claim under the Equal Status Acts in relation to the reasonable accommodation and the provision of accommodation (s 6) to a person with severe agoraphobia and claustrophobia. Even though the disability ground does not come within the Race Directive, Judge Hunt in the judgment on the appeal to the Circuit stated: 'I adopt the starting point for the construction of this statute, which is a statute intended to confer rights on the citizen, that I should adopt the construction and proceed on the basis of an interpretation which is consistent with the broadest possible application of statutory rights to the citizens, or indeed to give effect to a European directive if necessary.'

25 There are separate provisions in relation to registered clubs (section 8) and the jurisdiction of the Equality Tribunal in relation to licensed premises has been transferred to the District Court pursuant to the Intoxicating Liquor Act 2003.

26 The Workplace Relations Act 2015.

The EEA provided for a review of its operation within two years of its coming into force, with a view to assessing whether there was a need to add additional grounds. The Department of Justice, Equality and Law Reform commissioned a comparative review of the prohibition of discrimination on four grounds, to provide a knowledge base to assess whether to include additional discriminatory grounds in the Employment Equality Act, 1998.<sup>27</sup> The Review included the ground of socio-economic status/social origin.<sup>28</sup> The Review stated inter alia that:

[...] prohibiting discrimination on the basis of social origin/socio-economic status would serve the objectives underpinning the adoption of equality legislation, namely the pursuit of a more equal and just society. It would also promote a more sophisticated intersectional approach to discrimination, leading to greater recognition of the multiple forms of discrimination that many groups face. It is argued that social origin or socio-economic status is difficult to define with the degree of clarity necessary for a legislative document. However, concerns about problems of definition are not unique to this area of anti-discrimination law.<sup>29</sup>

In order to achieve more comprehensive protection and coherence between the various instruments, the grounds contained in the domestic equality legislation should be levelled up to include the additional grounds of language, political or other opinion social origin, property, birth or other status, which are named in the Charter, CRC and the ECHR.

## 1.5 DISCRIMINATORY GROUNDS THAT HAVE PARTICULAR RELEVANCE TO CHILDREN

### The Age Ground

Children, with certain exceptions, may seek to rely on any of the discriminatory grounds under the ESA. However, there is a significant exemption in relation to the age ground, which greatly limits the scope of the protection of the ESA in relation to children. Section 3(3) of the ESA provides that treating a person who has not attained the age of 18 years less favourably or more favourably than another, whatever that person's age, shall not be regarded as discrimination under the age ground. This section allows less favourable treatment of under 18s vis-a-vis those over 18 on the age ground but it also allows discrimination as between children of different ages. This exemption allows age to be used as an arbitrary cut off for the provision of services, irrespective of need and no matter how vital these services may be.

27 S Kicommins, E McClean, M Mc Donagh, S Mullaly and D Whelan, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* (Stationary Office, 2004).

28 The other grounds reviewed were trade union membership, political opinion, and criminal conviction.

29 S Kicommins, E McClean, M Mc Donagh, S Mullaly and D Whelan (n28) 13.

As noted by Walsh, a health authority could decide that speech therapy will only be afforded to children under 6, introducing an arbitrary cut off for access to a vital service. These decisions could be challenged using the ESA because of section 3(3)a.<sup>30</sup>

This exemption is overbroad. It may be wholly appropriate to restrict the sale of certain goods and services to those under 18 on health and safety grounds such as alcohol and certain drugs, but health and safety matters can be protected by the use of appropriate exemptions. This significant exemption needs to be reviewed and amended so as not to allow the age of a child to be used as a decisive factor in the denial of key socio-economic rights.

### Gender and Family Status Ground

The gender ground may provide protection against discrimination by service providers for mothers who may wish to breastfeed.<sup>31</sup> The family status ground has the potential of requiring child-friendly facilities. It is defined in the ESA as 'being pregnant or having responsibility – (a) as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years.'<sup>32</sup> Much of the case law on this ground has involved access to service providers' premises. *Shanahan v One Pico Restaurant*<sup>33</sup> involved the refusal to admit a family with a baby to a restaurant. In *De Burca and Fernandez v Homelocators*, a viewing appointment had been cancelled and a message had been left on the Complainant's phone that the landlord's wife isn't really pushed about having children in the apartment. The Equality Officer found that the letting agency had discriminated on the family status ground.<sup>34</sup>

A number of successful cases on the family status ground had involved the admission of people accompanied by children to pubs. However, the Intoxicating Liquor Act 2003 introduced amendments, which allowed discretion to publicans as to whether to permit a

30 Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing 2013) 59.

31 The Equality Officer found in *Flanagan Talbot v Killarney Cineplex Cinema*, DEC-S2008-053 that the Respondent did not operate discriminatory practices against mothers who wished to breastfeed but found that the respondent's ban on children under two, constituted discrimination on the family status ground.

32 'or (b) as a parent or the resident primary carer in relation to a person of or over that age with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis.'

33 *Shanahan v One Pico Restaurant* DEC-S2003-056.

34 *De Burca and Fernandez v Homelocators* DEC- S2004-030/031.

person under 15 accompanied by parents or guardians to be on licensed premises.<sup>35</sup> The changes may have the consequences of making pubs less family friendly.

The full potential of the family status ground has not been realised in terms of the provision of child friendly services. The new positive duty, which is imposed on public bodies by the Irish Human Rights and Equality Commission Act 2014 to promote equality of opportunity and treatment of the persons to whom they provide services, may act as a stimulus for the creation of child friendly services in the public arena.

### Race and the Traveller Community Ground - Traveller Ethnicity

The Traveller community ground is included as a distinct ground in the ESA even though the ground of race includes ethnic origins as well as race, colour, nationality and national origins. The definition of Traveller community in the ESA points to Travellers being an ethnic group – 'the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland'. The Race Directive applies to 'racial or ethnic origin' and Travellers would have the benefit of the protections provided by the Race Directive if they are an ethnic group. The Minister of State for Equality has committed to the formal recognition by the State that Travellers are an ethnic group.<sup>36</sup> There are very strong arguments to be made that Travellers are an ethnic group for the purposes of the Race Directive and other human rights instruments.<sup>37</sup> Formal State recognition of this reality is overdue and welcome.

### Disability and Reasonable Accommodation

The definition of disability in the ESA is very broad and wider than the equivalent definition in the Disability Act 2005 and the definition of special educational needs in the Education for Persons with Special Educational Needs Act 2004.<sup>38</sup> Therefore the obligation to provide reasonable accommodation imposed in the ESA applies to a broad range of children with disabilities.

While this provision to provide reasonable accommodation extends to a wide variety of service providers including public service providers, local authorities, schools and other educational authorities, the extent of the obligation is limited. The obligation to provide special treatment or facilities only arises in the first place where it would be impossible or unduly difficult for the person to avail himself or herself of the service, without such special treatment or facilities. No obligation arises where the person with the disability finds it only moderately difficult to obtain the service. There is no obligation to provide the special treatment, even if the person with the disability finds it exceedingly difficult to avail of the service, if the provision of the facility or treatment would give rise to more than a nominal cost. This exemption applies even to the State provision of essential services.

Nonetheless it is clear from the case law of the Equality Tribunal under the ESA that parents seek to use the ESA as a means of securing services for children with disabilities, Traveller children and others.

### Specified Course of Action - Schools and Local Authorities

The equality legislation provides for an unusual innovative practical and creative remedy that is relatively unique. In addition to compensation, an Equality Officer in claims under the ESA may order 'that a person or persons specified in the order take a course of action which is so specified'.<sup>39</sup> This type of order has potential particularly in cases that have resonances for children in the field of education and housing.

A good example of this is the case of *Mrs X on behalf of her son Mr Y and a Post Primary School*.<sup>40</sup> The pupil had ADHD, behavioural difficulties and a poor attendance record. It was agreed that the school had taken several steps to accommodate his needs including providing access to a full-time Special Needs Assistant (SNA) and one to one tuition on a number of subjects. The school had concluded that the pupil should not be educated in a mainstream setting. The Equality Officer took into account the school's obligations under other legislative provisions and found that it had failed to activate all of the available supports. In addition to compensation, the Equality Officer ordered:

[...] that the respondent put in place a system that will facilitate the timely compliance with its statutory obligations under the Education (Welfare) Act, 2000 to report to the appropriate educational authorities any issues which may arise in the future in relation to the non-attendance of students at the school.<sup>41</sup>

In *Two Complainants (Mrs A and her son M) v A Primary School*,<sup>42</sup> the Equality Officer, in addition to awarding compensation, also ordered the respondent to put in place a system

35 Intoxicating Liquor Act 2003. Section 14 of that Act prohibits persons under 18 from entering private premises. Under subsection (2), a licensee can permit a child under 15 to be in a bar before 9pm if accompanied by a parent or guardian. Subsection 4 gives licensees discretion to allow a person aged 15 to 17 accompanied by a parent or guardian to be in the bar after 9pm on the occasion of a private function at which a substantial meal is served to persons attending the function.

36 Kitty Holland, 'Traveller ethnicity will be reality in six months, says Ó Riordáin' *The Irish Times* (Dublin, 19 November 2014) < <http://www.irishtimes.com/news/social-affairs/traveller-ethnicity-will-be-reality-in-six-months-says-%C3%B3-riord%C3%A1in-1.2005945>> accessed 14 July 2015.

37 Irish Human Rights Commission and Equality Authority, 'IHRC and Equality Authority call for recognition of Traveller Ethnicity by the State in presentations to Oireachtas Joint Committee on Justice, Defence and Equality' <<http://www.ihrec.ie/news/2013/11/13/ihrc-and-equality-authority-call-for-recognition-of/>> accessed 14 July 2015.

38 Disability Act 2005 (s2) and Education for Persons with Special Educational Needs Act 2004 (s1).

39 Equal Status Acts 2000 to 2012 s 27 (1) b.

40 *Mrs X on behalf of her son Mr Y and a Post Primary School* DEC-S2010-009.

41 *ibid.*

42 *Two Complainants (Mrs A and her son M) v A Primary School* DEC-S2006-028.

facilitating the early identification of students with disabilities or learning difficulties with the aim of directing these students to the appropriate educational services quickly, in order to ensure that they maximise the benefit of their participation in formal education.

In *Ms KN v Department of Education*,<sup>43</sup> the Equality Officer found that the respondent's policy, which required students attending special schools to leave the school they attended at the end of the school year in which they turn 18, was discriminatory. The respondent was also directed to review the policy that requires students who are attending special schools to leave the school at the end of the year in which they reach their eighteenth birthday with a view to ensuring that students in special schools who are pursuing courses leading to accreditation (such as the Junior Certificate/Leaving Certificate Applied) be afforded the same duration of time to complete these courses as their counterparts in mainstream education.

A number of claims have been unsuccessful, particularly in the Superior Courts. In *Two Complainants v Minister for Education and Science*, the Equality Officer, in a very strong recommendation, found that the annotation on the leaving certificates of students with dyslexia to the effect that all parts of the subject were assessed except spelling and some grammatical elements, constituted disability discrimination and that there was no evidence that the annotation advanced the integrity of the system. Judge Hunt in the Circuit Court overturned this decision. He found that the disclosure of a disability did not amount to discrimination and that a difference in treatment was not synonymous with less favourable treatment. Even if there had been discrimination, the provisions of section 5(2)(h) provided an exemption. An appeal on a point of law to the High Court was unsuccessful.<sup>44</sup> The outcome of a further appeal to the Supreme Court is awaited.

There was a similarly strong recommendation by the Director of the Equality Tribunal in the field of education in the case of *Mary Stokes (on behalf of her son John Stokes) v Christian Brothers' High School, Clonmel*.<sup>45</sup> The Director found that the priority given to the sons of former pupils in the admissions policy of the school puts members of the Traveller community at a particular disadvantage compared with non-Travellers. He ordered the school to immediately offer a place to the complainant. He also ordered the school to review its Admission Policy to ensure that it does not indirectly discriminate against pupils. The school was successful in its appeal to the Circuit Court. Appeals on behalf of the pupil to the High Court and the Supreme Court were unsuccessful. The judgment of the Supreme Court, which does not refer to any case law of the CJEU on

indirect discrimination, sets an almost impossibly high standard for proving indirect discrimination. The level of analysis required will be beyond the capacity of most litigants.

In *Clare v Minister for Education and Science*,<sup>46</sup> the High Court found that the provision of separate tuition for a student with ADHD did not amount to discrimination, having regard to section 4(4). The Court also upheld the decision to expel the student, whose conduct was disruptive, having regard to section 7(4) b.

Some very significant orders have been made in housing cases under the ESA in relation to children. For example in *A Complainant v A Local Authority*,<sup>47</sup> a local authority was ordered to pay the maximum compensation of €6,350 for the distress and hardship caused to the Complainant by the discrimination. It was ordered to construct an extension suitable to the needs of a child with autism or to rehouse the family in alternative accommodation suitable to the needs of the child with autism.

### Religious Ethos Exemption

One provision in the ESA which has attracted considerable publicity but surprisingly little litigation, is the religious ethos exemption in section 7(3)c of the ESA. This provides that denominational schools do not discriminate where 'it admits persons of a particular religious denomination in preference to others or it refuses to admit as a student a person who is not of that denomination and, in the case of a refusal, it is proved that the refusal is essential to maintain the ethos of the school.' The provisions are somewhat unclear and a restricted interpretation would be expected. The constitutionality of this provision has never been tested. It is questionable whether a broad interpretation of this provision would be in compliance with the Race Directive as the issue of ethnicity and religion are often closely connected.

However, in one of the few cases on this controversial area, the Equality Tribunal has found in *Ms A (on behalf of her son X - A Minor) v A Secondary School*,<sup>48</sup> that the action of a Roman Catholic secondary school in giving preference to Roman Catholic applicants in respect of allocation of places for the 2014 academic year was permitted by section 7(3)c. The case was taken on behalf of a potential pupil who was a member of the Christian Orthodox Church.

43 *Ms KN v Department of Education* DEC- S 2009-050.

44 *Two Complainants v Minister for Education and Science* DEC-S2006- 077, *The Minister for Education and Science V Hollingsworth*, (CC 10 October 2007) and *Cahill v Minister for Education and Science* [2010] IEHC 227.

45 *Mary Stokes (on behalf of her son John Stokes) v Christian Brothers' High School, Clonmel* DEC-S2010-056.

46 *Clare v Minister for Education and Science* [2004] IEHC 350.

47 *A Complainant v A Local Authority* DEC-S2007-049.

48 *Ms A on behalf of her son X - A Minor v A Secondary School* DEC-s2014-010.

The United Nations Committee on the Elimination of Racial Discrimination has requested Ireland to revise the legislative exemption in the light of the dominance of Catholic schools in the provision of education at primary school level.<sup>49</sup>

## 1.6 EDUCATION (ADMISSION TO SCHOOLS) BILL 2015

It was anticipated that the provisions of this Bill would in some way ameliorate the situation. However, the provision of the Bill as currently drafted would appear to weaken the provisions contained in the ESA and to copper fasten the entitlement of denominational schools to give preference to potential students belonging to the denomination.<sup>50</sup>

## 1.7 POSITIVE DUTY

The most significant amendment to the equality legislation, which has potential for children, is contained in section 42 of the Irish Human Rights and Equality Commission Act. This requires a broad range of public bodies in the performance of their functions to have regard to the need to eliminate discrimination, promote equality of opportunity and protect human rights. The implications of this duty should not be underestimated. Compliance with the duty is likely to require on-going impact assessment. Guidance from the Commission in the form of guidelines or a code of practice will breathe life into this new obligation. It has the potential to assist in the realisation of some of the rights set out in the CRC.

## 1.8 Limitations of the ESA

There are a number of limitations in the ESA, which restrict the potential to realise equality rights generally and for children in particular.

### Services v Functions

Section 5 of the ESA applies the prohibition of discrimination to the provision of goods and services. The definition of services in section 2 is broad enough to include the services provided by public bodies. However, the scope of the ESA does not extend explicitly to the performance of the functions of public bodies generally. Therefore it is unclear to what extent the ESA applies to public authorities performing public functions which may not

come within the definition of service but which may nonetheless have a great impact on lives, including the lives of children. These areas of legal uncertainty are likely to include immigration, certain aspects of direct provision, citizenship, police powers, defence and prisons. This is a significant limitation.<sup>51</sup>

It is increasingly accepted particularly in the UK and Northern Ireland, that public authorities should conduct their activities without the use of discriminatory distinctions, and should be subject to enforceable and clear anti-discrimination controls. Section 29 of the UK Equality Act 2010 prohibits discrimination in the exercise of public functions. In Northern Ireland, the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 and the Disability Discrimination Act 1995 prohibit discrimination in the performance of public functions. Further, the Race Directive requires the inclusion of any functions that could come within the definition of social advantages, social protection, social security, healthcare, education and housing.<sup>52</sup>

It is likely that the investigation and prosecution of offences<sup>53</sup> and matters such as ethnic profiling in the exercise of the powers of the Garda Síochána to remove a child to safety, would not be found to come within the remit of the ESA. The Special Inquiry in relation to the removal by the Gardaí of two Roma children into care, referred to the extent to which ethnicity was a feature in the decision to remove both children and concluded that the actions of the Garda Síochána conformed to the definition of ethnic profiling.<sup>54</sup>

### Direct Provision and the Non-National Exemption

A third limitation in the scope of the ESA is the exemption on grounds of nationality in section 14(aa). It would appear that the primary intention behind the exemption was to ensure that the ESA could not be used to challenge the direct provision system. The

49 UN Committee on the Elimination of Racial Discrimination (CERD), 'UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Ireland' (14 April 2005) CERD/C/IRL/CO/2 para 18.

50 Education (Admission to Schools) Bill 2015 s 62(6) c (iv).

51 The text of the Race Directive does not distinguish between services and functions and some commentators argue that the directive can and should be read to include the activities of public bodies like the police. (See Chris Brown 'The Race Directive: Towards Equality For All the Peoples of Europe?' (2001) 21 Yearbook of European Law 195-227.

52 Disability Discrimination Act 2005 (UK and Northern Ireland) Article 3(e)(f) (g) and (h).

53 *Donovan v Garda Donnellan* DEC-S2001- the Equality Officer held that the investigation and prosecution of a crime by the Gardaí did not come within the remit of the ESA.

54 Department of Justice, 'Garda Síochána Act 2005 (Section 42) (Special Inquiries relating to Garda Síochána) Order 2013, Report of Ms Emily Logan' (2014) <<http://www.justice.ie/en/JELR/Emily%20Logan%20report.pdf/Files/Emily%20Logan%20report.pdf>> accessed 14 July 2015. It found at paragraph 2.10.66 that '... To the extent that Child A's ethnicity was so influential in determining the decision to remove him from the care of his parents, with no objective or reasonable justification, the inquiry concludes that the actions of the Garda Síochána in this case conformed to the definition of ethnic profiling' It also found at paragraph 3.9.56 that 'given that the Inquiry believes that Child T's ethnicity and appearance played a role in the decision to invoke section 12 of the 1991 Act, the Inquiry concludes that the actions of Garda Síochána in this case conformed to the definition of ethnic profiling.'



exemption appears to afford a very wide range of public bodies discretion to discriminate on grounds of nationality in relation to certain non-nationals. Discrimination on other grounds such as gender, sexual orientation and the other elements of the ground of race such as 'colour' is not permissible, at least in relation to the provision of goods and services that could not be described as a function of the State. However, a potential claimant may have difficulties in establishing a comparator in similar circumstances.

An amendment to the ESA to explicitly include the function of public bodies, would bring areas such as immigration, police powers and certain aspects of direct provision within the remit of the ESA, would assist with compliance with the Race Directive and would provide equivalence with Northern Ireland and the UK in this regard.

### **Statutory Exemption**

A third major limitation to the scope of the ESA is the blanket exemption contained in section 14(1)a for any action that is required by or under 'any enactment'. This exemption limits the scope of the protection by exempting action required by other legislative provisions. This would include legislative requirements involving the areas explicitly concerned by the Race Directive such as education, goods and services, and housing.

It means that the ESA cannot be used to challenge other laws and so limits the scope of the anti-discrimination provisions significantly. The exemption also means that successful equal status challenges can be reversed by simply amending the ESA or by bringing in another law.<sup>55</sup>

Legislation in a particular area may take the area outside of the remit of the ESA. For example, surrogacy currently comes within the remit of the ESA in that service providers cannot discriminate on grounds of sexual orientation, family status or civil status for instance, but it is likely that legislative provision governing the issue will result in the area being removed from the scope of the ESA because of the exemption in section 14.

The statutory exemption only relates to discriminatory treatment required by law and therefore does not apply where some element of discretion exists in the provision of the benefit or service. It is difficult to understand the logic behind this distinction as to when the prohibition on discrimination applies and is exempted. In any event neither the Race Directive or the Gender Goods and Services Directive allow for any blanket exemption for discriminatory measures required by law. A significant way of improving the scope of the ESA would be to delete the statutory exemption. This would also assist in compliance with the Race Directive and the Gender Goods and Services Directive.

## **1.9 Recommendations for improving the scope of protection for children in the ESA and other protective measures**

- > The scope of the ESA should be broadened to include the functions of public bodies.
- > The statutory exemption in section 14 should be deleted and the exemption on grounds of nationality should be reviewed.
- > The grounds contained in the domestic equality legislation should be levelled up to include the grounds of language, political or other opinion social origin, property, birth or other status which are named in the it the Charter, CRC and the ECHR.
- > Given the importance of parental leave to early child development, it is important that the proposed Family Leave Bill 2015, contains comprehensive provisions on paternity leave and maternity leave for surrogate mothers and that consideration should be given to introducing a statutory right to request flexible working.
- > The potential of the new positive duty, which is imposed on public bodies by the Irish Human Rights and Equality Commission Act 2014, to promote equality of opportunity and treatment of the persons to whom they provide services, should be explored in relation to the creation of child friendly services in the public arena.
- > The non-application of the age ground to people under 18, as provided for in section 3(3) of the ESA should be reviewed and amended.
- > The Education (Admissions to Schools) Bill 2015 needs significant amendment to improve the accessibility of local national schools to children with no religion or who belong to minority religions.
- > The reasonable accommodation provision in section 4 need to be broadened and the nominal cost exemption should be reviewed and amended at least in relation to public and State bodies.

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55 Judy Walsh (n 30) 50-51.

# CHAPTER 2:

## Access to Justice and Decision Making

Siobhan Phelan, BL

### 2.1 INTRODUCTION

Providing for children's rights in law is only really meaningful when the measures required to enforce those rights are effective. When children are involved with the justice system, whether as victims, defendants, witnesses, asylum seekers or when their parents divorce and disagree over custody, their rights can easily be overlooked. Effective access to justice and decision making for children requires measures that promote participation by children in the decision and law making processes, that ensure appropriate representation for children in those processes, provide for the communication of information in an age appropriate manner and ensure that the professionals dealing with children within the justice system receive appropriate training.

This section focuses on participation in the justice system and decision making process and does not address the question of law reform required to protect substantive children's rights. Wide scale law reform is required to provide explicit protection for the rights of children across a range of legislative instruments and is fundamental to providing effective access to justice and protection for children's rights in the decision making process. Legislative lacunae, such as those enshrining the best interests of the child as a primary consideration required to be addressed in the decision making process, go beyond the scope of this chapter.

### 2.2 OVERVIEW OF RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS

Article 12 of the Convention on the Rights of the Child provides for the child's procedural rights, including the right to participate in decisions that affect them and to have representation to this end as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative of an appropriate body, in a manner consistent with the procedural rules of national law.<sup>1</sup>

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<sup>1</sup> Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC).

Article 12 contains both a substantive right, namely the right to be heard, to participate or to be involved in decision making and a procedural provision requiring that provision is made for the child's participation in the process. It has been described by the leading academic in this area as 'the gold standard'<sup>2</sup> and is broad in its scope and application. It applies in all matters affecting the child.

Article 24 of the European Union Charter of Fundamental Rights also recognises the rights of children to express their views freely and to have such views taken into consideration on matters which concern them in accordance with their age and maturity.

Article 13 on the Hague Convention on the Civil Aspects of International Child Abduction gives a discretion to a court to refuse to return a child to the place of his or her habitual residence based on the child's objection to such a return where the child has attained an age and degree of maturity at which it is appropriate to take account of their views.

Article 11(2) of Regulation 2201/2003 (the Brussels II A Regulation) provides that when applying Articles 12 and 13 of the Hague Convention, a child must be given an opportunity to be heard, unless this is inappropriate having regard to his or her age or degree of maturity. Recent guidelines issued by the UK Court of Appeal for Judges hearing children in this context recommend that the role of the judge is to be the passive recipient of the child's views.<sup>3</sup>

The European Convention on Human Rights, whilst silent on children's participative rights qua child, is also relevant because of its developed jurisprudence on procedural rights under Article 6 (fair trial) and its jurisprudence on the rights of the child under the rubric of Article 8 rights (family life). The jurisprudence of the European Court of Human Rights recognises the right of participation of the child in proceedings as stemming from the impact of the proceedings on the child and what is at stake for the child. Insofar as the child's fair trial rights are concerned, the Court has ruled that it is fundamental that the child is dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote their ability to understand and participate in the proceedings.<sup>4</sup> The Court has found a violation of Article 8 arising from a failure to hear the child in Court and the absence of accurate and complete information on the child's true wishes.<sup>5</sup> From the Convention case-law,

there is clear protection against delay in cases involving children. The procedural rights protected under Article 8 of the Convention apply to both administrative and judicial phases of proceedings and include a right to legal representation in certain circumstances.

Ireland has not ratified the European Convention on the Exercise of Children's Rights, signed in 1996, which provides for the separate representation of children in family law proceedings. The Convention expands upon the provisions of the Hague Convention and in Article 3, the European Convention details the right of children with sufficient understanding to receive all relevant information about family proceedings in relation to them, the right to be consulted and to express their views upon them, as well as the right to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

The EU Agenda on the Rights of the Child adopted in 2011 recognised the promotion of child friendly justice and the use of the Council of Europe Guidelines on Child Friendly Justice as EU priorities in the field of the rights of the child. The said Guidelines, published by the Committee of Ministers of the Council of Europe, identify a number of practical obstacles to access to justice required to be addressed within national legal systems. The Guidelines provide, for example, that obstacles to access to court, such as the cost of the proceedings or the lack of legal representation, should be removed. They further provide that children should have the right to their own legal representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties. The Guidelines go on to provide that children should have access to free legal aid under the same or more lenient conditions than adults. The Guidelines provide that in cases where there are conflicting interests between parents and children, the competent authority should appoint either a Guardian *ad litem* or another independent representative to represent the views and interests of the child.

## 2.3 REVIEW OF IRISH LAW

The Courts have traditionally recognized the desirability of ascertaining and considering the wishes of children affected by their decisions, albeit on an ad hoc and inconsistent basis. A practice has developed of some judges speaking to a child in chambers but the wisdom of such a practice is questionable from a child protection/welfare perspective, particularly in the absence of special training for judges. The recognition of the importance of the child's views has gained traction in more recent times through legislative acknowledgment that there are circumstances where Courts are obliged to have regard to the wishes of children affected by their decisions. Clearly, however, the

2 Ursula Kilkelly, *Children's Rights in Ireland; Law, Policy and Practice* (Tottel Publishing 2008) 201.

3 Lord Justice Thorpe's Working Party of the Family Justice Council, 'Guidelines in relation to Children giving evidence in Family Proceedings' <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Children+Giving+Evidence+Guidelines+-+Final+Version.pdf>> accessed 13 July 2015.

4 *T v UK* App no. 43844/98 (ECtHR, 16 December 1999); *V v UK* App no.24724/94 (ECtHR 16 December 1999).

5 *Sahin v Germany* (2003) 36 EHRR 765.



right of the child to be heard in matters concerning his or her welfare has not only legislative origin but also arises pursuant to the provisions of the Constitution and the requirement to comply with principles of constitutional justice in decisions affecting children.<sup>6</sup>

Under the Rules of Court, children cannot independently institute legal proceedings in Ireland. The Rules of Court provide<sup>7</sup> that an infant may sue as plaintiff by his next friend and may defend proceedings by his guardian appointed for that purpose. Where the Plaintiff is an infant, the consent of the next friend is required to be filed in the Central Office at the same time as the summons is issued, and the person acting as next friend is required to sign a written authority to the solicitor for that purpose and the authority is required to be filed in the Central Office. The solicitor acting in the matter acts for the next friend and not for the infant. In circumstances where there may be a conflict of interest between a parent's interests and a child's or where a child is in care or is a separated child within the asylum system, the absence of a provision whereby children may institute proceedings independently can provide a real barrier to the child's access to justice.

The Irish position contrasts with the position elsewhere. For example, in England and Scotland, children are entitled to instruct a solicitor and enter the court process in any civil proceedings provided a solicitor is satisfied that the child has a general understanding of what he or she means to do. Section 11(10) of the Children (Scotland) Act 1995 provides for the presumption that a child aged 12 or more is of sufficient age and maturity to form a view both in relation to instructing a solicitor and to telling the court his views. In England and Wales, the law makes provision for children to bring their own proceedings without a next friend or Guardian *ad litem* in certain circumstances, including where leave of the court is obtained or a solicitor considers the minor is able to give instructions. Given that different provision exists for considering the wishes of the child in different areas of law, we propose to consider each area separately.

### Child Care Proceedings

Section 24 of the Child Care Act, 1991 requires a Court to have regard to the welfare of the child as the first and paramount concern and insofar as it is practicable, to give due consideration to the wishes of the child having regard to his age and understanding. The manner in which section 24 is couched places primary importance on the welfare of the child (as assessed by the Court) and accords only secondary importance to the wishes of the child but it also obliges the Court to balance the rights of children and parents. This model has been criticised as falling short of what is required by Article 12 of the

Convention on the Rights of the Child.<sup>8</sup> Different models of protection have been adopted in other jurisdictions where the child's participation is provided for through the express requirement to provide sufficient information to the child that explains to them why the process has been engaged with regard to them, the way in which they can participate in decision making and the way in which they can address complaints about the process. Provision is made for the child's views to be expressed, with such assistance as is necessary, and for information to be given to the child about the outcome of any decision made and the reasons for the decision.

Provision has been made under the Child Care Act, 1991 for the joinder of a child as a separate party in proceedings under that Act where the Court is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case, that it is necessary in the interests of the child and in the interests of justice to do so. The Court may order that the child be joined as a party to the case, or shall have such of the rights of a party as may be specified by the Court in, either the entirety of the proceedings or such issues in the proceedings as the Court may direct. The making of any such order is expressed as not requiring the intervention of a next friend in respect of the child. Having made an order joining the child as a party in the proceedings, the Court is also empowered to appoint a solicitor to represent the child in the proceedings. While provision is made for the costs of a solicitor appointed to act for a child are to be borne by the Child and Family Agency and they in turn can apply to recover those costs as against a party in the proceedings, orders joining the child as a party with separate legal representation are rare.

As an alternative to its power to join the child in the proceedings and to appoint a solicitor to represent the child, the Court may also appoint a Guardian *ad litem* for the child and the Guardian, in turn, may instruct legal representation. No guidance is offered in the 1991 Act, however, in relation to the circumstances in which the child's interests or the interests of justice require the appointment, but there is an onus to satisfy the Court that it is 'necessary in the interests of the child and of justice' that a guardian be appointed. This means that the appointment is far from automatic and practice varies widely from Court to Court. The default position in other jurisdictions is that a Guardian is appointed, unless it would serve no useful purpose. There is a need for guidance in this area to develop consistency and maintain standards in relation to access to justice as between different Court areas.

The Child Care Act, 1991 is silent as to the role of the Guardian *ad litem*. In the absence of a duty to appoint a Guardian *ad litem* in all child care cases the Guardian *ad litem* service is unregulated and ad hoc. No minimum qualifications have been prescribed with the result that in theory anyone can currently act in this role. The appointment of a Guardian *ad litem* is expressly precluded where the child is a party to the proceedings.

6 *FN v CO* [2004] 4 IR 311, [2004] IEHC 60.

7 Courts Service Ireland, 'Rules of the Superior Courts Order 15' r16 (and similar rules in the lower courts) <<http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/f10c1841df0af07380256d2b0046b3d4?OpenDocument>> accessed 13 July 2015.

8 Ursula Kilkelly (n 2) 216.

This is an apparent failure to recognise both that the Guardian performs the difficult role not only of communicating the views and wishes of the child but also of advising the Court as to the best interests of the child, even where these conflict and that the traditional adversarial court room scenario, which is promoted by the appointment of a solicitor for the child, is not conducive to effective access to justice for the child. A solicitor acting on the instructions of a child does not have a similar role to that of a Guardian and does not advise on the best interests of the child where the interests of the child differ from the expressed wishes of the child. The solicitor is ill equipped to assist the Court in the decision making process by reference to the best interests of the child standard.

The power of the Court to join the child as a party or to direct the appointment of a Guardian *ad litem* in respect of a child under the Child Care Act, 1991 (as amended), only arises however in the case of proceedings in being and does not address a situation where a child may seek to proactively agitate an issue under the Child Care Acts. Furthermore, the power to appoint either a solicitor or a Guardian *ad litem* appears to be mutually exclusive and the legislation does not provide for the joinder of the child as a party represented by a solicitor together with the appointment of the Guardian *ad litem*. This is perhaps due to a failure to appreciate the different role of the solicitor for the child and the Guardian *ad litem*. The solicitor for the child acts on the instructions of the child and communicates the child's wishes. The Guardian *ad litem*, in contrast, presents to the Court an assessment of what is considered to be in the child's best interests, having duly listened to and considered the child's wishes. There can be cases where a proper consideration of the child's best interests benefits from both an intervention by a solicitor on behalf of the child as an independent party in the proceedings and from the intervention of a Guardian *ad litem* who has a professional competence in assessing how the child's best interests are met.

### Private Family Law Proceedings

Children remain largely invisible in Irish family law proceedings. Although there is support of a constitutional right on the part of the child to be heard in family law proceedings, the law does not reflect this by providing for the child's right to be heard, their right to have their wishes considered and the modalities of same in clear terms. The opportunity to address this lacuna was taken in the Children and Family Relationships Act 2015 with the insertion of Part V into the Guardianship of Infants Act, 1964 (particularly sections 31 and 32) which places the best interests of the child at the forefront. Section 32 of the Guardianship of Infants Act 1964 (as amended) empowers the Court to appoint an expert to determine and convey the child's views. How this will work in practice remains to be seen post commencement of the new Part V. No provision has yet been made for the appointment of the child as a party in the proceedings or for the separate representation of children in the proceedings raising clear issues as to Ireland's compliance with its obligations under Article 12(2) of the Convention on the Rights of the Child and Articles 6 and 8 of the European Convention on Human Rights.

Section 25 of the Guardianship of Infants Act, 1964 (as amended) provides that the Court shall, as it thinks appropriate and practicable, having regard to the age and understanding of the child, take into account the child's wishes in the matter. This provision was clearly designed to have the effect of increasing the extent to which a court has regard to the views and wishes of children, but the experience in practice is that its impact has been limited because the parties in private litigation will, in most cases be unable to discharge the costs associated with representing the interests of the child.<sup>9</sup>

In disputed cases, welfare reports can be sought which provide some opportunity for the child's views to be considered by decision makers;<sup>10</sup> however the power of the District Court to order such reports under section 26 of the Guardianship of Infants Act, 1964 (as amended) has never been commenced. The statutory purpose of the report is to deal with welfare issues rather than to present the views of the child. The failure to require direct input from children limits the effectiveness of the report as a tool for ensuring that the child's views and wishes are brought to the attention of the Court. A further limitation on the utility of welfare reports as a tool in enhancing participation by children in the decision making process is the absence of funding in private law proceedings for reports of this nature and delays in concluding them.

Section 11 of the Children Act, 1997 inserted a new section 28 into the Guardianship of Infants Act, 1964 to make provision for the appointment by the Court of a Guardian *ad litem* in private law proceedings concerning custody, access or guardianship matters. The power as provided for was tightly circumscribed in that the Court could only exercise the power in 'special circumstances'. The provision might be criticised from a children's rights perspective as not providing more widely for the appointment of a Guardian *ad litem*; however, as it has never been commenced, its operation in practice has not been assessed and there remains no power to appoint a Guardian *ad litem* on behalf of children in private law proceedings concerning custody, access or guardianship matters.

In addition to the possibility of the child finding some voice in welfare reports prepared for the Court, a child may also give evidence in proceedings. Under section 28 of the Children Act, 1997, a judge may accept the unsworn evidence of a child under 14 years provided that the child can give an intelligible account of evidence relevant to the proceedings. It is problematic, however, in the particular context of private family law proceedings, that a child may be convicted of perjury for giving false evidence under section 28(3) of the Children Act, 1997. Whilst the ability to give evidence in Court or through video link is clearly one means of ensuring that a child's voice is heard in the proceedings, it is widely accepted that it is not appropriate to call children to give direct

9 Gerard Durcan, 'Hearing the Voice of the Child' (2012) 18(1) MLJI 21.

10 Child Care Act 1991, s 20 where there may be a child protection concern and the Family Law Act 1995, s 47 in relation to issues of custody and access.

evidence which may involve them expressing a preference for one parent over another in Court.

In the absence of other mechanisms for hearing the voice of the child in family law proceedings, judges are more likely to consider speaking with a child privately in chambers than might be considered desirable in terms of its departure from the normal forensic process and the requirement to observe fair procedures and constitutional justice in the Court's process. The taking of evidence in this manner is facilitated by sections 23, 24 and 25 of the Children Act, 1997, which provides for the admission of hearsay evidence in proceedings involving children and the reliance on this evidence in the decision making process. There may be an issue here as to whether Ireland has introduced sufficient legislative safeguards to ensure a proportionate balance between the child's right to be heard and the due process rights of the parties affected.

Also, section 11 of the Children Act, 1997 inserted a new provision (section 25) into the Guardianship of Infants Act, 1964 which requires that in any proceedings concerning matters of guardianship, custody and access, the Court shall, as it thinks appropriate and practicable, having regard to the age and understanding of the child, take into account the child's wishes in the matter. This provision has been criticised on the basis that it affords too much discretion to the judge resulting in uncertain and inconsistent application of the provision. Comparable provisions in other jurisdictions place a duty on decision makers to have regard to the views of the child and prohibit the making of court orders unless due weight has been given to any views expressed by a child. This ensures a proactive approach on the part of the Court.

Section 28(5) of the Civil Legal Aid Act, 1995 (amended by section 13 of the Children Act, 1997) provides that where the Court appoints a Guardian *ad litem* in proceedings under the Guardianship of Infants Act, 1964 and decides that the Guardian should be legally represented, legal aid shall be granted by the Legal Aid Board for the Guardian provided that one of the parties to those proceedings is in receipt of civil legal aid. The requirement that a party to the proceedings be in receipt of legal aid has the effect of seriously circumscribing the circumstances in which provision is made for legal representation for the Guardian *ad litem* in family law proceedings.

### Criminal Proceedings

In contrast with family law proceedings, a child accused of a crime is always a party to the proceedings and entitled to legal representation. It has been suggested, however, that practice in Ireland is still some distance from full observance of the requirement that children enjoy effective participation in criminal proceedings in which they are involved as accused.<sup>11</sup> Legal terminology is still reported to be widespread rendering the process

inaccessible to the child. A lack of systemic training requirements for legal professionals (including judges) working with children also means that standards of representation and decision making remain inconsistent.

### Representation for Separated Children

There is no provision in Irish law for a separated child to be appointed a Guardian *ad litem*. There is a serious question about the lack of guardianship, independent representation and advocacy for these children<sup>12</sup> prompting the Committee on the Rights of the Child to express concerns (which they have repeated subsequently, that separated children in Ireland might not receive the necessary guidance, support and protection during the asylum process, in particular with respect to access to services and independent representation.<sup>13</sup> Although the treatment of separated children falls within the remit of the complaints function of the Ombudsman for Children in relation to health, education and housing matters, steps taken in the administration of the law in relation to asylum, immigration and naturalisation/citizenship fall outside the remit of the Ombudsman and no statutory redress has been provided for lack of effective and independent representation in such matters.

### The Child Witness

Section 23 of the Children Act, 1997 makes extensive provision for the use of hearsay evidence and permits its inclusion as evidence of any fact in all proceedings relating to the welfare of a child in cases where a child is unable to give evidence because of age or where the giving of evidence would not be in the child's best interests. While hearsay evidence is prima facie admissible once the conditions set out in section 23 are met, the admissibility of such evidence may be challenged on grounds of fairness or the interests of justice. In this regard, we differ from the UK where the grounds for challenging the admissibility of hearsay evidence in cases involving the welfare of a child have been removed. It seems clear, however, that the requirements of constitutional justice are such that it is unlikely that the blanket admission of hearsay evidence in cases involving the welfare of the child would pass constitutional muster in this jurisdiction. Judges enjoy discretion as to the weight to be attached to hearsay evidence under section 24 of the Children Act, 1997, but in identifying the criteria to be considered by the Court in determining the weight to attach, section 24 does not require account to be taken of child specific factors such as age, the context and circumstances in which the statement was made and the child's previous behaviour. The section draws into sharp focus the need for specialised training and the desirability of joint social work/Garda interviewing.

11 Ursula Kilkelly (n 2) 230.

12 Dr Nalinie Mooten, *Making Separated Children Visible: the Need for a Child-Centred Approach* (Irish Refugee Council 2006).

13 UN Committee on the Rights of the Child, 'General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) CRC/GC/2005/6.

Provision exists for the child witness to give evidence via video link in criminal and civil cases.<sup>14</sup> Section 14 of the Criminal Evidence Act, 1992 provides for cross-examination to be conducted through an intermediary with the intention of ensuring that questions are put in age appropriate language. Despite this, Irish law continues to permit personal cross-examination of victims by their alleged abuser.

### Delay as a Barrier to Access

Notwithstanding the child's right to an expeditious determination of issues affecting their welfare, there is a documented problem of delay in the Irish Court system.

### Complaints Procedure under the Child and Family Agency Act 2013

The absence of effective complaints procedures and remedies has been criticised as an apparent gap in providing access to justice in Ireland. The Child and Family Agency Act 2013 established the Child and Family Agency. The Agency was established with effect from 1 January 2014. The establishment of a dedicated Child and Family Agency was intended as a response to child protection failings, including inconsistency and fragmentation in service provision. The Agency brings together key services relevant to children and families including:

- > child protection and welfare services formerly operated by the HSE;
- > the Family Support Agency; and
- > the National Educational Welfare Board.

The legislation provides for the subsuming of functions from these three separate agencies and reassigns legal responsibilities in relation to the care and protection of children and the promotion of their welfare. Notably, the Act establishes a complaints procedure whereby a child affected by service provision under the Act may make a complaint. It is regrettable that the Act does not specify the remedies available in respect of complaints made, nor does it prescribe the procedural safeguards to be provided to a child making a complaint under the Act. The effectiveness of the newly established complaints procedure remains to be tested, but the fact that the opportunity was not taken to enshrine remedies in respect of wrongs identified under the Act, and to safeguard the procedural rights of the child in accessing those remedies, suggests that the complaints mechanism will be more theoretical than real in delivering protection for the rights of the child. Notably, the opportunity was lost in the 2013 Act to expressly oblige the Agency to respect the best interests principle in discharging its functions in relation to complaints. It is hoped that the categories of persons eligible to make complaint on behalf of a child who is unable to make a complaint on their own behalf may be expanded to include extended family members and professionals working with the child.

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14 Criminal Evidence Act 1992, s21; Children Act 1997.

### The Ombudsman for Children

The Ombudsman for Children in Ireland is an independent statutory office established under the Ombudsman for Children Act, 2002. The main functions of the Office are:

- > to promote and monitor the rights and welfare of children under the age of 18 living in Ireland; and
- > to investigate complaints made by children or on behalf of children in relation to the administrative actions, or inactions, of public bodies, schools and voluntary hospitals, which have had, or may have had, an adverse effect on the child or children concerned.

The Ombudsman for Children may investigate on his/her own initiative or as a result of a complaint made by a child, a family member or any other person who, by reason of that person's relationship (including professional relationship) with the child and his or her interest in the rights and welfare of the child, is considered by the Ombudsman for Children to be a suitable person to represent the child.

In its annual reports, the Office of the Ombudsman for Children has consistently highlighted certain deficiencies in the 2002 Act, particularly with respect to the Office's investigatory remit. These deficiencies have been noted by international human rights monitoring mechanisms such as the UN Committee on the Rights of the Child and the Council of Europe Commissioner for Human Rights. Of note, the Committee of the Rights of the Child recommended the extension of the remit of the Ombudsman for Children to all children in the criminal justice system, and places of detention under the aegis of the Department of Justice and Equality are now within the investigatory remit of the Ombudsman for Children's Office. The UN Committee on the Rights of the Child further recommended enhancement of the 2002 Act by broadening the scope of the Ombudsman's investigative powers with a view to eliminating gaps which could result in a violation of children's rights and safeguarding the independence of the Office by committing financial resources directly through the Oireachtas (as opposed to through a Department of State).

In addition to reiterating these long-standing concerns, the review of the 2002 Act by the Office of the Ombudsman for Children in 2012 (undertaken in accordance with section 7(1)(h) of the 2002 Act) set out a number of additional aspects of the Act that could benefit from amendment. The principal recommendations of the review of the operation of the 2002 Act were to:

- > remove existing exclusions to the investigatory remit of the Ombudsman for Children;
- > include additional public bodies with functions relating primarily or exclusively to children within the remit of the Ombudsman for Children;
- > expand and clarify the advisory functions of the Ombudsman for Children;

- > place a new duty on public bodies to provide appropriate assistance and guidance to complainants;
- > enhance the powers of the Ombudsman for Children to ensure that public bodies comply with requests for information, documents or other records in the course of investigations; and
- > clarify that the in camera rule should not operate in such a way as to frustrate statutory investigations under the Ombudsman for Children Act, 2002.

During the passage of the Ombudsman (Amendment) Bill 2008 through the Houses of the Oireachtas, an opportunity arose to address some of the recommendations contained in the review of the 2002 Act. Significant amendments to the investigatory remit and powers of the Ombudsman for Children were achieved through the Ombudsman (Amendment) Act 2012. Since 30 April 2013, the range of bodies that can be investigated by the Office of the Ombudsman for Children has widened to cover a greater number of public bodies and organisations that provide services to children on behalf of the State. However, many of the recommendations contained in the review of the 2002 Act have not yet been implemented and it is considered likely that primary legislation will be required to address these outstanding issues.

The Courts have commented on the lack of representation of the child's perspective in cases touching on the welfare of children.<sup>15</sup> One way of addressing an apparent lacuna in this regard would be to extend the role of the Ombudsman for Children to provide for an express power to apply to appear as *amicus curiae* in cases involving the promotion or protection of children's rights. However, in so acting, the Ombudsman would not be acting for the child but as a friend of the Court.

## 2.4 RATIONALE FOR GAPS IN PROTECTION

The rationale for the failure to provide for separate representation for children in family law proceedings may be partly attributable to a paternalistic approach to the care of children and deference to the views of parents, which may be more deeply ingrained in Ireland than elsewhere. The view has also been expressed that providing children with representation would exacerbate the adversarial nature of already emotionally charged proceedings<sup>16</sup> and may contribute to delays. It is likely, however, that some part of the reluctance to have children represented in proceedings is related to the added cost of same.

The failure to appoint a Guardian *ad litem* as the norm in cases may be explained by cost considerations, and the financial implications of providing for better access to

justice for children are really due to the need for the involvement of an additional professional before the Court.

Limitations on the admissibility of hearsay evidence and permitting cross-examination of children by their victims are connected with the need to ensure due process in the justice system: the balancing exercise between the rights of the child and the rights of other parties is not always a straightforward one.

Although video link evidence is admissible, the availability of technology in all courts has been restricted by financial constraints.

Delay has been identified as one of the most important factors impeding access to justice.<sup>17</sup> The Guardianship of Infants Act, 1964 (as amended) does not make statutory provision for a duty to proceed expeditiously in children's cases. This contrasts with other jurisdictions where delay is expressly addressed as being detrimental to the welfare of the child. The rationale for the failure to make express provision may be a concern about an increased exposure to costly litigation on the part of the State arising from systemic delays in the court system and in decision making processes concerning children.

## 2.5 RECOMMENDATIONS TO STRENGTHEN THE PROTECTION OF RIGHTS

The Convention on the Rights of the Child should be incorporated into domestic law.

The Guardian *ad Litem* Service should be regulated and provision made for the appointment of a Guardian where appropriate in cases that impact on the rights of children.

Consideration should be given to the establishment of a Child Advocacy Service to support children seeking to be heard in decision making processes. This service could also provide useful support to children as vulnerable witnesses and children as parties in criminal cases.

The requirement to consider the wishes of the child needs to be strengthened in legislation. Whilst it is recognised that the judge should retain discretion, the requirement to hear the child should not be limited to what is 'practicable' or 'appropriate', subject of course to the right of the child to choose not to participate.

15 *McD v PL* [2010] 2 IR 199.

16 Working Group on a Courts Commission, *Sixth Report* (Government Publications 1999).

17 Geoffrey Shannon 'Fifth Report of the Special Rapporteur for Children' <<http://www.dcy.gov.ie/documents/publications/5RapporteurRepChildProtection.pdf>> accessed 13 July 2015.

The law should be amended to provide a means whereby children may pursue a legal remedy without the need for a next friend; perhaps along the lines seen in England and Scotland. Provision should be made for joinder of children as parties in all proceedings in which their interests are affected in accordance with identifiable criteria.

Effective participation of children in proceedings will also require provision for legal representation and/or the appointment of a Guardian *ad litem* in all areas of law and practice and not simply in the areas of child care. To provide for effective access to the process for children, these services must be properly resourced. Express statutory provision for publicly funded legal representation for children and the appointment of Guardians *ad litem* are necessary pre-requisites for the protection of the rights of access of children to the justice and decision making processes. Similarly, provision is required for the independent funding of welfare reports in cases affecting the rights of children. It is recommended that all necessary measures required to enable the State to ratify the European Convention on the Exercise of Children's Rights should be enacted.

Section 26 of the Child Care Act, 1991 should be strengthened to better protect children's rights by amending it both to provide for dual representation and to make statutory provision for guidance on the appointment, qualifications, role and function of a Guardian *ad litem*.

Section 10 of the Children and Young Persons (Care and Protection) Act 1998 (New South Wales) provides a useful model for prescribing participation of children in decision making by requiring that adequate information is provided to the child, in a manner and language that he or she can understand, concerning the decisions to be made, the reasons for the Department's intervention, the ways in which the child or young person can participate in decision making and any relevant complaint mechanisms. The section further requires that the child is afforded an opportunity to express his or her views freely, according to his or her abilities, any assistance that is necessary for the child or young person to express those views, information as to how his or her views will be recorded and taken into account, information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision as well as an opportunity to respond to a decision made under this Act concerning the child or young person.

Notable attempts have been made by judges of the Superior Courts to develop guidelines as to the best approach to talking to children<sup>18</sup> and identifying the factors to be taken into account when assessing the significance of a child's wishes. However, practitioners working with children have identified a lack of consistency in the approach taken by judges as between different courts. There is a need for guidelines to be

published and formal training to be rolled out. Guidelines have been identified as necessary in areas including the factors that judges should consider when assessing the significance of a child's wishes; the age a child should be when the child's wishes are taken into account, the criteria guiding when a child should be entitled to separate representation and to attend court to give evidence, guidance as to how best to assess the child's wishes, how judges talk to or interview children, the suitability/competence of professional reports, the format service and admissibility of reports.<sup>19</sup> Similarly, the Law Reform Committee of the Law Society has recommended that legislative guidelines and rules of professional conduct be developed for the legal representation of children.<sup>20</sup> It has been suggested that specific training and registration (including vetting) should be required for those seeking to represent children.<sup>21</sup> In this context, the Council of Europe Guidelines on Child Friendly Justice emphasise the importance of specialised training for legal professionals working with children.

It is recommended that the complaints procedure established under the Child and Family Agency Act 2013 be strengthened to provide in clear terms for participation of children in the complaints process and to ensure that remedies available under the Act are effective and dissuasive.

It is further recommended that the remit of the Ombudsman for Children is extended to include, inter alia, complaints from children in the asylum and immigration system and a power for the Ombudsman for Children to seek to be joined as *amicus curiae* in proceedings concerning the welfare and rights of children.

Delays in the courts system and decision making as it affects children could be countered by specific statutory provision promoting the right to expedition. An example is provided by section 1(2) of the Children Act 1989 (UK) which provides that any proceedings in which any question with respect to the upbringing of children arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child. Tackling delay will undoubtedly have funding implications and there is a clear requirement for greater investment in the courts system, in legal aid, in the Guardian *Ad Litem* Service and in reporting services. Delay is likely to result in prejudice to the welfare of the child and requires to be tackled as a matter of priority.

One of the indicators for effective child participation has been identified as children's direct access to human rights complaints mechanisms but only a few countries collect

18 *O'D v O'D* [2008] IEHC 468.

19 Colm Roberts, 'The voice of the child in family disputes' (Legal Aid Board Family law Conference 2013) <[http://www.legalaidboard.ie/lab/publishing.nsf/7a4c7e6aa25d28734a2569fa0000ed33/3da3d208b17a327d80257bcd0045cc03/\\$FILE/C.\\_Roberts.pdf](http://www.legalaidboard.ie/lab/publishing.nsf/7a4c7e6aa25d28734a2569fa0000ed33/3da3d208b17a327d80257bcd0045cc03/$FILE/C._Roberts.pdf)> accessed 13 July 2015.

20 Law Society Law Reform Committee, *Rights Based Child Law: The Case for Reform* (2006).

21 Ursula Kilkelly, (n 2), 228, and *Barriers to the Realisation of Children's Rights in Ireland* (2007) 163-164.



data broken down by age to reflect complaints directly from children. There is a need for collection of this type of data to measure whether effective access to justice and decision making exists for children and to assess what steps directed at promoting access succeed and why. Until resources are allocated to the strengthening of protections for children through a range of measures including awareness building and education, legislative change will not be effective in ensuring the protection of children in the justice system and in decision making.

Lessons can be learned from the approach taken in other European States to the protection of children's rights in the decision making process. Several EU Member States have amended their procedural laws to make children's involvement in justice procedures more child friendly. In Hungary, for example, a new law requires that courts use language appropriate to age when they communicate with children through summons, warnings or notices.<sup>22</sup> In the Czech Republic, the legislative procedure for the new law on victims of criminal offences treats children as particularly vulnerable and therefore requires the use of specially trained staff in questioning children as well as allowing for the use of audio-visual equipment.<sup>23</sup> Denmark amended the law regulating its National Council for Children, which now states explicitly that the Council should involve children's views in its work and that the Council represents the opinion of children included in its panel on matters of law and practice identified by the Council as requiring reform<sup>24</sup>.

## 2.6 CONCLUSION

The goal of securing children's rights in the decision making process may be enhanced by adopting specific legal measures and procedures but more fundamentally achieving this goal requires a shift in mind-set whereby decision makers - who are properly trained - proactively question whether the interests of children are affected and having identified that such interests are affected, adopt appropriate methods to ascertain what the views of the child are and weigh those views in the decision making process. Vindicating the child's rights in the decision making process will require decision makers across a broad spectrum of areas to routinely consider whether children are affected by the decisions made and to demonstrate that the decisions taken were properly informed by and had due regard to the rights of those children affected. The requirement under the constitutional amendment to give primary weight to the best interests of the child can only be achieved when children are given the possibility to express their views in matters that concern them and that those views are properly taken into account when decisions are made.

Although there have been legislative developments over the last 30 years in relation to the obligation to hear children and to have regard to their views in decisions affecting them, there remain significant identifiable gaps in certain areas of the law. It must be recalled, however, that the constitutional right of the child to be heard and have their wishes considered applies across the spectrum where important decisions affecting children are taken, whether statutory provision has been made for same or not. The failure of the State to provide effective mechanisms whereby this can be achieved may itself give rise to actions against the State for failure to vindicate constitutional rights in individual cases and may ultimately provide the necessary impetus for law reform measures directed towards providing effective access to justice and decision making processes for children.

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22 Child Rights International Network, 'Access to Justice for Children: Hungary' (April 2014) <[http://childhub.org/sites/default/files/library/attachments/1787\\_hungary\\_access\\_to\\_justice\\_original.pdf](http://childhub.org/sites/default/files/library/attachments/1787_hungary_access_to_justice_original.pdf)> accessed 13 July 2015.

23 Fundamental Rights Agency, *Annual Report 2012* (Fundamental Rights Agency 2013) 124.

24 *ibid* 129.

# CHAPTER 3:

## Guardianship, Access and Custody

Natalie McDonnell ,BL

### 3.1 INTRODUCTION

A range of international human rights standards and obligations contain provisions relevant to the rights of the child in the context of private family law proceedings in Ireland. The focus of this chapter will be on the UN Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR) and the level of protection currently afforded these rights in the context of domestic family law and practice. The focus of this chapter is on proceedings relating to guardianship, access and custody of children.

This is an area of law in a state of flux due to the recent enactment of the Children and Family Relationships Act 2015 (hereinafter the 2015 Act) and the passing and coming into effect of the referendum in November 2012 on the introduction of Article 42A on Children's Rights into the Irish Constitution.

Article 42A has only recently taken effect due to a failed legal challenge to the result of the referendum. The 2015 Act, although signed into law on 6 April 2015, has at the time of writing, yet to be commenced and is therefore not yet in force.

The 2015 Act substantially reforms domestic law pertaining to guardianship, access and custody of children and represents a major and overdue reform of this area of law. This Chapter will therefore make reference to the law currently in force as well as the changes that will be introduced when the 2015 Act takes effect.

### 3.2 INTERNATIONAL HUMAN RIGHTS STANDARDS IN RELATION TO GUARDIANSHIP, ACCESS AND CUSTODY

As has been pointed out by Ursula Kilkelly 'altogether, it is clear that children have a right to know and be brought up by their parents. They have a right to live with them and where they live apart, they have a right to maintain regular and direct contact with them.'<sup>1</sup>

The United Nations Convention on the Rights of the Child in Articles 7(1)<sup>2</sup> 8(1)<sup>3</sup> and 18(1)<sup>4</sup> guarantee the right of children to have a relationship with their parents regardless of their

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- 1 Ursula Kilkelly, *Children's Rights in Ireland; Law, Policy and Practice* (Tottel Publishing 2008) 114.
  - 2 (7) 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
  - 3 (8) 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
  - 4 (18)1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.



marital status. The Committee on the Rights of the Child has further explained the rights contained in Article 7 via its General Comment No. 7 and the role of parents in the formulation of the child's identity, particularly during the child's early years.<sup>5</sup>

Article 7(1) protects the right of the child to know and be cared for by her parents 'as far as possible'. MacDonald points out that the phrase 'as far as possible' constitutes a stricter and less subjective test than the concept of best interests and, thus, the circumstances in which it will be in the child's best interests will be relatively narrow and strictly construed.<sup>6</sup> MacDonald further notes that the term 'cared for' has been found to 'imply a more active involvement on the part of the non-resident parent than simply paying child maintenance'.<sup>7</sup> He further notes that the right of the child to know and be cared for by his or her parents has been found to encompass a right to knowledge of his or her origins.<sup>8</sup>

A further right guaranteed by the UNCRC is that the 'best interests' of the child must be a 'primary consideration' in decision making concerning the child.<sup>9</sup> Although the Convention does not contain a definition of 'best interests', the UN Committee on the Rights of the Child has published its *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* which provides that this is a concept to be applied on a case by case basis.

Article 5 of the UNCRC provides that States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention. MacDonald notes that the rights of children remain constant but the manner in which they are given effect is dependent on age, development and understanding of the child and that 'the principle of "evolving capacity" refers to the process of maturation and learning whereby children

progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and how best they can be realised.<sup>10</sup>

Article 14 of the UNCRC obliges State Parties to respect the right of the child to freedom of thought, conscience and religion and the rights of parents, and when applicable, legal guardians, to provide direction to the child in the exercise of his/her right in a manner consistent with the evolving capacities of the child. MacDonald points out that the child's right to freedom of thought, conscience and religion 'must be interpreted in accordance with the best interests of the child in accordance with Art 3(1) of the UNCRC'.<sup>11</sup> He further notes that the evolving capacity of the child as outlined in Article 5 of the UNCRC is crucial to the interpretation of this Article and in relation to parental direction, that the extent of this;

will be dependent on the age, development and understanding of the child. Direction and guidance provided by the parents should be 'child centred' and achieved through dialogue and should not go beyond that which is necessary to provide direction and guidance. It is the child and not the parent who exercises the right to freedom of conscience, thought and religion.<sup>12</sup>

MacDonald notes that the position of the child in respect of freedom of thought, conscience and religion is stronger than in respect of religious education. Article 5 recognises that, as between children, parents and the State, the application and enforcement of children's rights moves from being an exercise of parental responsibility (or State intervention) to an exercise in participation and, finally, self-determination. Each of the rights under the Convention must be read subject to Article 5.<sup>13</sup>

The International Covenant on Civil and Political Rights (ICCPR) acknowledges, in Article 23, that the family is the natural and fundamental unit group of society and is entitled to protection by society and the State. It requires State Parties to ensure equality of rights and responsibilities as between spouses to a marriage throughout the duration of the marriage and at its dissolution. In the context of dissolution, the Article also provides for the necessary protection of children. This has been interpreted, by the Human Rights Committee, as including the provision of contact with his or her parents.<sup>14</sup> The ICCPR does not contain a best interests principle but MacDonald notes that the Human Rights Committee has made clear, in the context of the development of General Comments on the Convention, 'that the child's interests are paramount in cases involving parental separation and divorce'.<sup>15</sup>

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5 UN Committee on the Rights of the Child, 'General comment No. 7 (2005): Implementing child rights in early childhood' (1 November 2005) CRC/C/GC/7.  
6 Alistair MacDonald QC, *The Rights of the Child; Annotated Materials* (Family Law Jordan Publishing 2014) 24; Peter Newell and Rachel Hodgkin, *Implementation Handbook for the Convention on the Rights of the Child* (3rd Edition UNICEF 2008) 109.  
7 *ibid.*  
8 Alistair MacDonald QC (n6) 24.  
9 Article 3 of the CRC states: 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

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10 Alistair MacDonald QC (n6) 20.  
11 *ibid* 37-38.  
12 *ibid.*  
13 *ibid* 39.  
14 The Human Rights Committee, 'Wim Hendriks, Sr. v. The Netherlands, Communication No. 201/1985' (27 July 1988) CCPR/C/33/D/201/1985.  
15 Alistair MacDonald QC (n6) 111.

Article 8 of the ECHR protects the right to family life which clearly applies also to children. As Kilkelly states 'The European Court of Human Rights has confirmed the relevance of Article 8 to private family law disputes and the compatibility with the Convention of decisions regarding access and custody (as well as legal recognition of family ties...) is an issue in a growing number of cases'.<sup>16</sup>

The European Court of Human Rights (ECtHR) has found that the right of a child to know and have a relationship with both of his/her parents engages Article 8 of the ECHR, given that this is an intrinsic and essential component of a child's identity.<sup>17</sup> The ECtHR has also found a positive obligation on the State to act in a manner designed to enable the link between a child and his/her parents to be developed, from the moment of birth.<sup>18</sup>

Interestingly, the ECtHR has found, in a number of recent cases, that there had been a violation of Article 8 of the ECHR, concerning the children's right to respect for their private lives in circumstances where the State refused to grant legal recognition to parent-child relationships legally established in another State between children born as a result of surrogacy arrangements and couples who had the treatment. The ECtHR based its decisions on the undermining of the children's identity in the country in which they resided (France) and the fact that the French case-law completely precluded the recognition of a legal relationship between the children and their biological father.<sup>19</sup>

### 3.3 REVIEW OF IRISH LAW TO IDENTIFY GAPS

#### Guardianship Rights

Guardianship refers to the globality of rights, duties and responsibilities exercised by a parent in respect of a child. In *RC v JS*,<sup>20</sup> Finlay Geoghegan J. approved the following passages from *Shatter's Family Law*<sup>21</sup> as an accurate general statement of the law:

Guardianship describes the group of rights and responsibilities automatically vested in the parents of a child born within marriage and in the mother of a child born outside marriage in relation to the upbringing of the child...Guardianship encompasses the duty to maintain and properly care for a child and the right to make decisions about a child's religious and secular education, health requirements and general welfare. The right to custody of a child is one of the rights that arises under the guardianship relationship.<sup>22</sup>

16 Kilkelly (n 1).

17 See, for example, *Rasmussen v Denmark* (1985) 7 EHRR 371 and *Mikulic v Croatia* (2002) 1 FCR 720.

18 See, for example, *Marckx v Belgium* (1979) 2 EHRR 330 and *Johnston v Ireland* (1987) 9 EHRR 203.

19 *Mennesson & Ors v France*, App no. 65192/11 (ECtHR, 26 June 2014) and *Labassee v France*, App no. 65941/11 (ECtHR, 26 June 2014).

20 [2003] 4 IR 431.

21 (4th ed.) 531-532.

22 *ibid.*

While the 2015 Act does not define guardianship, it does, as outlined later in this chapter, define the rights and responsibilities of a guardian and these generally accord with the dicta above. A number of difficulties arise from the legal framework governing guardianship, access and custody of children in Ireland currently in operation, prior to the changes in law provided for by the 2015 Act taking effect. The rules relating to guardianship of children are outmoded and arguably do not adequately protect the rights of the child to have their parents act as joint guardians if they are unmarried. The rights, duties and responsibilities associated with guardianship are not defined in the legislation currently applying. In addition, where children are separated from their parents and are living, for example, in private family arrangements the current rules do not appear to permit a carer in those circumstances to be appointed as a guardian.<sup>23</sup>

Under the regime currently in operation, the unmarried father has no right to be appointed a guardian in Ireland; the right has been expressed as the 'right to apply for guardianship'.<sup>24</sup> Kilkelly, examining the statistics on the refusal of guardianship applications expressed concern that fathers had to seek recourse to the Courts:

This highlights the urgent need to undertake reform to address the legal position of the father so that those seeking to be involved in their children's lives, but frustrated in that process, enjoy access to an effective remedy which gives due consideration to their rights but, more importantly, to the rights of their children.<sup>25</sup>

In the ECHR case of *Zaunegger v. Germany*,<sup>26</sup> Judgment delivered on 3 December 2009 lends support to those who argue that the lack of provision for guardianship on establishment of paternity breaches the European Convention on Human Rights. The Strasbourg Court found a breach of Article 14 of the Convention, which guarantees equal protection of Convention rights.

23 There is, under the law currently in operation, no express provision in the Act of 1964 for the appointment of a non-biological guardian during the lifetime of the existing guardians. However in the recent case of *MR v SB* (2013) (unreported), Abbot J concluded that he had an implied power to appoint another appropriate person as a guardian where the court had decided that it should not return the children to the mother. He reasoned that this implied power arose under s 16 of the 1964 Act and "having regard to the general imperative of the Guardianship of Infants Act 1964 that the welfare of the child shall be paramount". Section 16 of the 1964 Act provides: "that where a parent has: (a) Abandoned or deserted an infant, or (b) Allowed an infant to be brought up by another person at that person's expense, or to be provided with assistance or to be provided with assistance by a health authority under s 55 of the Health Act 1953, for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties, the court shall not make an order for the delivery of the infant to the parent unless the parent has satisfied the court that he is a fit person to have the custody of the infant."

24 See the Judgment of McKechnie J. in *G.T. v G.A.O.* [2007] IEHC 326, which summarised the relevant law applying to guardianship in this jurisdiction. Surveying the case-law including *SW, An infant, J.K. v. V.W.* [1990] 2 IR 437 in which the Supreme Court held that section 12 of the Status of Children Act did not confer any natural or Constitutional rights on an unmarried father, although there "may be rights of interest or concern arising from the blood link between the father and child". It also held that the High Court was incorrect in that s. 6A did not, even prima facie, confer guardianship rights on an unmarried father. What the 1964 Act as amended, did, was to grant to him the 'right to apply' for guardianship but no more.

25 Kilkelly (n1) 125.

26 App no 22028/04 (ECtHR, 3 December 2009).

Although this case dealt specifically with German custody laws as opposed to those dealing with parental responsibility, the Court made firm pronouncements on differential treatment of parents in respect of their rights and responsibilities to their children born out of wedlock.<sup>27</sup>

Much of this mischief will be addressed once the 2015 Act comes into force. The 2015 Act significantly reforms the law relating to guardianship. The Act provides for automatic guardianship rights for an unmarried father who has cohabited with the child's mother for one year including a period of three consecutive months, after the birth of the child, where both have lived with the child.

The Act also provides that where the other parent of the child is the mother's civil partner or where the other person is a parent for the purpose of the provisions of the Act relating to parentage of a child for the purpose of Donor Assisted Human Reproduction, that other parent will have automatic guardianship of the child.

In addition, the Act entitles a person who is not a parent of the child who is over the age of 18 years and is the spouse, civil partner or cohabitant (for a period in excess of 3 years) of a child's parent and who has shared responsibility for the day to day care of the child for a period in excess of 2 years, to apply for guardianship of such a child.

The 2015 Act provides a statutory definition, for the first time in Irish law, of rights and responsibilities of a guardian. These include decisions as to the child's place of residence and with whom they should reside, religious, spiritual, cultural and linguistic upbringing, and consent to medical treatment.

It is noteworthy also that the 2015 Act will, once in force, put in place a regime for the attribution of parentage in the context of Donor Assisted Human Reproduction and provides for guardianship where the conditions relating to the attribution of parentage and other conditions are met.<sup>28</sup> The 2015 Act will not address surrogacy arrangements and the attribution of parentage or guardianship in the context of those arrangements.<sup>29</sup>

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27 While accepting that it may be necessary to attribute parental authority to the mother in a non-marital situation at birth owing to the various situations in which conceptions of births outside marriage occurs the Court said at para. 56 that: "there may exist valid reasons to deny an unmarried father participation in parental authority, as might be the case if arguments or lack of communication between the parents risk jeopardising the child's welfare. However, nothing establishes that such an attitude is a general feature of the relationship between unmarried fathers and their children". The Court, while allowing a margin of appreciation especially in dealing with custody-related matters, also considered "the evolving European context in this sphere and the growing number of unmarried parents"

28 See sections 5 and 43 and 49 of the Children and Family Relationships Act 2015.

29 In *MR v TR* [2013] IEHC 91, [2014] IESC 60, Denham CJ held that no legislation, has been passed by the Oireachtas to address the issues which arise on surrogacy arrangements. Denham CJ held that as a significant social matter of public policy it is clearly an area for the Oireachtas, and it is not for the Supreme Court to legislate on the issue. Denham CJ held that the appeal would be allowed and the orders of the High Court, permitting the registration, would be quashed.

## Access and Custody of Children

Custody refers to day to day care and control of the child. Pursuant to section 10(2) of the Guardianship of Infants Act, 1964, as amended, a guardian is entitled, as against other non-guardians, to custody of their child. Married parents are joint custodians of their child even after the dissolution of the marriage. Under the system currently in operation, an application can be made for custody pursuant to the Guardianship of Infants Act by an unmarried father, even where he is not a guardian of the child. Section 11A of the 1964 Act permits a Court to make an Order for joint custody in respect of a child and the approach of the Irish Courts has been to do this where it is appropriate and workable in the individual case. In practice, this does not necessarily mean that the child will reside with each parent for an equal proportion of the time as primary residence is often agreed and/or awarded to one parent notwithstanding the joint custody order.

Section 57 of the 2015 Act amends the 1964 Act by providing that relatives and certain persons may apply for custody of a child. Once the 2015 Act comes into force, the new section 11E of the 1964 Act will permit a number of categories of person to apply for custody of a child. A relative or a person with whom the child resides, where that person is, or was married to, or was in a civil partnership with the child's parent, or was for a period of 3 years, the cohabitant of the parent and has for a period of more than 2 years shared responsibility with the parent, of the day to day care of the child, will be in a position to apply.

Similarly, an adult who has, for a continuous period of more than 12 months, provided for the child's day to day care and the child is without a guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child, will be able to apply for custody of that child. The Court will be empowered under the section to appoint such persons jointly with a child's parent and make orders as to the residential arrangements for the child where these are not agreed and specify contact arrangements, where appropriate.

Other relevant reforms contained in the Act include the following: altering the guiding principle of 'welfare of the child' to the 'best interests' of the child; requiring the Court to have regard to the fact that unreasonable delay in proceedings may be contrary to the child's best interests; providing for an improved mechanism for enforcing contact and custody orders and removing the two stage process for non-parents seeking access or contact through the courts.

Access is the means of ensuring that the child is able to maintain a relationship with the parent with whom he/she is not residing. It is an important tool in realising the child's rights. Under the law currently in operation, a mother or father may apply for access pursuant to section 11A of the 1964 Act. A relative or person acting in *loco parentis* can apply to the Court for access pursuant to section 11B of the 1964 Act. There is a leave requirement for applications under section 11B and the Court must, in determining whether to grant leave, have regard to all of the circumstances including the

connection of the application to the child, the risk of disruption to the child's life and the view of the child's guardians.

Once leave is granted, the test is the welfare of the child. The denial of access or the placing of limitations on access, are only legally tenable if in line with the welfare of the child. The Supreme Court, in a recent case, upheld the decision of the High Court to suspend/curtail overnight access between a child and his father on welfare grounds.<sup>30</sup>

The 2015 Act will, once in force, amend the provisions of the 1964 Act relating to access by substituting the terms 'mother and 'father' for 'parent' and clarifying the right of a parent who is not a guardian to apply for custody or access of a child. Section 11B of the 1964 Act, which regulates relative access, will be amended to specifically include a person with whom the child resides or has formally resided (replacing the concept of *in loco parentis* for the purpose of that section) and abolishing the leave requirement for applicants. The 2015 Act will, once in effect, also add the views of the child and the extent to which it is necessary to make an order to facilitate access to the statutory circumstances to which the Court must have regard in considering the application.

Clearly, issues arise as to the enforcement of custody and access orders by the Courts. Kilkelly points out that:

Parents with custody can and do frustrate or make access to children difficult for the non-residential parent and, in such circumstances, the only remedy available is to return to the family court. However, the courts are reluctant to impose sanctions on parents who fail to comply with an order for access and are left with little choice but to remind parents of their duties in this area, including the duty to act in the best interests of their child by ensuring that access take place and attaching conditions to the order to make it more effective.<sup>31</sup>

The 2015 Act aims to improve this situation by providing for the making of enforcement orders pursuant to section 60 of the Act which will, once in effect, amend section 18 of the 1964 Act. One of the powers of the Court, when granting an enforcement order, will be to grant additional access in order to allow any adverse effects on the relationship caused by the denial of access to be addressed and direct that the Applicant and/or Respondent attend a parenting course or family counselling – either individually or together and receive information on the possibility of availing of mediation to resolve the dispute. The section also provides for the voice of the child to be heard in the context of enforcement proceedings. The 2015 Act will, when in force, also permit an application for re-imbursment of necessary expenses incurred by a parent or guardian of a child incurred due to the non-exercise by the other guardian or parent of their rights to custody or access.

30 *MM v GM* [2015] IECA 29.

31 Kilkelly (n 1) 155.

### Best Interests of the Child

Section 45 of the Children and Family Relationships Act 2015 will, once in force, amend section 3 of the Guardianship of Infants Act, 1964, mainly to provide that the best interests of the child shall be determined by Part V of the 2015 Act. Section 31 of the Act, contained in Part V, sets out the factors and circumstances to which the Court must have regard in determining what is in the best interests of the child, for the purposes of the Act. This is not an exhaustive list but includes the benefit to the child of having a meaningful relationship and sufficient contact with each of his or her parents and with other relatives or other persons involved in the child's upbringing, except where this is contrary to the child's best interests, the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and his or her other parent and to maintain and foster relationships between the child and his or her relatives, and the history of the child's upbringing and care including that relationship between the child and the parent(s) or relative concerned.

Also included are factors relating to the needs of the child. Section 31(2)(c) provides for the child's physical, psychological and emotional needs in light of the child's age and stage of development and the likely effect on him or her of any change of circumstances. Section 32(1)(e) and (f) require that the child's religious, spiritual, cultural and linguistic upbringing and needs and the child's social, intellectual and educational upbringing and needs must be considered.

The age and any special characteristics of the child, and their views, if ascertainable, must also be taken into consideration. Section 31(2)(k) requires the Court to take into consideration the capacity of the parent or relative concerned to care for and meet the needs of the child, to communicate and co-operate on issues affecting the child, and to exercise the relevant powers, responsibilities and entitlements to which the application relates. This statutory guidance is welcome.

## 3.4 INTERNATIONAL HUMAN RIGHTS STANDARDS IN RELATION TO THE RIGHT OF THE CHILD TO BE HEARD

The UNCRC makes clear that children are to be viewed as active individuals in a position to have as full an input as possible into matters affecting them.<sup>32</sup> Article 12 of the UNCRC

32 The Article states as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided an opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of the national law.

provides that the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them and that due weight should be given to those views in accordance with the age and maturity of the child. Article 12(2) provides that, in particular, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The importance of Article 12 as a guiding principle of the Convention, closely allied to the Child's right under Article 13 to freedom of expression and required for the purpose of the realisation of the other rights under the Convention has been articulated by the Committee on the Rights of the Child in General Comment No. 12 on the right of the child to be heard.<sup>33</sup>

In relation to the capability requirement the Committee have stated that this is not to be interpreted as a limitation but rather 'an obligation for States Parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible'.<sup>34</sup> In essence therefore, it is not for the child to first prove his or her capacity but rather a presumption that the child has the capacity to form his or her own views.

The Committee underlines that:

Full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.<sup>35</sup>

In terms of mechanisms by which a child should be heard the committee recommends that where possible, the child should be given the opportunity to be heard directly and if indirectly effected, the child's views must be transmitted correctly to the decision maker by the representative. It is also recommended that codes of conduct be developed for representatives who are appointed to represent the views of the child.

As noted by MacDonald:

The qualification contained in Article 4 in relation to economic, social and cultural rights, that States parties shall undertake implementation of those rights "to the maximum extent of their available resources" does not apply to civil and political

rights, including those enshrined in Art 12. Accordingly, implementation of Art 12 should not be dependent on the availability of resources.<sup>36</sup>

The Committee on the Rights of the Child, has in the context of General Comment No. 12, emphasised the interaction between Article 12 and Article 5 of the UNCRC, which deals with the evolving capacity of the child. The General Comment encourages an approach to parenting where children can freely express views and be taken seriously as this approach 'serves to promote individual development, enhance family relations and support children's socialization and plays a preventative role against all forms of violence in the home and family'.<sup>37</sup> At paragraph 93, the Committee urges States to promote parent education programmes which 'build on existing positive behaviours and attitudes and disseminate information on the rights of children and parents enshrined in the Convention'.<sup>38</sup>

Disputes about child custody in respect of which there is an EU dimension and to which EU Regulation 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, (known as Brussels II bis) applies, requires the Court to hear the voice of the child before making orders pertaining to the child's welfare and custody. This is mandated by the terms of the Regulation itself. This is currently achieved via the procurement of a section 47 report and/or judicial interview of the child.

### 3.5 REVIEW OF IRISH LAW FOR ASCERTAINING THE VIEWS OF THE CHILD

A number of pieces of child and family law legislation already contain provisions aimed at ensuring that the voice of the child is heard. These include the Guardianship of Infants Act, 1964, as amended and the Child Care Act, 1991, as amended. Section 25 of the Guardianship of Infants Act, 1964, as amended, states:

In any proceedings to which section 3 applies, the Court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter.

The parameters of section 25 were considered by Finlay Geoghegan J. in *FN v CO*,<sup>39</sup> involving a custody dispute in respect of two children aged 14 and 13 between the

33 UN Committee on the Rights of the Child, 'General comment No. 12 (2009): The right of the child to be heard' (20 July 2009) CRC/C/GC12.

34 *ibid.*

35 *ibid.*

36 Alistair MacDonald QC (n 6) 32.

37 UN Committee on the Rights of the Child (n 33) para 90.

38 *ibid* para 93.

39 *FN v CO* [2004] IEHC 60.

children's father, his new wife and the paternal grandfather and the children's maternal grandparents. The mother of the children was deceased, having died in 1995 since which time the children effectively lived with their maternal grandparents, the Applicants.

The Applicant grandparents sought to be appointed guardians of the children and sole custody of them on the basis that the children had been residing with them in Ireland since 1998. A section 47 assessment was carried out, and the trial judge interviewed the children in chambers. In her findings of fact, the learned trial judge found, among other things, that the children were of an age and maturity to have their wishes taken into account; that each girl considered the applicants as *de facto* parents and regard their home as being with them; that they each wished to remain in Ireland and objected to moving to England; and that it would be detrimental to their welfare to require them to move to England against their wishes and that it was in their interest to have regular contact with their father.

It was held that section 25 of the 1964 Act required the courts to take positive action within the terms of the section.

While it was noted that section 25 only demands that the wishes be taken into account, it was held that in considering the weight to be given to such wishes, the statutory purpose of section 25 must be considered. It was noted that an individual in respect of whom a decision of importance was being made, including those under section 3 of the 1964 Act, had a personal right under Article 40.3 of the Constitution to have the decision made in accordance with natural and constitutional justice. Those principles include the right of a child, of appropriate age and understanding, to have their wishes taken into account by a Court in making a decision to which section 3 of the 1964 Act applies and it was held:-

Hence s.25 should be construed as enacted for the purpose of *inter alia* giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of a child.<sup>40</sup>

This decision underscores and clarifies the importance of section 25. It was also noted, in respect of the right of the children to have decisions taken in the interests of their welfare:

It appears to me that the right of a child to have decisions in relation to guardianship, custody or upbringing, taken in the interests of his/her welfare is a personal right of the child within the meaning of Article 40.3 and therefore one which the State pledges to vindicate as far as practicable.<sup>41</sup>

40 *ibid.*

41 *ibid.*

As identified by Mary O'Toole SC,<sup>42</sup> there are effectively five methods in our current system by which the wishes and views of a child can be ascertained: by direct evidence from the child, by the child speaking privately to the judge, by the appointment of a Guardian *ad litem*, by ascertaining the views of the child through a section 47 assessment and by providing for the child to be separately legally represented as a party to the proceedings.<sup>43</sup>

#### Direct Evidence from the Child

Section 28 of the Children Act, 1997 permits a Court to accept the unsworn evidence of a child under 14, provided that the child can give an intelligible account of evidence relevant to the proceedings. However, this is not an approach that has found much favour with parents or practitioners in the private family law context for reasons relating to the pressure such an approach could place on a child and the potential trauma of the court environment and process.

#### Child Speaking Privately to the Judge

This creates obvious evidential difficulties in that the child's statements to the Judge cannot be tested in cross-examination. In *O'D v O'D*, in a decision of Abbott J., delivered on 26th May 2008, the Judge sets out the process for interviewing children and the circumstances in which such interviewing should take place. At paragraph 10, he sets out the approach the Court should take in talking to children in cases such as this:

1. The judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.
2. The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judge's own experience.
3. The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.
4. The judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and should assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all,) determinative of the ultimate decision of the court.
5. The judge should explain the development of the convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.
6. The court should, at an early stage ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in dispute in the litigation are likely to assist and agree on this aspect. In the

42 Mary O'Toole 'The Voice of the Child and the Role of the Guardian ad Litem' (Seminar of the Irish Family Lawyers Association, Summer 2013).

43 *ibid.*



absence of such agreement then it is advisable for the court to seek expert advice from the section 47 procedure, unless of course such qualification is patently obvious.

7. The court should avoid a situation where the children speak in confidence to the court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case.

It is clear from the above that Abbott J. considers parental consent necessary in this context and that a stenographer be present.

The Supreme Court in 2001 considered the question of the interviewing of children in chambers in *AS (Otherwise AB) v RB*.<sup>44</sup> Lavan J. had heard an application for a decree of nullity, together with reliefs pursuant to the Guardianship of Infants Act, 1964 and other statutory reliefs. The trial judge interviewed the child of the parties in chambers. This formed one of the grounds of appeal to the Supreme Court. The Supreme Court held:

While I can understand the approach adopted by the trial Judge to this matter in proceedings of this nature, the fact remains, that, as a matter of principle the only evidence which a trial Judge, in family law proceedings, as in other proceedings can receive his evidence on oath or affirmation given in the presence of both the parties and their legal representatives. It has long been recognised that trial Judges have a discretion as to whether they will interview children who are the subject of custody or access disputes in their chambers, since to invite them to give evidence in Court in the presence of the parties or their legal representatives would involve them in an unacceptable manner in the marital disputes of their parents. Depending on the age of the children concerned, such interviews may be of assistance to the trial Judge in ascertaining where their own wishes lie and that would undoubtedly have been the case in with Ru in these proceedings. It is however, sufficient to say, that while the objection to the Trial Judge having seen Ru in his chambers was well founded, as there is no serious issue as to the legal custody of Ru and the question of access, if it cannot be agreed, must be determined now in the High Court no order is required in respect of the proceedings under the Guardianship of Infants Act.<sup>45</sup>

The Supreme Court did not offer any clear principles in relation to this procedure. O'Toole notes the views of Clissman and Hutchinson (2006) who argue that 'it is profoundly unclear where the judicial discretion to hear the views of an infant in this way is derived from'.<sup>46</sup> They conclude that the information gathered in this process either

constitutes the giving of evidence or is gathered by the judge but is not properly before the Tribunal of fact when the hearing resumes. The authors also point out that section 23 of the Children Act, 1997 permits the admission of the statement of a child under certain circumstances without requiring the child to come to court to give sworn evidence.

#### Appointment of a Guardian *ad Litem*

The Children Act, 1997, inserted a new section 28 into the Guardianship of Infants Act, 1964 to provide for the appointment of a Guardian *ad litem* in guardianship, custody and access proceedings. The provision has not, as yet, been commenced with the result that it is not currently possible to have a Guardian *ad litem* appointed in private family law matters. Even if the provision were to take effect serious issues arise in relation to the funding of a Guardian *ad litem* in private law; the cost presumably having to be borne by the parties to the proceedings.

In the case of *AB v CD*,<sup>47</sup> Abbott J. confirmed that neither the Circuit nor the High Court had the power to appoint a Guardian *ad litem* in the context of private family law proceedings.

In *C v W*<sup>48</sup> Abbott J. was dealing with an appeal from the Circuit Court to the High Court of a decision to permit a father to relocate to Hong Kong with his two children. During the course of the appeal to the High Court, an argument was made that the High Court was empowered to appoint a Guardian *ad litem* to represent the children or to make them parties to the proceedings and to provide for them to be separately represented.

It remains to be seen whether the coming into effect of Article 42A will have an impact in this area.

#### Ascertaining the Views of Children via a Section 47 Report

Section 47 reports are a widely used tool in private family law proceedings in this jurisdiction. They are provided for in section 47 of the Family Law Act, 1995. Generally, the assessor will provide a report to the Court to assist in determining a family law dispute and make recommendations as to practical arrangements for the care and custody of the children in circumstances where the parties are no longer living together. However, it is not clear that the purpose of a section 47 report is in fact to adduce the views of the child.

#### Separate Representation for Children

This approach confers on children and young people an active role in the proceedings affecting them. This model requires that the child be made a full party to the

44 *AS (Otherwise AB) v RB* [2001] IESC 106.

45 O'Toole (n 39).

46 *ibid* 21.

47 *AB v CD* [2011] IEHC 435.

48 *C v W* [2008] IEHC 649.

proceedings and instruct their own lawyers to represent them in said proceedings. The benefits of this approach may be more discernible in the child care context than in private family law disputes where there is a risk of children becoming embroiled in intractable disputes between their parents. Mary O'Toole SC points out that the research suggests that children in those family law disputes do not wish to have responsibility for the outcome of proceedings and would prefer not to be separately represented in those contexts.

Taking the human rights standards and the notion of the evolving capacity of the child and the constitutional amendment into account, a sea change is necessary on this issue in Irish law and practice. At present, the views of the child in private family law proceedings fall to be dealt with in a section 47 report or via the child talking to the judge in chambers. Section 47 reports were not specifically designed for this purpose and are extremely costly to parties. The option of the child talking to the Judge in chambers is one fraught with complexity in terms of the evidential issues it raises and the fact that few judges are trained for this role.

Jane Fortin states, in the context of English proceedings, that 'research re-inforces the view that children who do obtain separate legal representation find the support they receive thereby extremely helpful. In particular, a separate representative may be able to gain children's confidence and support them in long-running intractable contact disputes'.<sup>49</sup> The author goes on to state that 'a heightened appreciation of human rights law seems to have provoked a judicial acknowledgement that children may have a "right" to participate in judicial proceedings involving them'. Two decisions in particular of the UK Courts receive attention from Fortin. In *Mabon v Mabon*<sup>50</sup> Thorpe J., stated:

Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 rights [UNCRC], we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.<sup>51</sup>

Fortin also instances the case of *Re L (family proceedings court): appeal jurisdiction*<sup>52</sup> in which Munby J. was at pains to point out that a 15-year-old's rights under Articles 6 and 8 of the European Convention on Human Rights had been breached in circumstances where a declaration of parentage had been issued in respect of her without any notice to her or permitting her to attain party status.<sup>53</sup>

Article 42A.2 of the Irish Constitution requires that provision be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° which

includes guardianship, custody and access of children, in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

The amendment requires that laws be enacted for securing, in the case of a child who is capable of forming them, the views of the child and putting them before the Court. Due weight is to be afforded those views, having regard to the age and maturity of the child. There is a constitutional obligation on the legislature to introduce legislation to give effect to this provision.

The child must also be capable of forming and expressing a view. This will require a finding by a trial judge as to the level of maturity of the child. The use of the term 'provision shall be made by law' affords the legislature a relatively wide discretion as to the scope of the right. It is noteworthy that a right of full participation in the proceedings is not the result of this wording - simply that the voice of the child is heard in the context of the proceedings.

#### Hearing the Voice of the Child under the Children and Family Relationships Act 2015

Section 32 of the 2015 Act will, once in force, permit the Court to direct the procurement of a report from an expert in writing on any question affecting the welfare of the child or to determine or convey the child's views. The section provides that the Court shall, in deciding whether to make the order, in particular, have regard to a number of factors, including the age and maturity of the child, the nature of the issues in dispute, the best interests of the child and whether the making of the order will assist the child in the expression by the child of his or her views. The child as the subject of the report, is entitled to a copy of the report whether a party to the proceedings or not, although the Court must consider, in line with the factors set out in the section, whether the child should be furnished with the report.

An expert appointed under the section must ascertain the maturity of the child and, where requested by the Court, ascertain whether or not the child is capable of forming his or her own views. Where the expert concludes that the child is capable of forming his or her own views on the matters that are the subject matter of the proceedings, he or she should ascertain those views and furnish a report to the Court putting before it the expressed views of the child concerned.

The Act provides that the fees and expenses of the expert shall be paid by the parties. Questions therefore arise as to what is to happen where the parties do not have the means to fund the work of the expert.

It has been argued, since the passing of the referendum on Article 42A, that the State would have to establish a system in order to give effect to the constitutional amendment in respect of hearing the voice of the child. Again, it is noteworthy that the State is required to ascertain the views of the child as far as practicable. It is arguable that the

49 Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge CUP 2009) 259.

50 *Mabon v Mabon* [2005] EWCA Civ 634

51 Fortin (n 46) 260.

52 *Re L (family proceedings court): appeal jurisdiction* [2003] EWHC 1683 (Fam)

53 Fortin (n 46) 260.



word 'securing' means that the State should also be responsible for funding the procurement of the views of the child. This would be in keeping with the comments of the Committee on the Rights of the Child as outlined above. However, the 2015 Act places the onus in this regard on the parties to the proceedings, at least in respect of the use of an expert to meet the obligation of hearing the voice of the child in the proceedings. The appointment of such an expert is a discretion inherent in the Court and it presumably does not usurp or unseat the other methods by which the voice of the child can be heard.

### 3.6 Conclusion and recommendations

The evolving nature of the law relating to guardianship, access and custody of children in this jurisdiction provides an opportunity to address the gaps in protection for the rights of the child. That opportunity has been, to a large extent, grasped by the enacted, but not yet in force, 2015 Act. In particular, it is clear that the changes to the law relating to guardianship are essential to ensuring that children are afforded the opportunity to have both parents actively involved in decision making processes affecting them.

In addition, the right of the child to be heard in the context of private family law proceedings needs to be addressed, particularly in terms of providing effective and accessible mechanisms to ensure that this is a meaningful and realisable right for children involved in private family law proceedings.

Thus, some recommendations are as follows:

- > The 2015 Act should be commenced without further delay.
- > A fully funded system in which the right of the child to have their voice heard in the private family law context, in line with their constitutional and international human rights should be put in place.
- > Arrangements relating to surrogacy should be legislated for and in a manner consistent with the rights of the child pursuant to international human rights law.
- > The State should ensure full compliance with international human rights law in this area by encouraging parents to exercise their rights in a manner consistent with the best interests of the child and the evolving capacity of the child.
- > Child inclusive mediation and other child centred methodologies should be explored, implemented, and fully funded in the private family law system.

# CHAPTER 4:

## Health and Healthcare

Professor Geoffrey Shannon

Article 24 of the UN Convention on the Rights of the Child (CRC) states that:

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.<sup>1</sup>

Article 24 then goes on to stipulate that states must take measures to diminish infant and child mortality, to ensure the provision of necessary health care to children, to combat disease and nutrition, to ensure pre-natal and post-natal care for mothers, to ensure appropriate access to information on health care, to develop preventive health care including family planning, to abolish harmful traditional practices and to encourage international co-operation in realising the right. The Committee on the Rights of the Child (hereafter the Committee) makes the point that 'the realization of the right to health is indispensable for the enjoyment of all the other rights in the Convention'.<sup>2</sup>

The Committee released in 2013 its General Comment No. 15 on *The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health*. General Comment No. 15 is based on the importance of interpreting the matter of children's health from a children's rights perspective. This involves the approach that all children have the right to survive, grow and develop, in a context of physical, emotional and social well-being, and every child should have the opportunity to reach his or her full potential.<sup>3</sup> It is also based on the premise of the World Health Organisation that health 'is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.<sup>4</sup>

The comment is aimed at a wide range of duty bearers, including governmental and non-governmental organisations, those in the private sector and funding organisations. It is emphasised that states are obliged to ensure that all duty bearers are sufficiently aware of their obligations and responsibilities and are capable of meeting them, and that children themselves are also empowered to be involved in decisions affecting them.<sup>5</sup>

The Committee states that children's best interests should be at the centre of decisions affecting their health, for example in relation to providing, withholding or terminating treatment. This also includes the development and implementation of relevant policies and the allocation of resources. It is specified that the best interests of the child should:

1. Guide treatment options, superseding economic considerations where feasible;
2. Aid the resolution of conflicts of interest between parents and health workers; and
3. Influence the development of policies to regulate actions that impede the physical and social environments in which children live, grow and develop.<sup>6</sup>

The Committee stipulates that States should develop procedures to guide health workers apply the best interest of the child principle in the area of health.<sup>7</sup>

## 4.1 PARTICIPATION

A clear element of the best principle of the child is the right of children to be heard and to participate in decisions being made on their behalf. This applies in the medical arena as it does elsewhere. This is closely linked to the right of children to information, and the Committee has long emphasised that it is in the best interests of children to have access to 'appropriate information on health issues'.<sup>8</sup> It is emphasised in the General Comment that the Article 12 right of children to be heard provides for children to express their views on all aspects of health provision and to have those views taken into account.

Children's views should, for example, be included in decision making at policy level regarding what services are needed, how they are best provided, what the barriers are as regards accessing services, measuring the quality of the services and how to assist children to take responsibility for their own health and development. For this purpose, the Committee stipulates that states should conduct regular participatory consultations with children in order for children's views and experiences to contribute to the design of health interventions and programmes.<sup>9</sup> In this regard, the initiative taken by the Law Reform Commission in relation to its consultation on *Children and the Law: Medical Treatment* whereby children were widely consulted is to be welcomed.<sup>10</sup>

Of course participation by individual children in decision making regarding personal medical matters is also a vital part of vindicating the right of children to the highest possible standard of health. Research conducted on behalf of the Office of the Minister for Children identified a number of obstacles in Ireland to communicating with children on medical matters.<sup>11</sup> It was found that, whilst children's specialists appeared to engage

1 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) art 24.  
 2 UN Committee on the Rights of the Child, 'General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health' (13 April 2013) CRC/C/GC/15, 5.  
 3 *ibid* 3.  
 4 Preamble to the Constitution of the World Health Organization (WHO) as adopted by the International Health Conference, New York, 22 July 1946. See *ibid*.  
 5 UN Committee on the Rights of the Child (n2) 4.

6 *ibid* 5.  
 7 *ibid* 6.  
 8 UN Committee on the Rights of the Child, 'General Comment No. 4 (2003) on adolescent health and development in the context of the Convention' (1 July 2013) CRC/GC/2003/4 para 10. Cited UN Committee on the Rights of the Child (n2) 6.  
 9 UN Committee on the Rights of the Child (n2) 7.  
 10 Children's Rights Alliance, 'Submission to the Law Reform Commission on: Children and the Law: Medical treatment' (Dublin, April 2010) <[http://www.childrensrighs.ie/sites/default/files/submissions\\_reports/files/AllianceSubLRCChildrenMedicalTreatment16042010\\_0.pdf](http://www.childrensrighs.ie/sites/default/files/submissions_reports/files/AllianceSubLRCChildrenMedicalTreatment16042010_0.pdf)> accessed 14 July 2015.  
 11 Office of the Minister for Children, *The Child's Right to be Heard in the Healthcare Setting: Perspectives of Children, Parents and Health Professionals* (OMC 2006) <[http://www.dcy.gov.ie/documents/research/The\\_Childs\\_Right\\_to\\_be\\_heard\\_in\\_the\\_healthcare\\_Setting.pdf](http://www.dcy.gov.ie/documents/research/The_Childs_Right_to_be_heard_in_the_healthcare_Setting.pdf)> accessed 14 July 2015.

in best practice regarding communicating with children, non-specialists did not appear to be as familiar with children's rights and the need to listen to children. It was found that the attitude of parents can determine whether children are heard in the healthcare setting. It was also found that professionals are often lacking in the time required to ensure that children are heard during the consultation and treatment process. Both the amount of appropriate physical space and the personal attitude of health professionals were also found to determine whether or not children were listened to.<sup>12</sup>

A number of recommendations were made in the report as regards addressing obstacles to hearing children in the healthcare setting. These recommendations are:

- > Public information campaign: A public information campaign aimed at children and adults needs to take place to raise awareness of the right of the child to be heard.
- > Training: Child development, children's rights and appropriate ways to communicate with children of all ages and stages of development should be incorporated into the training of all health professionals. This should also address the role of parents in this process.
- > Protocols and best practice: Protocols need to be developed between all health professionals, establishing best practice and shared approaches to communicating with children.
- > Research: Further research should be undertaken into the extent to which children are listened to in the healthcare setting. In particular, the experiences of teenagers and children and young people with disabilities should be taken into account.<sup>13</sup> The report also usefully outlined best practice in communicating with children regarding healthcare as involving the following factors:
  - > The child must be involved in treatment decisions as far as possible, bearing in mind his/her capacity to understand and willingness to be involved.
  - > The patient's parents or carers must be involved in treatment decisions.
  - > The views of children must be sought and taken into account.
  - > The relationship between health professional and child should be based on truthfulness, clarity and awareness of the child's age and maturity.
  - > Children must be listened to and their questions responded to, clearly and truthfully.
  - > Communication with children must be an ongoing process.
  - > Training in communication skills with children is an essential component of appropriate professional education.<sup>14</sup>

These factors will provide welcome guidance for professionals in order to ensure a rights-based approach to best practice is being followed as regards hearing children and taking their views into account in the area of medical treatment.

12 *ibid* 6.  
13 *ibid* 6.  
14 *ibid* 4-5.

A crucial issue relating to the participation of children in healthcare decisions is that of the right to consent to medical treatment. Law and practice in Ireland does not at present provide clear guidelines on consent for professionals, and it has been reported that this results in inconsistent professional practice. It is also of concern that the existing mechanism through which children may consent to medical treatment is the Non-Fatal Offences Against the Person Act, 1997, which provides a medical professional with a defence when facing prosecution for assault. This is a criminal statute unsuitable for the vindication of children's healthcare rights.<sup>15</sup> It does not provide a rights-based approach to children's consent and legislation should be drafted which deals in particular with this matter. The Law Reform Commission has made a number of recommendations as regards consent to medical treatment in the report *Children and the Law: Medical Treatment*.<sup>16</sup>

There is evidence that children can be dissuaded from seeking medical advice if confidentiality is not observed.<sup>17</sup> Therefore it seems preferable for legislation to be introduced specifying that it be lawful for a health care professional to provide treatment to a person aged under 16 on the condition that the child has the capacity to understand the nature and consequences of the treatment.

Another vital issue is the right of children to refuse medical treatment. The Non-Fatal Offences Against the Person Act, 1997, does not provide guidance on whether children of 16 years of age have a right to refuse medical treatment. The issue of the right to refuse treatment in Ireland therefore remains vague as regards children aged 16 to 18 years. This issue is particularly important for children in the care of the State, who are without parents to guide them in this respect. The same issue also arises as regards persons under the age of 16. If children under 16 were to have the right to consent to medical treatment under such circumstances as recommended above, then logically they should also have the right to refuse such treatment. Clear guidelines should therefore be set out to address the matter of whether children under the age of 18 years have the right to refuse to consent to medical treatment.<sup>18</sup>

## Recommendations

- > **Regular participatory consultations should be conducted with children in Ireland in order for children's views and experiences to contribute to the design of health interventions and programmes.**

15 Law Reform Commission, *Children and the Law: Medical Treatment* (Law Reform Commission, 2009) 221.

16 *ibid* 219.

17 Children's Rights Alliance, *Submission to the Joint Committee on Child Protection* (Dublin, 2006) <[http://www.childrensrights.ie/sites/default/files/submissions\\_reports/files/SubJointOirCommChildProt0806\\_0.pdf](http://www.childrensrights.ie/sites/default/files/submissions_reports/files/SubJointOirCommChildProt0806_0.pdf)> Accessed 14 July 2015.

18 This has also been provisionally recommended by the Law Reform Commission. Law Reform Commission, (n 15) 220.

- > **The recommendations made in the report of the Office of the Minister for Children, *The Child's Right to be Heard in the Healthcare Setting*, should be implemented. These recommendations include an awareness-raising campaign for the general public, training for all relevant professionals and the development of relevant protocols and research into the area. The best practice guidelines in the report should be made widely available to all.**
- > **Legislation should be drafted which deals in particular with the right of children to consent to treatment as the Non-Fatal Offences Against the Person Act, 1997 is unsuitable for this purpose. It should be lawful for a health care professional to provide treatment to a person under 16 years without parental consent on the condition that the child has the capacity to understand the nature and consequences of the treatment being provided.**
- > **Clear guidelines should be set out to address the matter of whether children under the age of 18 years have the right to refuse to consent to medical treatment.**

## 4.2 MENTAL HEALTH

General Comment 15 emphasises the serious nature of mental health problems for children and young people and the need to tackle

'behavioural and social issues that undermine children's mental health, psychosocial wellbeing and emotional development'.<sup>19</sup>

The lack of provision in this regard in the Irish context has been well documented. The Shadow Report to the Committee on the Rights of the Child, for example, highlights the absence of comprehensive, rights-based legislation in Ireland for addressing children's health needs; the lack of counselling services for children and the fact that children cannot access counselling without parental consent, despite the fact that the problems which many children experience will derive from issues in the home.<sup>20</sup> Adequate provision for children's mental health services will require greater resources and political will in Ireland.

In my Fourth Report as Special Rapporteur on Child Protection, I engaged extensively with the issue of the right to be heard of children with mental health difficulties.<sup>21</sup> It was

highlighted that the Mental Health Act, 2001 operates in a context of uncertainty as regards children and medical consent, and that this can lead to situations whereby parents make decisions in respect of their children that otherwise the children would make for themselves. Although the age of consent for medical treatment is 16 years under the Non-Fatal Offences Against the Person Act, 1997, under the Mental Health Act, 2001 the age of consent for mental health treatment is 18 years. In order to account for the vulnerable position of children in this regard, it was recommended, amongst other things, that the Mental Health Act, 2001 should be amended to include a separate section which clarifies the rights of children in relation to that Act. The uncertainty and inconsistency as regards consent to treatment for mental health problems still persist for children in Ireland despite the serious rights issues involved.

A recent report by Children's Mental Health Coalition highlights the urgent need for a more joined-up system to address the mental health needs of young people who have experienced care and the youth justice system.<sup>22</sup> The report acknowledges that, while there are some undoubtedly positive developments underway which aim to improve services for these children (for example, the establishment of the Child and Family Agency and the Assessment, Consultation and Therapy Service for the mental health needs of children in detention, special care and high support units), many problems remain which challenge the enjoyment by these children of the right to the highest attainable standard of health. The report emphasises that children, and particularly those with mental health problems, should not be involved with the youth justice system but instead be diverted towards community services that address their needs. In particular the fact that many such children require support 'to address trauma, neglect or abuse they may have experienced'<sup>23</sup> is emphasised.

A clear theme of the research is the need of children for stability and continuity in care, two factors which the report showed as notably missing from their lives. It is stated in the report that 'the overwhelming message is that if they could develop a single trusting relationship, the impact would be enormous'.<sup>24</sup> The report identifies the need for a coherent and comprehensive national strategy which would address the mental health needs of young people in care and those in the youth justice system. This strategy should involve input planning, development and delivery of services by the young people themselves as they are experts by virtue of their own experiences. The report also highlights the crucial nature of inter-agency co-operation and emphasises evidence that a piece meal approach to improving the system will not be successful.<sup>25</sup> The main recommendations of the report are as follows:

19 UN Committee on the Rights of the Child (n2) 7.

20 Children's Rights Alliance, *From Rhetoric to Rights: Second Shadow Report to the UN Committee on the Rights of the Child* (Children's Rights Alliance, 2006).

21 Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (Dublin, 2010) <<http://www.dcyu.gov.ie/documents/publications/Rapporteur-Report-2010.pdf>> accessed 14 July 2015.

22 Children's Mental Health Coalition, *Someone to Care: the mental health needs of children and young people in the care and youth justice system* (Dublin, 2013).

23 *ibid* 8.

24 *ibid*.

25 *ibid* 20.

- > Listen to the voice of the child: involve young people in planning service developments, education and consultation;
- > Issue a national policy statement and national strategy to address the mental health needs of children and young people in the care of the State;
- > Establish a common assessment framework and ongoing monitoring of children's and young people's mental health needs;
- > Provide stability for children and young people in the care and in youth justice systems;
- > Provide adequate, equitable access to services;
- > Establish mandatory protocols for inter-agency work;
- > Develop training programmes in identifying and understanding psychological well-being issues as an integral part of professional development for all professionals;
- > Provide legislative protection for children leaving care and detention, and homeless children.<sup>26</sup>

### Recommendations

- > **Comprehensive, rights-based legislation should be drafted in Ireland for addressing children's health needs. Increased counselling services should be established, and children should be permitted to access counselling without parental consent. Greater resources should be ringfenced in Ireland to provide for children's mental health services more generally.**
- > **The recommendations from the Fourth Report of the Rapporteur on Child Protection should be carried out, in particular the Mental Health Act, 2001 should be amended to include a separate section which clarifies the rights of children in relation to that Act.**
- > **The recommendations from the recent report of the Children's Mental Health Coalition should be carried out, in particular the drafting of a national strategy to address the mental health needs of children and young people in the care of the State and in the youth justice system.**

## 4.3 OBESITY

The General Comment stipulates that states must tackle obesity in children, because of the negative effects of this health condition including 'hypertension, early markers of cardiovascular disease, insulin resistance, psychological effects, a higher likelihood of

<sup>26</sup> *ibid* 21.

adult obesity, and premature death'.<sup>27</sup> Levels of overweight and obesity among Irish children are high compared to other Northern European countries and these levels are on the increase.<sup>28</sup> If this increase is not reversed it will have a significant impact on quality of life, life expectancy and healthcare costs in Ireland.<sup>29</sup> This is a vital child protection issue and a challenge to implementation of the right of children to the highest attainable standard of health in Ireland.

Research conducted on behalf of the Minister for Children and Youth Affairs, based on the *Growing Up In Ireland* Longitudinal Study, indicates that 75% of nine-year-olds in the study were of healthy body mass index (BMI), 19% were overweight and 7% were obese.<sup>30</sup> Girls were more likely to be overweight or obese, as were children from semi and unskilled social class households. Low levels of physical exercise were found in the research to be far more closely linked than diet to the risk of being overweight or obese. It was also found that parents underestimated the extent to which their child's weight was a problem.<sup>31</sup>

The report conducted on behalf of the Minister for Children and Youth Affairs includes a number of important recommendations. It is recommended that height and weight measures are routinely included in GP visits and school visits by public health nurses. It is recommended that sports policy include national standards for exercise in schools but also that a holistic approach is taken in that all those involved in sports are included. Because children from semi and unskilled social class households were found to have worse diets and less physical exercise, it was recommended that resources for interventions should be heavily targeted at relevant schools and communities. However, it was emphasised that the structural reasons for the higher levels of overweight and obese children among semi and unskilled social class households must be tackled through a cross agency approach in a manner similar to that adopted for 'poverty proofing' in accordance with the National Anti-Poverty Strategy.<sup>32</sup>

Low levels of exercise is a particular problem in relation to girls, and therefore greater efforts must be made to make regular exercise more accessible to this group. Dance is consistently reported by girls to be a preferred form of exercise, although it is one of the more expensive options.<sup>33</sup> Research is needed to establish how to make exercise more

<sup>27</sup> UN Committee on the Rights of the Child (n 2) 12.

<sup>28</sup> Richard Layte and Cathal McCrory, *Growing Up in Ireland: Overweight and Obesity Amongst Nine-Year-Olds* (Minister for Children and Youth Affairs, 2011).

<sup>29</sup> *ibid*.

<sup>30</sup> *ibid*.

<sup>31</sup> *ibid*.

<sup>32</sup> *ibid*.

<sup>33</sup> See National Heart Alliance, *Physical Activity, Young People and the Physical Environment: Summary of Evidence* (National Heart Alliance, 2006) 13. <[http://www.irishheart.ie/iopen24/pub/positionstatements/summary\\_of\\_evidence\\_physical\\_activity\\_young\\_people\\_the\\_physicalenvironment.pdf](http://www.irishheart.ie/iopen24/pub/positionstatements/summary_of_evidence_physical_activity_young_people_the_physicalenvironment.pdf)> accessed 14 July 2015.

accessible to girls, in particular on how to make the medium of dance more accessible to girls.

Breastfeeding is closely correlated with lower levels of obesity.<sup>34</sup> Data from the *Growing Up in Ireland* study indicates that children who are breastfed for three to six months are 38% less likely to be obese at nine years of age compared to children who have been exclusively formula-fed.<sup>35</sup>

However, as outlined below, levels of breastfeeding in Ireland are very low. The link between breastfeeding and lower levels of obesity further highlights the need to increase levels of breastfeeding in Ireland. One way in which this could be done would be to highlight this link in information campaigns on breastfeeding.

The Committee on the Rights of the Child makes the point that the exposure of children to sugary drinks and 'fast foods' high in fat, sugar or salt contributes to obesity and that 'the marketing of these substances – especially when such marketing is focused on children – should be regulated and their availability in schools and other places controlled'.<sup>36</sup> The Broadcasting Authority of Ireland has issued General and Children's Commercial Communications Codes which include rules on commercial communications for High Fat, Salt and Sugar food directed at children, most recently updated in 2013. However the Institute of Public Health in Ireland states that the Codes do not go far enough, and recommends:

- > the adoption of the Nutrient Profiling Model (a 'simple scoring' system used in the UK, where points are allocated based on the nutritional content in 100g of a food or drink) to limit the exposure of the children to advertising of a product high in fat, sugar and salt;
- > a 'co-regulation' approach whereby both producers and a statutory agency have joint responsibility for certifying a product as a food high in fat, sugar and salt;
- > restrictions on the advertising of foods high in fat, sugar and salt between 6am and 9pm;
- > a monitoring system be established in order to evaluate the effect of measures adopted.<sup>37</sup> There is a clear link between advertising and consumption of fast food by children,<sup>38</sup> therefore standards need to be strengthened in this regard in Ireland to tackle rising obesity levels and comply with General Comment No. 15.

34 Muiris Houston, 'Feeding the Debate', *Irish Medical Times* (8 June 2012) <<http://www.imt.ie/opinion/2012/06/feeding-the-debate.html>> accessed 8 Dec 2013.

35 Layte and McCrory (n 28).

36 UN Committee on the Rights of the Child (n 2) 12.

37 Institute of Public Health in Ireland, *Submission to Broadcasting Authority of Ireland Children's Commercial Communications Code* (14 October 2011) <<http://www.publichealth.ie/sites/default/files/FINAL%20BAI%20ChildrensCode%20HMcA14Oct%2011%20VX.pdf>> accessed 14 July 2015.

38 See Jason Halford et al., 'Effect of television advertisements for foods on food consumption in children' (2004) 42 *Appetite* 221.

## Recommendations

- > **Implement the recommendations of the report conducted on behalf of the Minister for Children and Youth Affairs. These include recommendations to have more height and weight measures for children, to take a holistic approach to sports policy, and to take a cross agency approach to tackling the obesity problem in semi and unskilled social class households.**
- > **Conduct research into increasing opportunities for girls to engage in exercise, with a particular emphasis on dance for girls.**
- > **Place greater emphasis on the link between breastfeeding and lower levels of obesity in children.**
- > **Implement the recommendations of the Institute of Public Health in Ireland to adopt of the Nutrient Profiling Model, a 'co-regulation' approach, restrictions on the advertising of foods high in fat, sugar and salt between 6am and 9pm and the establishment of a monitoring system.**

## 4.4 Breastfeeding

The Convention on the Rights of the Child stipulates that states must

'ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in... the advantages of breastfeeding...'<sup>39</sup>

The Committee emphasises in the General Comment the importance of breastfeeding for the health of children, citing the recommendation of the World Health Organisation that infants should be exclusively breastfed to six months of age and that breastfeeding 'should continue alongside appropriate complementary foods preferably until two years of age, where feasible'.<sup>40</sup> States have obligations in this area to 'protect, promote and support' breastfeeding.<sup>41</sup> States are required, for example, to implement the International Code on Marketing of Breast-milk Substitutes, which includes a requirement to forbid the advertising of baby formula.<sup>42</sup>

39 Article 24(2)(e).

40 UN Committee on the Rights of the Child (n2) 11, citing WHO and United Nations Children's Fund (UNICEF), *Global Strategy for Infant and Young Child Feeding* (Geneva, 2003).

41 WHO and United Nations Children's Fund (UNICEF), *Global Strategy for Infant and Young Child Feeding* (Geneva, 2003).

42 See Health Service Executive, 'International Code of Marketing and Breast-Milk Substitutes Factsheet' (HSE <<http://www.breastfeeding.ie/uploads/files/factsheet09.pdf>> accessed 14 July 2015.



The health benefits of breastfeeding for both mother and baby are well known,<sup>43</sup> and breastfeeding reduces respiratory, ear and gastrointestinal infection in infants as well as ensuring health benefits which endure into adulthood.<sup>44</sup> It is estimated that exclusive formula feeding costs at least €12 million annually due to extra health care costs for the treatment of infections in infancy in Ireland.<sup>45</sup> Yet in 2010, Ireland had the lowest breastfeeding rate of 14 European countries.<sup>46</sup> 56% of mothers in Ireland currently initiate breastfeeding compared to 81% in the UK and over 90% in Scandinavian countries.<sup>47</sup> Though breastfeeding duration rate figures are not collected at national level in Ireland research studies indicate that less than 10% of infants are still breastfed at age six months.<sup>48</sup> At international level a clear link has been made between breastfeeding and human rights obligations to children; therefore it is vital that significant efforts are made in Ireland to improve these figures and therefore the health of children.

Attempts have been made to implement policy in Ireland to increase breastfeeding rates, however there does not appear to have been sufficient efforts to follow-up on these efforts. Policy changes were recommended in the 2005 Five-Year Strategic Breastfeeding Action Plan in order to increase rates of breastfeeding in Ireland.<sup>49</sup> The targets included an infant feeding Data Collection System to be developed to include demographic indicators known to influence breastfeeding, the appointment of ten regional breastfeeding co-ordinators and an increase in the national breastfeeding initiation rate of 2% per year. It was stated in the Plan that an interim report and final report would be published, however neither have been produced.<sup>50</sup> Rates of breastfeeding in Ireland at hospital discharge had increased by almost 7% by 2010,<sup>51</sup> however an Economic and Social Research Institute study found that existing policy

initiatives had at best a limited role in the increase in breastfeeding. Most of the increase had occurred because the characteristics of mothers changed. The average age of mothers had increased and more non-Irish national mothers were giving birth in Ireland, and both factors increase the rate of breastfeeding.<sup>52</sup> In any case, Ireland still has an unacceptably low rate of breastfeeding compared to other countries.

Although detailed analysis of the causes of such low rates of breastfeeding in Ireland is beyond the scope of this report, there are some obvious points which can be made. An inadequate number of trained professionals exist in Ireland to assist women with breastfeeding. In one study, 54% of GPs and only 32% of practice nurses felt sufficiently skilled to provide breastfeeding support.<sup>53</sup> This is unfortunate as on the HSE breastfeeding website the emphasis is on accessing support from midwives and GPs who do not specialise in breastfeeding.<sup>54</sup> Lactation consultants, however, are professionals (usually midwives) who specialise in supporting mothers with breastfeeding. It is mentioned on the website that 'A Lactation Consultant (IBCLC) may also be available'.<sup>55</sup> There is no guarantee that a mother who requires assistance will have access to this professional. The Association of Lactation Consultants in Ireland states that there is a shortage of lactation consultants. At Cork University Maternity Hospital, for example, there were almost 9,000 births in 2008, with only one lactation consultant employed at the hospital.<sup>56</sup> There was still only one lactation consultant employed at the hospital in 2013. Clearly better training for health care staff generally, as well as an increase in the number of available lactation consultants should be the first step in attempting to increase breastfeeding rates.

The lack of a breastfeeding culture in Ireland also needs to be tackled. The National Infant Survey found in 2008 that by three to four months, only 53% of mothers who were breastfeeding had breastfed in public.<sup>57</sup> Increased health promotion strategies are one way in which breastfeeding should be promoted in line with State obligations. Research in Ireland has indicated that such strategies should be targeted at young people before they initiate pregnancies, and that girls should be made aware of the generally positive attitudes of boys to breastfeeding.<sup>58</sup> Attitudes of others have a great

43 American Academy of Pediatrics, 'Section on breastfeeding: Breastfeeding and the use of human milk' (2005) 115 (2) Pediatrics 496; Chessa Lutter et. al., Quantifying the benefits of breastfeeding: A summary of the evidence (The Food and Nutrition Programme 2002).

44 The Economic and Social Research Institute, 'Breastfeeding in Ireland 2012: Consequences and Policy Responses' <[https://www.esri.ie/news\\_events/latest\\_press\\_releases/breastfeeding\\_in\\_ireland\\_/index.xml](https://www.esri.ie/news_events/latest_press_releases/breastfeeding_in_ireland_/index.xml)> accessed 2 Dec 2013.

45 *ibid.*

46 EURO-PERISTAT Project, SCPE EUROCAT, EURONEOSTAT European Perinatal Health Report (EURO-PERISTAT Project 2013).

47 The Economic and Social Research Institute (n44).

48 [http://www.breastfeeding.ie/support/what\\_help\\_is\\_available#before](http://www.breastfeeding.ie/support/what_help_is_available#before) (last visited 8 Dec 2013).

49 Department of Health and Children, 'Breastfeeding in Ireland: A five-year strategic action plan' (National Committee on Breastfeeding/ Department of Health and Children 2005) <<http://www.breastfeeding.ie/uploads/files/ACTIONplan.pdf>> accessed 14 July 2015.

50 Australian Government, Department of Health, 'An International Comparison Study into the implementation of the WHO Code and other breastfeeding initiatives: Republic of Ireland' (Australian Government, Department of Health, 2012). <<http://www.health.gov.au/internet/publications/publishing.nsf/Content/int-comp-whocode-bf-init-int-comp-whocode-bf-init-ico-int-comp-whocode-bf-init-ico-ireland>> accessed 1 Dec 2013.

51 The Economic and Social Research Institute, 'Breastfeeding in Ireland 2012: Consequences and Policy Responses' <[https://www.esri.ie/news\\_events/latest\\_press\\_releases/breastfeeding\\_in\\_ireland\\_/index.xml](https://www.esri.ie/news_events/latest_press_releases/breastfeeding_in_ireland_/index.xml)> accessed 20 Dec 2013.

52 Aoife Brick and Anne Nolan, 'Explaining the increase in breastfeeding at hospital discharge in Ireland, 2004–2010' (2013) 183 (3) Irish Journal of Medical Science 333.

53 Barbara Whelan, 'An Exploration of Health Professional Support for Breastfeeding' Unpublished Thesis <<http://arrow.dit.ie/cgi/viewcontent.cgi?article=1090&context=sciendoc>> accessed 8 Dec 2013.

54 <[http://www.breastfeeding.ie/policy\\_strategy](http://www.breastfeeding.ie/policy_strategy)> accessed 8 Dec 2013.

55 *ibid.*

56 Gary Culliton, 'Ireland needs more lactation consultants' Irish Medical Times, (Dublin, 19 March 2009) <<http://www.imt.ie/news/public-health/2009/03/ireland-needs-more-lactation-consultants.html>> accessed 14 July 2015.

57 Louise Gallagher, *National Infant Feeding Survey* (Health Service Executive, 2008) <[http://www.breastfeeding.ie/uploads/files/National\\_Infant\\_Feeding\\_Survey\\_2008.pdf](http://www.breastfeeding.ie/uploads/files/National_Infant_Feeding_Survey_2008.pdf)> accessed 14 July 2015.

58 Claire Connolly, 'Attitudes of Young Men and Women to Breastfeeding' (2013) 106 Irish Medical Journal 9.

59 Gallagher (n 57).

bearing on the likelihood of a mother to breastfeed,<sup>59</sup> and therefore nationwide campaigns to the general public and not just mothers will be of huge importance in increasing breastfeeding rates.

The marketing of baby formulas is also an area which could be improved in Ireland. Formula advertisements have been found to influence mothers' feeding choices. In one study, mothers who recalled an infant formula advertisement message were found to be twice as likely to feed their babies formula.<sup>60</sup> Ireland is subject to EU regulations as regards the control of advertising of such products.<sup>61</sup> The Regulations detail, amongst other things, restrictions on the advertising of infant formulas (for those under six months) and 'follow-on formulas' (for those under 12 months). However the regulations do not apply to the full range of products covered by the International Code of Marketing of Breast-milk Substitutes of the World Health Organisation. Such products include all breast-milk substitutes, bottles and teats and bottle-fed complementary foods. There are many improvements which could be made to the standards around infant formula and related products in Ireland. Furthermore there is no indication that there has ever been action taken for a breach of the advertising codes, despite evidence that such breaches have occurred.<sup>62</sup> Therefore more stringent policing of the implementation of the regulations is needed.

## Recommendations

- > Greater training should exist for GPs and nurses in relation to support for breastfeeding.
- > A greater number of lactation consultants should be appointed in Ireland immediately.
- > Recommendations of the 2005 Five-Year Strategic Breastfeeding Action Plan should be implemented, in particular:
  - o Establish an infant feeding Data Collection
  - o Appoint ten regional breastfeeding co-ordinators
  - o Conduct and publish a review of the implementation of the 2005 Five-Year Strategic Breastfeeding Action Plan

- > There needs to be greater emphasis on health promotion strategies regarding breastfeeding. Such strategies should be targeted at the general public, and at young people before they initiate pregnancies. Girls should be made aware of the generally positive attitudes of boys to breastfeeding.
- > Legislation should be introduced which goes beyond EU regulations to ban the advertising of baby formula outright.
- > The regulation of advertising should apply not just to baby formula itself, but also to related products.
- > More stringent policing of the implementation of the regulations should be implemented.

60 Howard Sobel *et. al.*, 'Is Unimpeded Marketing for Breast milk Substitutes Responsible for the Decline in Breastfeeding in the Philippines? An Exploratory Survey and Focus Group Analysis' (2011) 73 *Social Science and Medicine Journal* 1445. See also Suleiman, A, 'A study on marketing and its effects on infant feeding practices' (2001) 56 *Medical Journal Malaysia* 23.

61 The most recent is Regulation (EU) No 609/2013 of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control.

62 Australian Government, Department of Health (n 117).



## Spotlight on Consent to Healthcare

Professor Deirdre Madden

### 4A.1 IMPORTANCE OF CHILD-CENTRED APPROACH IN HEALTH LAW

In the health and social care context in any matter relating to children, it is generally accepted that the child's best interests are of paramount importance. Such an approach involves putting the interests and wellbeing of the child at the centre of all decisions and ensuring that the child's own voice is heard and respected as far as possible. This does not mean that the interests and views of parents will be displaced, as in most instances the child's interests will be best represented by his or her parents, although their interests are not the same. However, respect for the autonomy of the child entails the facilitation, wherever possible, of the child's right to make his/her own decisions.

Involving children in decision making may be different from obtaining consent in the adult context due to the age or capacity of the child to understand and participate in the decision and the role of the parents in decision making. However, even where children are unable to give a valid consent for themselves, they should nonetheless be as involved as possible in decision making as even young children may have opinions about their healthcare and have the right to have their views taken into consideration by giving their assent to the proposed treatment or service. This principle is in keeping with legal and international human rights standards and ethical guidance which provide that the child's wishes should be taken into account and, as the child grows towards maturity, given more weight accordingly.<sup>1</sup>

### 4A.2 ROLE OF PARENTS AND LEGAL GUARDIANS

Parents and legal guardians are generally considered best placed to safeguard the health and wellbeing of their children. Legal guardianship refers to the right of a parent to be involved in all major decisions affecting the welfare and upbringing of a child including decisions relating to education, health, religious, moral and monetary concerns.

In Ireland, there has been for some time inconsistency in health and social care practice as to whether one or both parents/legal guardians' consent was required prior to commencement of medical treatment and/or social care intervention. On the one hand it was argued (and some health and social care services such as child vaccination

programmes required) that the consent of both parents/legal guardians is required prior to treatment of the child on the basis of the rights of the parents/legal guardians in keeping with Article 41 of the Constitution, which recognises the family as the natural primary and fundamental unit group of society, and the Guardianship of Infants Act, 1964. However, it was also recognised by service providers that seeking joint parental consent sometimes caused delays in children receiving services and potential logistical difficulties in ensuring that all forms are co-signed, for example when parents/legal guardians are working abroad. In addition the requirement for joint consent may be perceived by those parents/legal guardians not in dispute to be bureaucratic.

It was therefore argued that seeking the consent of only one parent/legal guardian should be recognised in health and social care practice as more practical for safe, timely and effective service provision in the best interests of the child. It is generally accepted in other jurisdictions from a legal perspective that, in protecting health professionals from an action in battery, the consent of one parent (or in their absence, that of the court) is sufficient. The acceptance of consent of one parent/legal guardian assumes that the child's welfare is paramount, which is in line with the Child Care Act 1991 and the Children Act 2001, and that the health and social care professional is proposing treatment/intervention in the child's best interests. It also assumes that both of the parents/legal guardians are concerned with the child's welfare.

The provisions of the Irish Constitution 1937 acknowledge the important role and responsibility that all parents have to safeguard the welfare of their children in relation to decisions in many different contexts, including health, social development and education. As a corollary to the rights given to parents as legal guardians of their children, there are also duties imposed on them to act in the best interests of their children. In the health and social care context this requires parents to engage with health and social care service providers to ensure that the child receives the best possible care and services. Such involvement by parents should be encouraged and facilitated by service providers as much as possible.

In 2013 the Health Service Executive (HSE) published a National Consent Policy for all health and social care services provided by or on behalf of the HSE.<sup>2</sup> In trying to accommodate both of these positions outlined above – the protection of the welfare of the child as well as respect for the rights of both parents – the policy advises that where both parents have indicated a wish and willingness to participate fully in decision making for their child, this must be accommodated as far as possible by the service provider. This also imposes a responsibility on the parents to be contactable and available at relevant times when decisions may have to be made for the child.

1 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) art 3; Medical Council, Guide to Professional Conduct and Ethics for Registered Medical Practitioners (7th edn, 2009) para 43.

2 Health Service Executive, *National Consent Policy* (HSE 2013) pt 2 <[http://www.hse.ie/eng/services/list/3/nas/news/National\\_Consent\\_Policy.pdf](http://www.hse.ie/eng/services/list/3/nas/news/National_Consent_Policy.pdf)> accessed 20 January 2014.

The policy advocates that even where both parents have not clearly indicated their wish to be involved in decision making, if the decision will have profound and irreversible consequences for the child, both parents should be consulted if possible. The policy does not attempt to catalogue what is included in the meaning of 'profound and irreversible consequences' as it was felt that this should be left to the discretion of the clinician based on his/her best clinical judgement of the child's situation and that attempts to pre-determine what such consequences might be would not allow for sufficient flexibility to ensure adequate protection of the child. If urgent care is required and the second parent cannot be contacted despite reasonable efforts to do so, the service provider has a paramount duty to act in the best interests of the child.

Apart from the circumstances outlined above and in keeping with the prioritization of the best interests of the child, the policy provides that the consent of one parent/legal guardian will provide sufficient authority in respect of any health or social care intervention in relation to a child. Despite efforts to find a middle ground position that prioritises the welfare of the child, it is possible that this policy may be legally challenged in the courts on the grounds that it fails to give due regard to the rights of both parents equally. This would raise a clash of constitutional principles, for example between the principle that the courts must always act on the basis that the child's welfare is paramount and the principle that each parent or legal guardian has equal standing in decision making for their child in the absence of indications to the contrary.

In 2013 the Irish High Court dealt with a case involving a five-year-old boy whose parents were in dispute about whether he should get vaccinations. The boy's parents were not married but were in a ten year relationship which broke down in 2009. When the child was born, he was immunised without dispute and with no adverse reactions reported. But after the parents' relationship broke down in 2009, the mother left the family home with her son, who was due to receive a further two vaccination injections provided under the public health programme to children. A dispute arose between the parents on the issue. The HSE and the boy's father supported him getting the vaccinations but the mother was opposed. The High Court held that both mother and father were clearly loving parents and that, even though the mother was the primary carer, the court did not accept a hierarchy of authority could exist in cases where unmarried guardians have disagreements as to the medical treatment for their children. In other words, the judge rejected arguments that the mother as primary carer has a stronger voice than the father. The court had to decide the matter on the basis of what was in the child's best interests. This was upheld by the Supreme Court which agreed that the mother did not have superior constitutional rights requiring that her opposition to the vaccinations of the child take priority over the father's support for them.<sup>3</sup> Her claim of an effective veto would, if upheld, set at naught the father's rights and status as his son's legal guardian, according to MacMenamin J. The court was not obliged to give

precedence to either parent, as the welfare of the child is their first and paramount consideration.<sup>4</sup>

It is difficult to anticipate the outcome of further litigation on this issue and it is not best practice to have each individual case referred to legal resolution as this may cause delay in treatment for children which is contrary to their best interests. However, in the absence of legislation on the issue, it is hoped that the National Consent Policy will form the basis of best practice safeguarding the welfare of the child in medical decision making.

#### 4A.3 MINORS AND CONSENT TO MEDICAL TREATMENT

Under the Irish Constitution, the rights of children flow from the rights of every individual person to life, liberty, education etc. These rights are independent of the rights of the parents as such. Therefore, an unqualified acceptance of absolute parental authority would unduly restrict the exercise by older minors of their legal and constitutional rights, their rights under the European Convention of Human Rights, and the United Nations Convention on the Rights of the Child. These rights include rights to liberty, bodily integrity, the freedom to communicate with others and to follow their own conscience.

There is no single age in Ireland at which a person is entitled to all the rights and responsibilities of adulthood. The law instead sets various thresholds such as 16, 18 and 21 years at which the young person gradually moves from childhood to adulthood. For example, at 16 some restrictions on employment are lifted and young people may choose to leave school whereas the Age of Majority Act, 1985 provides that a person becomes an adult for the purposes of civil law at 18 years. This marks an important point as the person loses many of the protections of childhood at that point.

The Non-Fatal Offences Against the Person Act, 1997 provides in section 23(1) that in the context of criminal law only, consent to medical treatment by a person aged over 16 has the same status as if he or she was an 18 year old. This means that although Section 23 of the Act provides a defence to a criminal charge of assault against a health care professional who provides treatment to a 16 or 17 year old, it does not provide a defence to a civil action. However, in terms of health care practice, 16 is largely accepted as the age of consent to medical treatment in Ireland. This means that a person aged 16 years can in practice choose their own doctor, obtain a Medical Card or consent to an operation. In general, young people are not treated in paediatric hospitals once they reach 16.

3 C.O's. & Anor. v Her Honour Judge Alice Doyle & Ors. [2013] IESC 60.

4 Mary Carolan, 'Challenge to son's vaccination fails' The Irish Times (Dublin, 20 December 2013). <<http://www.irishtimes.com/news/crime-and-law/courts/challenge-to-son-s-vaccination-fails-1.1633545>> accessed 20 January 2014.

Section 23 does not make any reference to those under the age of 16. There are various possible interpretations of this. One interpretation is that the Act provides for consent by a person over 16 without necessarily preventing those under 16 from giving consent. Another interpretation is that the Act prevents those under 16 giving consent. It has been consistently recommended by legal commentators as well as the Law Reform Commission and the Ombudsman for Children that the law should be clarified on this matter.<sup>5</sup>

There have not been any clear judicial decisions on the capacity of young persons to give consent to or refuse healthcare interventions in Ireland. However, some guidance may be drawn from a handful of cases in the general healthcare context. For example, in *McK v The Information Commissioner*<sup>6</sup> the Supreme Court held that in a health care setting the views of a young person aged 17 are very relevant and may override a parent's presumed entitlement to access health care information about their children under the Freedom of Information Acts, which applies until the age of 18.

In the *D* case in 2007, the High Court acknowledged that a 16- or 17-year-old can give consent in certain circumstances without parental involvement.<sup>7</sup> The young person in this case was 16 years old when she became pregnant (she was 17 when the case came before the court). A scan revealed that the foetus had anencephaly and would not survive. She decided to go to England for a termination of the pregnancy. For different reasons the HSE obtained an interim care order which meant she was under the care of the HSE. The HSE took the view that she should be prohibited from travelling to England for a termination, although it is not clear whether her welfare or indeed her own views were taken into account in this decision. *D* applied to the High Court for a declaration that she had a right to travel. McKechnie J took the view that she had displayed good moral judgement, courage, integrity and maturity following the discovery of her baby's condition and he made the declarations sought.<sup>8</sup>

The courts have generally taken the view that as a young person approaches 18, their decision making capacity increases and the decision making capacity of their parents decreases. However, there is no definitive legal framework that clarifies the rights of those under 18 and the health care professionals treating them. In practice it appears that many doctors in Ireland have adopted the mature minor test put forward in the English case of *Gillick v West Norfolk and Wisbech Area Health Authority* (1985), and in particular the 'Fraser Guidelines' set out in that case.<sup>9</sup> This case is very significant in setting out the legal relationship between parents and children, though of course it

must be remembered that the constitutional framework in Ireland may result in a different outcome here. In the *Gillick* case a mother of five daughters under the age of 16 challenged the legality of guidance issues to health authorities. This guidance was to the effect that if a doctor was approached by a girl under the age of 16 for contraception he should try to persuade her to involve her parents but that in exceptional cases the decision of whether or not to prescribe the contraception was a clinical one for the doctor. Mrs Gillick complained that this breached her parental rights.

The House of Lords held by majority that the guidance was lawful and that parental rights recede as the child grows in maturity. They concluded that a strict age rule would not take account of the growing maturity and capacity of the child. Therefore capacity to consent should not be determined by a fixed age limit but should be determined according to the maturity, understanding and intelligence of the child in relation to what is proposed. The guidelines proposed in this case by Lord Fraser are that the doctor will be justified in proceeding without parental consent or knowledge if the girl who is under 16 understands the medical advice given; the doctor cannot persuade her to inform her parents; the girl is very likely to begin or continue sexual intercourse without contraception; unless she receives contraception, her physical or mental health are likely to suffer; and her best interests require the doctor to give such contraception.

The first of these tests is often referred to as the test of Gillick competence. It is consistent with international standards in the area of adolescent autonomy such as Article 12 of the UN Convention on the Rights of the Child as well as the Irish Child Care Act, 1991. It is also reflected in the Age of Legal Capacity (Scotland) Act 1991 which states that a person under the age of 16 'shall have legal capacity to consent on his own behalf to any surgical, medical or dental treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment.'<sup>10</sup> The absence of a best interests requirement seems to suggest that a young person who is deemed mature enough to understand the nature of their treatment can make healthcare decisions even if these are not in their best interests.

Existing practice in Ireland has therefore taken the view that although the 1997 Act applies to criminal law only, it is seen as setting the correct approach with regard to 16- and 17-year-olds having the capacity to give their own consent to medical treatment generally. The Medical Council which regulates the conduct of registered medical practitioners in Ireland has given guidance to registered medical practitioners in this area in its Guide to Professional Conduct and Ethics which reflects the general law.<sup>11</sup> It recommends that where a person under the age of 16 years seeks to make a healthcare decision, the doctor should encourage the patient to involve their parents in the

5 Law Reform Commission, *Children and the Law: Medical Treatment* 2011 (LRC 103 - 2011).

6 [2006] IESC 2, [2006] 1 IR 260.

7 *D v Ireland* App no 26499/02 (ECtHR, 27th June 2006).

8 <<http://www.rte.ie/news/2007/0509/88757-abortion/>> accessed 17 January 2014.

9 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

10 Age of Legal Capacity (Scotland) Act 1991 Section 2 subsection 4.

11 Medical Council (n 1).

decision, bearing in mind the doctor's paramount responsibility to act in the patient's best interests.<sup>12</sup>

The National Consent Policy states that while currently there are no legal provisions in Ireland for minors under 16 years to give consent on their own behalf, it is nonetheless good practice to involve the minor in decisions relating to them and listen to their wishes and concerns in terms of their treatment and care.<sup>13</sup> It acknowledges that the *Gillick* case and other similar cases elsewhere do not have any application in Ireland although they may be of persuasive authority in the event of a judicial determination on this issue. The policy acknowledges that in health and social care practice it is usual to involve parent(s)/guardian(s) and seek their consent when providing a service or treatment to a minor under 16. However, the minor may seek to make a decision on their own without parental involvement or consent. In such circumstances it is best practice to encourage and advise the minor to communicate with and involve their parents or guardians. It is only in exceptional circumstances that, having regard to the need to take account of an objective assessment of both the rights and the best interests of the person under 16, health and social care interventions would be provided for those under 16 without the knowledge or consent of parent(s) or guardian(s).

It is unclear whether, in the absence of a finding that there has been a failure by the parents to provide for their child, Articles 41 and 42 of the Constitution would allow medical treatment to be given to a 15-year-old without the consent or knowledge of the parents or their right to decide what is in the best interests of their child. It is possible that an Irish court would draw a distinction between contraceptive treatment (or decisions in relation to termination of pregnancy) on the one hand and ordinary medical treatment on the other as the former may be seen as in keeping with the right of family to make moral/ social decisions in relation to children in the family under Article 42. The latter form of decision might lend itself to increased judicial willingness to adopt the mature minor approach in this jurisdiction. Although the courts have been clear in stating that constitutional rights extend to children, it may be argued that it would only be lawful to interfere with the authority of the family in its decision making over the medical welfare of the child as a member of the family unit, if legislation were introduced to specifically deal with the question of medical treatment and intervention in a way that is consistent with Articles 41 and 42.

The passing into law of Article 42A of the Constitution, following the referendum on children's rights in 2012, may have an impact in this area in the future through the interpretation placed on the new constitutional provisions by the courts although the wording of the new provisions do not appear to directly affect the provision of healthcare. The provisions of the European Convention on Human Rights Act 2003 are

also relevant in ensuring that the Convention rights are applied here as much as possible in keeping with the limitations on judicial function under the Constitution. In particular Article 8 of the Convention provides for the right to respect for private and family life which may have relevance in this context although the breadth of the right in the context under discussion is unclear.

#### 4A.4 MENTAL HEALTH LAW AND MINORS

The Mental Health Act, 2001 defines a child as a person under 18 years. There is confusion as to the interaction between the Mental Health Act, 2001 and the Non-Fatal Offences Against the Person Act, 1997 discussed above as it is unclear whether the age of 16 years also applies to mental health treatment. The Law Reform Commission in its 2011 stated that:

The Mental Health Act 2001, however, does not engage with section 23 of the Non-Fatal Offences Against the Person Act 1997, which provides that a minor aged 16 years of age may consent to medical treatment. The uneasy relationship between section 23 of the 1997 Act and the 2001 Act raises questions over the status of consent or refusal given by a young person aged 16 years of age under the 2001 Act. This uncertainty also extends to issues of capacity and consent in respect of young people under 16 years of age.<sup>14</sup>

The Commission also pointed out that: 'The failure to recognise the capacity of children and young people, particularly those aged 16 and 17 years of age in respect of consent to mental health admission and treatment creates an arbitrary distinction between physical and mental health.'<sup>15</sup> It recommended that the Mental Health Act, 2001 be amended to provide that a person who is 16 or 17 years of age is presumed to have capacity to consent to and refuse healthcare and medical treatment, including psychiatric treatment. It also stated that its recommendations concerning healthcare decision making by persons under 16 years of age should also be applied in the context of mental health, including decisions in respect of admission and treatment under the Mental Health Act, 2001. This means that there would be no distinction between physical and mental health for the purposes of recognising the young person's capacity to give consent.

The only parts of the Mental Health Act which refer to children are those which apply to involuntary detention so it may be argued that the only time the definition is relevant is in this context. This may be interpreted to mean that for clinical assessment and treatment in any other context such as outpatient treatment, the Act does not apply to

12 *ibid* para 43.5.

13 Health Service Executive (n 2).

14 Law Reform Commission 2011 Report on Children and the Law: Medical Treatment, at para. 3.40.

15 *ibid* para 3.53.

limit the giving of consent to those over the age of 18. Therefore a person aged 16 years would have the legal capacity to give personal consent to their own mental health treatment in the same way as any other medical treatment.

Of some relevance in this context is *HSE v JM* in 2013,<sup>16</sup> where a 15-year-old girl with bipolar disorder was refusing to comply with her treatment regime or to allow a blood sample to be taken from her to monitor her condition. She was assessed by a consultant adolescent psychiatrist as mature enough to understand the necessary information regarding her diagnosis and treatment, and as being at significant risk of suicide to the extent that her judgement was impaired and she was unable to make clear decisions about her future. The judge took the view that she lacked the capacity to refuse consent to the taking of blood samples. In discussing section 23 of the 1997 Act, Birmingham J stated that although the consent of a minor aged 15 years and 11 months would not provide a statutory defence to what would otherwise be a trespass, this is 'not at all to suggest that the views of a minor of that age ought not to be treated with respect, they most certainly should be'.

He went on to say:

I am not to be taken as being of the view that there are no decisions of a medical nature which X.Y. would not have the capacity to take. Neither am I laying down any general principle that young people aged 15 going on 16 should always be regarded as lacking capacity.<sup>17</sup>

In relation to the question of whether Gillick competence forms part of Irish law, the court noted that this approach had found favour in a number of common law jurisdictions but did not comment on whether it formed part of Irish law. The judge stated that even assuming for the purpose of this case only that the concept forms part of Irish law, X.Y. was not in fact Gillick competent. The relevance of the case here is that the judge was prepared to countenance that the Non-Fatal Offences Against the Person Act, 1997 does in fact apply to psychiatric treatment as advocated above.

The Mental Health Commission has recommended that persons under 18 should be allowed to consent to psychiatric treatment and it is understood that they intend revising their code of practice in this regard in light of the *JM* case mentioned above.

16 2013] IEHC 12.

17 *HSE v JM* [2013] IEHC 12 (Birmingham J 24).

## Spotlight on Mental Health

Anne-Marie O'Sullivan BL

### 4B.1 INTRODUCTION

The prevalence of mental health problems among children and adolescents is well documented, as is the need to prioritise mental health care in childhood.<sup>1</sup> Recent studies also suggest that young people in Ireland may have a higher rate of mental health problems than similarly aged young people in other countries.<sup>2</sup> Unfortunately, this has not resulted in the required level of service provision or legislation.<sup>3</sup> Failure to deal with the mental health needs of children can lead to mental health problems with lifelong consequences, undermining compliance with health regimes and reducing the capacity of societies to be safe and productive.<sup>4</sup> Mental health problems do not occur in isolation and children who are exposed to risk factors such as homelessness, poverty, the care and youth justice system, and substance abuse have a greater likelihood of developing mental health difficulties.<sup>5</sup> The cross cutting nature of mental health issues demands a multi-disciplinary approach to reform across the education, care and youth justice and asylum and immigration systems, both in terms of policy and legislative reform.<sup>6</sup>

### 4B.2 REVIEW OF RELEVANT INTERNATIONAL HUMAN RIGHTS AND CONSTITUTIONAL STANDARDS

#### International standards

Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) establishes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The ICESCR also provides for an overarching right to non-discrimination under Article 2(2).<sup>7</sup> The right to health is also set out in Article

- 1 Department of Health and Children, *A Vision for Change - Policy Document* (2006) 85; Health Service Executive, *Fifth Annual Child & Adolescent Mental Health Service Report 2012 – 2013* (2014); Tony Bates and others, *Someone to Turn To, Someone to Talk To* (Headstrong 2009) 18; Barbara Dooley and Amanda Fitzgerald, *My World Survey: National Study on Youth Mental Health in Ireland* (Headstrong and UCD 2012).
- 2 Mary Cannon and others, *The Mental Health of Young People in Ireland: A report of the Psychiatric Epidemiology Research across the Lifespan (PERL) Group* (RCSI 2013) 7.
- 3 Health Service Executive, *Fifth Annual Child & Adolescent Mental Health Service Report 2012 – 2013* (2014).
- 4 World Health Organisation, *Caring for children and adolescents with mental disorders: Setting WHO direction* (2003) 25, appendix 1.
- 5 Department of Health and Children, (n 1) 85.
- 6 Rosaleen McElvaney and others, *Someone to Care: The Mental Health Needs of Children and Young People with Experience of the Care and Youth Justice Systems*, (Children's Mental Health Coalition Dublin 2013).
- 7 UN Economic and Social Council, 'CESCR General Comment No. 5: Persons with Disabilities' (9 December 1994) E/1995/22.



24 of the UN Convention on the Rights of the Child (CRC) which includes mental health. Article 23 of the CRC also specifically addresses the rights of children with disabilities to enjoy a 'full and decent life' as well as the right to 'special care' and 'assistance' while Article 27 of the CRC provides that every child has the right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development. The CRC's four main guiding principles include the best interests of the child (Art 3 CRC), non-discrimination (Art 21 CRC), the right to survival and development (Art 6 CRC), and respect for the views of the child (Art 12 CRC). The Convention also contains a number of more specific rights of relevance to children with mental health problems, which will be discussed in more detail in the body of this section.

Ireland is also a signatory to the UN Convention on the Rights of Persons with Disabilities (CRPD).<sup>8</sup> While the CRPD does not introduce any new rights, it seeks to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.<sup>9</sup> The CRPD moves towards a social model of disability<sup>10</sup> and has been described as marking a 'paradigm shift' in attitudes and approaches to persons with disabilities, which includes persons who experience mental health problems.

Article 3 CRPD, which sets out the Convention's general principles, refers to the specific needs of children and requires respect for the evolving capacities of children with disabilities, while Article 4(3) requires States to closely consult with and actively involve children with disabilities and their representative organisations in the development and implementation of legislation and policies to implement the CRPD. Article 7 of the CRPD discusses the principle of 'best interests' and recognises the developing capacities of children. It states that 'in all actions concerning children with disabilities, the best interests of the child [...] be a primary consideration' (Art 7(2) CRPD) and that their views be given due weight in accordance with their age and maturity (Art 7(3) CRPD). This must be read in conjunction with Article 12 of the CRPD, which protects equality before the law for all persons regardless of age. The UN Committee on the CRPD has provided clarification on Article 12 in its first General Comment and in relation to children has stated that parties must examine their laws to ensure that the will and preferences of children with disabilities are respected on an equal basis with other children.<sup>11</sup> In light of this approach and the evolving interpretation of Article 12 of the CRPD, there is a need

for greater clarity and guidance from the CRC Committee in relation to concepts of best interests, the voice of the child and the evolving capacity of the child as they relate to mental health, particularly. There remains a gap in international commentary on the position of children under the CRPD and further consideration and guidance is necessary on this developing issue. In particular, further thought must be given as to how the principles of autonomy, self-determination and the promotion of a child's decision making abilities might be balanced alongside the exercise of parental responsibilities and the child's best interests.<sup>12</sup>

The *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*<sup>13</sup> were adopted by the UN in 1991 to provide useful guidance on the human rights of people experiencing mental health problems. The Principles have to a large extent been superseded by the CRPD, however they emphasise the right to care and treatment in the community<sup>14</sup> and to the least intrusive treatment in the least restrictive environment in accordance with an individually prescribed treatment plan.<sup>15</sup>

### Regional standards

The European Convention on Human Rights (ECHR)<sup>16</sup> contains a number of provisions relevant to the treatment and detention of children with mental health problems. These include Article 2 ECHR (right to life), Article 3 ECHR (prohibition of torture, inhuman and degrading treatment or punishment), Article 8 (right to respect for private and family life, including a person's physical and psychological integrity) and Article 5 (right to liberty and security). The European Court of Human Rights' (ECtHR) jurisprudence in the area of mental health has primarily dealt with adults. In the context of children and mental health, the ECtHR found in *DG v Ireland* that Ireland was in breach of its obligation under the Convention for the temporary placement of a minor with a mental health problem in St. Patrick's Institution for Young Offenders without charge or conviction. The Court did not accept the argument that a high-support secure educational facility for 16-18 year olds was unavailable and held that such a facility was not lawful for the purposes of educational supervision and was a violation of D.G.'s rights under Article 5 ECHR.<sup>17</sup>

In 2004, the Council of Europe issued *Recommendation Concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorders* (Rec (2004) 10). Article 10 requires the provision of hospital facilities with appropriate levels of security, as well as community-based services to meet the health needs of people with mental health problems involved in the criminal justice system. Article 29, paragraph (2) states that the

8 Ireland has yet to ratify the UN CRPD, which entered into force on 3 May 2008 and has been ratified by 126 countries. The Government has signalled its intention to ratify the Convention following the enactment of capacity legislation which it says is necessary. The Assisted Decision-making (Capacity) Bill 2013 was published in June 2013.

9 Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006) A/RES/61/106 art 1.

10 Article 1 CRPD defines the term 'disability' as including 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

11 UN Committee on the Rights of Persons with Disabilities, 'General Comment No. 1 (2014) Article 12: Equal recognition before the law' (11 April 2014) CRPD/C/GC/1, para. 32, 9.

12 Amnesty International Ireland, *Response to the Interim Report of the Steering Group on the review of the Mental Health Act 2001* (Dublin, November 2012) 46.

13 UN General Assembly, 'Principles for the Protection of Persons With Mental Illness and the Improvement of Mental Health Care' (17 December 1991) A/RES/46/119.

14 *ibid* Principle 7.

15 *ibid* Principle 9.

16 Incorporated into Irish law by means of the European Convention on Human Rights Act 2003.

17 Ursula Kilkelly, 'Children's Rights: A European Perspective' (2004) 4(2) *Judicial Studies Institute Journal* 68.



minor's opinion should be taken into consideration in decisions about placement and treatment and should have proportionate weight to the child's age and degree of maturity. It also requires that representatives should provide assistance to children who have been involuntarily placed<sup>18</sup> and that minors should not be placed in a facility with adults unless it would benefit the minor.<sup>19</sup>

### Constitutional Standards

The 31st Amendment to the Constitution was passed by referendum in November 2012 and following the Supreme Court decision in *Re: Referendum Act & re: Jordan v Minister for Children and Youth Affairs & ors*,<sup>20</sup> new provisions strengthening children's rights were inserted into the Constitution. While this amendment has been broadly welcomed as a positive step for children's rights, its impact in the area of children's mental health is regrettably limited. The 'best interests' principle and the right of the child to be heard under the amendment will only apply to matters concerning adoption, guardianship, custody or access and proceedings brought by the State. This means that it does not apply to the admission or treatment of children under the Mental Health Act, 2001 or proceedings arising under the Act. However, the amendment is an important first step and has the potential to bring about a fundamental change in the relationship between the State and children by affirming in children as rights holders under the Constitution and placing an obligation on the State to uphold those rights.<sup>21</sup> It may also redress the imbalance between parental rights and children's rights, particularly where there is a disagreement between the child's wishes and those of the parent in relation to either treatment or admission under the 2001 Act.

## 4B.3 REVIEW OF IRISH LEGISLATION AND CASE LAW

### Mental Health Act 2001

The Mental Health Act, 2001 is the primary legislation governing children with mental health problems and their access to mental health services. Even though the 2001 Act was only brought into effect in 2006, it is outdated and is not in line with Ireland's international human rights obligations, particularly as these relate to children.<sup>22</sup> When the 2001 Act was first enacted, the CRC Committee welcomed its introduction but noted the lack of adequate programmes and services related to the mental health of children and their families in Ireland. The Committee also expressed concern that many children with mental health difficulties were unable to access existing programmes and services

for fear of stigmatisation and that some children were treated with adults in psychiatric facilities.<sup>23</sup> *The Programme for Government 2011* recognised this and committed to reviewing the 2001 Act in consultation with service users, carers and other stakeholders and in line by human rights standards. This review was recently completed with the publication of a *Report by the Department of Health's Expert Group on the review of the Mental Health Act 2001*, which contained a number of important recommendations relating specifically to children.<sup>24</sup>

### Separate section for children and young people and guiding principles

The provisions of the 2001 Act relating to children and young people are spread throughout the Act so the extent to which such provisions apply to children is unclear.<sup>25</sup> To make the 2001 Act user-friendly and to facilitate the introduction of a separate set of guiding principles specifically for children and young people, the Law Reform Commission (LRC) recommended the introduction of a separate section for people under the age of 18 into the Act.<sup>26</sup> The Expert Group has added to this recommendation by stating that the applicable provisions of the Child Care Act 1991 should be expressly included in the 2001 Act rather than being cross referenced.<sup>27</sup> The Expert Group also recommended that this separate section contain its own set of guiding principles.<sup>28</sup>

Best Interests: The Expert Group has accepted that interventions under the 2001 Act must take into account the views of the child and that those should be given due weight in accordance with his/her age, evolving capacity and maturity. This doesn't go as far as the recommendation of the LRC, and the requirement of Article 3 of the CRC, that the best interests of the child be the first and paramount consideration in all decisions taken under the Act.<sup>29</sup> This should be clearly stated in the new guiding principles. On a more positive note, the Expert Group's Report does take into account the need to respect the evolving capacities of the child (Article 5 CRC) as well as their right to be heard and to participate in decisions affecting them (Article 12 CRC);<sup>30</sup> an approach that is reflected in the CRPD (Article 7 CRPD). In implementing the recommendations of the Expert Group, it is important that the legislature adopt a holistic approach when considering what is in the 'best interests' of a child in a mental health context. This should not be limited to the

18 Art 29(3).

19 Art 29(4).

20 *Re: Referendum Act & re: Jordan v Minister for Children and Youth Affairs & ors* [2015] IESC 13

21 Ursula Kilkelly, 'Ireland's Law and Policy: Moving towards a Children's Rights Based Approach' (Symposium to mark the 10th Anniversary of Ombudsman for Children's Office, Farmleigh House, 25 April 2014).

22 Mental Health Commission, *Response to the Law Reform Consultation Paper on Children and the Law: Medical Treatment* (2010) 24.

23 UN Committee on the Rights of the Child, 'Concluding Observations of the UN Committee on the Rights of the Child: Ireland' (29 September 2006) CRC/C/IRL/CO/2 para 46.

24 Department of Health and Children, *Report of the Expert Group on the Review of the Mental Health Act 2001*, (Dublin: Department of Health, 2015).

25 Department of Health and Children, *Report of the Steering Group on the Review of the Mental Health Act 2001*, (2012) 14.

26 Law Reform Commission, *Children and the Law: Medical Treatment 2011* (LRC 103 - 2011) recommendation 7.14.

27 Department of Health, Expert Group Report (n 24) 68. At present, a number of sections of the Child Care Act 1991 apply to proceedings under s. 25 of the 2001 Act making its application unnecessarily complex.

28 *ibid* 68.

29 Law Reform Commission (n 26) para 3.82, 132 -133.

30 Jean Zermatten, *The Best Interests of the Child, Literal Analysis, Function and Implementation* (Institut International Des Droits De L'Enfant, 2010).

medical best interests of the child but also recognise the child's life in the family or community. The best interests of the child should not be objectively assessed; instead there should be objective and subject elements to the definition of best interests. The subjective elements of best interests should include collective subjectivity (what is in the best interests of the child in the context of society at the time) and personal subjectivity.<sup>31</sup> In order to facilitate such an assessment, the 2001 Act should contain a set of guiding principles or factors to be considered in determining what is in a child's the best interests.<sup>32</sup>

Voice of the child: The 2001 Act does not provide for the voice of the child to be heard in relation to treatment or admission.<sup>33</sup> In a welcome move, the Expert Group has recommended that the child's right to be heard be included in the guiding principles of the child-specific part of the legislation and that consultation with the child is required at each and every state of diagnosis and treatment.

### Capacity to Consent<sup>34</sup>

The 2001 Act does not recognise the ability of a person under the age of 18 years to consent to admission or treatment for mental health problems. Instead parental consent is determinative of a young person's status as a patient (voluntary or involuntary) regardless of their age, maturity or ability to consent. This issue was recently highlighted by the High Court in *In re X.Y.: HSE v J.M. & Anor*<sup>35</sup> where a child aged 15 years and 11 months disagreed with her doctors and parents regarding the provision of medication and the taking of an ancillary blood test. The judge acknowledged that the views of a minor ought to be treated with respect but stated that a minor's consent could not provide a statutory defence in this matter.<sup>36</sup> The court did not rule out the possibility that the respondent could have the capacity to make certain decisions of a medical nature. The judge clarified this by stating that there was no general principle that young people aged 15 going on 16 should always be regarded as lacking capacity.

Children aged 16 and 17 years of age: Section 2 of the 2001 Act defines a child as a person under the age of 18<sup>37</sup> while the HSE's *National Consent Policy* confirms that the age of consent for treatment of a mental health problem is 18.<sup>38</sup> This contrasts with s. 23

of the Non-Fatal Offences Against the Person Act 1997, which provides that a young person can make decisions about his or her medical treatment from the age of 16. This inconsistency was recognised by the Expert Group which recommended that children aged 16 and 17 be presumed to have the capacity to consent or refuse healthcare and treatment under the 2001 Act. This approach is in line with Article 12 of the CRC which respects the evolving capacities of the child and gives due weight to his or her views in accordance with his or her age and maturity. Unfortunately, the Expert Group also introduced a requirement that where a *16- or 17-year-old* objects to treatment for a mental health problem, the case should be referred to a child friendly District Court. This undermines the presumption of capacity as the mere fact of a *16- or 17-year-old's* objection to admission or treatment is enough to bring his or her ability to consent into question and retains the existing discrimination.

To ensure compliance with the CRPD, there must not be any discrimination in the application of age limits, i.e. if there is a presumption of the ability to consent, it should apply to all children over the age of 16 equally, including those with mental health problems. Where this presumption exists, the child should have the full benefit of the principles of autonomy, self-determination, will and preferences as set out in relation to adults as well as support in making those decisions.<sup>39</sup> The CRPD creates an obligation to support such children to exercise their will and preferences and make decisions.<sup>40</sup>

Under 16 years of age: The 2001 Act does not distinguish between children under the age of 16 years of age and those aged 16 and 17. The Expert Group recommended there should be no automatic presumption of capacity for children under the age of 16 but that the views of the child should be heard and given due weight in voluntary admission process.<sup>41</sup> The situation regarding children below the age of 16 years is less clear than minors age 16 and 17 years as 'competence' is a matter of fact that can differ from child to child depending on the individual child's maturity.

The Law Reform Commission considered that the 2001 Act should provide that where it has been established that a child has the maturity and understanding to appreciate the nature and consequences of a specific healthcare treatment decision, they should be able to make healthcare decisions. The LRC has recommended inserting a set of factors to be taken into account when deciding whether a child has the ability to make a decision.<sup>42</sup> These include having regard to whether the child has the maturity to understand the information and to appreciate its potential consequences; whether the child's views are stable and a true reflection of his/her core values and beliefs; the nature, purpose and utility of the treatment; the risks and benefits of the treatment and

31 *ibid.*  
 32 Amnesty International (n 12) 46.  
 33 Ursula Kilkelly, *Children's rights in Ireland: Law, policy and practice* (Tottel Publishing 2008) 177.  
 34 In this section, reference to capacity refers simply to the legal capacity of children generally to make decisions, rather than 'mental capacity' or decision-making ability of a child by virtue of their disability or mental health problem. In recognising the evolving capacity of children to make decisions, it is important that this is differentiated from the 'decision making ability' of children. See AI, *Response to the Interim Report of the Steering Group*, at p. 48.  
 35 *In re X.Y.: HSE v J.M. & Anor* [2013] IEHC 12.  
 36 *HSE v J.M. & Anor* [2013] IEHC 12 para 23.  
 37 The UN CRC also defines a child as anyone below the age of 18.  
 38 Health Service Executive, *National Consent Policy* (HSE 2013).

39 Convention on the Rights of Persons with Disabilities (n 9) art 7(2).  
 40 Amnesty International (n 12) 51.  
 41 Department of Health, Expert Group Report (n 24) 71.  
 42 Law Reform Commission (n 26) 102-103.

any other specific welfare, protection or public health considerations. However, the LRC also referred to the child's 'mental health' as a possible factor for assessing a child's decision making ability. A child's mental health problems should not be considered in relation to whether or not he or she is able to make a decision. Rather, appropriate supports should be put in place to ensure that the child can exercise his or her will and preferences.<sup>43</sup>

### Admission to age-appropriate approved centres

Article 37(c) of the CRC provides that 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so'.<sup>44</sup> The UN Principles for the Protection of Persons with Mental Illness state that the environment and living conditions in mental health facilities must be as close as possible to those of the normal life of persons of similar age.<sup>45</sup>

The 2001 Act does not require that children and young people be admitted to age-appropriate mental health facilities. As a result, children and young people are routinely placed in adult facilities, a practice that has raised concerns for the UN Committee on the Rights of the Child<sup>46</sup> and the Inspector of Mental Health Services.<sup>47</sup> In order to address this issue and phase out the admission of children and young people to adult centres, the Mental Health Commission introduced an addendum to its *Code of Practice Relating to the Admission of Children under the Mental Health Act 2001*<sup>48</sup> which states that except in exceptional circumstances no child under 18 years is to be admitted to an adult unit in an approved centre from 1st December 2011.<sup>49</sup>

The number of available child units has doubled from three units in 2008 to six in 2012, contributing greatly to the decline in the number of admissions of children to adult units. More CAMHS beds will be added to the system in 2015. However, the Inspector for Mental Health Services' Annual Report showed that levels of compliance under this Code for 2014 fell from 21% to 16% while compliance with the code of practice on admission, transfer and discharge to and from an approved centre fell by 11% from 30%

to 19% compliance.<sup>50</sup> Admissions of children to adult units continued in 2014 when there were 89 such admissions amounting to 20% of all child admissions. While this reflects a year-on-year decline of child admissions to adult units, progress on this issue must continue to ensure that all children receive the mental health services they require in an age-appropriate setting.<sup>51</sup> In 2014, over 84% of the child admissions to adult units were on the basis that no CAMHS beds were available. However, there were in fact vacancies in at least one CAMHS unit on 98% of those occasions.<sup>52</sup> Possible reasons include the geographical location of the CAMHS units, lack of out-of-hours availability of CAMHS beds or a parent unwilling to admit their child to a CAMHS unit some distance from their home. The lack of provision of emergency assessment by a CAMHS team also means that children presenting for admission during out-of-office hours may be admitted to adult units.<sup>53</sup>

### Admission of children and young people

Definition of a 'voluntary patient': Under the 2001 Act children receiving care and treatment on foot of their parent's consent are voluntary patients.<sup>54</sup> Section 2 of the 2001 Act defines a voluntary patient as a 'person receiving care and treatment in an approved centre *who is not the subject of an admission order or a renewal order.*' This definition does not contain any reference to consent, decision making ability or legal capacity. While the Expert Group proposes to amend this definition to reflect a person's ability to consent, there is no proposal to deal with children who have been detained 'voluntarily' on the basis of their parent's consent. The Mental Health Commission has stated that in spite of their voluntary status, these children would not be allowed to leave approved centre<sup>55</sup> and they do not have the protections or safeguards that flow from involuntary status under the 2001 Act. The Law Reform Commission believes that this practice is flawed and out of line with children's rights<sup>56</sup> and have recommended the introduction of a third category of 'informal admission' for children admitted under the 2001 Act by parental consent. The admission and treatment of this intermediate category of patients would be subject to regular review, in the same manner as involuntary patients and the proposed third category of 'intermediate' patient proposed by the Expert Group.

The failure to provide safeguards for 'voluntary' child patients has been observed by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading

43 Amnesty International (n 12) 51.

44 See also Council of Europe, 'White Paper on the protection of human rights and dignity of people suffering from a mental disorder, especially those placed as voluntary patients in a psychiatric establishment' DIR/JUR (2000) para 8.4 and UN Committee on the Rights of the Child, 'General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (1 July 2003) CRC/GC/2003/4 29.

45 UN General Assembly, 'Principles for the Protection of Persons With Mental Illness and the Improvement of Mental Health Care' (17 December 1991) A/RES/46/119.

46 UN Committee on the Rights of the Child, 'UN Committee on the Rights of the Child: Concluding Observations, Ireland' (n 12) 11.

47 Mental Health Commission, *Annual Report 2009* (MHC 2010) 29.

48 Mental Health Commission, *Code of Practice Relating to the Admission of Children under the Mental Health Act 2001* (2006).

49 Section 2.4.1 (c) of the *Addendum to the Code of Practice Relating to the Admission of Children under the Mental Health Act 2001*.

50 Mental Health Commission, *Mental Health Commission and Inspector of Mental Health Services Annual Report 2014* (MHC 2015) 8.

51 Mental Health Commission, *Annual Report 2012* p 28 and Health Service Executive, *Fifth Annual Child & Adolescent Mental Health Service Report 2012 – 2013* (2014) 46.

52 Mental Health Commission (n 50) 67.

53 *ibid.*

54 S 2 of the 2001 Act. See also Mental Health Commission, *Code of Practice Relating to the Admission of Children under the Mental Health Act 2001* (MHC 2006) para 2.7, 13.

55 Mental Health Commission, *Code of Practice Relating to the Admission of Children under the Mental Health Act 2001* (n 48) 15.

56 Law Reform Commission para 3.38, 119.

Treatment or Punishment (CPT).<sup>57</sup> It may also be in contravention of the CRC, which provides that no child should be deprived of his or her liberty unlawfully or arbitrarily. The CRC calls for detention to be in conformity with the law and used only as a measure of last resort for the shortest appropriate period of time.<sup>58</sup> Articles 14 and 17 of the CRPD take a similar approach and point out the general inappropriateness of detaining individuals for the purposes of treatment, while the Act's shortcomings in this respect may also infringe the ECHR.<sup>59</sup> In *XY (a minor) v Health Service Executive*<sup>60</sup> the plaintiff argued that the 2001 Act's failure to provide adequate safeguards for minors who objected to detention or forced treatment was unconstitutional and in breach of the ECHR. The plaintiff's argument addressed a number of potential shortcomings in the 2001 Act: the lack of review by Mental Health Tribunals; the fact that the District Court can and does act on the report of a single psychiatrist who may also be the treating psychiatrist and the lack of a statutory obligation to notify the Mental Health Commission of the making of an order under s. 25 of the Act. Unfortunately, the High Court rejected these arguments and did not make the declarations sought in relation to unconstitutionality and incompatibility.

#### Power of Gardai to remove children

The Expert Group's recommended clarifying the interplay between s. 25 of the 2001 Act and the relevant provisions of the Child Care Act 1991 by granting the Gardai the specific power to remove a child believed to be experiencing a mental health problem to an age-appropriate approved centre is welcome. However, this must be subject to the inclusion of safeguards for the child in such circumstances and the proviso that such Garda powers be exercised only in exceptional circumstances where all other avenues have been exhausted. Where such involvement is deemed necessary, trained personnel with experience of dealing with children should accompany the Gardai.

#### Review of admission and detention

At present, the District Court has jurisdiction to order the detention of children. Whereas adults who are involuntarily detained under the 2001 Act have the right to a review of their detention by a Mental Health Tribunal, no such automatic review is available to children. The Expert Group recommends retaining the role of the District Court in making admission orders and this is appropriate given the seriousness of depriving a child of her/his liberty. These proceedings should take place in camera and with

anonymous reporting. However, consideration should be given to ensuring that Courts have the necessary age appropriate focus and provide support. Where a child is involuntarily detained, she or he should have the right to an independent review of her or his detention by a child friendly Tribunal,<sup>61</sup> with appropriate child expertise.

In addition, children should be provided with a legal representative and parents of detained children should have the right to attend the Tribunal hearing together with the child.<sup>62</sup> In terms of the review of detention, the Act should review detention after 28 days, similar to the length of time which applies for the review of interim care orders under the Child Care Act 1991.

#### Child advocacy service

Advocates should be available to children and young people when making decisions prior to admission to mental health in-patient units, as well as for any subsequent decisions about care and treatment. Children and young people detained under s. 25 of the 2001 Act are particularly vulnerable and should be provided with information in a child-friendly and easy-to-read format.<sup>63</sup>

#### Assisted Decision-Making (Capacity) Bill 2013

The Assisted Decision-Making (Capacity) Bill 2013 was published in 2013 and is the Government's first step towards ratification of the CRPD. The Bill does not refer to children or young people under the age of 18, again creating a discrepancy between the Bill, the 2001 Act and the Non-Fatal Offences Against the Person Act, 1997. However, the question of a child's decision-making ability is one that should be dealt with in great detail in light of the requirement to take into account the voice of the child and children's evolving capacities as outlined in the CRPD and the CRC. If the Bill is to deal with the matter of children and young people, it should do so in a separate section. This should contain its own set of guiding principles and overarching provisions to reflect international human rights law and standards. However, it would be more appropriate to introduce separate legislation dealing with the evolving legal capacity and decision-making ability of children and young people.

#### Supported Decision-Making

The LRC has acknowledged that the level of support and encouragement that a child is given can have a significant impact on competence.<sup>64</sup> The CRC also favours giving

57 Council of Europe, 'Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)', (10 February 2011) CPT/Inf (2011) 3, 60.

58 UN Convention on the Rights of the Child (n 23) Art 37(b).

59 Mental Health Commission, *Response to the Law Reform Consultation Paper on Children and the Law: Medical Treatment* (2010) 9. See *Nielson v Denmark* (1988) 11 EHRR 175 and *Johanssen v Norway* (1996) 23 EHRR 33 paras 76-78. See also Ursula Kilkelly and Mary Donnelly, 'Child Friendly Healthcare: Delivering on the Right to be Heard' (2011) 19 (1) *Med Law Review* 27-54, p 49.

60 *X.Y. (a minor) v Health Service Executive* [2013] IEHC 490

61 Department of Health, Interim Report of the Steering Group (n25) 18.

62 Law Reform Commission (n 26) 18.

63 *ibid* para 3.109, 138.

64 *ibid* para 1.10. The LRC referred to an English Study (Priscilla Alderson, *Children's Consent to Surgery*, (Open University Press 1993) cited in Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Research Centre 2005) at 25.

children an increasing ability to make decisions that concern them as the child matures. While the parents' role in decision-making cannot be ignored, it is important, especially for adolescents to be able to rely on a support network beyond parents.<sup>65</sup>

## Policy Background and Children's Mental Health Services

### Policy

In 2006, *A Vision for Change* called for fundamental reform of the Irish mental health system and included specific recommendations for a comprehensive system of mental health care for young people from infancy up to the age of 18 years from primary care to specialist mental health services, on a community, regional and national basis.<sup>66</sup> It proposed a new structure for specialised mental health services to respond to the needs of children at risk of mental health problems to be based in 'community mental health centres.' Such services were to comprise a range of supports, be delivered by multidisciplinary teams, including day hospitals and sufficient in-patient places and be available in all parts of the country. The Report also recommended that young people using mental health services, and their carers, should be facilitated in giving feedback on their experiences with a view to influencing future policy.

### Services

The service model currently in place in Ireland to address the mental health needs of children spans a range of agencies and disciplines; from community-based supports and services designed to prevent the development of mental health problems, to tertiary level, specialist mental health services providing support for those with psychiatric disorders.<sup>67</sup> These services remain inadequate with complaints including the fragmented and under-resourced nature of financing and staffing as well as problems with the availability of assessments and long waiting lists. There remains a lack of clarity about which service providers should assess young people in situations where they have multiple needs.<sup>68</sup> The implementation of *A Vision for Change* has been 'slow and inconsistent' and no coherent framework for developing mental health specialties has been introduced. The total staffing of the 58 existing community mental health teams remains at 44.6% of the staffing level recommended in *A Vision for Change*.<sup>69</sup> A

comprehensive, time-lined and costed implementation plan as well as increased coherence in the development of community mental health services is necessary.<sup>70</sup>

Child and Adolescent Mental Health Services (CAMHS) cater to a high level of need and provide a community-based, multi-disciplinary team service but remain underdeveloped and understaffed. The service has not been available on a consistent basis to 16-18-year-olds in many areas despite evidence that mental health problems increase in frequency and severity over the age of 15. On 4 September 2012, the HSE approved 'Access protocols for 16- and 17-year-olds to mental health services' and from 1 January 2014, all children up to their 18 birthday who require mental health assessment and treatment will be seen by CAMHS. The HSE made this a mental health service priority for 2014.<sup>71</sup> Between October 2012 and the end of September 2013, of the 9,616 new cases seen, 1551 (16%) were 16 years of age and over. This was an increase of 446 (40%) compared with the previous year.<sup>72</sup> Unfortunately, over a similar period the number of children on waiting lists for appointments with community CAMHS increased by 24%.<sup>73</sup> There also continues to be an inequitable variation in the distribution of CAMHS throughout the country.

While CAMHS teams were not brought within the scope of the Child and Family Agency (TUSLA), the Task Force for Tusla highlighted the current deficits in access to, and coordination between, specialist mental health services and other services for vulnerable children and families.<sup>74</sup> There is a clear need for effective inter-agency working, as well as a shared understanding of the mental health needs of young people.<sup>75</sup>

*A Vision for Change* highlighted the absence of certain specialist services such as paediatric liaison services in most major hospitals, specialist services for eating disorders, mental health services for autism and autistic-spectrum disorders and dedicated child and adolescent forensic teams. There has been some limited progress in these areas with a National Forensic Hospital to include a 10 bed secure unit for adolescents due to open in 2017 as well as a 20 bed unit in the new National Children's Hospital that will include an 8 bed eating disorder service which is at initial planning stage.<sup>76</sup>

65 Mona Paré, 'Of minors and the mentally ill: re-positioning perspectives on consent to health care' (2011) 29 *Windsor Yearbook of Access to Justice* 107, 123-125.

66 Department of Health and Children (n 1).

67 Rosaleen McElvaney, 96.

68 Ombudsman for Children, *Submission of the Ombudsman for Children to the Oireachtas Joint Committee on Health and Children Consultation on Primary Medical Care in the Community* (2008).

69 Health Service Executive, *Fifth Annual Child & Adolescent Mental Health Service Report 2012 - 2013* (2014), 6 and 19 and Figure 2.3(i). According to the HSE, Mental Health Division - Operational Plan 2015, 103, this will rise to 64 CAMHS teams in 2015.

70 Department of Health, *A Vision for Change - the Report of the Expert Group on Mental Health Policy Sixth Annual Report on implementation 2011* (Department of Health 2012) 3.

71 Health Service Executive, *Mental Health Division - Operational Plan 2014* (2014) 2.

<<http://www.hse.ie/eng/services/Publications/corporate/mentalhealthplan.pdf>> accessed 9 July 2015.

72 Health Service Executive (n 69) 7.

73 *ibid.*

74 Department of Children and Youth Affairs, *Report of the Task Force on the Child and Family Support Agency* (2012).

75 Mental Health Commission, *Response to Task Force Report on the Child and Family Support Agency* (2012) at 3. The MHC objected to the transfer of mental health services to the CFA, stating that mental health services should be treated like any other health service and the transfer of CAMHS to CFA could further stigmatize children with mental health problems while at the same time impeding referral and access to appropriate services. Rosaleen McElvaney, 155 and 177.

76 Health Service Executive, *Fifth Annual Child & Adolescent Mental Health Service Report 2012 - 2013* (2014) 52.



Headstrong currently provides adolescent mental health services at a community level through its 10 Jigsaw sites around the country. However there remains a need for a dedicated service on a national level. Community level supports can also be found in the education system but school-based mental health supports continue to be under-resourced. In addition, the *Guidelines for Mental Health Promotion and Suicide Prevention in Post-Primary Schools*,<sup>77</sup> which were a welcome development when published in 2013, do not provide a framework for multi-agency collaboration between various education agencies such as the National Educational Psychology Services, CAMHS, the Special Education Support Service and the National Education and Welfare Board.

## Conclusion

Legislative change alone will not be sufficient to provide the sea-change necessary in the area of children's mental health services. The Government and the HSE have begun to invest in community-based mental health services for children and adolescents. However, the slow progress of policy implementation suggests that a stronger legislative basis is required to ensure that the rights of children and young people to mental health are respected and protected in line with Ireland's human rights obligations.

## Recommendations

- > The 2001 Act should contain a separate section for children and young people with mental health problems.
- > This separate section of the 2001 Act should contain its own set of guiding principles tailored specifically to the needs of young people, including reference to best interests and the voice of the child.
- > 16- and 17-year-olds should be presumed to have the ability to consent or refuse healthcare and treatment under the 2001 Act.
- > Where this presumption exists, the child should have the full benefit of the principles of autonomy, self-determination, will and preferences.
- > The 2001 Act should be amended to provide that a child under 16 years of age can make a decision about his or her care or treatment where he or she has the maturity and understanding to appreciate the nature and consequences of a specific healthcare treatment decision.

- > The 2001 Act should set out factors to be taken into account when deciding whether a child has the ability to make a decision.
- > The 2001 Act should be amended to provide that no child under the age of 18 years should be admitted to an adult in-patient unit unless it is in his or her best interests to do so.
- > A third category of patients, 'informal patients' should be created for children admitted under the 2001 Act on the basis of parental consent.
- > The 2001 Act should provide safeguards for children who have been involuntarily or informally detained under the Act. Such safeguards would include automatic review of detention by a Mental Health Tribunal every 28 days and the automatic provision of legal representative.
- > The 2001 Act should be amended to provide Gardaí with the power to remove a child who is experiencing a mental health problem to an age-appropriate approved centre.
- > The 2001 Act should provide for specialised child advocacy and consideration should be given to the feasibility of providing for a form of peer-advocacy so that people aged 18-24 can provide advocacy support to children experiencing mental health problems.
- > Children and young people detained under s. 25 of the 2001 Act should be provided with child-friendly and easy-to-read information.
- > Separate legislation dealing with children's evolving legal capacity and decision-making ability should be developed and this should include decisions relating to health and mental health care. Such legislation should include provisions for supported decision-making.
- > There should be a comprehensive, time-lined and costed plan for the full implementation of *A Vision for Change* with emphasis on the coherent development of community mental health services for children and young people.<sup>78</sup>
- > Inter-agency coordination is necessary in the provision of comprehensive mental health services to children and young people.
- > Funding must be allocated to ensure the establishment of further specialist and community CAMHS teams in line with the number of teams required in *A Vision for Change*.

77 Department of Education and Skills, *Well-being in Post-Primary Schools: Guidelines for Mental Health Promotion and Suicide Prevention* (2013).

78 Independent Monitoring Group for A Vision for Change, Department of Health, 2012 3.



# CHAPTER 5:

## Welfare and Material Deprivation

Kevin Baneham, BL

This chapter examines the issues of welfare and material deprivation and considers how the best interests and the voice of children are treated in housing and social welfare law.

Two things became very apparent in preparing this chapter. The first was the sheer number of issues that could be included in a chapter looking at the effect material deprivation has on children. The second is that while this is, primarily, a legal text, any study on the rights and interests of children will also include elements of sociology, public policy and child development.

At the outset of the chapter, I propose to list the most relevant provisions of the United Nations Conventions on the Rights of the Child as well as the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights. I will give an overview of the main social welfare payments that relate to children and the data relating to child poverty. I will examine the jurisprudence regarding the Domiciliary Care Allowance.

In respect of housing law, I will examine the issues of homelessness, standards of rented houses and the assessment of eligibility for social housing of European Economic Area (EEA) families. I will look at the issues of window safety and social housing supports to accommodate children whose parents live apart. Lastly, the chapter considers the right of children to play, specifically in multi-unit developments.

What this chapter does not do is to address the question of what constitutes an adequate level of income support. Although this question is one of great importance, it goes beyond the scope of this chapter and its recommendations.

### 5.1 INTERNATIONAL LEGAL OBLIGATIONS AND STANDARDS

Article 27 of the United Nations Convention on the Rights of the Child (CRC) provides for the rights of the child with regard to standard of living. The Article provides:

1. State Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. State Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial

responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

In Article 27, State Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. There is a specific reference in the Article to providing material assistance and support programmes for nutrition, clothing and housing.

Also relevant are CRC articles Article 26 (the right of the child to social security) and Article 31 (the right to play).

Also of relevance is the European Convention on Human Rights, in particular Articles 2, 3, 8 and 14. Article 2 relates to the right to life; Article 3 to the prohibition of torture, including inhuman or degrading treatment. Article 8 refers to the right to respect of private and family life, including the home. Article 14 provides for the prohibition of discrimination.

The EU Charter of Fundamental Rights includes provisions relevant to the welfare and voice of children. Article 14 provides for the right to education. Article 19 relates to the rights of migrant workers and includes a reference to the rights of children of migrant workers to be facilitated in learning their mother tongue.

Article 24 of the EU Charter contains detailed provisions regarding the rights of the child. The article provides:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Also contained in the EU Charter is recognition of entitlements to social security, including the right to social and housing assistance in order to provide a decent existence for all those who lack sufficient resources.

## 5.2 ISSUES ARISING IN IRELAND

In a seminal review on behalf of the Office of the Ombudsman for Children, Kilkelly<sup>1</sup> pointed to the invisibility of children in policymaking, including with regard to their welfare and measures taken to tackle material deprivation. The author referred to particular groups of very marginalised or vulnerable children, and the multiple barriers that they face. Such groups include Traveller children, the children of immigrants and asylum-seekers and children living in poverty.

As a party to the CRC, Ireland is obliged to report to the UN Committee on the Rights of the Children in relation to the implementation of the CRC. The most recent report of the Irish Government is the consolidated third and fourth reports submitted in July 2013.<sup>2</sup> This chapter will consider the adequacy of the responses given by Ireland to those points and suggest recommendations. It will also assess how well the best interests and voice of the child are respected in housing and social welfare law.

The main points arising from the Government's response are that there are 1,148,687 children in Ireland, some 25% of the total population. It notes that as a result of the economic downturn, child poverty has become more prevalent, with both an increase in the number of children 'at risk of poverty' and in 'material deprivation'.

In its report, the UN Committee made recommendations regarding the standard of living of children. It called for a supplement to the universal Child Benefit payment to assist families with a high level of poverty. It called for additional investment in social and affordable housing. In response, the Government pointed to the priority afforded to child poverty in the *National Action Plan for Social Inclusion 2006 – 2014* and the commitments made in the *Programme for Government 2011 – 2016*. It pointed to initiatives taken, mainly related to childcare in disadvantaged areas, which counter-balance the reductions in the universal Child Benefit payment. As regards to housing, the Government response simply states the number of children living in households assessed as having a housing need.

The 2015 Report Card published by the Children's Rights Alliance gave a 'D' grade for the measures under Right to an Adequate Standard of Living.<sup>3</sup> It noted that the 2013 EU SILC results show 11.7% of children living in consistent poverty, while a further 17.9% were at risk of poverty.<sup>4</sup> The report notes that the cuts in the Back to School Clothing and

1 Ursula Kilkelly, *Barriers to the Realisation of Children's Rights in Ireland* (Office of the Ombudsman for Children 2007).

2 Department of Children and Youth Affairs, *Third and Fourth Consolidated Report to the UN Committee on the Rights of the Child* (2013).

3 Children's Rights Alliance (2015) Report Card 2015

4 Central Statistics Office, *Ireland: At risk of poverty and consistent poverty rates by age group*, 2013 <<http://www.cso.ie/en/releasesandpublications/ep/p-mip/measuringirelandsprogress2013/society/society-socialcohesion/#.VUpn0fVhBc> accessed 6 May 2015.

Footwear Allowance have not been reversed and that Maternity Benefit payments were reduced. Budget 2014 did not make further reductions in Child Benefit payments, while Budget 2015 introduced a €5 per month increase in the payment. The new rate was payable from the 1 January 2015.

### 5.3 HAS THE CONVENTION BEEN JUDICIABLE IN HOUSING AND SOCIAL WELFARE LAW?

In Irish courts, plaintiffs have raised the CRC in cases involving deportation of children<sup>5</sup> and in cases involving the surrender of a person subject to a European arrest warrant.<sup>6</sup> The parallel Convention on the Rights of Persons with Disabilities 2006 has been subject to judicial consideration in cases involving wrongful arrest<sup>7</sup> and detention under the Mental Health Act.<sup>8</sup> In *DF v the Garda Commissioner*, Hogan J. held:

[A]s this case is accordingly governed entirely by Irish law, the 2006 Convention could only be justiciable in the event that there was a domestic law which gave effect to its provisions. Since the Oireachtas has not enacted such legislation, it follows, therefore, that the claim based on the 2006 Convention is doomed to fail and must be struck out pursuant to the inherent jurisdiction of the Court.<sup>9</sup>

The CRC and the Convention on the Rights of Persons with Disabilities (CPRD) have been invoked in a number of decisions regarding housing benefit in the UK superior courts. In *Burnip v Secretary of State for Work and Pensions*,<sup>10</sup> the Court of Appeal held that it was appropriate for courts to have regard to these unincorporated international Conventions. In his judgment, Lord Justice Maurice Kay held, at paragraph 22, that:

If the correct legal analysis of the meaning of Article 14 discrimination in the circumstances of these appeals had been elusive or uncertain (and I have held that it is not), I would have resorted to the CRDP and it would have resolved the uncertainty in favour of the appellants. It seems to me that it has the potential to illuminate our approach to both discrimination and justification.<sup>11</sup>

In *MA v Secretary of State for Work and Pensions*,<sup>12</sup> Lord Justice Laws issued a notice of caution about using either Convention as a source of domestic rights, stating:

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5 *Olaniran v Minister for Justice, Equality and Law Reform* [2010] IEHC 83.  
6 *Minister for Justice and Equality v RPG* [2013] IEHC 54.  
7 *DF v the Garda Commissioner and others* [2014] IEHC 213.  
8 *MX v HSE and others* [2012] IEHC 491.  
9 *DF v the Garda* (n 7).  
10 *Burnip v Secretary of State for Work and Pensions* [2012] EWCA Civ 629.  
11 *ibid.*  
12 *MA v Secretary of State for Work and Pensions* [2013] EWHC 2213.

I certainly accept that under our law an unincorporated treaty may be deployed as an aid to construction of an ambiguous statute to whose subject-matter it is relevant ... but care is needed to ensure that such a treaty is not seen as a source of substantive domestic legal rights.<sup>13</sup>

In *Nzolameso v City of Westminster*,<sup>14</sup> the UK Supreme Court reiterated that where ECHR rights are engaged, they should be interpreted in line with international human rights standards, but the Court left over the question of whether a statutory provision could be construed in line with the Convention, where ECHR rights are not engaged.

#### The ECHR and Housing

The European Convention on Human Rights (ECHR) has been raised in Irish housing cases on many occasions since the enactment of the European Convention on Human Rights Act 2003. It led, for example, the Supreme Court to issue a declaration of incompatibility of section 62 of the Housing Act, 1966 regarding the recovery of local authority dwellings (see *Donegan v Dublin City Council*).<sup>15</sup>

The Courts have also been willing to hold that a plaintiff's Convention rights have been breached without finding that there has been any breach of a statutory duty. In *O'Donnell v South Dublin County Council*,<sup>16</sup> Laffoy J. held that a plaintiff's Article 8 rights had been breached by the failure to provide adequate accommodation for the plaintiff, given their 'disability, hardship and deprivation'.

#### Children and Social Welfare Law

In Budget 2015, the Minister for Social Protection announced an allocation of €1.97 billion in Child Benefit payments, increasing the monthly payment by €5 per child. This payment is a universal payment that is not subject to a means test or included in assessment of income tax.

A child's parent may be in receipt of One Parent Family Payment; although new claims will come to an end when the parent's youngest child reaches the age of seven. Support for children is also made through the Qualified Child payment; a small supplement made to recipients of other social welfare payments such as Jobseeker's Allowance or Disability Allowance. Children at school whose parents receive social welfare could also benefit from the Back to School Clothing and Footwear Allowance. Family Income Supplement supplements the income of low income families.

The reductions made in recent years to the Back to School Clothing and Footwear Allowance has not been reversed. The Qualified Child payment was maintained at

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13 *ibid.*  
14 *Nzolameso v City of Westminster* [2015] UKSC 22.  
15 *Donegan v Dublin City Council* [2012] IESC 18.  
16 *O'Donnell v South Dublin County Council* [2007] IEHC 204.

€29.80 per week. It is notable that the eggs are very much in the Child Benefit basket and I would suggest that this spreads increased resources thinly, without focusing them on the most disadvantaged children.

It is also notable that many of the recent cases involving challenges in the High Court to decisions of the Department of Social Protection involve benefits paid on behalf of children. In *Jama v Department of Social Protection*,<sup>17</sup> the High Court considered the Department's obligation to maintain, and allow access to, a database of decisions regarding entitlement to Child Benefit. The High Court ruled that there was no obligation on the Department to maintain such a database. In *Solovastru v Minister for Social Protection*,<sup>18</sup> the High Court refused the applicants' claim for Child Benefit and other payments in circumstances where they were formerly self-employed Romanian nationals and did not have a right to reside in Ireland.

### Habitual Residence Condition and Family Benefits

In social welfare law, the Habitual Residence Condition (HRC) is a statutory provision that requires claimants of certain social welfare payments to establish their right of residence and habitual residence in Ireland, in order to qualify for payment. In short, a claimant is required to show that their main centre of interest is Ireland. It is the subject of controversy as many claimants have been wrongly refused a claim on HRC grounds.

The Social Welfare Appeals Office Annual Report 2013 refers to a pilot project initiated by it and the Department regarding quality assurance in HRC-related cases, noting that issues arose around the level of investigation carried out to establish relevant facts; the weight being given to family resident abroad; the weight given to employment history and the understanding of Deciding Officers of the right to reside.

Two issues arise around Child Benefit and family payments. The first is ordinary residence and the second is habitual residence.

Child Benefit is payable in respect of children ordinarily resident in the State. The Appeals Office 2013 highlights cases where Child Benefit was wrongly ended where children were temporarily outside of the State, for example to visit family abroad. The Appeals Office drew attention to confusion amongst Deciding Officers as to the difference between 'ordinarily resident' and a child being absent from the State, stating that temporary absences do not affect ordinary residence.

Child Benefit, One Parent Family Payment and other child-related payments are defined as family benefits under EU law (Regulation 883/2004). An EEA migrant who is employed or self-employed does not have to demonstrate habitual residence in order

to qualify for a family benefit. Non-EEA migrants who have previously worked in another EEA state may also qualify, without being subject to a HRC test, subject to their being employed in the State and their dependents being resident in the EEA. Migrants moving to Ireland from outside the EEA do not benefit from the Regulation and are therefore subject to a Habitual Residence Test.

A review of the case studies by the Social Welfare Appeals highlighted cases where the HRC test is not being administered in a fair or proportional manner by Department officers. There is insufficient weighing up of all the facts and factors of a case. Decisions concentrate on the factors counting against habitual residence, without a fair or proportionate account being taken of the positive factors. The existence of difficulties around the interpretation of HRC is evident from the ongoing focus on such cases by the Social Welfare Appeals Office. All the case studies in the 2011 Annual Report are devoted to HRC.

As a supplementary point, it is unclear what the logic is for excluding Carer's Allowance from the definition of 'family benefit' contained in the EU Regulation. This excludes a person who returns to Ireland to care for a person who is eligible on care needs grounds to the payment. From media reports and the work of the Carer's Association, this provision has affected UK residents of Irish descent who move to Ireland to care for ailing relatives. They cannot show that their centre of interest will be Ireland as they retain substantial links to the UK and are likely to return there. They cannot show habitual residence in their own right, but it is unclear why such a connection is necessary when they must also be able to demonstrate their full-time caring responsibilities to a person.

As a further supplementary point, Family Income Supplement (FIS) is not subject to habitual residence. This payment provides extra financial support to people on low wages, who have at least one dependent child residing with them. This means that all low-income workers will qualify for FIS, even if they have been deemed not to be HRC compliant in other circumstances.

### Domiciliary Care Allowance – A Case Study

Domiciliary Care Allowance is a payment made in respect of children who have a severe disability requiring, for a period of at least 12 months, continuous care and attention substantially in excess of the care and attention normally required by a child of the same age. It is paid in respect of some 25,966 children<sup>19</sup> and how the Department assesses such applications remains a matter of public controversy.<sup>20</sup> Many applications are refused on the basis that the disability is not sufficiently severe or that the level of care

17 *Jama v Department of Social Protection* [2011] IEHC 379.

18 *Solovastru v Minister for Social Protection* [2011] IEHC 532..

19 DCA Review Group, *Domiciliary Care Allowance Review* (Department of Social Protection 2012).

20 Noel Baker, 'More families head to court to secure DCA payments from Department' *The Irish Examiner* (Cork, 10 February 2014).

and attention required is not substantially in excess of that required of other children of the same age.

This chapter will consider Department case studies and the case law around the assessment of entitlement to this payment. It assesses the extent the best interests of the child have been taken into account by the Department of Social Protection and the Appeals Office. It does so because it provides insight into how the Department assesses the best interests of the child and the voice of the child.

The 2013 Annual Report of the Social Welfare Appeals Office addresses the ongoing controversy in dealing with Domiciliary Care Allowance applications. The report states:

[I]n Domiciliary Care Allowance cases, experience shows that many appellants concentrate on detailing and emphasising the cost to them of accessing services for their child. However, the relevant issue relates to the requirement for continual or continuous care substantially in excess of a peer child.<sup>21</sup>

It commented on the work of the Department in providing information to assist Deciding Officers and noted that these efforts have been hindered by the lack of face-to-face contact between Deciding Officers and families.

Demonstrating the public importance of entitlement to Domiciliary Care Allowance, all the case studies featured in the 2013 annual report related to this matter. The 24 case studies cover a wide range of ages and medical diagnoses. They provide significant assistance in preparing social welfare appeals. It is also significant that Deciding Officers are now required to explain the basis for any refusal.

The 2013 Annual Report is a significant improvement on how the issue was dealt with in the 2012 Annual Report. In the 2012 case studies, it is striking how much emphasis was given to the genuineness and credibility of the parent, as opposed to the needs of the children concerned. It is submitted that the Department should place greater emphasis on the care needs of children. As a parallel, and commenting on the assessment of children's rights in the Swedish social welfare appeals system, Fernqvist outlined:

[S]ince the legislation that these cases emanate from is not oriented towards child welfare but the adults' rights to benefits, children's needs become secondary. Consequently, children's well-being and access to resources is often neglected by the court, even though children are directly affected by the outcome of the appeals.<sup>22</sup>

The High Court has considered this issue on a number of occasions. In *AM v Minister for Social Protection*,<sup>23</sup> Hanna J. held that there was no duty for the Department to physically assess the child where there is no conflict as to the medical diagnosis of the disability (in this case, autism), even where there is a conflict as to the consequent care and support required by the child in question. The Court held that the Department was entitled to rely on a desk assessment of the resulting care and support needs.

It is submitted that the decision in *AM* does not give sufficient weight to the rights and interests of the child, in particular in the light of the Convention. What is at stake is the child's right to social security and an adequate standard of living, given his or her physical and mental development. Given the importance of such supports, it is submitted that a duty to do more than a desk assessment where the Department is inclined to refuse the application.

It should also be noted that the Department has a longstanding entitlement to require claimants of any disability-based payment to be medically assessed. 267,760 such assessments took place between 2008 and 2012.<sup>24</sup> It appears, however, that the Department's capacity to carry out such assessments has declined, with 60,412 taking place in 2008 compared to 37,396 in 2012.

In another Domiciliary Care Allowance case before the High Court, *CP v Chief Appeals Officer, Social Welfare Appeals Office*,<sup>25</sup> the High Court (Hogan J.) quashed a decision of the Chief Appeals Officer to close the applicant's appeal and require the applicant to submit a new application for the payment. The case revolved around the interpretation of section 317 of the Social Welfare (Consolidation) Act 2005 regarding unsuccessful, 'closed' claims. Section 4 of the Social Welfare and Pensions (No. 2) Act 2013 was enacted to allow the closing of unsuccessful new claims.

In *B v Minister for Social Protection*,<sup>26</sup> Barrett J. held that the decision-making process around a Domiciliary Care Allowance application to be flawed as the Department's Deciding Officers generally deferred to the opinion of the Department's medical assessors. The Court held that this represented an abdication of statutory duty in the case before it, resulting in a contravention of section 300 of the Social Welfare Consolidation Act 2005, which provides for the role of Deciding Officers.

Given that eligibility to Domiciliary Care Allowance is a comparative, based on the care needs of the child being substantially in excess of those of a child of the same age and without the disability, it is important that a child's eligibility be reconsidered over time and applications, where necessary, left open. For example, it will be easier to determine

21 Social Welfare Appeals Office, *Annual Report 2013* (Social Welfare Appeals Office 2014).

22 Stina Fernqvist, 'Redefining Participation? On the positioning of children in Swedish welfare benefit appeals' (2011) 18(2) *Childhood* 227.

23 *AM v Minister for Social Protection* [2013] IEHC 524.

24 Dáil Deb, 5 November 2013, reply to Parliamentary Question 46174-2013.

25 *CP v Chief Appeals Officer, Social Welfare Appeals Office* [2013] IEHC 512.

26 [2014] IEHC 186.

that the care needs of a ten-year old are substantially in excess of the norm than those of a five-year old. It should also be possible for the Department, in marginal cases, to fix a date in the future for an applicant child's eligibility to be reviewed, rather than having them re-submit an application.

## 5.4 CHILDREN AND HOUSING

Children are almost completely invisible in how the State allocates housing and housing. It is submitted that the housing in which children live has a determining effect on the realisation of their rights and on their development.

The CRC makes a particular reference in Article 27 to the need to provide support for housing available to children. In commenting on the scope of this right, MacDonald, 2011<sup>27</sup> refers to the report of the UN General Assembly special session on children which concluded that:

[a]dequate housing fosters family integration, contributes to social equity and strengthens the feeling of belonging, security and human solidarity, which are essential for the well-being of children. Accordingly, we will attach a high priority to overcoming the housing shortage and other infrastructure needs, particularly for children in marginalised peri-urban and remote rural areas<sup>28</sup>

In 2006, the UN Committee on the Rights of the Child<sup>29</sup> had raised two general points relating to housing in Ireland: they were to 'implement fully existing policies and strategies and increase budgetary allocations for and subsidisation of services, including childcare, healthcare and housing, for families with children who are particularly vulnerable; and increase investments in social and affordable housing for low-income families.'

The Government's response in July 2013 was a statement of fact about the number of households with children seeking social housing and a statement that the bi-annual assessment of housing need would occur (and did occur) in 2013. It states:

[i]n 2011, there were 43,578 households with children identified as being in need of social housing. The next assessment of housing needs is due to be carried out by local authorities in April 2013. Information on particular housing needs, household size and composition (including number and ages of children) will be gathered as part

of the assessment. This information will be used by authorities when drawing up their social housing programmes.<sup>30</sup>

'Growing Up in Ireland'<sup>31</sup> is a significant and complex longitudinal study undertaken on behalf of the Department of Children and Youth Affairs regarding the lives of children and their parents or guardians. For the purposes of this chapter, it is interesting to note that there is little assessment of the housing in which the children surveyed live.

The report on nine-year olds provided findings in relation to the neighbourhoods in which children live. The survey asked the children's mothers to give their perceptions of the condition of the neighbourhood, including whether homes and gardens were in poor condition. For the record, 17% of mothers classified as 'semi-skilled or unskilled manual' said that there were 'fairly common' or 'very common' issues with the poor condition of houses and gardens in their area. 10% of mothers classified as 'other non-manual/skilled manual' and 5% of mothers classified as 'professional/managerial' gave this response.

The survey thus far does not appear to have sought to elicit information on the quality of housing occupied by the cohort of children being followed. There does not appear to have been any analysis of the quality of the immediate living environment in which children live, for example facilities for children to play, or privacy in respect of sharing rooms with siblings or others. We know from the 2011 Census that 34.7% of all pre-school age children live in rented accommodation. We know that, in all, 347,846 children live in the rented sector. We also know that 53,936 children live in apartments or flats.

This chapter will examine five issues related to children and housing. It will look at children living in homelessness and increasing rent costs. It will examine the allocation of housing supports to accommodate children whose parents live apart and the eligibility for social housing of EEA migrants. It will look at the need to ensure that children are safe in high-rise homes. The last issue considered is the opportunity children have for structured and unstructured play in multi-unit developments.

### Homelessness and Children

Housing charities have warned of the great number of households with children becoming homeless.<sup>32</sup> The loss of their home has an obvious effect on children and cuts their ties to friends, community and services such as schools. It is submitted that part of the cause of the increased number of children being made homeless is how the rent supplement scheme is framed.

27 Alistair MacDonald, *The Rights of the Child Law and Practice* (Jordan Family Law 2011).

28 UN General Assembly, 'Report of the Ad Hoc Committee of the Whole of the Twenty-seventh Special session of the General Assembly' A/S-27/19/Rev.1.

29 UN Committee on the Rights of the Child, 'Concluding Observations of the UN Committee on the Rights of the Child: Ireland' (29 September 2006) CRC/C/IRL/CO/2.

30 Department of Children and Youth Affairs, *Ireland's Consolidated Third and Fourth Reports to the UN Committee on the Rights of the Child* (DCYA 2013).

31 See [www.growingup.ie](http://www.growingup.ie).

32 Kitty Holland, 'Dublin's homeless children' *The Irish Times* (Dublin, 15 November 2014) and 'Rise in Dublin families becoming homeless, says Focus Ireland' *The Irish Times* (Dublin, 8 December 2013).



Rent Supplement requires the landlord's ongoing consent for the payment to be made on the behalf of the tenant and demands that the rent cannot be set above a maximum rent cap. The Department has reduced the maximum rents on a number of occasions, causing great difficulties in urban areas for households to secure accommodation below or at the maximum rent. A landlord is entitled, once every 12 months, to increase the rent to market rent, thereby causing tenants to end tenancies because the new rent is above the maximum rent cap.

The development by the Private Residential Tenancies Board of a localized rent index is an important step in assessing what market rent is for a particular dwelling. A landlord, however, is entitled to increase the rent by whatever amount, so long as the new rent is within market rent. This poses particular challenges to households with children in urban areas, as they have relatively little mobility and may not be able to afford the new rent.

On the 26 November 2014, the Government launched the Social Housing Strategy 2020 in response to this crisis. It undertakes to dramatically increase the number of social housing units. A significant reform in the plan is the development of cost rental housing, whereby housing provided to social housing applicants via housing associations or institutional investors would be let on a cost rental basis, rather than on a market rent. This seeks to counteract the current problem of private landlords deserting Rent Supplement as market rents rise.

In the interim, many families with children will be accommodated in temporary homeless accommodation. This chapter recommends that there should be a specific statutory duty to place the interests of such children at the centre of decision-making regarding such placements.

Becoming homeless will have significant detrimental effects on children. They lose the place they have called home. They are moved to alternative, temporary accommodation. They will often live in cramped accommodation and share a room with siblings and parents. They will live in close proximity with other families in a similar situation. There is no guarantee that such accommodation will be close to where they lived previously; they might lose contact with friends and family and have to move schools. They have no security; they could be moved at anytime to alternative homeless accommodation. Temporary homeless accommodation raises obvious child protection issues.

This report recommends that we apply a gold standard in realizing the best interests of children facing homelessness. It recommends that a statutory duty to the best interests of the child be the primary consideration in accommodating homeless children, reflecting Article 3 of the CRC. This is a higher standard than that of 'having regard', and places a positive obligation on the State to adequately accommodate children living in the precarious situation of homelessness. The effect of this duty is that statutory bodies will have to show how they have met the best interests of children while they reside in accommodation for homeless families.

### Social housing supports to accommodate children whose parents live apart

#### (i) Social housing and the accommodation of children who have two homes

Adequate housing fosters family integration and assists children to develop, as well as form bonds with their parents or guardians. The parents of many children live separately, and where the parents are dependent on social housing or housing supports, the question that arises is their entitlement to avail of accommodation of sufficient size for their children.

As a preliminary point, the Housing (Miscellaneous Provisions) Act 2009 provides the framework for the assessment of housing need and following which, housing is allocated to persons and households deemed in need of housing support. Under the Act, each housing authority is obliged to carry out a housing needs assessment every two years, establishing the number and categories of households seeking social housing. The Social Housing Strategy 2020 outlines that such assessments will take place on a yearly basis from 2016.

The Social Housing Assessment Regulations 2011, as amended, provide detailed guidance to housing authorities on how to assess housing need. They determine how social housing assessments shall be carried out and provide for standard application forms. Being assessed as in need of housing is an obvious first step to being allocated a dwelling by the housing authority. It is also necessary to avail of other housing supports such as Rent Supplement or the Rental Accommodation Scheme. The 2013 Housing Needs Assessment establishes that 89,872 households are in need of social housing. The Service Indicators in Local Authorities 2013 suggest that some 6,462 new tenancies were created in the year.

The Act of 2009 imposes an obligation on each housing authority to publish a scheme of letting priorities. The scheme outlines how it will allocate dwellings to applicants and what types of accommodation they will be considered for. The question that arises here is what allowance is made in schemes of letting priorities for children who stay on a regular, overnight basis with parents who live apart. It is submitted that the social housing system should allow for the accommodation of children who have regular, overnight access to parents who live apart. They should not lose out on living with one parent because the child's accommodation needs are not included on the assessment of a parent's housing need.

It appears from the schemes of letting priorities operated by most housing authorities that they will only allow a child or children be counted on the assessment of housing need of one parent. This means that the housing needs assessment of the other parent will not include accommodation for the children, thereby preventing regular, overnight access of the child with this parent. A number of housing authorities, however, recognise this need, for example Dublin City, South Dublin, Galway City and Kildare. They may, for example, allow for a person to be entitled to a second bedroom to accommodate their child or children.

It is submitted that Schemes of Letting Priorities should provide for additional bedroom accommodation to allow parents facilitate overnight access of their children, where parents do not live together. This will allow both parents to accommodate children and provide for better relationships between parent and child. A child and parent who cannot facilitate court-ordered or privately-arranged overnight access or even to have a child visit their dwelling (say in the case of a small flat or bedsit) will likely have a weaker attachment. Housing authorities should also be consistent in their approach to this situation.

#### (ii) Rent supplement and the accommodation of children who have two homes

Rent Supplement is paid by the Department of Social Protection to assist social welfare recipients meet the cost of rent. The amount of support is determined by the location of the rented dwelling and the household size of the applicant. The question that arises is how to assess the household size of an applicant who has regular, overnight access to a child or children.

This question was considered in late 2014 by the High Court. In *McCormack v the Minister for Social Protection*,<sup>33</sup> the applicant challenged the Department's refusal of his application for Rent Supplement for him and his four children. The Department sanctioned payment of the supplement on the basis of his own accommodation needs only. He had agreed, overnight access to his children, who resided with their mother, some distance away. Baker J. held that:

I am satisfied that the decision making process was flawed as a matter of law in that the decision body took an erroneous view of the test it had to apply, and looked only to test the accommodation needs of the applicant himself without having any regard to the complexity of his family relationships, the needs of the children and their intrinsic interconnectedness with those of their father, the fact that the accommodation needs of the children when they are visiting their father in Dublin are an element in the test of whether they are qualified within the meaning of the legislation, and that if they have needs which are required to be satisfied by their father, his needs are to be accessed as including theirs. Further, the deciding body failed to have any regard to the fact that the accommodation and maintenance needs and claims of the children were met by a capitalized payment in the separation agreement.<sup>34</sup>

It is submitted that this is a welcome decision, as it recognises the accommodation needs of children whose parents live apart. Overnight access, even where ordered by a court, is not a realistic prospect where the parent's accommodation is too small or otherwise unsuitable. It would also be regrettable if reform in this regard became a zero-sum game between the competing claims of parents. Instead, it is the needs of the child

that should determine the level of social housing support. The need for an additional bedroom is not exceptional, but a necessary step to ensure that the children can bond with both parents by living with them.<sup>35</sup>

The decision in *McCormack* mirrors similar developments in the United Kingdom. In a case before the UK Social Welfare Tribunals, a First-Tier Tribunal in Liverpool held that the Housing Benefit Regulations were to be read subject to Article 1, Protocol 1, Article 8 and Article 14 of the ECHR.<sup>36</sup> The Tribunal determined that a parent who had regular, overnight access to a child required the second bedroom; consequently, the parent's housing benefit could not be reduced on the grounds that the second-bedroom represented over-accommodation.

It also mirrors the decision of the Irish Equality Tribunal *A v Community Welfare Service, Department of Social Protection*.<sup>37</sup> The Equality Tribunal held that the Department directly and indirectly discriminated against the applicant in refusing to include his two children in assessing the size of the household. The Tribunal held that the exceptional circumstances of this case meant that the respondent should have considered the claimant's parenting obligations as to whether the accommodation was suited to his 'residential or other needs.' The Tribunal made the maximum award of damages to the claimant and ordered the respondent to ensure compliance with the Equal Status Acts regarding the entitlement to rent supplement of separated parents.

On the 10 December 2014, the Minister of State at the Department of Social Protection, Kevin Humphreys, indicated that the decisions in *McCormack* and *A* are being considered as part of a Departmental review of the Rent Supplement scheme. It is submitted that the needs of children whose parents live apart should be facilitated in the Rent Supplement scheme.

#### Social housing and EEA citizens

An applicant for social housing support will be assessed pursuant to the Housing (Miscellaneous Provisions) Act, 2009 and the Social Housing Assessment Regulations, 2011 (as amended). Applicants who live in Ireland and who are from an EEA state other than the UK face an additional hurdle. This is provided in the Department of Environment Circular 41/2012, which deals specifically with eligibility for social housing of non-Irish households.

It is submitted that this Circular unduly restricts the ability of EEA citizens living here to apply for social housing in Ireland. It does so because it relies on an incomplete reproduction of the Statutory Instrument transposing an EU Directive regulating free

33 [2014] IEHC 489.

34 *ibid* para 52.

35 Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No. 5) (Rent Supplement) Regulations 2014, SI 2014/604 was enacted after *McCormack* to clarify the definition of 'qualified child' in the Rent Supplement Regulations.

36 Decision of Judge McMahon, 13th February 2014, SC068/13/12334.

37 *A v Community Welfare Service, Department of Social Protection* DEC-S2013-010.

movement. This issue has been raised by Focus Ireland, Crosscare and the Mercy Law Centre.

In order to be eligible for social housing, Circular 41/2012 requires that a non-UK EEA national be in employment or self-employment or they be temporarily out of work, having worked for a year and now be registered as a jobseeker. The text contained in the Circular is a partial reproduction of Regulation 6 of Statutory Instrument (S.I. 656/2006), which governs the residence of EEA citizens.

It is submitted that Circular 41/2012 wrongly excludes categories of EEA citizens living in Ireland. It does so as it does not have regard for EEA citizens who have acquired the right of permanent residence in Ireland under Regulation 12 of S.I. 656/2006.

It also excludes families whose children have acquired a right of residence in Ireland while being in education. This right arises following judgments of the Court of Justice of the European Union, for example in *Teixeira v Lambeth Borough Council*.<sup>38</sup> In *Teixeira*, the Court held that children who were in education in a member state after a parent or carer had exercised free movement rights acquired a right of residence in the member state that was not dependent on the child or their carer having sufficient resources to avoid being a burden on the State. As a result, the applicant in *Teixeira* was able to avail of social housing supports, as her daughter had a right of residence in the United Kingdom.

It is recommended that Circular 41/2012 be amended to cater for situations where the EEA citizen has acquired permanent residence in Ireland or where a right of residence has arisen pursuant to the CJEU jurisprudence.

### Children can't fly

'Children can't fly' was a programme developed by New York City's Department of Health in the early 1970s, to counter the high rates of death and injury among children following falls from windows.

According to Census 2011, 53,936 children live in apartments or flats in Ireland. Of this group, 25,647 were aged under four years. As a matter of note, 330 children of this age lived in bed-sits, i.e. the entire area to live, sleep and eat was one single room.

The significant number of children living in apartments or flats in Ireland raises the issue of their safety, in particular when living in dwellings above ground level. Working at heights has led to extensive legislative intervention to ensure the safety of employees and contractors in the workplace; this can be contrasted to the lack of intervention to protect children living in dwellings above ground level.

In 2014, the Children's University Hospital, Temple Street, published a study on the number of children killed or injured following falls from apartments.<sup>39</sup> The survey showed that the hospital had treated 45 high-fall cases between January 2010 and September 2012. 80% were aged between one and five, and 33 of the 45 cases involved boys.

Tragically, children have died as a result of such falls. The Irish Examiner reports six such deaths in six years.<sup>40</sup> The Dublin Coroner, Brian Farrell has made representations to statutory bodies and the matter lies there. The Census illustrates that apartments and flats are the long-term home of many young children. The evidence published by Temple Street and the proceedings before Coroner's Courts demonstrate that children's safety is placed at risk by falls from high windows.

Where the dwelling is rented, the Standards of Rented Houses Regulations apply. The improved definition of 'proper state of structural repair', introduced on the 1 December 2009, provides that all windows and fittings should be in good condition and repair. There is no obligation to provide any specific window safety devices, for example in high windows.

The dangers arising from children falling from residential buildings have recently been extensively considered in Sydney. In 2011, the leading Sydney children's hospital published an 80-page report on window and balcony safety, including the corresponding need to ensure safe exit from a dwelling in the case of fire.<sup>41</sup> Among the report's recommendations are that landlords should be obliged to provide window safety devices in windows above ground floor. It also recommends a similar obligation for owner management companies in the windows of common areas in apartment blocks.

Analysing the reasons why children living in apartments are vulnerable (and writing about Sydney), Sherry outlined the following considerations:<sup>42</sup>

First and most obviously, the apartment buildings from which children fall are high. While most freestanding homes only have a second or, at most, a third storey from which a child could fall, high-rise buildings may have more than 50 floors. The further the fall, the greater the likelihood of serious or fatal injury. Second, when a child falls from an apartment building, they are unlikely to fall on anything other than concrete in the form of paths or driveways. Children who fall from freestanding homes may fall

38 *Teixeira v. Lambeth Borough Council* [2010] C-480/08 ECJ 216–17.

39 B Freyne and others, 'Epidemiology of High Falls from Windows in Children' (2014) 107(2) *Ir Med J.* 57–59.

40 'Landlords face fines in window safety review' *Irish Examiner* (Cork, 6 January 2014).

41 The Children's Hospital at Westmead, 'Working Party for the Prevention of Children falling from residential buildings: outcomes report' (February 2011) <[http://kidshealth.schn.health.nsw.gov.au/sites/kidshealth.chw.edu.au/files/attachments/758/outcomes\\_report\\_-\\_executive\\_summary.pdf](http://kidshealth.schn.health.nsw.gov.au/sites/kidshealth.chw.edu.au/files/attachments/758/outcomes_report_-_executive_summary.pdf)> accessed 15 July 2015.

42 Cathy Sherry, 'Kids can't fly: The legal issues in children's falls from high-rise buildings' (2012) 2 *Prop L Rev* 22, 22.

into garden beds or onto grass, which greatly reduces the severity of injuries. Third, owing to the lack of play space around apartment blocks, in particular those dating from the 1960s and 1970s, as well as parents' inability to supervise children when several storeys up, children are more likely to be confined to bedrooms to play. Fourth, children living in apartments overwhelmingly live in those with two or less bedrooms. Limited floor space means that furniture is often placed under windows allowing children to climb up to sill level and fall.<sup>43</sup>

Sherry further considers the rights parents have to install safety measures, such as locking mechanisms or nets affixed to the walls of buildings and the potential conflict this poses with apartment house rules and the prohibition on occupants to fix devices onto the external walls of a building. Such conflicts arise in Irish law and must be considered in ensuring that children are safe within apartment buildings and within their homes.

It is recommended that the Standards for Rented Houses Regulations be amended to include a specific landlord obligation to provide window safety devices. The Multi-Unit Development Act should be amended to impose an obligation on owner management companies to affix such window safety devices on windows in common areas. Section 23 of the Act should be amended to prevent apartment house rules from prohibiting window safety devices, such as nets or additional guards on or above balcony balustrades.

## 5.5 THE RIGHT TO PLAY

Article 31 of the CRC enshrines the right to play. It provides that '[S]tate Parties recognise the right of the child to rest and leisure, to engage and play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts'.<sup>44</sup> The predecessor of the Department of Children and Youth Affairs published a National Children's Play Policy in 2004, to be implemented by Government and local authorities.

I will consider a child's right to both structured and unstructured play in the public open spaces of multi-unit developments. This arises because the dwellings in many multi-unit developments do not have sufficient private open space to allow children to play.

This issue was anticipated by the Department of Environment when it published guidelines 'Sustainable Urban Housing: Design Standard for New Apartments' in 2007. This provides that the recreational needs of children need to be planned for from the

outset and states '[e]xperience from Ireland and elsewhere has shown that children will play everywhere; therefore, as far as possible, their safety needs to be taken into consideration and protected throughout the entire site, particularly in terms of safe access to larger communal or public open spaces.'

Some 53,000 children reside in apartments or flats. In many cases, children will not have access to private open space, such as a garden, or the private open space may be extremely restrictive, for example a small balcony. Some larger and more recently built apartment developments will have playgrounds built within the confines of the development. The Multi-Units Development Act, 2011 seeks to regulate apartments or estates under the ownership of an owners' management company. A multi-unit development is defined as a building that is comprised of units where it is intended that amenities, facilities and services are to be shared.

Section 23 of the 2011 Act provides that an owners' management company may make house rules in relation to the effective operation and maintenance of the development, with the objective of enhancing the quiet and peaceful occupation of units in the development. The section further provides that such house rules and any covenant or conditions in the title documents are terms of the letting of any unit in the development.

The section further provides that any house rules shall be made in a manner consistent with the objective of advancing the quiet and peaceful enjoyment of the property by the unit owners and the occupiers, and the objective of the fair and equitable balancing of the rights and obligations of the occupiers and the unit owners. The Minister may also make Regulations relating to the contents of house rules.

The issue of children playing in multi-unit developments is the subject of controversy, for example in one estate in Clane, Co. Kildare.<sup>45</sup> There are many examples of apartment house rules that seek to prohibit children's play, using a phrase like 'The Unit owner/ Tenant shall not permit children to play in or obstruct the use of the entrance halls, staircases and landings leading to the Units.'

It is submitted that unstructured children's play is an important part of their development and having regard to Article 27 of the CRC, one that should not be subject to undue restriction in house rules or to financial penalties. House rules should recognise a child's right to play, including where this involves unstructured play in public open space within multi-unit developments. It is submitted that the Minister issue Regulations to limit the extent house rules can prohibit or restrict play.

43 *ibid.*  
44 Ciara Davey and Laura Lundy, 'Towards a Greater Recognition of the Right to Play: An Analysis of Article 31 of the UNCRC' (2011) 25(1) *Children & Society* 3.

45 Conor McHugh, 'Children banned from playing in gated Clane apartment complex' *Leinster Leader* (Kildare, 18 December 2012) and 'Meeting planned of Abbeylands, Clane residents' *Leinster Leader* (Kildare, 25 September 2012).

## Recommendations

The chapter recommends the following legislative, administrative or procedural amendments:

| Policy area                                 | To whom addressed               | Nature of recommendation  | Purpose of recommendation  |
|---|---------------------------------|---|--|
| The Convention on the Rights of the Child   | Government                      | Act of the Oireachtas to incorporate the Convention on the Rights of the Child into Irish law   | To allow the CRC be judiciable in Irish courts   |
| Social welfare payments related to children | Department of Social Protection | Targeted increases in the Qualified Child payment and Back to School Clothing and Footwear Allowance  | To target increases in social welfare payments to the vulnerable children  |
| Child Benefit 'ordinary residence'          | Department of Social Protection | Clear guidance issue to Department of Social Protection officials regarding definition of 'ordinary residence'  | To prevent recipients of Child Benefit unfairly losing entitlement to the payment for visits overseas that do not break ordinary residence |
| Habitual residence                          | Department of Social Protection | Ongoing information campaign to Department of Social Protection officials regarding fair and thorough examinations of a claimant's habitual residence | To improve the quality of Department decision making on habitual residence to ensure a full and fair examination of the facts              |
| Carer's Allowance                           | Department of Social Protection | Carer's Allowance should be listed as a 'family benefit'  | To allow carers care for relatives while they need full time care and attention  |

| Policy area                     | To whom addressed   | Nature of recommendation  | Purpose of recommendation  |
|---------------------------------|---|---|--|
| Domiciliary Care Allowance (1)  | Department of Social Protection                           | Provide for medical assessments of applicants in cases where the Department is inclined to reject the application                 | Desk reviews of an applicant's diagnosis and care needs do not respect the voice of the child              |
| Domiciliary Care Allowance (2)  | Department of Social Protection                           | Training of Department officials to allow them assess DCA applications without excessive reliance on Department medical assessors | To allow Deciding Officer to fully exercise their statutory powers in considering applications             |
| Domiciliary Care Allowance (3)  | Department of Social Protection                           | To set review dates on borderline applications  | To allow for automatic review of applications as the child grows up, to assess their developing care needs |
| 'Growing Up in Ireland'         | Department of Children and Youth Affairs                  | The survey should assess children's housing situation, i.e. the quality and security of their home                                | To allow for a deeper insight into the effect housing has on the development of children                   |
| Children living in homelessness | Department of Environment, Community and Local Government | Statutory duty regarding the best interests of the child in providing accommodation to families in homelessness                   | To ensure that statutory authorities ensure that children in homelessness are adequately accommodated      |

| Policy area   | To whom addressed   | Nature of recommendation   | Purpose of recommendation  |
|---|---|--|--|
| Social housing and housing supports                   | Department of Environment, Community and Local Government | To provide social housing and social housing supports as an alternative to rent supplement | To respond quickly to the many children who are homeless or in danger of homelessness  |
| Social housing and children whose parents live apart  | Department of Environment, Community and Local Government | Amendment to the Social Housing Assessment Regulations                                     | To provide that Schemes of Letting Priorities should provide for additional bedroom accommodation to allow parents facilitate overnight access of their children, where parents do not live together |
| Rent supplement and children whose parents live apart | Department of Justice and Equality                        | Amendment to the Rent Supplement Regulations   | To allow for parents with overnight access to children to have the children's accommodations needs considered for rent supplement  |
| Social housing and EEA citizens resident in Ireland   | Department of Justice and Equality                        | Amendment of Circular 41/2012  | To ensure that the right of residence of EEA citizens is fairly and lawfully dealt with as part of their application for social housing support  |
| Children can't fly (1)                                | Department of Environment, Community and Local Government | Amendments to the Standards for Rented Houses Regulations                                  | To make the provision of window safety devices mandatory   |

| Policy area               | To whom addressed                  | Nature of recommendation   | Purpose of recommendation  |
|---------------------------|------------------------------------|--|--|
| Children can't fly (2)    | Department of Justice and Equality | Amendment to the Multi-Unit Developments Act and enacting Regulations                | To provide for the installation of window safety devices and to allow for the installation of additional guards or nets around balconies |
| Right of children to play | Department of Justice and Equality | Statutory instrument pursuant to section 23 of the Multi-Unit Developments Act, 2011 | To prevent house rules in multi-unit developments from excessively restricting children from structured and unstructured play            |



## Spotlight on Direct Provision

Dr. Liam Thornton

The government hides it so well that people don't know. It's such a tragic form of a life. We don't get new toothbrushes or linen or soap. We want to stand on our own two feet. We want a better life, not a worse one. Ask the Minister to try live where we live and see if she survives for a week. It's not good enough. Would she like her family to be in that situation? Why don't we deserve the same as her children? The fear alone does not let you sleep. Ireland is not living up to its commitments - our rights and needs are not being met. They don't care about our needs. We are treated like animals. When we protested the staff at the centre treated us worse. We are not treated with any dignity or respect. They think we're a burden. After 14 years, you've nothing left where you came from. Everyday a bit of our past is being rubbed out. We're not cats. We don't have 9 lives and we cannot keep adjusting to changes. All I want is the protection of the country. I want to help the world be a better world. Happiness is what you want for everyone. No matter how much of an optimist you are, there is no good from Direct Provision.

Children living in the direct provision system in Athlone, Westmeath, 12 February 2015.<sup>1</sup>

### Introduction to the System of Direct Provision

'Direct provision' is the phrase used to describe the system Ireland utilises to provide minimum supports to those claiming refugee,<sup>2</sup> subsidiary protection<sup>3</sup> and/or leave to remain.<sup>4</sup> Within direct provision, asylum seekers<sup>5</sup> are provided with bed and board, along with a weekly allowance. Accommodation is provided by the Reception and Integration Agency, a sub-unit of the Department of Justice and Equality. The weekly allowance, known as direct provision allowance, is paid by the Department of Social Protection. Adult asylum seekers are entitled to a direct provision allowance rate of €19.10 per week, while the payment for dependent children is €9.60 per week. This rate of payment has not increased since 2000.<sup>6</sup> In June 2015, the *Working Group Report on the Protection*

- 1 Children's Rights Alliance, Department of Children and Youth Affairs and UNICEF, *Picture Your Rights: A Report to UN Committee on the Rights of the Child from Children Living in Ireland* (2015) 89.
- 2 For definition of 'refugee', see Section 2 of the *Irish Refugee Act 1996*.
- 3 For definition of subsidiary protection, See European Communities (Eligibility for Protection) Regulations 2006, SI 2006/518, and European Union (Subsidiary Protection Regulations) 2013, SI 2013/423. See further, Liam Thornton, 'Subsidiary protection for asylum seekers within Ireland' (2008) 26(1) *ILT* 6-13.
- 4 An application for leave to remain is made under Section 3 of the *Immigration Act 1999*.
- 5 An asylum seeker is a person who seeks refugee status, subsidiary protection or leave to remain. The veracity of the individual's claim has yet to be tested through the status determination process or determined by the Minister for Justice and Equality.
- 6 A challenge to the lawfulness of direct provision allowance was unsuccessful in *C.A. & T.A. v Minister for Justice and Equality & others* [2014] IEHC 532. See in particular paras. 13.1-13.27.

*System and Direct Provision (McMahon Report)* recommended an increase in direct provision allowance for adults and children. It is recommended that the adult rate be increased to €38.74 and child rate to €29.80 per week (equivalent to the Qualifying Child Allowance rate under Supplementary Welfare Allowance).<sup>7</sup>

Asylum seekers, while having authorised presence in the State,<sup>8</sup> are not entitled to any other social welfare payment (including the Child Benefit payment)<sup>9</sup> and cannot seek or enter employment, on pain of criminal conviction.<sup>10</sup> A number of other supports are provided to asylum seekers, including education up to Leaving Certificate level (if person is of an appropriate age) and entitlement to a Medical Card.<sup>11</sup> Since May 2009, asylum seekers have been definitively disentitled to any other social security/welfare payment, other than direct provision allowance, as asylum seekers are legally barred from gaining habitual residence in Ireland.<sup>12</sup>

At the end of January 2015, there were 1,482 children resident in direct provision accommodation as part of a family unit.<sup>13</sup> While figures for length of time children remain in direct provision accommodation are not provided, given the fact that the average length of stay within accommodation centres is generally 48 months (four years), this significantly impacts on the rights of the child.<sup>14</sup>

### Direct Provision and the Rights of the Child<sup>15</sup>

Article 22(1) CRC provides:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable

- 7 Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, *Final Report June 2015* (2015), paras 51, 5.27 and 5.30 Bullet Point 1.
- 8 Refugee Act 1996 (as amended) s 8(1)(a).
- 9 Social Welfare (Consolidation) Act 2005 s 246, as amended by Social Welfare and Pensions (No. 2) Act 2009 s 15.
- 10 1996 Act (as amended) s 9(4)(b).
- 11 For a detailed discussion of the modalities of the direct provision system, see: Liam Thornton, 'Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in Ireland' (2007) 24(2) *Refuge: Canadian Periodical on Refugee Studies* 86; Liam Thornton 'Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion' (2013) 20(2) *Journal of Social Security Law* 66-88.
- 12 See of the Social Welfare and Pensions (No. 2) Act 2009 s 15. This was enacted due to the success of the Free Legal Advice Centres in arguing that the previous iteration of the habitual residence condition did not absolutely exclude asylum seekers, see: *Case A: Review of the Appeal Officer's Decision under Section 318 of the Social Welfare Consolidation Act 2005*.
- 13 Reception and Integration Agency, 'Monthly Statistics Report January 2015', <<http://www.ria.gov.ie/en/RIA/RIA%20Monthly%20Report%201-2015.pdf/Files/RIA%20Monthly%20Report%201-2015.pdf>> accessed 14 July 2015.
- 14 *ibid* 19.
- 15 For a more detailed analysis of some of the arguments introduced in this short contribution, see Liam Thornton, 'Direct Provision and the Rights of the Child in Ireland' (2014) 17(3) *IJFL* 68.

international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.<sup>16</sup>

The United Nations High Commission for Refugees (UNHCR) has stated categorically that the Convention on the Rights of the Child (CRC) applies to children seeking asylum or children accompanying family members seeking asylum.<sup>17</sup> While Ireland may seek to objectively, legitimately and proportionately limit the socio-economic rights of asylum seekers under other international human rights treaties, they are absolutely prohibited from doing this for children in the system of direct provision.<sup>18</sup> The socio-economic rights of children are outlined in a variety of the CRC's articles. All children have the right to health,<sup>19</sup> the right to benefit from social security,<sup>20</sup> the right to an adequate standard of living,<sup>21</sup> the right to education,<sup>22</sup> the right to rest and leisure,<sup>23</sup> and protection from economic exploitation<sup>24</sup> including protection from sexual exploitation<sup>25</sup> and trafficking.<sup>26</sup>

The UN Committee on the Rights of the Child have stated categorically that there are no grounds for adopting lesser rights protection for children seeking asylum.<sup>27</sup> Ireland has

very clear international legal obligations that asylum seeking children/children in a family who have a member claiming asylum, must be treated equally vis-à-vis citizen children. In Ireland to date, law and administration, has rejected such a rights based approach to children in direct provision. The 2015 *List of Issues of the Committee on the Rights of the Child* to Ireland had not been issued prior to the finalising of the *McMahon Report*. However, it remains instructive as to what the precise obligations of Ireland are towards children in the asylum system.

At para. 10, the UN Committee on the Rights of the Child requests that Ireland:

Please provide additional information on the criteria for the fulfilment of the so called 'Habitual Residence Condition' in order to access social services. In doing so, please provide information on measures, if any, taken to ensure that this condition does not result in children from asylum seeking, refugee, migrant, and Traveller and Roma ethnic minority backgrounds being excluded from primary care, child benefits and social protection.<sup>28</sup>

### Direct Provision: A Violation of the Rights of the Child

Ireland is to be commended for mainstreaming children seeking asylum into education and providing for their medical needs through the medical card system. However, the significant time that children have had to spend in direct provision is of deep concern.<sup>29</sup> The *McMahon Report* has proposed that all individuals in the protection, 'Leave to Remain' or deportation systems, for five years or more, should, in general, be granted either protection status or leave to remain within six months of the report's publication. The *McMahon Report* 'discounted the possibility of an amnesty'.<sup>30</sup> Instead, the *McMahon Report* recommends:

All persons awaiting decisions at the protection process and leave to remain stages who have been in the system for five years or more from the date of initial application should be granted leave to remain or protection status as soon as possible and within a maximum of six months from the implementation start date subject to the three conditions set out below for persons awaiting a leave to remain decision. It is

16 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) Art 3.

17 See, UN High Commissioner for Refugees (UNHCR), *UNHCR Global Trends 2013: War's Human Cost* (UNHCR, June 2014) and UNHCR, UN High Commissioner for Refugees (UNHCR), 'Refugee Children and Adolescents' (17 October 1997) A12 A/52/12/Add.1, para 1.

18 Article 2 CRC. In this regard, other international human rights treaties are not as categorical as regards the equal applicability of rights for asylum seekers vis-à-vis citizens. For discussion on this, see: Liam Thornton, 'Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe' (2014) FRAME Working Paper No. 6, January 2014 <<http://www.fp7-frame.eu>> accessed 08 July 2015 and Liam Thornton, 'The Rights of Others: Asylum Seekers and Direct Provision in Ireland' (2014) 3(2) Irish Community Development Law Journal 22.

19 Convention on the Rights of the Child (n 16) Art 24.

20 *ibid* Art 26.

21 *ibid* Art 27.

22 *ibid* Art 28/29.

23 *ibid* Art 31.

24 *ibid* Art 32.

25 *ibid* Art 34.

26 *ibid* Art 35.

27 In UN Committee on the Rights of the Child (CRC), 'Report of the UN Committee on the Rights of the Child: Twenty-eight Session' (28 November 2001) CRC/C/111/59, the Committee stated that all children within Qatar's jurisdiction must enjoy all the rights set out in the Convention without discrimination (para 296(a)). See this point reemphasised in: UN Committee on the Rights of the Child (CRC), 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration' (Art. 3, para. 1) (29 May 2013) CRC /C/GC/1 and UN Committee on the Rights of the Child (CRC), 'Report of the UN Committee on the Rights of the Child, Seventeenth Session (Geneva, 5-23 January 1998)' (17 February 1998) CRC/C/73/14 at para. 96 and UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Ireland (29 September 2006) CRC/C/IRL/CO/2 para. 56.

28 UN Committee on the Rights of the Child (CRC), 'List of issues in relation to the combined third and fourth periodic reports of Ireland' (22 June 2015) CRC/C/IRL/Q/3-4.

29 See in particular, Geoffrey Shannon 'Fifth Report of the Special Rapporteur for Children' <<http://www.dcy.gov.ie/documents/publications/5RapporteurRepChildProtection.pdf>> accessed 13 July 2015 18; Emily O'Reilly, 'Asylum Seekers in our Republic: Why Have we Gone Wrong?' 102 *Studies*, Summer 2013; Catherine McGuinness (Foreword) in , Irish Refugee Council, *State Sanctioned Child Poverty and Exclusion* (2012) and Carol Coulter, 'Interim Report: Child Care Law Reporting Project' (November 2013) <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>> accessed 14 July 2015, 20, 24 and 27 and Working Group to Report to Government (n 7) para 3.1. and Appendix 6.

30 Working Group to Report to Government (n 7) para 3.4.

recommended that an implementation start and end date be set by the authorities as soon as possible.<sup>31</sup>

If this recommendation is implemented, it has the potential to impact upon an estimated 1,082 children who have been living in the direct provision system for over five years.<sup>32</sup>

However, it must be recognised that time spent in direct provision is only one of the problematic aspects of direct provision. Fundamentally, Ireland must ensure that accompanied children seeking asylum (or with carers who are seeking asylum), must enjoy all socio-economic rights that are recognised in the UN Convention on the Rights of the Child. While the *McMahon Report* engaged in an analysis of potential *child protection* issues within the direct provision system,<sup>33</sup> it does not substantively engage in a *child rights* analysis of the direct provision system.<sup>34</sup> If the *McMahon Report* recommendations are implemented, children can still potentially spend up to five years in the direct provision system.<sup>35</sup>

Northern Ireland has refused to return children to the Republic of Ireland, who, along with their mother, had unsuccessfully claimed asylum and had an application outstanding for subsidiary protection in Ireland.<sup>36</sup> Relying on Section 55 of the Borders, Immigration and Citizenship Act 2009,<sup>37</sup> Stephens J. held that the children would not be able to develop their sense of identity and belonging in direct provision centres, accepted that many asylum seekers spend several years in direct provision and this can impact on mental and physical health of children and would not be able to enjoy family life in the Republic of Ireland if returned to direct provision.<sup>38</sup> In the recent Irish High Court decision, *CA & TA*,<sup>39</sup> direct provision was not found to have violated any of the adult applicant's human rights, protected under the Constitution or the European

Convention on Human Rights. A decision as to whether the child applicant, T.A, had legal rights that the State had to protect by virtue of Ireland's legal obligations under the CRC, was adjourned.<sup>40</sup> The *Dos Santos* judgment, delivered a number of days after *C.A and T.A.*, stated that no individual rights can be relied upon in Irish courts by children deriving from Ireland's obligations under the UN CRC.<sup>41</sup>

## Recommendations

- > **The system of direct provision violates the rights of children and the system as currently operating is not compliant with Ireland's obligations under the UN Convention on the Rights of the Child.**
- > **The length of time children must live in direct provision is of deep concern. However, this is only one problematic aspect of the direct provision system.**
- > **At a minimum, children seeking asylum should be entitled to the Child Benefit payment and should not be expected to reside in communal accommodation for the duration of their (or their carers) asylum claims.**
- > **Children seeking asylum should enjoy the same social, economic and cultural rights as Irish citizen children. To this end, the Habitual Residence Condition in Irish social security law, must be amended so that it no longer violates the socio-economic rights of children seeking asylum.**
- > **An explicit best interests of the child requirement should be introduced within Irish immigration and protection law, protecting the best interests of the child as regards their civil, political, economic, social and cultural rights in Ireland.**

31 *ibid* para 3.128.

32 *ibid* paras 3.11-3.13. This recommendation may also potentially benefit 649 children who are in the refugee/subsidiary protection system, or who are subject to a deportation order for a period of over 5 years.

33 *ibid* paras 4.61 to 4.75.

34 See further, Liam Thornton, 'A Preliminary Human Rights Analysis of the Working Group Report and Recommendations on Direct Provision' < [https://www.academia.edu/13446243/A\\_Preliminary\\_Human\\_Rights\\_Analysis\\_of\\_the\\_Working\\_Group\\_Report\\_and\\_Recommendations\\_on\\_Direct\\_Provision](https://www.academia.edu/13446243/A_Preliminary_Human_Rights_Analysis_of_the_Working_Group_Report_and_Recommendations_on_Direct_Provision) > accessed 08 July 2015 20-26.

35 Working Group to Report to Government (n 7) para 3.165.

36 *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88.

37 Section 55 provides that any function of the UK Home Secretary within the field of immigration, asylum or nationality must be discharged so as to promote the welfare of children who are in the United Kingdom.

38 For a detailed discussion on this case, and its potential impact, see Liam Thornton, 'Ireland's Asylum & Direct Provision System under the Spotlight in Northern Ireland High Court' (*Human Rights in Ireland*, 14 August 2013) < <http://humanrights.ie/children-and-the-law/irelands-asylum-direct-provision-system-under-the-spotlight-in-northern-ireland-high-court/> > accessed 14 July 2015 and Ciara Smyth, 'Direct Provision at 14: Has Direct Provision Met its Nemesis' (*Human Rights in Ireland*, 10 April 2014) < <http://humanrights.ie/children-and-the-law/directprovision14-has-direct-provision-met-its-nemesis/> > accessed 14 July 2015.

39 *C.A. & T.A. v Minister for Justice and Equality & others* [2014] IEHC 532. For a summary of the decision, see Liam Thornton, 'C.A. and T.A.: The Direct Provision Case' (2014) 17(4) IJFL 116.

40 *C.A. & T.A. v Minister for Justice and Equality & others* [2014] IEHC 532 at para 2.10. This element of the decision was specifically adjourned due to the *Dos Santos* decision.

41 *Dos Santos & others v Minister for Justice and Equality & others* [2014] IEHC 550, paras 48-60.

# CHAPTER 6:

## Education, Play and Leisure

Dr Conor O'Mahony

### 6.1 INTRODUCTION

This chapter will examine the law surrounding educational rights, and benchmark Irish law against the international standards set down in the United Nations Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR). Prior to the approval of Article 42A, education was the only area where the Irish Constitution contained dedicated provisions dealing with children's rights, and a substantial volume of case law and legislation has built on this foundation. Nonetheless, as will be seen, gaps remain in the level of protection offered for children's rights in this area. Recommendations will be made as to how these gaps could be filled.

#### Background to organisation of Irish education system

By international standards, the Irish education system is organised along relatively unusual lines, in that it is an overwhelmingly indirect model of State provision of education, whereby the State largely outsources the function of providing free education to private actors (primarily religious denominations, but also other educational organisations). Primary education is delivered exclusively through this medium; notwithstanding the common use of the term 'National School', there are in fact no State-owned or State-managed primary schools in Ireland. The roots of this system are historical and can be traced to the very beginning of the system of State funded education in Ireland in 1833 and a document known as the 'Stanley Letter'<sup>1</sup> This arrangement was copperfastened by the Constitution in 1937 and has endured to this day. The great majority (92%) of primary schools are Catholic denominational schools; most of the remainder (5%) are under the control of one of the Protestant denominations, while a small multi-denominational sector is beginning to emerge, principally through the Educate Together movement.<sup>2</sup>

At secondary level, the majority (53%) of schools are also privately owned but State funded schools, many of which are owned by religious denominations. However, there is far greater diversity at secondary level, with a significant number of these private schools being owned by non-religious entities such as private companies providing commercial private education, as well as a greater level of direct State involvement, with 47% of secondary schools being owned and run by the State, and in that sense being more in line with international concepts of 'public' education. These types of school include vocational schools, which are State-owned, run by statutory local vocational educational committees, and non-denominational in their ethos (although religion is included as one subject in the curriculum); and community and comprehensive schools, which are State-owned schools which are run in conjunction either with religious denominations or local boards of management.

1 See Alison Mawhinney, *Freedom of Religion and Schools: the Case of Ireland* (VDM Verlag, Saarbrücken, 2009) 17–22.

2 *ibid* 50.

### Identification of main themes for consideration

For the purposes of this brief analysis, a number of key children's rights will be used as benchmarks against which the Irish legal system will be assessed. In any analysis of the field of education, the overriding standard is obviously the right of the child to receive education. Within this, a key issue is the adequacy of that education, particularly in the context of children with special educational needs and disabilities. Education and religion are closely related issues in many countries, and especially in Ireland, given the dominance of denominational schools; thus, the right to religious freedom is a key consideration in any assessment of the protection of children's rights in the field of education. Finally, since education is a lengthy process that shapes a child's future and involves many key decisions along the way, the right of the child to participate in those decisions and to express his or her views on them will also be considered.

## 6.2 OVERVIEW OF RELEVANT INTERNATIONAL HUMAN RIGHTS AND CONSTITUTIONAL STANDARDS

The right to education was identified in the Universal Declaration of Human Rights in 1948, and has been elaborated on in virtually every major international human rights document since then. A comprehensive analysis is outside of the scope of this chapter, and so discussion will focus first on the United Nations Convention on the Rights of the Child (CRC) as the mostly widely ratified convention in international law and the centrepiece of children's rights discourse; and on the European Convention on Human Rights (ECHR), as the only major international human rights law convention to have been incorporated in domestic Irish law. Following these, the relevant provisions of the Irish Constitution will be set out.

### Convention on the Rights of the Child

#### Article 28 (Education)

Article 28(1) of the CRC provides that State Parties recognise the 'right of the child to education', including free primary education,<sup>3</sup> and sets the goal of progressive introduction of free secondary education. Article 28(1) explicitly states that the actions which States are obliged to take under the Convention must be with a view to achieving the right on the basis of equal opportunity, and places States under a duty to offer financial assistance in case of need.<sup>4</sup>

#### Article 23 (Disability)

Article 23 of the CRC provides specific detail in relation to State's obligations towards

disabled children, a number of which are highly relevant in the context of education. These include the facilitation of the child's active participation in the community<sup>5</sup> and the right of the disabled child to special care.<sup>6</sup> Article 23(3) places a duty on the State to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration and individual development.

#### Article 14 (Religious freedom)

Article 14 of the CRC provides that 'States Parties shall respect the right of the child to freedom of thought, conscience and religion', while also respecting 'the rights and duties of the parents ... to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child'. This provision is clear as to the existence of an independent right of the child to religious freedom, and establishes that the exercise of this right is dependent on the maturity of the individual child in question; no minimum age is set below at which it may not be exercised.

#### Article 12 (Right to be Heard)

Article 12(1) of the CRC provides that 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.' This implies that decisions relating to, for example, the content of the education to be received, cannot be made without affording the child the opportunity to be heard and taking due account of his or her wishes. It also gives rise to a right for children to participate in any decision making process which affects them, of which there are many in the field of education. An overarching principle relevant to the educational rights of children is that of the evolving capacities of the child. This principle reflects the reality that as children grow older and mature, their capacities increase and they become more able to make important decisions themselves. The law should therefore strive to facilitate a child of a sufficient understanding and maturity in making certain decisions for him or herself. Legal basis for this principle can be found in Articles 5,<sup>7</sup> 12<sup>8</sup> and 14<sup>9</sup> of the CRC. The principle implies that in cases of conflict between children

3 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) art 28(1)(a).

4 *ibid* Art 28(1)(b).

5 *ibid* Art 23(1).

6 *ibid* Art 23(2).

7 Convention on the Rights of the Child (n 3) Art 5 provides that State Parties shall respect the right of parents to "to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

8 Convention on the Rights of the Child (n 3) Art 12(1) provides that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

9 Convention on the Rights of the Child (n 3) Art 14 provides that States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right [to freedom of thought, conscience and religion] in a manner consistent with the evolving capacities of the child.



and parents in the exercise of their respective educational rights, the views of a sufficiently mature child should take precedence. This principle is, however, subject to the overriding welfare principle which, in the words of Article 3(1), is a 'primary consideration'.

Moreover, making children a part of the decision making process and helping them to become accustomed to taking responsibility for their decisions is an important part of education in itself. This will better prepare them for adult life, when they will constantly have to make such decisions for themselves. Manfred Nowak has submitted:

If education aims at fully developing the child's personality and talents and at enabling the child to actively participate in a free society, a stronger protection of the rights of the young person to choose his or her education and to participate in the relevant decision-making process would seem highly desirable.<sup>10</sup>

### European Convention on Human Rights

The right to education set out in the ECHR is of a somewhat limited nature when compared with the CRC. The negative formulation of Article 2 of the First Protocol, which states that '[n]o person shall be denied the right to education', has been held by the European Court of Human Rights not to place a positive obligation on the State to provide education, being interpreted instead as merely conferring a right of equal access to educational establishments existing at a particular time.<sup>11</sup> Article 2 goes on to provide that the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. In addition to this parent specific right, Article 9 of the ECHR recognizes an independent right to religious liberty of children by providing that 'Everyone has the right to freedom of thought, conscience and religion'.

In *Folgero v Norway*,<sup>12</sup> the European Court of Human Rights held that beliefs must be respected throughout entire State education programme and in all functions taken on by State. While some integration of religion into the broader curriculum is acceptable, the absence of an effective opt-out was deemed to violate the rights of parents under Article 2 of Protocol 1 to ensure such education and teaching in conformity with their own religious and philosophical convictions. While no independent breach of the rights of the children under Article 9 was found in this case, it seems at least arguable that such

10 Manfred Nowak, 'The Right to Education' in Asbjørn Eide, Catarina Krause, Allan Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff: Dordrecht 1995) 205. See also Martin Van Bueren, 'Education: Whose Right is it Anyway?' in Heffernan (ed) *Human Rights: A European Perspective* (Round Hall 1994) 348–349, who argues that [t]he exercise of the right to education is essential for children because it helps realize their potential. Yet an important aspect of education, learning to take responsibility for decisions made, has been overlooked. Children have been excluded from participating in a wide range of educational choices, from government debates over the content of school curricula to the choice of school.

11 *Belgian Linguistic case* (1979–80) 1 EHRR 252.

12 *Folgero v Norway* App no 15472/02 (ECtHR June 29 2007).

occurred. Significantly, in *Lautsi v Italy*,<sup>13</sup> the Chamber found breaches of the rights of both children and parents due to a law making it mandatory for State schools to display the crucifix in classrooms. Although the Grand Chamber ultimately found that no breach had in fact occurred,<sup>14</sup> the finding that children had an independent interest in religious liberty within the education system is nonetheless highly significant.

### Irish Constitution

The Irish Constitution does not actually contain an express right of the child to receive education; instead, Article 42.4 places a duty on the State to 'provide for free primary education'. However, the Courts have long recognised a corresponding right of children to receive the free primary education that the State has a duty to provide.<sup>15</sup> In the context of religious education, Article 44.2.1° states that '[f]reedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen'. This provision is noteworthy for its all inclusive approach; 'every citizen' clearly includes children, since the provisions of Articles 2 and 9 in relation to the criteria for citizenship would seem to indicate that the term 'citizen' was not intended by the drafters of the Constitution to carry any connotation of age, and a number of decisions of the courts would seem to confirm this.<sup>16</sup> Article 44.2.3° further provides that '[t]he State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status'. Finally, Article 44.2.4° provides that children have a right 'to attend a school receiving public money without attending religious instruction at that school'.

## 6.3 REVIEW IRISH LAW/LEGISLATION IN EACH SPECIFIC AREA TO IDENTIFY GAPS IN THE PROTECTION OF CHILDREN'S RIGHTS

### Primary Education

As noted above, the Courts have consistently recognised a constitutional right of children to receive the free primary education that the State has a duty to provide. This was best expressed in the judgment of O'Higgins C.J. in *Crowley v Ireland*, where he stated:

...the imposition of the duty under Article 42, s. 4, of the Constitution creates a corresponding right in those in *[sic.]* whose behalf it is imposed to receive what must be provided. In my view, it cannot be doubted that citizens have the right to receive what it is the State's duty to provide for under Article 42, s. 4.<sup>17</sup>

13 App no 30814/06 (ECtHR November 3 2009).

14 App no 30814/06 (ECtHR March 18 2011).

15 *Crowley v Ireland* [1980] IR 102, at 122 per O'Higgins C.J.

16 See, e.g. *State (M) v Attorney General* [1979] IR 73 and *G v An Bord Uchtála* [1980] IR 32.

17 *Crowley v Ireland* (n 15).



Although the existence of this right is well established and has been confirmed in a number of subsequent cases,<sup>18</sup> the Constitution Review Group has recommended that Article 42.4 should be amended to contain a more explicit statement of the child's right to free primary education.<sup>19</sup> Such a move would be welcome as part of a general movement towards a greater level of express recognition of children's rights.

The Education Act, 1998 elaborates on Article 42.4 of the Constitution by providing in s. 7 that it is a function of the Minister for Education to ensure that there is made available to each person resident in the State a level and quality of education appropriate to meeting the needs and abilities of that person; to provide funding and support services to schools to this end; and to monitor and assess the quality, economy, efficiency and effectiveness of the education system provided in the State.

### Post-primary education

Like the CRC, the terms of Article 42.4 of the Irish Constitution make it clear that the only level of education which the State has a duty to provide for is primary education. However, unlike the CRC, the Constitution does not explicitly refer to any level of education outside primary education.<sup>20</sup> What it does provide, in Article 42.4, is that the State 'shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions'. It is unclear what exactly this provision requires of the State, especially since it has not received any detailed consideration by the Courts. Having said that, s. 7 of the Education Act, 1998 applies equally to primary and post-primary education.

The Constitution Review Group in 1996 recommended that the Oireachtas 'should seriously consider' extending the right to education to include second level education.<sup>21</sup> They stopped short of an outright recommendation of such a move because of the resource implications involved. However, the Review Group itself noted that at the time of writing, it was over thirty years since free second level education was introduced in Ireland (since that was 18 years ago, it is therefore now almost 50 years). It should also be noted in this context that the Education (Welfare) Act, 2000 provides for compulsory education up to the age of 16.<sup>22</sup> It is submitted that Article 42.4 should be extended to encompass second level education as to do so would reflect practical reality, while also strengthening the educational rights of children under the Constitution, in line with the CRC's target of progressive realisation of the right to free post primary education.

18 See, e.g., *O'Donoghue v Minister for Health* [1996] 2 IR 20 and *Sinnott v Minister for Education* [2001] 2 IR 545.

19 The Constitution Review Group, Report of the Constitution Review Group (Stationery Office Dublin 1996) 353.

20 Note that in *Sinnott* (n 18) Murphy J at 675 distinguished pre-school education from primary education as mentioned in Art 42.4.

21 The Constitution Review Group (n 19) 353.

22 sections 2(1) and 17(1).

### Special Educational Needs and Disability

In *O'Donoghue v Minister for Health*,<sup>23</sup> the right of children to free primary education was held to extend to meeting the needs of all children, no matter how extensive those needs might be. In rejecting the argument presented by the State that 'free primary education' in Article 42.4 referred only to scholastic education provided in primary schools, O'Hanlon J. held that the State's duty

'involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, *however limited these capacities may be*'.<sup>24</sup>

This approach was confirmed by McGuinness J. in *Comerford v Minister for Education*,<sup>25</sup> where she confirmed that

'the right to free primary education extends to every child, although the education provided must vary in accordance with the child's abilities and needs'.<sup>26</sup>

Later case law confirms this approach,<sup>27</sup> and thus, the principle set down in Article 23 of the CRC is adhered to in the interpretation of the Constitution.

Two main limitations arise: the first is the decision of the Supreme Court in *Sinnott v Minister for Education*<sup>28</sup> that the right ends at the age of 18, which has serious implications for the right to education of children whose disabilities are such that they require ongoing education into adulthood. Second, in *O'Carolan v Minister for Education*,<sup>29</sup> the High Court held that in determining whether the applicant's constitutional right to education was being vindicated, the test was whether the provision on offer was 'appropriate'. The test was not whether an alternative placement was better or the best, so long as the placement in question was appropriate to the needs of the particular child.<sup>30</sup> This carries the unfortunate implication that a lowest common denominator may be seen as an acceptable response to a child's constitutional right to education.

23 [1996] 2 IR 20.

24 *ibid* at 65 (emphasis added). The learned judge reached this conclusion after considering, *inter alia*, legislative developments such as the English Education Act 1970 and the US Education of All Handicapped Children Act 1975 as well as reports such as the Committee of Enquiry into the Education of Handicapped Children and Young people, *Special Education Needs (Warnock Report) Cmnd 7212* (HMSO: 1978) and the *Blue Report* (Stationery Office, Dublin, 1983).

25 [1997] 2 ILRM 134.

26 *ibid* at 143.

27 See, e.g., *Sinnott* (n 18) and *O'Carolan v Minister for Education* [2005] IEHC 296.

28 [2001] 2 IR 545.

29 [2005] IEHC 296.

30 *ibid* at 46.

While the existence of a constitutional right to education suitable to the needs of every child is a key foundation in the law dealing with special educational needs, it is clear that far more detailed provisions are necessary to ensure the vindication of this right in practice.<sup>31</sup> Section 7 of the Education Act, 1998 expressly states that the duty of the Minister for Education to make appropriate education available to everyone in the State includes persons with a disability or who has other special educational needs. However, the Act fails to set out anything resembling the level of detail that is required of an adequate legal framework designed to cater for the complex needs of children with special educational needs and disabilities.

Efforts were made to address this deficiency with the enactment of the Education for Persons with Special Educational Needs Act 2004, which establishes a comprehensive framework for the assessment of educational needs; the drafting of education plans that set out the educational provision to be made for children, and create a legal entitlement to the services specified therein; periodic reviews of these education plans; and an accessible specialised appeals process to adjudicate on disputes. Although it is not perfect, the 2004 Act is by and large an excellent piece of legislation that would represent real progress in the vindication of the right to education of children with special educational needs and disabilities.<sup>32</sup> Unfortunately, the Act was originally intended to have a five-year implementation period and to come into effect in 2009; but following the economic crisis of 2008, its implementation was postponed indefinitely. This is an issue that should be rectified at the soonest available opportunity.

### Religious freedom

On paper, the guarantee of a constitutional right to religious liberty; the constitutional prohibition on religious discrimination; and the constitutional right to opt-out from religious instruction in publicly funded schools would seem to combine to provide children with strong constitutional rights in the context of religious liberty in the education system. However, these rights are impacted upon quite heavily by a number of practical realities, and by the way in which they have been interpreted by the courts and qualified by legislation.

First, it should be noted that in the majority of areas in Ireland, there is limited (if any) freedom of choice of schools. As noted above, well over 3,200 out of a total of 3,300 primary schools are denominational in nature. 92% of primary schools are Catholic denominational schools; most of the remainder are Protestant denominational, while a small multi-denominational sector is beginning to emerge.<sup>33</sup>

While in principle, the opt-out provision set out in Article 44.2.4° should protect the religious liberty of children who are unable to access a school attuned to their own religious beliefs, this latter right is entirely undermined by the operation of what is known

as the 'integrated curriculum' within these denominational schools. The integrated curriculum has its origins in Rule 68 of the 1965 Rules for National School:

Of all the parts of a school curriculum Religious Instruction is by far the most important, as its subject-matter, God's honour and service, includes the proper use of all man's faculties, and affords the most powerful inducements to their proper use. Religious instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of the school.<sup>34</sup>

Rule 68 goes on to state that the teacher 'should constantly inculcate' various Catholic values in their students and that the primary duty of the educator is to habituate the students to observe the laws of God.<sup>35</sup> Thus, while the predominant approach is that Irish primary schools deliver 30 minutes per day of formally timetabled religious instruction,<sup>36</sup> religious values permeate the entire school day.<sup>37</sup>

The effect of the integrated curriculum is that it is impossible for a child to attend the vast majority of primary schools in Ireland without being exposed to, and influenced by, Catholic teachings.<sup>38</sup> This system quite obviously impinges on the religious freedom of non-Catholic children within the education system—and yet the scant case law that exists in this area to date would seem to indicate that the Courts do not consider this to be unconstitutional. In *Campaign to Separate Church and State Ltd v Minister for Education*,<sup>39</sup> Barrington J. examined this issue and stated:

The Constitution therefore distinguishes between religious 'education' and religious 'instruction'—the former being the much wider term. A child who attends a school run by a religious denomination different from his own may have a constitutional right not to attend religious instruction at that school, but the Constitution cannot protect him from being influenced, to some degree, by the religious 'ethos' of the school. A religious denomination is not obliged to change the general atmosphere of its school merely to accommodate a child of a different religious persuasion who wishes to attend that school.<sup>40</sup>

When read in the isolated context of a constitutionally sanctioned system of non-discriminatory State funding for denominational education, this passage is unobjectionable; however, the empirical reality of the overwhelmingly denominational

34 *Rules for National School* (Stationery Office, Dublin 1965) 38.

35 *ibid.*

36 See Mawhinney (n 1) 69–70.

37 For empirical evidence of the integrated curriculum in action, see Mawhinney (n 1) 104–107.

38 See further Áine Hyland, 'The multi-denominational experience' in *Report of the Constitution Review Group* (Stationery Office, Dublin, 1996) 630–634 and D Clarke 'Education, the State and Sectarian Schools' in T Murphy (ed) *Ireland's Evolving Constitution* (Hart Publishing Oxford 1998) 69–71.

39 [1998] 2 ILRM 81.

40 *ibid* at 101 See, however, Gerard Whyte, 'Education and the Constitution' in Dermot Lane (ed), *Religion, Education and the Constitution* (Dublin 1992) 107–108.

31 See generally Conor O'Mahony, 'Constitutionalism and Legislation in Special Educational Needs Law: An Anglo-Irish Perspective' 2008) 1 Public Law 125.

32 See Conor O'Mahony, *Educational Rights in Irish Law* (Thomson Round Hall 2006) Chapter 7.

33 See Mawhinney (n 1) 50.

nature of the Irish primary school system, combined with the operation of the integrated curriculum, can have the effect that it is virtually impossible for some parents and children to fully exercise their rights with respect to religious freedom in education. They are faced with no realistic freedom of choice of school, and this is compounded by a partial and ineffective opt-out mechanism that leaves the children subject to a significant degree of religious influence. There are currently only a very small number of multi-denominational schools available, and these are concentrated in the major cities; consequently, the only possibility of non-Catholics avoiding exposure to Catholic denominational education will often be through the establishment by their parents of a private school or through home education (neither of which may be practicable in many cases).

While the courts have indicated that this is not a violation of the Irish Constitution, serious questions could be asked as to whether the Irish primary school system complies with the principles set down by the European Court of Human Rights in *Folgero v Norway*,<sup>41</sup> at least in areas where no multi-denominational alternative is readily accessible. Thus, given that economic reality makes it improbable that a genuine parallel system of State-funded multi- or non-denominational schools will be established in even the medium term, a partial restriction on the religious rights of members of the majority religions, through the abolition of the integrated curriculum and a watering down of school ethos outside of formally timetabled periods of religious instruction, may ultimately be a necessary price of avoiding a severe abrogation of the freedom of thought, conscience and religion of members of minority religions and of none.

Another challenge in ensuring the vindication of the religious freedom of children in the education system is the exemption made in anti-discrimination legislation for denominational schools. The Education Act, 1998 requires school admissions policies to provide for maximum accessibility to the school and to respect principles of equality, but also to uphold the school's characteristic spirit.<sup>42</sup> The Equal Status Act, 2000 expressly prohibits religious discrimination in school admissions, but includes an exemption for cases where denominational schools admit coreligionists in preference to non-coreligionists, or where they refuse to admit a non-coreligionist (provided that such refusal is reasonably necessary to uphold the ethos of the school).<sup>43</sup>

On first reading, this provision might seem to constitute a flagrant breach of the constitutional prohibition on religious discrimination, but the Supreme Court has read that prohibition as being subject, in certain circumstances, to the broader guarantee of religious freedom. When the Court was invited to pronounce on the constitutionality of similar provisions in the Employment Equality Act, 1998 allowing for religious

discrimination in the employment of teachers, it held that such provisions may be permitted if reasonably necessary to protect the free practice of religion of those who seek to have their children educated through a particular religious ethos.<sup>44</sup> This decision may provide constitutional cover for the provisions of the Equal Status Act, 2000 relating to school admissions; the key point of debate is how to define what is considered 'reasonably necessary' to uphold the ethos of a school.<sup>45</sup> Arguably, the necessity is not as great in the context of admitting an individual child who is a non-coreligionist as it is in the context of employing a teacher, given the enormous influence exerted by teachers on the atmosphere of a school. In any event, so long as the provision remains on the statute books, it has the potential to result in children of minority religions and of none being excluded from their local National School, and to create pressure for parents to baptise their child where they might otherwise choose not to.<sup>46</sup> The Ombudsman for Children has recently called on the Minister for Education to amend this provision as part of a forthcoming package of reforms on school admissions,<sup>47</sup> but at present, it seems unlikely that this will occur.

## Participation

### Education Act 1998

In spite of the clear requirement under the CRC that children should be entitled to participate in decision making and express their views on matters affecting them, Irish law has made very limited provision for facilitating this. Some attempt has been made to give post primary students the opportunity to express their views through the provisions of the Education Act, 1998 relating to Student Councils. Section 27(3) of the Act provides that students of a post primary school may establish a student council, and a board of a post primary school shall encourage and give all reasonable assistance to the establishment of such councils. The function of such Student Councils is to 'promote the interests of the school and the involvement of students in the affairs of the school,

41 App no 15472/02 (ECtHR June 29 2007).

42 s 9(m) and 15(2)(d).

43 s 7(2).

44 In *re Article 26 and the Employment Equality Bill, 1996* [1997] 2 IR 321 at 356–359. The Court stated that [i] this is true that 'ethos' is a vague term and is nowhere defined in the Bill ... It is probably true to say that the respect for religion which the Constitution requires the State to show implies that each religious denomination should be respected when it says what its ethos is. However the final decision on this question as well as the final decision on what is reasonable or reasonably necessary to protect the ethos will rest with the court and the court in making its overall decision will be conscious of the need to reconcile the various constitutional rights involved.

45 See Mawhinney (n 1) 165–167.

46 See *ibid* 142. See also Ruairi Quinn, 'Time to transfer control of primary education', *The Irish Times* (January 26 2010), who comments that many parents 'realise that a visit to the baptismal font is between them and access to a primary school place for their child. Parents and godparents, not practising, lapsed, agnostic or atheists are now required to make solemn vows before a priest, to raise the child as a practising Catholic. The priest, who has not seen the parents before and does not expect to see them again, goes along with this charade.'

47 See Kitty Holland, 'Call for end to religious discrimination by schools' *The Irish Times* (Dublin. December 12 2013); the Ombudsman for Children, 'Advice on the General Scheme of the Education (Admission to Schools) Bill 2013' <<http://www.oco.ie/wp-content/uploads/2014/03/AdviceoftheOmbudsmanforChildrenontheGeneralSchemeoftheEducationBill.pdf>> accessed 16 July 2015 and the Ombudsman for Children, *Report to the UN Committee on the Rights of the Child* (Ombudsman for Children 2015) 12–13.

in co-operation with the board, parents and teachers'.<sup>48</sup> However, these provisions are somewhat isolated and their effectiveness stands to be undermined unless school boards, parents and teachers take the views of Student Councils seriously. It is difficult to see how this can be assured by the provisions as currently formulated.

#### Education for Persons with Special Educational Needs Act 2004

As noted above, the Education for Persons with Special Educational Needs Act 2004 provides a comprehensive framework for vindicating the rights of children with special educational needs. It sets out in detail the steps to be taken at the key points in the process, namely assessments, the preparation of education plans, reviews of education plans and appeals. The Act takes great care to ensure that parents have adequate opportunity to express their views at each point in the process; unfortunately, it takes less care to ensure that children are in a position to independently express their views and actively participate in the various stages of the process. The major exception in this regard is the preparation of education plans: s. 8(4) of the Act provides that where the National Council for Special Education is preparing an education plan for a child under s. 8, the relevant special educational needs organiser shall convene a team of people to provide advice to them in relation to the preparation of the education plan, and that team of people shall include the child, where this is considered appropriate by the special educational needs organiser having regard to the age of the child and the nature and extent of the child's special educational needs.<sup>49</sup> Unfortunately, no comparable provision exists in s. 3, which deals with education plans that are prepared within the school (for children with less complex special educational needs). This is not to suggest that children will be excluded from actively participating in the process—but the absence of an express legal obligation leaves open the possibility of such.

As regards the other stages of the process, no provision is made in the Act for children to be active participants (as opposed to mere passive subjects) in assessments of educational needs, although admittedly, it is difficult to see how any proper assessment of educational needs could take place without affording a child the opportunity to express their views about their educational needs. More disappointingly, s. 11 (which deals with periodic reviews of education plans) does not provide for the participation of children in reviews, and while it does allow parents to request a review before it falls due, no similar provision is made for children. The same approach is taken to appeals to the Special Education Appeals Board established under the Act; while parents can appeal against a variety of decisions, children are not entitled to bring appeals; are not a party to any appeal, even though it fundamentally affects them; and there is no provision in the Act designed to ensure that the views of the child are ascertained during the course of an appeal. This is clearly out of line with Article 12 of the CRC, and while the terms of Article 42A do not apply to administrative proceedings such as the Special Education Appeals Board, the exclusion of children from the process is nevertheless inconsistent with the spirit of the constitutional amendment.

48 s 27(4).

49 s 8(4)(a).

## 6.4 RATIONALE FOR GAPS IN PROTECTION

### Limitations of indirect provision model of state funded private schools

The current model of primary education in Ireland, whereby the State provides funding to private entities who deliver primary education on its behalf, limits the capacity of the State to respond in a timely fashion to changing demands on the education system. The absence of direct State ownership and management of primary schools, coupled with a policy of affording schools a large amount of autonomy, creates a system that is somewhat unwieldy and inflexible at times of rapid demographic change. Moreover, given the amount of private fundraising that primary schools engage in, it must be questioned whether the level of funding provided to such schools by the State is adequate and in line with a constitutional guarantee of 'free primary education'.

### Forum for Patronage and Pluralism

The Report of the Forum for Patronage and Pluralism of April 2012<sup>50</sup> recommended an incremental approach to addressing the lack of diversity in the composition of the primary schools system, whereby 250 schools would initially be scrutinised, of which 50 may be divested. This represents just 1.5% of primary schools, and is a rather cautious and limited recommendation. The report also recommended that steps be taken to measure parental preferences across the country to guide a later phase of divestment. On a more positive note, the report recognised the difficulties posed by the integrated curriculum and the Rules for National School, and recommended that Rule 68 be deleted as soon as possible. A range of other recommendations were made concerning school prayer and religious displays and the need to make these as inclusive as possible. It remains to be seen what steps will be taken to implement these recommendations, but it seems clear that focusing on diversity of type of school alone is insufficient, and that addressing the integrated curriculum and ensuring an effective opt-out mechanism is essential. This may have the effect of slightly diluting the rights of the religious majority in denominational schools, but it seems to be the only means available of avoiding a severe restriction on the religious liberty of the minority. Having said that, it seems likely that difficulties will remain for the individual religious liberty of children in the education system so long as our primary school system is composed of an overwhelming majority of religious (and, in particular, Catholic) schools.

### Restrictive interpretation of constitutional provisions by the courts

A number of constitutional provisions have been given a narrow interpretation by the Courts, which has served to restrict the rights of children in the education system. First, as mentioned above, the right to free primary education has been interpreted as ending at age 18 in all cases, even where the child has special educational needs that

50 Forum on Patronage and Pluralism in the Primary Sector, 'Report of the Forum's Advisory Group (2012)' <<http://www.education.ie/en/Press-Events/Conferences/Patronage-and-Pluralism-in-the-Primary-Sector/The-Forum-on-Patronage-and-Pluralism-in-the-Primary-Sector-Report-of-the-Forums-Advisory-Group.pdf>> accessed January 13, 2014.

will require ongoing provision into adulthood. This could fatally undermine the benefit derived from education provided up to that point. Second, the interpretation of Article 42.4 as conferring a right only to 'appropriate' rather than 'the best' education may result in some children having to settle for an inferior quality of education. Finally, the interpretation of the prohibition on religious discrimination in Article 44, as well as of the clause granting the right to opt out from religious instruction, has created a situation where an approach to religious education that could be seriously challenged under the CRC and ECHR has been deemed to be compatible with the Irish Constitution. In all three cases, a more child-centred interpretation was available to the Courts.

#### **Non-commencement of Education for Persons with Special Educational Needs Act 2004**

A major constraint on the adequate vindication of the rights of children with special educational needs is the continuing non-commencement of the Education for Persons with Special Educational Needs Act 2004. As noted above, this was intended to come into effect in 2009, but its commencement was indefinitely postponed after the economic crisis of 2008. As a matter of individual rights, all children are entitled to an adequate education that is appropriate to their individual needs, irrespective of cost, and the 2004 Act provides a far more effective model for ensuring this than existing law. Moreover, from an economic perspective, investment in education is cost effective in the long term. Therefore, as the economy stabilises, the commencement of this legislation should be a priority for the Department of Education.

### **6.5 RECOMMENDATIONS TO STRENGTHEN THE PROTECTION OF RIGHTS**

- > The constitutional right to free education should be extended to cover secondary education.
- > The right to free education should be determined on the basis of need rather than age.
- > The right to free primary education should, in line with the definition set down in *O'Donoghue v Minister for Health*, allow children to make the best possible use of their inherent and potential capacities, however limited those capacities may be.
- > The Education for Persons with Special Educational Needs Act 2004 should be commenced and fully implemented without further delay.
- > The recommendation of the Forum for Patronage and Pluralism with respect to the integrated curriculum should be implemented immediately—at least in areas where no multi-denominational alternative is available within a reasonable distance.
- > A more extensive programme of divestment of schools from religious denominations should be undertaken, with a view to providing genuine diversity and freedom of choice within the primary school system.

# CHAPTER 7:

## Youth Justice

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Sarah Jane Judge, BL

## 7.1 INTRODUCTION

The United Nations Convention on the Rights of the Child provides an effective benchmark against which domestic provisions for the treatment of children in conflict with the law can be measured and evaluated. Its provisions and the rights contained therein recognise and reflect best practice across jurisdictions while also representing minimum standards for the criminal prosecution of children.<sup>1</sup> It provides a rights based framework for the creation of domestic youth justice law, policy and practice.<sup>2</sup> The specific rights it affords to children in conflict with the law places the child as a rights holder within the criminal justice system. The CRC does not form part of Irish law and is not enforceable in Irish Courts.

Youth justice in Ireland is founded in legislation and implemented by policy. It applies to those under the age of 18<sup>3</sup> that come into conflict with the law. The Children Act 2001<sup>4</sup> outlines the principles and provisions of youth justice in Ireland. This Act is the blueprint from which policies and procedures of youth justice are developed and implemented by a network of government agencies.

This chapter seeks to evaluate the operation of the youth justice system in Ireland in light of the due process rights of the child as contained in the CRC. Reference is also made to the provisions of the non-binding guidelines published by the UN Committee on the Rights the Child (CRC) that direct the implementation of the CRC. These include the Beijing Rules<sup>5</sup> and the Riyadh Rules.<sup>6</sup> This evaluation is not exhaustive due to the length and nature of this chapter, however salient areas necessitating examination and discussion have been selected. These include the provisions of the Children Act and the operation of a number of agencies involved in the administration of youth justice in Ireland.

## 7.2 YOUNG PEOPLE IN CONFLICT WITH THE LAW

Before beginning an analysis of the rights held by children involved in the criminal justice process, it is imperative to understand the abilities, limitations and realities of these children. The capacities of children and adolescents, in general, are influenced by a lack of future orientation, a lack of risk aversion, impulsivity and suggestibility<sup>7</sup> and

have been found to be less risk averse than adults and tend to weigh anticipated gains more heavily than losses in making choices.<sup>8</sup> Children and adolescents tend to focus on the short term implications of decisions and to pay less attention to the long term consequences.<sup>9</sup> During the period of early to mid-adolescence, decisions are often driven by acquiescence or opposition to authority or by efforts to gain peer approval.<sup>10</sup>

These cognitive and emotional limitations have been held to directly impact on the ability of the child to participate effectively in legal proceedings. Grisso et al conclude that psychosocial immaturity may affect the performance of youths as defendants, in ways that extend beyond the elements of understanding and reasoning.<sup>11</sup> Adolescents may be more likely to make choices that reflect a propensity to comply with authority figures such as making statements or admissions to the police.<sup>12</sup> Furthermore they are less capable than others to recognise the risks inherent in the various choices they face such as choosing and consulting a lawyer and evaluating the various factors in entering a plea.<sup>13</sup> Children and adolescents are less likely to consider the long-term implications of their decisions, instead concentrating on the immediate consequences.<sup>14</sup>

Previous academic research conducted in the Children Court illustrated the key characteristics of many young offenders in the Irish criminal justice system. Children appearing before the Court were predominantly male (90%),<sup>15</sup> lived in specific disadvantaged areas (81%)<sup>16</sup> and did not live with both parents (71%).<sup>17</sup> The majority of accused (86%) had no engagement with mainstream education.<sup>18</sup> The presence of minority communities was significant. Of the young people studied 22.5% were from the Traveller or ethnic community.<sup>19</sup> The most common offences were public order, petty theft offences and road traffic offences.<sup>20</sup>

A further study conducted within a number of Irish detention schools came to similar conclusions.<sup>21</sup> Staff within the schools could expect 80% of the male children surveyed

1 Ursula Kilkelly, *Youth Justice in Ireland, Tough Lives, Rough Justice* (Irish Academic Press 2006) xv.  
 2 *ibid.*  
 3 Children Act 2001 s 3.  
 4 Children Act 2001 as amended by the Criminal Justice Act 2006.  
 5 UN General Assembly, 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") : resolution / adopted by the General Assembly' (29 November 1985) A/RES/40/33.  
 6 UN General Assembly, 'United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") : resolution / adopted by the General Assembly' (14 December 1990) A/RES/45/112.  
 7 Ido Weijers, 'Requirements for Communication in the Courtroom: A Comparative Perspective on the Youth Court in England/Wales and The Netherlands' (2004) 4(1) Youth Justice 25.

8 Elizabeth Scott & Thomas Grisso, 'Developmental Incompetence, Due Process and Juvenile Justice Policy' (2004) 11 University of Virginia Law Scholl: Public Law and Legal Theory Working Paper 23-24.  
 9 *ibid.* 25.  
 10 *ibid.* 26.  
 11 Thomas Grisso and others, 'Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants' (2003) 27(2) Law and Human Behavior 357.  
 12 *ibid.*  
 13 *ibid.*  
 14 *ibid.*  
 15 Jennifer Carroll, Emer Meehan and Sinead McPhillips, *The Children Court: A National Study* (Association for Criminal Justice Research and Development 2007) 18.  
 16 *ibid.* 19, 20.  
 17 *ibid.* 20.  
 18 *ibid.* 23.  
 19 *ibid.* 26.  
 20 *ibid.*  
 21 J. Hayes, G. O'Reilly 'Emotional Intelligence, Mental Health and Juvenile Delinquency' (Juvenile Mental Health Matters 2007). <[http://www.juvenilementalhealthmatters.com/Publications\\_files/Mental%20Health%20%26%20EI%20Report.pdf](http://www.juvenilementalhealthmatters.com/Publications_files/Mental%20Health%20%26%20EI%20Report.pdf)> accessed: 4 September 2010.



to satisfy diagnostic criteria for at least one psychological disorder<sup>22</sup> and for most boys, their mental health difficulties were compounded by co-morbidity.<sup>23</sup> That is to say that separate psychiatric diagnostic criteria are observable in the same young offender. A further one third of detainees could be expected to meet diagnostic criteria for a mood or anxiety disorder,<sup>24</sup> with two thirds experiencing an externalising or disruptive psychological disorder further compounded by a substance related disorder.<sup>25</sup> Cannabis and cocaine abuse was noted in males between the ages of 13-14 years.<sup>26</sup> Lower cognitive abilities are also manifest with impaired levels of emotional intelligence and competence.<sup>27</sup> Detainee subjects were found to have a reduced ability to identify emotions accurately and to employ emotional information to influence and regulate thinking.<sup>28</sup>

This psychological and background data charts the emotional and physical vulnerability of many young offenders and the psychological challenges and sociological barriers that they face. The fair trial rights of the child account for the age and vulnerability of young offenders by requiring the implementation of a number of safeguards throughout the Children Court process. These safeguards help to ensure the effective participation of the child throughout the Court proceedings.

### Number of Children in the Criminal Justice System in Ireland

In 2014, the Courts Service reported that court orders were made in respect of 4,877 offences committed by children.<sup>29</sup> This was a reduction of 9% from 2013.<sup>30</sup> The most common offences were larceny and public order offences with 50% of all offences having been struck out or taken into consideration.<sup>31</sup> In 2013, one hundred and eighteen offences committed by children were returned to a higher court for trial.<sup>32</sup> Such data is not available for 2014. Furthermore, no data is available concerning whether the children, against whom orders were made, reoffended or whether the children convicted had previous convictions.

22 *ibid* 37.  
 23 *ibid*.  
 24 *ibid*.  
 25 *ibid*.  
 26 *ibid* 44.  
 27 *ibid* 55.  
 28 *ibid*.  
 29 Courts Service, *Annual Report 2014* (The Courts Service 2014) 40.  
 30 *ibid*.  
 31 *ibid*.  
 32 *ibid*.

## 7.3 WHAT ARE THE RIGHTS OF THE CHILD UNDER THE CRC?

The CRC contains three fundamental principles which are applicable to all children.<sup>33</sup> Article 2 provides that there shall be no discrimination between children in the enjoyment of Convention rights on any grounds<sup>34</sup> while Article 3 states that the best interests of the child shall be the primary consideration in all actions taken concerning the child.<sup>35</sup> Article 12 requires that States assure to every child, who is capable of forming a view, has the right to express that view freely in all matters concerning him or her. These views are to be given due weight in accordance with the child's age and maturity.<sup>36</sup> The Committee on the Rights of the Child (CRC) states that each principle establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.<sup>37</sup> This includes the interpretation of the child's due process rights.

Article 37 and Article 40 address the due process rights of the child. These include a number of basic fair trial rights similar to those provided to adults such as the right to the presumption of innocence,<sup>38</sup> the right to legal representation;<sup>39</sup> not to be compelled to give testimony<sup>40</sup> and the right to have the judicial decision in relation to the offence reviewed by a higher, competent, independent and impartial authority or judicial body according to law.<sup>41</sup> Article 37 and 40 also provide specific protections for children in conflict with the law in light of their age and maturity. Article 40 mandates that State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law and to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.<sup>42</sup> The desirability of promoting the child's reintegration into society where the child can assume a constructive role is also recognised.<sup>43</sup>

The various stages of the criminal justice process and the rights of the child from detection and apprehension through to adjudication, disposition and possible detention are also addressed. The child has the right to be informed promptly and directly of the charges against him or her. The matter must then be determined without delay

33 UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard (20 July 2009) CRC/C/GC/12, at 2.34 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) Art 2.  
 34 Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) Art 2.  
 35 *ibid* Art 3.  
 36 *ibid* Art 12.  
 37 United Nations Committee on the Rights of the Child, General Comment No. 12 (n 33) at 2.  
 38 Convention on the Rights of the Child (n 34) Art 40(2)(b)(i)  
 39 *ibid* Art 40(2)(b)(ii).  
 40 *ibid* Art 40 (2)(b)(iv).  
 41 *ibid* Art 40(2)(b)(vi).  
 42 *ibid* Art 40(1).  
 43 *ibid*.

by a competent, independent and impartial authority or judicial body in a fair hearing according to law.<sup>44</sup> This should take place in the presence of legal or other appropriate assistance and the child's parents or legal guardians.<sup>45</sup> This recognises the need for urgency in dealing with children due to both their cognitive ability but also in light of the adverse impact of the criminal justice system on the child. The right of the child to privacy also must be fully respected at all stages of the proceedings.<sup>46</sup>

Capital punishment or life imprisonment of the child without possibility of release is prohibited.<sup>47</sup> Detention may only be imposed as a measure of last resort and for the shortest appropriate period of time.<sup>48</sup> This is a clear recognition of the adverse impact of detention on the child. Every child deprived of liberty must also be treated in manner which takes into account the needs of the child.<sup>49</sup> The detained child must also be separated from adults unless it is considered in the child's best interest not to do so. The importance of the child's family is also addressed. The child has a right to maintain contact with his or her family through correspondence and visits. This can only be dispensed within exceptional circumstances.<sup>50</sup>

A multidisciplinary approach is also advocated by Article 40. It requires that a variety of dispositions be available in addressing the child's offending behaviour.<sup>51</sup> This should include care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care.<sup>52</sup>

Kilkelly (2008) states that, taken together, these provisions of the CRC reflect the key obligations States must fulfil to ensure the implementation of the Convention as a whole.<sup>53</sup> The notions of treating children as equals, taking a child-centred approach and listening to children thus capture what the Convention as a whole is trying to achieve in bringing about a sea change in attitudes towards children.<sup>54</sup>

### The Children Act 2001

The culmination of three decades of debate,<sup>55</sup> the Children Act 2001 attempts to put

44 *ibid* Art 40(2)(b)(iii).

45 *ibid*.

46 *ibid* Art 40(2)(b)(vii).

47 *ibid* Art 37(a).

48 *ibid* Art 37(b).

49 *ibid* Art 37(c).

50 *ibid*.

51 *ibid* Art 40(4).

52 *ibid*.

53 Ursula Kilkelly, *Children's rights in Ireland: Law, policy and practice* (Tottel Publishing 2008) 27.

54 *ibid*.

55 The Kennedy Report (1970); the Henchy Report (1974), the Task Force on Child Care Services (1980); the Whitaker Report (1985); and the Report of the Dail Select Committee on Crime (1992).

in place a modern statutory framework for dealing with juvenile justice in Ireland.<sup>56</sup> Drawing on a number of rights afforded to the child under the CRC, the Act emphasises community based non-custodial measures as alternative approaches for dealing with young offenders. These include restorative justice, cautioning, family group conferences and the strengthening of the Garda Diversion Programme (GDP) by placing it on a statutory footing.<sup>57</sup> The underlying principle of the Act is detention as a last resort and should only be undertaken after all other community based sanctions have been exhausted. This recognises and upholds the provisions of the CRC,<sup>58</sup> that those under 18 should only be detained as a measure of last resort and for the shortest appropriate period of time.

The Act also provides that if the child is not eligible for admission to the GDP, the child will face prosecution in the District Court sitting as the Children Court. The Children Court must sit at a separate time or location to the District Court and the child's parents are required to attend the proceedings. The child's identity is also protected with restricted reporting measures. A number of alternative sentencing options are provided which allow the Court to not only punish but address the child's behaviour. Children who come before the Children Court found to be in need or at risk can be diverted to the attention of the Child and Family Agency (formally the Health Service Executive). A family welfare conference can then be undertaken with a view to deciding the best course of action in addressing the child's needs.<sup>59</sup> This has been seen by commentators as an attempt by the Act to *bridge the gap* between the justice and welfare systems that the Children Court operates within.<sup>60</sup>

The Act also increased the age of criminal responsibility from seven to twelve years. Children below twelve were now deemed not to have the capacity to commit an offence. This placed the common law presumption of *doli incapax* on a statutory footing. This is a rebuttable presumption and acts as protection for those who lack the maturity to understand the implications of the offence committed.

The Act was not fully implemented on introduction and was fundamentally altered by the Criminal Justice Act 2006. Originally undertaken to implement the Youth Justice Review,<sup>61</sup> the amendments also introduced a number of other significant reforms which were independent of the Review's recommendations. These included a lower age of criminal responsibility of ten years for all children found to have committed serious

56 Geoffrey Shannon, *Child Law* (Thomson Roundhall 2005) 393.

57 Raymond Dooley & Maria Corbett, 'Child Care, Juvenile Justice and the Children Act, 2001' in Ursula Kilkelly (ed) *Justice In Controversy; Youth Justice in Ireland, Tough Lives, Rough Justice* (Irish Academic Press 2006).

58 Convention on the Rights of the Child (n 34) art 37(b).

59 Children Act 2001 s 77.

60 Ursula Kilkelly, *Youth Justice in Ireland, Tough Lives, Rough Justice* (Irish Academic Press 2006) 35.

61 See Department of Justice Equality and Law Reform, *Report on the Youth Justice Review* (Government of Ireland 2006).

62 These crimes include murder, manslaughter and aggravated sexual assault.

63 Children Act 2001 as am. the Criminal Justice Act 2006, [hereinafter the Act] s 52(3).

crimes.<sup>62</sup> *Doli incapax*<sup>63</sup> was abolished with the reference to the child's capacity to commit a criminal offence being replaced by a commitment not to charge children below that age.<sup>64</sup> In justifying the lowering of the age of criminal responsibility, the then Minister for Justice, Equality and Law Reform described the age under the original Act as 'unduly optimistic' and that lowering the age to ten years was 'a reasonable step'. The Minister averted to increasing sexual activity among younger people and the implications for 'social confidence' in the criminal justice system if 'all sexual activity up to the age of 12 years, was in every circumstance, incapable of being regarded as criminal'.<sup>65</sup> Anti-social behaviour warnings<sup>66</sup> and orders were introduced<sup>67</sup> with the GDP being expanded to those less than twelve years of age.<sup>68</sup> The 2006 Act also limits the absolute *in camera* rule, making it subject to the public interest. Evidence of any involvement in the GDP will now be admissible in any other criminal proceedings the child may face.<sup>69</sup>

The Children Act (as amended by the Criminal Justice Act 2006) fails to follow the child's rights perspective of the CRC. No broad express principles are provided to promote the child's sense of dignity and worth.<sup>70</sup> Furthermore, the 2001 Act fails to provide and promote any guidance as to what the objectives of the youth justice system are. No direction is given as to how its principles should be implemented.<sup>71</sup> Any rights of the child such as those to privacy (Section 93) or liberty (Section 96) are subject to the interests of the victim or the protection of society as a whole. A failure to protect and observe children's rights is most manifest in the lowering of the age of criminal responsibility. No account is taken for the psychological ability of a child to differentiate between childish naughtiness and criminal behaviour.<sup>72</sup> The concept of responsibility for the crime is rendered meaningless with all reference to capacity of the child removed. This lower minimum age of criminal responsibility (MACR) also negates the scientific and developmental evidence regarding the capacity of children as discussed above. Adults, like children, do not always act in a considered and rational way and develop at different levels and speeds. Therefore the use of a standardised metric such as age in quantifying capacity raises serious concerns. As stated by Goldson, a low MACR leads to the

'institutionalised responsabilisation' and 'adultification' of children<sup>73</sup> while Bandalli argues that the abolition of *doli incapax* reflects a steady erosion of the special consideration afforded to children and extends the remit of the criminal law to address all manner of problems which young people face.<sup>74</sup>

The use of a low MACR also reveals tangible incoherence regarding the manner in which the legal personality of the child is constructed and social rights and responsibilities are statutorily assigned in Ireland.<sup>75</sup> In civil law, the law serves to mediate the transition from childhood to adulthood whereby rights and responsibilities accumulate with age. For example, In Ireland, the child can take up employment at 16, drive at 17 and vote at 18. The child is allowed to garner greater rights and responsibilities as they develop. However, this approach is abandoned when the child's alleged behaviour is criminal in nature. The Irish justice system presupposes that all children reach a standardised level of criminal competency at a certain age. This gives rise to certain inconsistencies in the legal regulation of children. Reflecting this, Goldson questions how the *adultification* of young children in criminal proceedings can be rendered legitimate when, in every other area of law, the social rights and responsibilities that adulthood conveys are reserved for those aged 18 years and older.<sup>76</sup> Due process concerns also arise as it is unclear how children can be said to satisfy the basic legal test for the factual mental element for criminal culpability (*mens rea*).

## 7.4 IRELAND AND THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

Some of the CRC's Concluding Observations in 1998 and 2006 in relation to juvenile justice in Ireland have yet to be addressed. These include:

- > The requirement for statistical and other information for the development of indicators to monitor the implementation of the principles and provisions of the CRC;<sup>77</sup>
- > The need for inter-agency coordination in promoting and protecting the rights of the child;<sup>78</sup>
- > The absence of adequate and systematic training on the principles and provisions

64 Ursula Kilkelly, *Youth Justice in Ireland* (n 60).

65 Michael McDowell, 'Criminal Justice Bill 2004 Ministerial Presentation to the Joint Committee on Equality, Justice, Defence and Women's Rights, September 7 2001' in Ursula Kilkelly (ed), *Youth Justice in Ireland* (n 60).

66 *Children Act 2001*, s.257B.

67 *ibid* s 257D.

68 *ibid* s 23 as am. *Criminal Justice Act 2006* s 125.

69 *ibid* s 48 as am. *Criminal Justice Act 2006* s 126.

70 Convention on the Rights of the Child (n 34) Art 37(b).

71 Convention on the Rights of the Child (n 34) Art 40 (3): States shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the penal law.

72 'It is difficult to imagine a child fully understanding an indictment, the course of proceedings, the role of the jury and the personal and sociological consequences of a criminal conviction.' Brenda Campbell, 'Vulnerable Defendants' (Annual Fair Trials International Youth Advocacy Programme, University of Nottingham, 24 June 2009).

73 *ibid* 113.

74 S. Bandalli (2000) 'Children, Responsibility and the New Youth Justice' in Barry Goldson (ed), *The New Youth Justice* (Russell House 2000) 94 as cited in John Muncie, *Youth and Crime* (2nd ed, Sage Publications 2004) 252.

75 Bary Goldson, 'Unsafe, Unjust and Harmful to Wider Society: Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales' (2013) 13(2) *Youth Justice* 119.

76 *ibid* 121.

77 UN Committee on the Rights of the Child (CRC), 'UN Committee on the Rights of the Child: Concluding Observations: Ireland' (4 February 1998) CRC/C/15/Add.85.

78 *ibid*.

of the Convention for professional groups working with and for children, such as judges, lawyers, law enforcement personnel was also a matter of concern;<sup>79</sup> Each of these ongoing concerns are discussed below.

### **Lack of statistical and other information concerning Children in Conflict with the Law in Ireland**

Currently, a centralised source of information regarding young offenders and young offending in Ireland does not exist. As outlined by the CRC, this information is essential to establish effective systems for data collection and to ensure that the data collected is evaluated and used to assess progress in implementation, to identify problems and to inform all policy development for children.<sup>80</sup> The CRC reminds State Parties that data collection needs to extend over the whole period of childhood, up to the age of 18 years.<sup>81</sup> It also needs to be coordinated throughout the jurisdiction, ensuring the development of nationally applicable indicators. These indicators should be related to all rights guaranteed by the Convention.<sup>82</sup> The Commentary to Rule 13.3 of the Beijing Rules further highlights the importance of this information in light of the rapid and often drastic changes in the lifestyles of children and young people and how quickly the societal and justice responses to juvenile crime and delinquency quickly become outmoded and inadequate.<sup>83</sup>

In 1985, the Whittaker Report outlined the continuing need for research analysis, discussion and deeper understanding of the issue of juvenile offenders in Ireland.<sup>84</sup> Much later in 2005, Walsh outlines that many of the data sources currently available suffer from inevitable agency bias and focus only on results pertaining to the key functions of the agency in question.<sup>85</sup> This is compounded by the fact that the data available only applies to crimes that have been detected.<sup>86</sup> One example of this is the data provided by the Annual Reports of the Garda Diversion Programme.<sup>87</sup> Although these reports are a valuable resource in assessing the success of the GDP, the Reports apply only to those children who are referred to the Programme. Kilkelly (2006) further highlights that these reports do not address the pathways of the GDP participants into crime or reoffending rates among these children who benefit from the Programme.<sup>88</sup>

79 *ibid.*  
 80 *ibid.* at 5.  
 81 *ibid.*  
 82 *ibid.* at 2.  
 83 UN Committee on the Rights of the Child (CRC), 'UN Committee on the Rights of the Child: Concluding Observations: Ireland (n 77) at Rule 13.3.  
 84 *The Report of the Committee of Inquiry into the Penal System* (Stationery Office 1985) in Dermot Wash, *Juvenile Justice* (Thomson Round Hall 2005) 484.  
 85 Dermot Wash, *Juvenile Justice* (Thomson Round Hall 2005) 312-315.  
 86 *ibid.* 313.  
 87 See Committee Appointed to Monitor the Effectiveness of the Diversion Programme 'Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme 2012' (Garda Youth Diversion Office 2012).  
 88 Ursula Kilkelly, *Youth Justice in Ireland* (n 60) 1.

In 2008, the Government recognised the importance of robust and consistent data on youth offending as part of the National Youth Justice Strategy.<sup>89</sup> Frameworks for the collection of this data have not been implemented. To date, no official reason has been provided for this. As to potential reasons for the difficulty in consolidating this data, the impact of data protection legislation has been cited as a possible reason for the inability of government agencies to share and collate this information.<sup>90</sup> Nevertheless, it can be concluded that any concerns regarding data protection could be addressed through cross-agency measures and safeguards to ensure that the identity of the child is protected and the data is stored safely and securely.

In 2013, the IYJS launched its Youth Justice Action Plan.<sup>91</sup> A high level goal of this Plan is the development of an evidence base to support more effective policies and services, having regard to the voice of young people. This is to be achieved through the collection of robust, comprehensive and consistent data on young offenders tracking the pathways of these offenders through the youth justice system. The responsibility for this is to be owned by a number of stakeholders including the Central Statistics Office, the Prison Service, the Department of Justice and Equality and the Department of Children and Youth Affairs.<sup>92</sup> The Action Plan does not state which government agency will have primary responsibility or accountability for the collection, coordination and dissemination of this data or where this data will be stored or accessed. This raises concern in light of the history of difficulties regarding inter-agency communication on youth justice matters in Ireland. It further highlights the need for an independent agency responsible for maintaining a centralised, contemporaneous resource of data pertaining to young offenders and youth offending in Ireland.

### **The need for inter-agency coordination in promoting and protecting the rights of the child**

A number of government agencies were originally charged with developing policies and procedures to implement the principles and provisions of the 2001 Act. The Youth Justice Review (2005) highlighted the lack of communication and co-ordination among the agencies concerned. It highlighted that effective leadership and management were needed within the agencies. In response to these recommendations, the Irish Youth Justice Service (IYJS) was founded. An executive office of the Department of Justice and Equality, it has responsibility for leading and driving reform in the area of youth justice. The IYJS is guided by the principles of the Children Act 2001 and works with the Department of Children and Youth Affairs.<sup>93</sup> However, the IYJS does not act

89 Irish Youth Justice Service, *The National Youth Justice Strategy 2008 – 2009* <[http://www.iyjs.ie/en/IYJS/IYJS\\_NYST\\_2008\\_10.pdf/Files/IYJS\\_NYST\\_2008\\_10.pdf](http://www.iyjs.ie/en/IYJS/IYJS_NYST_2008_10.pdf/Files/IYJS_NYST_2008_10.pdf)> accessed 16 July 2015, 37-39.  
 90 'Juvenile Justice in Times of Economic Constraint' (Honorable Society of Kings Inns Roundtable Discussion 2014). Present at Roundtable Discussion: Minister for Children and Youth Affairs Francis Fitzgerald, Prof. Ursula Kilkelly, Judge Ann Ryan, Justice Michael Moriarty, Mr. Geoffrey Shannon  
 91 Irish Youth Justice Service, *Tackling Youth Crime: Youth Justice Action Plan 2014 – 2018* (Irish Youth Justice Service 2013) 15.  
 92 *ibid.*  
 93 Irish Youth Justice Service, 'About Us' <<http://www.iyjs.ie/en/IYJS/Pages/Home>> accessed 16 July 2015.

as the co-ordinating body with accountability for the management of the Irish youth justice system. Many of the difficulties noted in the operation of the system before the establishment of the IYJS continue to prevail. These include the requirement for guidelines for the implementation of the provisions of the 2001 Act; the lack of a comprehensive data source on youth offending; the requirement for a case management system in the Children Court and the need for specialist training of all those working with young offenders within the youth justice system in Ireland.

### Requirement for Guidelines and Resource Allocation

Limited guidelines are available for the implementation of the Children Act. This has resulted in an *ad hoc* approach in implementing the Act across the agencies within the youth justice system. In the past, this has been compounded by a lack of inter-agency communication and cooperation. The need for guidelines is most evident in the operation of the Children Court. Studies of the Children Court have reported varying levels of implementation of the protections afforded to the child under the 2001 Act.<sup>94</sup> This has been observed in various court districts as part of these studies.

Furthermore, limited resources are available for the implementation of the 2001 Act despite the requirements made by its provisions for significant physical changes to the youth justice system. An example of this is the requirement under Section 56 of the Act that children are separated from adults in Garda custody. Full implementation of this provision would require the construction of a separate area of cells in each Garda Station in the event that a child is arrested. In the alternative, one Garda Station in each district could be designated as a child friendly station. Nevertheless, both options would require the construction of extra, specialist, segregated police cells or, at the very least, an increase in Gardaí to supervise specialist, designated Garda stations.

The scope of the limited guidelines that are available for the implementation of the Children Act 2001 also requires examination. The recent Practice Direction for the operation of Dublin Metropolitan Children Courts<sup>95</sup> provides much needed procedural guidelines as to how the provisions of the 2001 Act pertaining to the Children Court should be implemented. However, the Direction states that it applies to Dublin Metropolitan Children Courts and does not state that it applies to all District Courts sitting in their capacity as a Children Court.<sup>96</sup> Providing additional guidance to Dublin

Metropolitan Children Courts and not all District Courts sitting in their capacity as the Children Court arguably places children brought before Dublin Children Court in more favourable position as those children brought before another Children Court which does not benefit from the guidance of the direction. This could be deemed as discriminatory against the latter group of children. A recent positive development has been the introduction of the Children Court Bench Book.

It is described as a practical tool for District Court Judges working in the area of youth justice in Ireland.<sup>97</sup> This will hopefully go some way to ensuring the systematic application of the principles of the 2001 Act and best practice in all Children Courts in Ireland.

The viability of the Direction is also adversely affected by the lack of specialist training provided to judges and legal representatives. This training is imperative in ensuring that the discretion exercised by the presiding judge, as referred to in the Direction, is correctly applied. Similarly, this is crucial to ensure that the child friendly representation required by practitioners, under the Direction, is undertaken. Currently, no state sponsored specialist training exists for judges, legal representatives, an Garda Síochána or any other person working with children within the Irish youth justice system.

### Requirement for Specialist Training and Development

Paragraph 9 of the Riyadh Guidelines requires specialised personnel at all levels in the youth justice system<sup>98</sup> while paragraph 58 recommends that personnel be trained to respond to the special needs of young persons and be familiar with dedicated programmes and referral possibilities for the diversion of young people from the justice system.<sup>99</sup> Rule 1.6 of the Beijing Rules states that juvenile justice services must be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.<sup>100</sup> Professional education, in-service training, refresher courses and other appropriate modes of instruction are recommended to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases.<sup>101</sup> The accompanying commentary to the Beijing Rules recommends that a minimum training in law, sociology, psychology, criminology and behavioural sciences is required.<sup>102</sup> Furthermore, the CRC has stated that the training of the child's legal representative is paramount and should take place in a systematic and ongoing manner.<sup>103</sup> The

94 Ursula Kilkelly, 'Youth Courts and Children's Rights - The Irish Experience' (2008) 8(1) Youth Justice 51; Ursula Kilkelly, 'The Children Court: A Children's Rights Audit' <<http://www.ucc.ie/en/lawsite/research/research-projects/children-court/DocumentFile,11029,en.pdf>> accessed 16 July 2015, 63; K. Hehemann and R. Willemsen, 'The Irish Youth Justice System - An evaluation of the compliance of the Irish Youth Justice System with the International Standards of Youth Justice.' (2010) Unpublished LLM Thesis, University of Utrecht, Utrecht Law School, 45

95 The Courts Service of Ireland, 'Practice Direction DC04 - Children Court, Dublin Metropolitan Children Court' <<http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/de2140128f4c0e1580257c7800515bb1?OpenDocument>> accessed 16 July 2015.

96 *ibid* para 1.

97 Children Court Bench Book, District Court, March 2015 at iii.

98 UN General Assembly, 'United Nations Guidelines for the Prevention of Juvenile Delinquency (n 6) para 9.

99 *ibid* para 58.

100 UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (n 5) rule 1.6.

101 *ibid* rule 22.

102 *ibid* rule 22, Commentary.

103 Committee on the Rights of the Child, 'General comment No. 10 (2007): Children's Rights in Juvenile Justice' (25 April 2007) CRC/C/GC/2007 para 40.



Committee has highlighted that this training should not be limited to information on the relevant national and international legal provisions<sup>104</sup> and should include information on the causes of juvenile delinquency, psychological, cognitive and behavioural aspects of the development of children in general and the client in particular.<sup>105</sup>

The Children Act 2001 makes minimal reference to the necessity of the specialist training of those working with children within the youth justice system in Ireland. Section 72 provides that a judge of the District Court must participate in any relevant course of training or education required by the President of the District Court before transacting business in the Children Court.<sup>106</sup> The 2001 Act does not specifically outline the minimum duration and nature of training that judges of the Children Court are expected to complete. The Act does not place any obligation on the Children Court judges to engage in continuous professional development or refresher training. A previous study of the Children Court concluded that Children Court judges had not been given any training regarding effective communication methods with children.<sup>107</sup> This is concerning in light of the continuous communication and dialogue necessitated by the child's right to heard and effectively participate in all proceedings concerning him or her. Other presiding judges appeared to be unfamiliar with the exact provisions of the Children Act.<sup>108</sup> This undermines the due process rights of the child and is a clear indication of the need for ongoing and systematic training for Children Court judges.

Apprehending children, determining cases concerning alleged young offenders and representing these children can be a difficult task. The child may lack any form of familial support such as fixed accommodation or the presence of a parent or guardian in Court.<sup>109</sup> Furthermore, the child may be reluctant to comply with the court process due to learning and emotional difficulties, involvement with a negative peer group or the presence of intergenerational crime within the child's family. Children also have limited understanding and levels of concentration compared to adult clients. This requires that Gardai, judges and solicitors engage with children in age appropriate language and in a manner that ensures that the child understands the criminal justice process and the outcome of same for the child. This understanding is central to the child's right to be heard.

104 *ibid* para 97.

105 *ibid*. See also UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (n 5). The Beijing Rules require that solicitors, like judges, receive professional education, in-service training, refresher courses and other appropriate modes of instruction to establish and maintain the necessary professional competence in dealing with juvenile cases.

106 This infers that training should be provided to the judge after his appointment to the Children Court and should be additional to the judicial training he/she has already received when appointed as a District Court judge.

107 K. Hehemann and R. Willemsen (n 94) 48.

108 *ibid*.

109 Section 91 of the Children Act 2001 states that the parents or guardian of a child shall attend at all stages of any proceedings against the child unless the Court is of opinion that the interests of justice would not be served by such attendance.

The importance of specialist training for judges and legal representatives working with young offenders has also been recognised in other jurisdictions. Bench books are utilised in jurisdictions like England and Wales to provide procedural guidance to Children Court judges in sentencing, as well as in communicating and engaging with children.<sup>110</sup> In Northern Ireland, and in England and Wales, all solicitors who wish to become involved in the criminal defence of children must apply for membership of an accredited children's panel.<sup>111</sup> These panels require that solicitors reach standardised levels of competency in the area of juvenile justice before representing children.<sup>112</sup> In New Zealand, Legal Aid Services provide a specialist children's legal service that advises and represents children involved in criminal cases in the Children Court.<sup>113</sup>

While the Children Court Bench Book has been recently published, there appears to be little opportunity for judges to share their experiences and apply any learning acquired in a practical way. The Law Society of Ireland and the Bar Council do not require that a solicitor or barrister involved in the criminal representation of children undertake any specialised training before practicing in the Children Court. This is concerning in light of the difficulties that can arise in representing children and the best practice approaches adopted in other jurisdictions as discussed above.

## 7.5 YOUTH JUSTICE AGENCIES

Examination is now provided of three key agencies involved in youth justice in Ireland. These are the Garda Diversion Programme, the Children Court and the Children Detention Schools.

### The Garda Diversion Programme

As discussed earlier, the format of the Garda Diversion Programme (GDP) was changed under the Criminal Justice Act 2006. The scope of the programme was extended to ten and eleven year old children without stating whether this applies to children charged with serious crimes only.<sup>114</sup> If this is applicable to all crimes, the 2006 Act

110 Judicial Studies Board, 'Equal Treatment Bench Book - Children and the Courts and Tribunals' (Judicial Studies Board 2009) <[https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB\\_all\\_chapters\\_final.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf)> accessed 16 July 2015.

111 The Law Society, 'Children Panel Accreditation Scheme - Assessment questionnaire - private practice applicants' <<http://www.lawsociety.org.uk/productsandservices/accreditation/accreditationchildrenlaw.page#one>> accessed 14 August 2010. This panel provides guidance and standards of best practice which solicitors must follow when representing children in public law cases. In applying to the Panel, solicitors must detail their relevant qualifications and practical experience in representing children. A number of summaries of cases undertaken by the solicitor involving children must be submitted while an in-depth case study is also required. This assessment helps to ensure that solicitors reach a certain level of competency in the area of juvenile justice before being permitted to represent children.

112 *ibid*.

113 Legal Aid Service, New South Wales, 'Children and Young People' <<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=591>> accessed: 14 August 2010.

114 Criminal Justice Act 2006 s 125.



effectively ignores the age of criminal responsibility. Furthermore, the child's acceptance of responsibility, admission and involvement in the GDP can now be introduced as evidence in subsequent criminal proceedings. This is counterintuitive to the ethos of the GDP as a diversionary mechanism from the criminal justice process and vitiates the importance of diversionary programmes as outlined in the CRC.<sup>115</sup>

Further examination is also needed of the admission process applied to all children who are referred to the GDP. Between 2007 and 2012 an average of 15% of children referred to the GDP per year were deemed unsuitable for the programme.<sup>116</sup> Information is also not available as to how the criteria for admission to the GDP are applied by the Director of the Programme. This data is imperative in light of the requirement under the Act that the interests and views of the victim as well as the best interests of the child are accessed in deciding the suitability of the child for the programme.<sup>117</sup> The need for this data is further compounded by the adverse impact of the criminal justice system for any child who fails to gain admission to the GDP. This information could inform the creation of other diversionary mechanisms in dealing with children who are deemed unsuitable for the GDP. Although the decision of the director regarding admission is subject to judicial review, this course of action is not sufficient in ensuring that discretion is applied in a transparent and consistent manner on a case by case basis.

### The Children Court

The Children Court is the sole prosecuting body for children charged with minor crimes in Ireland. A specifically designated Children Court is located in Smithfield, Dublin 7. This Court only has remit to deal with cases arising within the Dublin Metropolitan District. Outside this District, all District Courts have jurisdiction to sit as a Children Court.

The operation of the Children Court since its establishment in 2001 has been observed in four research studies. These studies span from 2005 to 2010.<sup>118</sup> Each evaluation produced similar findings. Delays in court lists, the habitual use of adjournments and remands on continuing bail were common. Although these mechanisms appeared to be utilised in order to expedite the Court's business, they failed to uphold the instruction to minimise the child's involvement in the Court process. In addition, the accumulation of extra charges while on continuing bail has become prevalent. This serves to remove the connection for the child between the original offence and the punitive sanction attendant on that offence as the number of accumulated offences depreciates the significance of the original crime.

The role of Children Court judge presents unique challenges that are different from those faced by any other judge. To fulfil the requirements of the Act the judge is

required to account for the age and immaturity of the child<sup>119</sup> while interfering as little as possible in the child's legitimate activities.<sup>120</sup> As discussed, Children Court judges, until recently with the publication of the Children Court Bench Book, were required to this without any procedural guidelines as to how the provisions of the 2001 Act are to be implemented. Previous research has reported a lack of communication and interaction between the judge and the child. This occurred throughout the Court proceedings from the explanation of bail to the imposition of sentence. This served to disengage the child from the court process and substantiated the irrelevance of the child's presence at the Court proceedings. This disengagement was evidenced in the behaviour of many children observed as part of research conducted in 2010.<sup>121</sup> They often stared into space or played with their hands.<sup>122</sup> This is a clear indication of a failure to ensure that that child effectively participates in the proceedings and thus the right of the child to be heard being fully implemented. Breaches of the child's right to privacy during court proceedings have also been reported.<sup>123</sup> This most commonly occurred when the child's name was called into the public waiting area.<sup>124</sup> Furthermore, separation of children from adult offenders as required by Section 71(2) is habitually ignored. While the 2001 Act requires that the Court sit at a different time or place than the adult court, this is only guaranteed in the Dublin Children Court where the Court deals exclusively with children's cases.<sup>125</sup> As outlined by Kilkelly, in other District Court buildings, adults and children share the facilities.<sup>126</sup> This is still a problem in certain regional District Courts where the criminal court lists for adults and children sit at the same time and place. Kilkelly also notes that in one particular regional courthouse, two courtrooms face each other, separated only by a small shared waiting area, meaning that separation is not achieved in practice.<sup>127</sup>

From previous research concerning the Children Court, it was clear that a number of conflicting demands are placed on Children Court judges. They must implement the fair trial rights of the child, case manage the matters before the Court while adjudicating the case itself. This spectrum of responsibilities compels the need for specialised training of Children Court judges, as previously discussed. Guidelines for an efficient case management system within all Children Courts are urgently required. Bail support schemes should be considered to provide structure and supervision for children released on continuing bail. This is prevalent in light of the success of these schemes in other jurisdictions in preventing re-offending and ensuring young people abide by bail conditions and attend court.<sup>128</sup>

115 Convention on the Rights of the Child (n 34) art 40(3)(b).

116 Committee Appointed to Monitor the Effectiveness of the Diversion Programme (n 87) 24.

117 Children Act 2001 s 23.

118 See Jennifer. Carroll (n 15); Ursula. Kilkelly (n 94); K. Hehemann (n 94).

119 Children Act 2001, s 96(3).

120 Children Act 2001, s 96(2)(a) – (d).

121 Sarah Judge, 'The Children Court in Ireland: An Evaluation in Light of the Fair Trial Rights of the Child' (UCC LLM Thesis 2010). See Appendix A, Observed Case 2, 15, 17, 22, 38, 46, 48, 57, 60.

122 *ibid* at Appendix A, Observed Case 2, 15, 17, 22, 38, 46, 48, 57, 60.

123 *ibid* 61.

124 *ibid* 70.

125 Ursula Kilkelly, *Youth Justice in Ireland* (n 60) 136-137.

126 *ibid*.

127 *ibid*.

128 Sinead Freeman, 'The Experience of Young People Remanded in Custody: A Case for Bail Support and Supervision Schemes' (2008) <[www.arrow.dit.ie/aaschslarts/29](http://www.arrow.dit.ie/aaschslarts/29)> accessed 23 August 2010, 11.

Furthermore, the physical environment and formalities of the Court should recognise the limitations and vulnerabilities of the child. Standard style courtrooms, legal jargon and a marked Garda presence, as observed, all serve to distance the child from the court process.<sup>129</sup> Ideally, age appropriate language should be adopted by all legal personnel in small, single level courtrooms that encourage and facilitate the participation of the child. Currently, it is unlikely that adequate funding will be provided for these facilities. However, this is not to say that an environment cannot be created to facilitate the effective participation of the child within the facilities that are currently available. This can be achieved by engaging the child in child friendly dialogue and ensuring that the child stands or sits close to the judge and legal representative.

### Children charged with Serious Crimes

The Children Court has jurisdiction to deal summarily with a child charged with any indictable offence, other than those offences which are required to be tried by the Central Criminal Court. Indictable offences encompass a broad spectrum of offences including burglary, robbery, drug offences, assault crimes and sexual offences. If the Children Court is of the opinion that the offence does not constitute an indictable offence fit to be tried summarily, the Court has jurisdiction to send the child forward for trial on indictment to the Circuit Criminal Court.<sup>130</sup> To date, no legislative mandate, procedural safeguards or practice guidelines exists to govern the trial of a child in the event that he/she is sent forward for trial on indictment in the Circuit or Central Criminal Courts. A child charged with a serious crime in the Circuit or Central Criminal Courts faces trial as an adult in this jurisdiction.

This is concerning for a number of reasons. The Convention makes extensive provision in this area in Article 40 and the CRC have outlined that trial proceedings should be conducted in an atmosphere enabling the child to participate and to express him/herself freely.<sup>131</sup> It further states that exceptions to this rule should be very limited.<sup>132</sup> Furthermore, the European Court of Human Rights (ECtHR) has developed jurisprudence which develops and recognises the specific fair trial rights of children.<sup>133</sup> In the seminal cases of *T v. UK* and *V v. UK*, the ECtHR stated that it is essential that the child's age, level of maturity and intellectual and emotional capacities be taken into account when a child faces criminal charges.<sup>134</sup> The Court outlined that a public trial in an adult court must be regarded in the case of a child as a severely intimidating procedure and having regard to the applicant's age, the application of the full rigours

of an adult public trial deprived him of the opportunity to participate effectively in the determination of the criminal charges against him.<sup>135</sup> The ECtHR suggested that these interests could be met through a modified juvenile procedure.<sup>136</sup> Failing to adopt child friendly trial procedures for the prosecution of any child for any offence undermines and ignores the position of the child as a right's holder under the UNCRC. Furthermore, it fails to reflect fundamental due process principles as the child is unable to understand or participate in the proceedings against him or her.

### Children Detention Schools

The detention of children in Ireland spans a diverse range of legal, societal, governmental and child's rights issues. Reports of the abuses of children in reformatory and industrial schools has occupied news headlines and haunted the public consciousness for the past two decades. The reports of the Inspector of Prisons into St. Patrick's Institution further emphasised the ongoing concerns and complex issues pertaining to the detention of children in conflict with the law in Ireland. A full discussion of all these issues would require a specially designated chapter on the detention of children. As a result this section only seeks to deal with the use of remand custody, in particular the need for bail support schemes and the use of remands for assessment.

### Detention Schools in Ireland

Currently, the new National Children Detention Facility is being developed at the Oberstown campus in Co. Dublin. Six new units are being built – three to house 17-year-old boys and three to replace existing accommodation. The three existing Children Detention Schools will be integrated with the new units to form one single National Children Detention Facility. The facility will accommodate all children on remand or serving a custodial sentence, as originally provided for in the Children Act 2001. An amendment to the Children Act 2001 is planned to provide a secure legal framework for the operation of the campus as a single integrated facility and a programme of operational reforms and recruitment is underway.

The Health Information and Quality Authority (HIQA) is the body charged with inspecting the children detention schools. In 2015, HIQA found that the Children Detention Schools met just one of the 10 national standards in full: the education standard.<sup>137</sup> Six standards were found to require improvement.<sup>138</sup> The failure to meet standards regarding the use of single separation, management of medication, and staffing and training issues were cited by HIQA as posing 'a significant risk'.<sup>139</sup> Furthermore, HIQA identified that

129 See Jennifer. Carroll (n 15); Ursula. Kilkelly (n 94); K. Hehemann (n 94).

130 Children Act 2001, s. 75.

131 United Nations Committee on the Rights of the Child, General Comment No. 12 (n 33) para 60.

132 *ibid* para 61.

133 *Tyler v. the United Kingdom* App no 5856/72 (ECtHR 25 April 1978) para 31: The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. See also *Soering v. the United Kingdom* App no 14038/88 (ECtHR 7 July 1989) para 102.

134 *ibid* para 84.

135 *ibid*.

136 *ibid* para 87: The ECtHR also stated that the pre-introduction of the defendants to the courtroom and the shortening of hearing

137 Health Information and Quality Authority, 'Inspection Report on National Children's Detention School Campus' (2015) <[hiqa.ie/social-care/find-a-centre/childrens-detention-schools](http://hiqa.ie/social-care/find-a-centre/childrens-detention-schools)> accessed 1 May 2015, 10.

138 Health Information and Quality Authority, 'Action Plan: National Children's Detention Campus' (2015) <[http://www.hiqa.ie/system/files/DS\\_Action\\_Plan.pdf](http://www.hiqa.ie/system/files/DS_Action_Plan.pdf)> accessed 31 March 2015, 10.

139 *ibid* 10.

children had limited awareness of their rights and there was no mechanism in place for ensuring consultation and participation of children.<sup>140</sup> A centralised mechanism for recording and acting on complaints was not available.<sup>141</sup>

### The Use of Remand Custody

One constant issue noted in previous studies of the Children Court and independent studies concerning the detention of children in Ireland is the use of remand custody. This is where the child is remanded in custody by a Children Court judge. This occurs before sentence has been imposed for the offence in question. The child may receive a custodial sanction and serve a period in detention. Once sentenced the child is no longer remanded in custody for that particular offence. This can occur at any point from the child's first appearance in court regarding the alleged offences right up until the imposition of sentence. Non-compliance with bail conditions has emerged as a common route to remand custody. Seymour's study of young offenders on remand in 2008 concluded that almost all of the sample prisoners interviewed had been originally released on bail but were later remanded in custody due to reoffending.<sup>142</sup> The implications of remand custody for children are significant. In spite of their presumption of innocence, children in remand custody have a similar experience as those serving a sentence such as the prison lock-up regime.<sup>143</sup>

The most common reasons for remand custody have been noted as a breach of bail conditions,<sup>144</sup> the seriousness of the offence,<sup>145</sup> or the inability of the defendant to provide surety for bail.<sup>146</sup> Furthermore, remand appears to be most predominant where the child was already remanded in custody from his/her first appearance before the Children Court.<sup>147</sup> Seymour asserts that the ideology underlying such remands is counterproductive in that it identifies a problem area in the young offender's inability to obey restrictive demands but in turn increases the likelihood that the delay can give rise to the accumulation of charges that are in addition to the original charge.<sup>148</sup> The use of remand custody for such individuals seems to be both an inappropriate and disproportionate measure, particularly in light of the principles under Section 96 of the Children Act which promotes the use of custody as a measure of last resort and the provisions limiting the use of custody under the UNCRC.<sup>149</sup> Remand custody also fails to address the issues that result in the child failing to comply with bail. Rather, as stated by Freeman, 'the implication is that custodial remand may make future breaches of bail

an increasing possibility on release due to its disruptive impact on the child's already unstable life'.<sup>150</sup>

Over the last few decades, a number of jurisdictions including England<sup>151</sup> and Australia<sup>152</sup> have introduced bail support schemes (BSS schemes) and youth offending teams. These aim to minimise the use of custodial remand among those who breach bail but do not pose a threat to public safety.<sup>153</sup> This is provided by specialist divisions of the Probation Services.<sup>154</sup> They are designed to help individuals to attend court, abide by bail conditions and not re-offend during the bail period. Following this assessment, a customised support and supervision programme tailored to each individual is presented and agreed before the Court, subject to continual review during the bail period.<sup>155</sup> Research undertaken in England and Wales suggests that bail support programmes have the potential to reduce the number of young people re-offending while on bail and the number detained on remand.<sup>156</sup> Freeman concludes that such schemes could 'help young people to cope better with the actual remand process by allowing them to deal with the uncertainty of their case in a familiar, less transient environment and encourage greater feelings of responsibility and control when it comes to attending court, abiding by bail conditions and desisting from crime'.<sup>157</sup> A similar bail support programme for young offenders was to be implemented in Ireland under the National Youth Justice Strategy in 2008. The Department of Justice outlined that the scheme was not implemented due to the costs of the programme and a number of planning issues.<sup>158</sup>

### Remanding of Children for Assessment

Under the Children Act, where the Children Court is satisfied of the guilt of a child, it may defer taking a decision to allow time for the preparation of a probation report or for other sufficient reason. The child may then be remanded in custody for the minimum period necessary for the preparation of any such report. This detention period cannot exceed 28 days. The Act also states that the Court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child. No provision exists for the remand of an assessment.

Remand for assessment occurs when the remand warrant for the child sent to the detention centre states that the child is being remanded on criminal charges. However,

140 ibid 4.  
 141 ibid.  
 142 Sinead Freeman (n 128) 4.  
 143 ibid 7.  
 144 S. Judge (n 121) Observed Case 50.  
 145 ibid Observed Case 13, 61.  
 146 ibid Observed Case 3.  
 147 ibid Observed Case 58, 61.  
 148 Sinead Freeman (n 128) 9.  
 149 Convention on the Rights of the Child (n 34) Art 37(b).

150 Sinead Freeman (n 128) 9.  
 151 Youth Justice Board, 'Youth Offending Teams, who are they, what do they do?' <<http://www.yjb.gov.uk/en-gb/yjs/Youthoffendingteams/>> accessed 12 September 2010.  
 152 Indigenous Youth Justice, 'Bail Support in Australia' <<http://www.indigenousjustice.gov.au/briefs/brief002.pdf>> accessed 11 September 2010.  
 153 Sinead Freeman (n 128) 9.  
 154 ibid 22.  
 155 Ibid 10.  
 156 Audit Commission, *Youth Justice 2004, A Review of the Reformed Youth Justice System* (Audit Commission, 2004) 2.  
 157 Sinead Freeman (n 128) 12.  
 158 J. Hough, 'Bail support service for young offenders never rolled out' *Irish Examiner* (Cork, 16 July 2010).

the remand also states that that the remand is for a court ordered assessment. The judge must state which type of assessment he or she requires to be carried out on the child during the remand period. These assessments include behavioural, educational and psychological assessments are conducted by professionals within the detention centres and not by probation officers. This practice raises a number of due process concerns.

The remand of a child for assessment is not provided for under the Children Act 2001. This may be what is alluded to by remand for 'other sufficient reason' as contained in Section 100. However, this is not clarified in the 2001 Act or any statutory document. As a result, no clear statutory power exists allowing this form of remand under the 2001 Act. In the event that these remands were permissible under the heading of 'other sufficient reason', the remand remains a clear breach of Section 96 if the remand is not primarily based on the criminal offending of the child. Therefore, before remanding a child for any report or assessment, it must be clear that the child's criminal behaviour or inability to comply with community based services warrants that detention and that while in detention the report in question can be completed. Concerns also arise regarding the availability of existing reports regarding the child's wellbeing and why these cannot be utilised. Further questions arise as to why such assessments cannot be completed in the community. Clarity as to the exact reasons for these remands and evaluation of the legality of this practice would serve to address these questions.

Nevertheless, even if the purpose and legality of these remands is clarified, the completion of assessment remains outside the remit of the detention schools. Section 158 of the 2001 Act, in outlining the function of the detention schools does not outline any assessment function to be provided by the schools.

This lack of clarity regarding the practice of remanding for assessment raises serious concerns regarding the legality of these remands. This is caused and compounded by a lack of clarity within the Children Act. This fails to ensure that detention is only used as a measure of last resort. It also indicates the importance of community based resources as opposed to relying on detention schools to provide these services. Confirmation regarding the legal basis for these remands is urgently needed. Once this is provided training is required for all legal personnel as to how these remands can be appropriately utilised in light of the rights of the child.

## 7.6 CONCLUSION

This chapter has sought to evaluate the youth justice system in Ireland according to the rights of the child as contained in the UNCRC. These rights operate as standards of best practice and form part of binding international law which the State has ratified and agreed to implement. These rights are recognised, in part, in the Children Act 2001 which, as a legal document, is progressive, welfare focused and an improvement on the Children Act 1908.

However, the lack of procedural guidelines and resource allocation for the implementation of the Act has resulted in structural and administrative confusions and inefficiencies in the Youth Justice System. Concerns regarding transparency, delays in court lists, lack of case management, a failure to provide specialist training for legal personnel, recurring and frequent remands in custody all serve to undermine and impinge on the due process rights of the child and need to be addressed. Furthermore, the vulnerability and capacities of children within the criminal justice system must be accounted for. Interagency cooperation and communication between all agencies working with children in the criminal justice system is necessitated. These agencies include An Garda Síochána, the Courts Service, the Child and Family Agency, the Probation Service and the Irish Youth Justice Service. Reliance on principles of data protection laws as a reason for a lack of communication only serves to retain the child in the criminal justice process and undermines any progress in fully realising and implementing effective, child friendly interventions to prevent youth offending going forward. The trial of children as adults for serious crimes also requires urgent reform. Such practices are in breach of the UNCRC and have been criticised by the European Court of Human Rights.

From previous reports of the Children Court it was clear that a number of conflicting demands are placed on Children Court judges. They must implement the fair trial rights of the child, case manage the matters before the Court while adjudicating the case itself. This spectrum of responsibilities compels the need for specialised training of Children Court judges. This training should include theoretical and experiential modules on communication techniques and implementation of the fair trial rights of the child. As required in international legislation, this training should be adopted on a systematic and ongoing basis to ensure consistency in the application of juvenile justice throughout the jurisdiction.

Lawyers who choose to represent children should be obligated to undertake a course of specific training to facilitate the effective representation of young offenders. Following the practice in other jurisdictions, statutory requirements for the specialised training of legal representatives working with children and young people should be implemented. Such training should also be a condition which must be satisfied before a legal aid certificate can be claimed by the solicitor or barrister on behalf of a juvenile client.

This chapter identifies that the Children Act is inadequate in its current form. It essentially founders on a failure to establish clearly defined structures, protocols and procedures that serve to ensure that the due process rights of the child are defining of the youth justice system. What is absent is a clear mandate for specialised training, case management, guidelines and adequate resources. Implementations of these measures will help to ensure that best practice, complying with UNCRC, is attained.

# CHAPTER 8:

## Immigration and Asylum Law

Catherine Cosgrave and  
Dr. Liam Thornton

### 8.1 INTRODUCTION

People, including children, migrate for different reasons. Some are forced to migrate because they are fleeing persecution or other serious harm in their country of origin, whereas others may choose to migrate, for example, for economic reasons or study purposes. The 20th century and the start of the 21st century have been characterised by the need for many millions of people to seek refuge in countries which are not their own.<sup>1</sup> In 2015, almost 55 million people are in refugee or refugee like situations, stateless, internally displaced within their own countries or seeking asylum.<sup>2</sup> We live in an increasingly globalised world. The Irish legal system must ensure that the rights of the migrant child are respected. These rights are protected by the Irish Constitution, national legislation, the European Convention on Human Rights, the European Union Charter of Fundamental Rights, the European Social Charter and under UN Human Rights Treaties that Ireland has signed and ratified. At times, discourse on the rights of migrant children has sought to portray the State as some kind of victim against marauding child migrant hoards or their wicked parents seeking to utilise a child as a migrant anchor.<sup>3</sup> Politicians, policy makers, the legal professions, media and the judiciary should be cautious against adopting such simplistic responses to issues of child migration.<sup>4</sup>

Migrant children are particularly vulnerable and have been recognised to face particular difficulties vindicating their rights.<sup>5</sup> The issue of the rights of the children in

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- 1 In 2014, there were 1.796 million persons seeking asylum, whose cases were awaiting determination. UN High Commissioner for Refugees (UNHCR), *Global Report 2014* (New York/London: UNHCR 2014) <<http://www.unhcr.org/5575a7840.html>> accessed, 08 July 2015.
  - 2 *ibid.*
  - 3 See, Jacqueline Bhabha, 'Minors or Aliens: Inconsistent State Intervention & Separated Child Asylum Seekers' (2001) 3 *European Journal of Migration and Law* 283; Jason.M. Pobjoy, 'A child rights framework for assessing the status of refugee children' in Satvinder Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar 2013) 91 and Siobhan Mullally 'Citizenship and Family Life in Ireland: Asking the Question "Who Belongs"' (2005) 25(4) *Legal Studies* 578.
  - 4 See in particular, Nils Muižnieks, 'Decisions concerning migrant children must always be based on their best interests' (Council of Europe 19 September 2013) <<http://www.coe.int/en/web/commissioner/-/decisions-concerning-migrant-children-must-always-be-based-on-their-best-interes-1>> accessed 15 July 2015. See also, UN Committee on the Rights of the Child (CRC), 'Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration' (28 September 2012) <<http://www.refworld.org/docid/51efb6fa4.html>> accessed 15 July 2015, 18. <<http://www.refworld.org/docid/51efb6fa4.html>> accessed 15 July 2015, 18.
  - 5 Ursula Kilkelly, *Barriers to the Realisation of Children's Rights in Ireland* (OCO 2007) 31-39. See also Geoffrey Shannon, 'Sixth Report of the Special Rapporteur on Child Protection' (Department of Children and Youth Affairs 2013) <<http://www.dcy.gov.ie/documents/Publications/SixthRapporteurReport.pdf>> accessed 15 July 2015 70-73.

immigration and asylum law is wide-ranging and this chapter considers three core areas:

- > The legal obligations on Ireland to provide a child centred protection status determination process;
- > Immigration law and family reunification;
- > Deportation of non-EU citizen children.

## 8.2 ASYLUM LAW AND CHILDREN: STATUS DETERMINATION

As a matter of international law, States are under no general obligation to admit non-citizens into a country, be they adults or children.<sup>6</sup> However, this general principle is limited when it comes to those seeking asylum, due to States' obligations under the 1951 Refugee Convention and the 1967 Protocol to the Refugee Convention.<sup>7</sup> To this extent, Ireland has freely accepted obligations under national,<sup>8</sup> international<sup>9</sup> and European law<sup>10</sup> to consider asylum and subsidiary protection<sup>11</sup> claims from those who arrive in this State claiming to be in need of protection from the State of their birth or former habitual residence.

### International Legal Obligations and Standards

The UN Convention on the Rights of the Child<sup>12</sup> (CRC) is relevant in a number of respects to children in the asylum system. Equality in the enjoyment of rights (Article 2(1)

CRC), best interests of the child as a primary consideration (Article 3(1) CRC), ascertaining the views of the child (Article 12 CRC) and Ireland's obligations to provide protection and assistance to child refugees, whether accompanied or unaccompanied (Article 22(1) CRC) are all recognised.

States international legal obligations, regarding the rights of the asylum-seeking child and protection status determination procedures, can be summarised as follows:

- > The State has responsibility for ensuring the best interests of the child, in particular where the asylum seeker is a separated child;<sup>13</sup>
- > There is a need for child sensitive status determination procedures;<sup>14</sup>
- > In general, applications for refugee status (and other forms of protection) by children should be handled on a priority basis, unless there are good reasons not to do so;<sup>15</sup>
- > The views of children are to be taken into account, and the voice of the child is to be heard during status determination procedures.<sup>16</sup> As a corollary to this, decisions need to be communicated to children in a language they understand, and in an age appropriate manner.<sup>17</sup>
- > For separated child asylum seekers, an independent guardian should be appointed to represent the interests of the child;<sup>18</sup>
- > Decision makers must have training and competence to deal with asylum applications from children.<sup>19</sup> These decision makers must recognise that children communicate differently to adults and cannot be expected to provide adult like accounts of their experiences.<sup>20</sup>

6 *Vilvarajah et. al. v UK* (1991) 14 EHRR 248 para 102.

7 Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 137 and Protocol Relating to the Status of Refugees, (31 January 1967) 606 UNTS 267.

8 Refugee Act 1996 (as amended), "the 1996 Act"; Section 3 of the Immigration Act 1999 (leave to remain) and European Communities (Eligibility for Protection) Regulations 2006 (subsidiary protection) SI 2006/518.

9 Convention relating to the Status of Refugees (n 7); Protocol Relating to the Status of Refugees (n 7). See also, Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC) Art 22.

10 Under Council of Europe law, see: European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14, 4 November 1950) ETS 5. For European Union (EU) law, see: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (hereinafter "Qualification Directive") & Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13 (hereinafter "Procedures Directive").

11 A third country national is entitled to subsidiary protection from EU Member States where he/she faces a real risk of suffering serious harm if returned to the country of origin or country of former habitual residence (Article 15 of the Qualification Directive). 'Serious harm' consists of (i) death penalty or execution, or, (ii) torture or inhuman or degrading treatment or punishment of the applicant in the country of origin; or (iii) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Ireland has transposed the Qualification Directive through European Communities (Eligibility for Protection) Regulations 2006 SI 2006/518 and European Union (Eligibility for Protection) Regulations 2013 SI 2013/426. The Recast Qualification Directive will not apply to Ireland.

12 International Convention on the Rights of the Child (n 9).

13 UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR 2011) 41; See, UN Committee on the Rights of the Child (CRC), 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration' (Art. 3, para. 1) (29 May 2013) CRC /C/GC/1 para 75 and UN Committee on the Rights of the Child (CRC), 'Report of the UN Committee on the Rights of the Child, Seventeenth Session (Geneva, 5-23 January 1998)' (17 February 1998) CRC/C/73 para 96.

14 UNHCR Executive Committee, 'Conclusion No. 47 (XXXVIII) of 1987' A/42/12/Add.1 para (b)(v); UNHCR Executive Committee 'Conclusion No. 101 (LVIII) of 2007' A/AC.96/1048 para (c)(i).

15 UN High Commissioner for Refugees (UNHCR), 'Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' (22 December 2009) HCR/GIP/09/08 para 66.

16 Convention on the Rights of the Child (CRC) (n 9) Art 12 and for separated children, see: UN Committee on the Rights of the Child (CRC), 'General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) CRC/GC/2005/6 and UNHCR Executive Committee, 'Conclusion No. 102 (LVI) of 2005' paras (n)-(w) A/AC.96/1021; UNHCR Executive Committee, 'Conclusion No. 101 (LVIII) of 2007' para (g) A/AC.96/1048. For special measures for asylum seeking girls, see UNHCR Executive Committee, 'Conclusion No. 105 (LVIII) of 2006' paras (m)-(p) A/AC.96/1035; in particular (n)(iv).

17 Guidelines on International Protection (n 15) para 77.

18 *ibid* para 69.

19 *ibid*.

20 *ibid* para 72.



## Irish Law, Policy and Practice

Irish law as regards status determination of asylum claims is set down in the Refugee Act, 1996 (as amended). At first instance, an asylum claim is determined by the Office of the Refugee Applications Commissioner (ORAC),<sup>21</sup> while an asylum seeker may appeal a negative determination to the Refugee Appeals Tribunal (RAT).<sup>22</sup> Ireland is also bound by the EU's Procedure's Directive. This directive sets down minimum standards for assessing and deciding upon the granting of refugee status only.<sup>23</sup> This includes minimum standards accessing status determination procedures; guarantees as regards assessment of asylum applications; rights of interview and the principles relevant to assessing an asylum application. The rights of the child to proper asylum determination procedures are poorly considered in this directive. In Ireland, where an asylum seeker is found not to be in need of refugee status, only then may they claim to be in need of subsidiary protection.<sup>24</sup> While there has rightly been a significant focus on the needs of separated children,<sup>25</sup> the rights of children who are accompanied must also be considered during the status determination process.

As can be seen from the table below; the total number of children making initial refugee applications is relatively low.

### Children claiming asylum in Ireland<sup>26</sup>

| Year   | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 |
|--|------|------|------|------|------|------|------|------|
| Separated Children                           | 94   | 98   | 56   | 37   | 26   | 23   | 20   | 30   |
| Total Refugee Applications by those under 18 | 1025 | 1016 | 764  | 573  | 387  | 277  | 261  | 264  |

21 See, section 6, 8, 11 and 13 of the Refugee Act 1996 (as amended). An unofficial restatement of the Refugee Act (as amended) is available here: <<http://www.inis.gov.ie/en/INIS/RefugeeAmended.pdf/Files/RefugeeAmended.pdf>> accessed 15 July 2015.

22 See, section 15 and section 16 of the 1996 Act (as amended).

23 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13. Therefore, these minimum standards do not apply to applicants for subsidiary protection, however, for Ireland, now see: Eligibility for Protection Regulations 2013 (n 52), brought about by the decision in *M.M. v Minister for Justice, Equality and Law Reform* [2013] IEHC 9 (23 January 2013).

24 Eligibility for Protection Regulations 2006 (n 11) and Eligibility for Protection Regulations 2013 (n 11).

25 For an examination of how Ireland dealt with the applications of separated children, see Ciara Smyth, 'Refugee Status Determination of Separated Children: International Developments and the Irish Response Part I—The Refugee Definition' (2005) 1 IJFL 15; Ciara Smyth, 'Refugee Status Determination of Separated Children: International Developments and the Irish Response Part II—The asylum procedure' (2005) 2 IJFL 21; Irish Refugee Council, *Making Separated Children Visible* (Dublin: IRC 2006); Ursula Kilkelly (n 5) in particular pp. 34-38; Ombudsman for Children, *Separated Children Living in Ireland* (Dublin: OCO 2009).

26 Office of the Refugee Applications Commissioner, Annual Report 2014 (Dublin: ORAC 2014) 28 and 58.

Under section 8(5)(b) of the Refugee Act, 1996 (as amended) and the Irish 2011 Asylum Procedures Regulations,<sup>27</sup> the Child and Family Agency has duties to inter alia ensure a representative appointed by the Child and Family Agency explains to an unaccompanied minor the nature of the status determination and interview processes.<sup>28</sup> While ORAC and RAT do provide some facilities relating to the child-friendly nature of interview rooms and the Child and Family Agency can make an application for asylum or subsidiary protection on behalf of an unaccompanied minor;<sup>29</sup> explicit recognition of the rights of all children in the asylum process are somewhat absent from the Irish status determination legislation.<sup>30</sup> ORAC has engaged in training of staff on issues relating to separated children.<sup>31/32</sup>

Since November 2013, ORAC has been responsible for determining whether an asylum seeker meets the definition of subsidiary protection.<sup>33</sup> The EU Procedures Directive states that for unaccompanied minors only,<sup>34</sup> the best interests of the child is to be the primary consideration.<sup>35</sup> Ireland is not bound by the EU Recast Asylum Procedures Directive, which will bind other Member States post July 2015.<sup>36</sup> In the EU Recast Asylum Procedures Directive, there is a reference to protection of the 'best interests of the child' in applying the Directive.<sup>37</sup> However, substantive exposition of this principle is absent, bar from State obligations relating to unaccompanied minors.<sup>38</sup>

27 Refugee Act 1996 (Asylum Procedures) Regulations 2011, reg 4.

28 Department of Justice and Equality, 'General Scheme of the International Protection Bill' (Department of Justice and Equality 24 March 2015) <[http://justice.ie/en/JELR/General%20Scheme%20of%20the%20International%20Protection%20Bill%20\\_final\\_.pdf/Files/General%20Scheme%20of%20the%20International%20Protection%20Bill%20\\_final\\_.pdf](http://justice.ie/en/JELR/General%20Scheme%20of%20the%20International%20Protection%20Bill%20_final_.pdf/Files/General%20Scheme%20of%20the%20International%20Protection%20Bill%20_final_.pdf)> accessed 15 July 2015.

29 This is the phrasing utilised in Irish law, as opposed to the preferred phrase of separated children. See Guidelines on International Protection (n 15).

30 For an examination of the rights of separated children in Ireland, see Irish Refugee Council, *Closing a Protection Gap* (Dublin: IRC 2011) and Muireann Ni Raghallaigh, *Foster Care and Supported Lodgings for Separated Asylum Seeking Young People in Ireland: The views of young people, carers and stakeholders* (Dublin: HSE/Barnardos 2013).

31 Office of the Refugee Applications Commissioner, *Annual Report 2012* (Dublin: ORAC 2013) 45; Office of the Refugee Applications Commissioner, *Annual Report 2013* (Dublin: ORAC 2014) 16; Office of the Refugee Applications Commissioner, *Annual Report 2014* (Dublin: ORAC 2015) 35. ORAC recognises unaccompanied minors as 'vulnerable applicants'.

32 SI 2011/52 reg 4; Refugee Act 1996 (Asylum Procedures) Regulations 2011 (hereinafter 2011 Regulations).

33 *ibid.*  
34 In this regard, the EU refuses to use the phrase 'separated children'. As the Irish Ombudsman for Children notes: "The term "separated" is preferable to "unaccompanied" because it better defines the essential problem that such children face. Namely, that they are without the care and protection of their parents or legal guardian and as a consequence suffer socially and psychologically from this separation..."; see Ombudsman for Children, *Separated Children* (n 25) 13.

35 Council Directive 2005/85/EC (n 13) recital 14 and 17.

36 Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180 recital 50.

37 Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L180 recital 33.

38 *ibid* recital 25.

When dealing with an unaccompanied minor's application for subsidiary protection, ORAC must take the best interests of the child into account as a primary consideration, must ensure that the person appointed to represent the interests of the child explains to the child how the refugee or subsidiary protection process operates and the potential outcomes, and how best the child may prepare him/herself for an interview. The representative is allowed to ask questions and make comments, 'within the framework set' by the ORAC interviewer; the particular interviewer must have 'the necessary knowledge of the special needs of minors' and the report regarding refugee<sup>39</sup> or subsidiary protection.<sup>40</sup> The decision must be prepared 'by a person or persons with the necessary knowledge of the special needs of minors'.<sup>41</sup> That the best interests of the child is the primary consideration as regards the Minister granting permission to reside,<sup>42</sup> to obtain a travel document<sup>43</sup> or permission for a family member (if that family member does not qualify for subsidiary protection) to reside in the State<sup>44</sup> is also welcome.<sup>45</sup>

In January 2015, the Chairperson of the Refugee Appeals Tribunal, Barry Magee, issued *Guidance Note 2015/1, Appeals from Child Applicants*.<sup>46</sup> This Guidance Note,<sup>47</sup> represents an important development in the hearing of child refugee/ subsidiary protection claims on appeal. It applies to all children (whether separated or accompanied)<sup>48</sup> and is informed by key international legal obligations upon the State as regards procedural rights for children in the status determination process.<sup>49</sup> The best interests of the child as a primary consideration,<sup>50</sup> awareness of child-centric forms of persecution<sup>51</sup> and 'treat[ing] Children as Children first and foremost and asylum applicants second', are the key guiding principles within this Guidance Note.<sup>52</sup>

39 2011 Regulations (n 32), reg 4.

40 2011 Regulations (n 32) regulation 3 deals with the recommendation of ORAC on whether to grant or refuse the application for refugee status. Reg. 6 of the 2013 Regulations deals with the recommendation from ORAC (be it to grant or refuse the application for subsidiary protection). See also, General Scheme of the International Protection Bill (n 69) head 33.

41 Reg. 4(b) of the 2011 Regulations and European Union (Subsidiary Protection Regulations) 2013, SI 2013/423. See also, General Scheme of the International Protection Bill (n 69) head 33.

42 European Union (Subsidiary Protection Regulations) 2013 (n 41) reg 23.

43 European Union (Subsidiary Protection Regulations) 2013 (n 41) reg 24.

44 European Union (Subsidiary Protection Regulations) 2013 (n 41) reg 25. Children, be they accompanied or separated, are also entitled to have their best interests taken into account when the Minister decides

45 European Union (Subsidiary Protection Regulations) 2013 (n 41) reg 22(3)(b). This approach to the best interests of the child, post the recognition of protection status, will continue under Heads 47 to 52 of the General Scheme of the International Protection Bill 2015.

46 Refugee Appeals Tribunal, 'Guidance Note 2015/1, Appeals from Child Applicants (January 2015)' < www.refappeal.ie > accessed 08 July 2015.

47 The Guidance Note was issued pursuant to paragraph 17 of the Second Schedule of the Refugee Act 1996 (as amended).

48 Refugee Appeals Tribunal (n 46) para 1.2.

49 Refugee Appeals Tribunal (n 46) para 1.3.

50 Refugee Appeals Tribunal (n 46) para 3.1.

51 Refugee Appeals Tribunal (n 46) para 3.3.

52 Refugee Appeals Tribunal (n 46) para 3.4. In line with international law, the Guidance Note (para. 3.2) recognises that children will still have to satisfy all elements of the refugee and person in need of subsidiary protection definitions...

The Guidance Note imposes on Tribunal Members key obligations pre-hearing,<sup>53</sup> at the hearing<sup>54</sup> and when the substantive consideration of the child's protection claim occurs.<sup>55</sup> The Guidance Note also provides information on the questioning style to be utilised when interviewing child applicants.<sup>56</sup>

The near invisibility of accompanied children within Irish asylum law, has been recognised by the Irish Human Rights Commission (2008),<sup>57</sup> the Ombudsman for Children (2008)<sup>58</sup> and the Irish Refugee Council (2010)<sup>59</sup> who have highlighted some key problems from a child's rights perspective with earlier emanations of the Immigration, Residence and Protection Bill/ General Scheme of the International Protection Bill 2015.<sup>60</sup> ORAC and RATs internal guidance to decision makers does go some way to ensuring a more child friendly status determination process. However, at the legislative-policy level, children who make asylum/subsidiary protection claims should not simply be treated as having made adjunct claims subordinate to those made by their parents/ guardians, as is envisaged by Head 12(3) of the General Scheme of the International Protection Bill 2015.

53 Refugee Appeals Tribunal (n 46) paras 4-11. This includes RAT and individual Tribunal Members being responsible for prioritising child applicants, undergoing child specific training, communicating information about the hearing in a child appropriate manner, and scheduling hearings to be child friendly.

54 Refugee Appeals Tribunal (n 46) paras 12-20. This includes an obligation on the Tribunal Member to ensure that the child's right to be heard is respected, protected and facilitated, and the shared burden obligation within refugee/subsidiary protection status determination may be greater on the RAT, than may be the case for adult applicants.

55 Refugee Appeals Tribunal (n 46) paras 21-23. This includes an obligation on Tribunal Members to give the benefit of the doubt to the child applicant, where the child's account is broadly credible, recognising child specific forms of persecution and the heightened duty of confidentiality in the status determination process.

56 Refugee Appeals Tribunal (n 46) Annex 1.

57 Irish Human Rights Commission, 'Observations on the Immigration, Residence and Protection Bill 2008' (Irish Human Rights Commission March 2008) < http://www.ihrec.ie/download/doc/immigrationbillobervations2008.doc > accessed 15 July 2015, 15, where the IHRC called for the insertion of a general provision regarding the best interests of the child.

58 Ombudsman for Children's Office, *Advice of the Ombudsman for Children on the Immigration, Residence and Protection Bill 2008* (Dublin: OCO, March 2008) 11-13. The OCO has specifically noted how children are automatically deemed to be part of their parents application under Section 73(12) of the 2008 Bill (for the 2010 Bill, see Section 81(12)).

59 Irish Refugee Council, 'Meeting EU Minimum Standards for Separated Children Seeking Asylum- Incorporating the Best Interest of the Child into the Immigration, Residence and Protection Bill 2010' (Irish Refugee Council 2010) <http://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/Best\_interests\_of\_the\_child\_and\_the\_IRP\_Bill\_2010\_Irish\_Refugee\_Council\_October\_2010.pdf> accessed 15 July 2015.

60 The Immigration, Residence and Protection Bill has been around in one form or another since 2006. The Heads of the Immigration, Residence and Protection Bill were initially published in 2006. Two substantive Bills then followed: the Immigration, Residence and Protection Bill 2008 and the Immigration Residence and Protection Bill 2010. In March 2015, the General Scheme of the International Protection Bill 2015 was published by Government.

## Recommendations: Hearing the Voice of the Child in the Status Determination Process

In terms of concrete recommendations, the reformed status determination system that will be introduced in the forthcoming International Protection Bill, should ensure full respect for the rights of the child, and should comply with Ireland's obligations under international law. This must include:

- > The Government should accept and implement all recommendations made by the *Working Group on the Protection Process and Direct Provision System* as regards the rights of the child in the protection status determination process.<sup>61</sup>
- > A general duty to ensure that in exercising their functions, status determination bodies under the International Protection Bill should safeguard, promote and protect the best interests of the child.<sup>62</sup>
- > The International Protection Bill should include an explicit provision that at all stages of the protection process, the best interests of the child must be the *primary* consideration. This will augment the policy developments already occurring at ORAC and RAT.
- > All children, whether separated or accompanied, who are in the asylum process, must have their voice heard throughout the entirety of status determination procedures. This should be a specified legislative right of the child.<sup>63</sup>
- > An application for protection is only made for separated children where it is in the best interests of the child to do so. Such a determination will need to be made by the Child and Family Agency, the child's guardian *ad litem* and an independent legal representative, in conjunction with the separated child who is able to express her or his views on the matter. It is essential that unaccompanied children not be left in legal limbo, and face the prospect of having to make an asylum claim many years after arriving in the country.
- > For accompanied children, it is recognised that their parents or guardians will often be able to protect and vindicate the best interests of the child. However, in order to protect the rights of the child, as an individual, it is important that at all stages of the protection status determination procedures, the rights of the child are respected and protected. The forthcoming International Protection Bill should contain provisions that strengthen the rights of children to make protection claims independent of their parents or guardians.
- > Explicit legislative provisions should be included in the International Protection Bill, recognising the duty on all decision makers to ensure the right of the child to be heard, where it is appropriate to do so, in line with the capacity of the child to express her or his views.

61 Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, *Final Report June 2015* (2015).

62 This could be potentially modelled on such an existing legal provision applicable in the United Kingdom: Section 55, Borders, Citizenship and Immigration Act 2009. See also, Working Group to Report to Government (n 61) paras. 3.192 and 3.199 (general duty as regards best interests of the child).

63 See also, Working Group to Report to Government (n 61) para 3.203.

## 8.3 FAMILY REUNIFICATION

In general, the term 'family reunification' is used to describe the attempts of family members separated by forced, or voluntary migration to re-unite in a particular country. It can involve families whose members are third country nationals only or families that are a mix of third country nationals and EU/EEA citizens or Irish citizens. It covers situations where a sponsor seeks to be joined by third country family members where this relationship pre-existed before the sponsor moved to Ireland (family reunification), as well as situations in which a family unit is established between a sponsor who has acquired legal residence in Ireland or is already an Irish citizen with a third country national who lives abroad (family formation). Furthermore, the term may also be used when considering whether a family unit established in Ireland is protected against the expulsion or deportation of one or more family members (family retention).<sup>64</sup>

### International Obligations

The primacy of the family as the most basic unit of society and its importance to children is reflected in many of the human rights instruments relevant to the rights of the child.<sup>65</sup> The UN Committee on the Rights of the Child has noted that the separation of a child from a parent has adverse consequences, particularly for very young children, arising from their physical dependence on and emotional attachment to their parents/primary caregivers.<sup>66</sup> Article 9 and Article 10 CRC place obligations on State Parties to deal with applications for family reunification by a child and his or her parents to enter or leave a State Party for the purpose of family reunification in a positive, humane and expeditious manner. It is important to note that there is no right to family reunification per se. The obligation on States under the CRC consists of:

- > A fair and transparent process and procedure to consider family reunification applications from those with refugee status and any other migration status;<sup>67</sup>
- > The best interests of the child and preservation of the family unit have to be considered throughout the process;<sup>68</sup>

64 Tineke Strik, Betty de Hart and Ellen Nissen, *Family Reunification: a barrier or facilitator of integration? A comparative study* (European Commission 2013) 2.

65 Convention on the Rights of the Child (n 9). See, Preamble and Article 5 and Article 9.

66 UN Committee on the Rights of the Child (CRC), 'General comment No. 7 (2005): Implementing Child Rights in Early Childhood' (20 September 2006) CRC/C/GC/7/Rev.1. See also, Children's Commissioner for England: Dr. Maggie Atkinson, 'Children's Commissioner Investigates Family Migration Rules' (Joint Council for the Welfare of Immigrants August 1 2014) <<http://www.jcwi.org.uk/blog/2014/08/01/childrens-commissioner-investigates-family-migration-rules>> accessed 16 July 2015.

67 General comment No. 14 (n 13) para 3, 29 and 66.

68 UN Committee on the Rights of the Child (CRC), 'UN Committee on the Rights of the Child: Concluding Observations, Ireland' (29 September 2006) CRC/C/IRL/CO/2 paras 30-31.

## Irish Law, Practice and Practice

The importance of the family unit to society and the right to private and family life are protected under the Irish Constitution<sup>69</sup> and international<sup>70</sup> and European human rights law.<sup>71</sup> There is no automatic or absolute right under Irish or EU law for family members to have the care and/or companionship of other migrant family members in Ireland.<sup>72</sup> There are complex and separate legislative and administrative policies/procedures governing applications for family reunification depending on an individual's residence status. Some of the current statutory rights to family reunification concern non-EEA/EU family members of EU/EEA nationals,<sup>73</sup> scientific researchers,<sup>74</sup> refugees<sup>75</sup> and persons granted subsidiary protection.<sup>76</sup> There is a lack of any legislative process as regards the admission of family members of Irish citizens (adults and children). Individuals granted leave to remain, long-term residents, migrant workers, and international students, are generally subject to discretionary Ministerial decision-making on an individual case-by-case basis.<sup>77</sup> The details of this current legal and policy framework governing family reunification applications in Ireland has been set out comprehensively in a number of publications elsewhere and will not be discussed in this chapter.<sup>78</sup> A significant underlying issue that impacts on knowledge of family reunification, law, policy and the rights of the child is the lack of available data and statistics in this area.

69 See, Article 41.1.1° and Article 41.1.2° of the Irish Constitution.

70 See, for example, International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (ICCPR) Art 17 and Convention on the Rights of the Child (n 9) preamble para 6 and Art 5.

71 This includes Article 8 of the European Convention on Human Rights and Article 7 of the European Union Charter of Fundamental Rights.

72 Ireland did not opt-in to European Directive 2003/86/EC on the right to family reunification of third-country nationals [2003] O.J. L251/12.

73 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L 158/77. For Irish law, post C-127/08, *Metock v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241, see European Communities (Free Movement of Persons) (No. 2) Regulations 2006 SI 2006/656 and European Communities (Free Movement of Persons) (Amendment) Regulations 2008 SI 2008/310.

74 Ireland has opted-in to Council Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purpose of scientific research [2005] OJ L289/15. There is an absence of specific national legislation transposing this Directive, however see, Department of Jobs, Enterprise and Innovation, 'Scheme of Admission of Third Country Researchers to Ireland', <[http://www.djei.ie/science/technology/accreditation.htm#\\_Position\\_regarding\\_Family](http://www.djei.ie/science/technology/accreditation.htm#_Position_regarding_Family)> accessed 08 July 2015.

75 Refugee Act, 1996, s 18.

76 European Union (Subsidiary Protection) Regulations 2013 SI 2013/426 reg 25.

77 Immigration Act 2004 s 4; INIS, 'New Immigration Regime for Full Time Non-EEA Students' (Irish Naturalisation and Immigration Service 2011) <<http://www.inis.gov.ie/en/INIS/Students%20BookletA4%20%28white%20cover%29%20sept%202010.pdf/Files/Students%20BookletA4%20%28white%20cover%29%20sept%202010.pdf>> accessed 16 July 2015.

78 Catherine Cosgrave, *Family Matters: Experiences of Family Reunification in Ireland (ICI 2005)*; Catherine Cosgrave and Hilka Becker, *Family Reunification: a barrier or facilitator of integration? Ireland country report (European Commission, ICI, 2013)*; Irish Human Rights Commission, *Position paper on Family Reunification*, (IHRC, 2005).

In 2006, the Committee on the Rights of the Child recommended that Ireland must ensure systematic collection of data on a range of child rights issues.<sup>79</sup> To date, this has not occurred. Ireland does not keep statistics on issues relating to family reunification.<sup>80</sup> Although there is some limited information available from Eurostat<sup>81</sup> on first permits issued, the lack of data on visas and residence permits issued for the purpose of joining or remaining with family members in Ireland has been highlighted as an issue.<sup>82</sup> A number of key issues arise as regards the approach of Ireland to issues of family reunification from a child's rights perspective, including the level of discretion as regards family reunification in Irish law and policy; the rights of Irish citizen children to care and companionship of family members and refugee rights to family reunification.

### a) Procedure, Discretion and Delay

The level of discretion within Ireland's family reunification laws and policies could potentially have serious consequences for children. The UN Committee on the Rights of the Child has noted that;

[Y]oung children are especially vulnerable to adverse consequences of separations because of the physical dependence on and emotional attachment to their parents/primary caregivers. They are also less able to comprehend the circumstances of any separation.<sup>83</sup>

The separation of a child from a parent has particularly serious consequences for very young children when they are forming basic, life-long attachments. The negative psychological, emotional and social impacts on young children following the forced removal of a parent and the additional burdens placed on the remaining *de facto* single parents have also been highlighted.<sup>84</sup> In *POT v Minister for Justice, Equality and Law Reform*,<sup>85</sup> Hedigan J. voiced concerns about the period of time it took ORAC/the Minister to consider the application for family reunification in light of Irish constitutional protection of the family, Article 16 of the Universal Declaration of Human Rights and Article 8 of the European Convention on Human Rights.<sup>86</sup> Hedigan J. stated that even a two-year delay in arranging the reunification of the family of a person granted refugee

79 Concluding Observations (n 68) paras 16-17.

80 Department of Children and Youth Affairs, *Ireland's Consolidated Third and Fourth Reports to the UN Committee on the Rights of the Child* (DCYA, 2013) 81.

81 Eurostat, *First Permits Issued for Family Reasons by Reason, Length of Validity and Citizenship – Annual Data* (2012).

82 Catherine Cosgrave and Hilka Becker (n 78) 61, 69 and 70.

83 General Comment No. 7 (n 66) para 18.

84 Catherine Cosgrave and Hilka Becker (n 78) 56 and 62. See also: L Coakley, *The Irish Born Child Administrative Scheme for Immigrant Residency 2005 (IBC/05): The impact on the families of status holders seven years on* (NCP 2012) 21.

85 *P.O.T.v Minister for Justice, Equality and Law Reform* [2008] IEHC 361 (19 November 2008). For analysis of this case, see Liam Thornton, 'Human Rights Law in the Republic of Ireland-2008' (2010) *Irish Yearbook of International Law* 159, 164-166.

86 [2008] IEHC 361 para 14.

status would be an acceptable delay in the light of Article 8 of the European Convention on Human Rights and the protection of the family within the Irish Constitution.<sup>87</sup> In the context of refugee applications, average processing times are currently two years. In respect of non-refugee applications, the Minister has recently identified processing targets of between 6-12 months depending on the category of applicant.<sup>88</sup> The Irish High Court has already indicated that a processing time of 12 months for applications for residence permits made by spouses of Irish nationals is the maximum time which can be considered reasonable.<sup>89</sup>

#### b) Irish Citizen Children

The issues of discretion, lack of clear policy and inconsistent outcomes are issues that have particularly affected Irish citizen children seeking family reunification with their non-Irish family members, including their parents and siblings.<sup>90</sup> The Irish Naturalisation and Immigration Service (INIS) policy document on Non-EEA Family Reunification recognises the rights of the citizen child to special protection<sup>91</sup> and to consider the child's rights to the financial and emotional support of her non-EU national parent(s).<sup>92</sup> However, the policy goes on to set out that an Irish child may be one member of a larger family comprised of non-Irish citizens and that applications;

[S]eeking to bring to Ireland both parents and all siblings, on the basis of the citizenship of a single minor would seem to go beyond what is reasonable, particularly if the State would be required to provide financial support for the family.<sup>93</sup>

Although not explicitly stated, it seems that a child's rights are deemed to be met by facilitating their presence in Ireland and by permitting a parent to reside in the State with them, even if this results in ongoing separation from another parent and/or siblings living in another country. The policy does not appear to address the situations of Irish children whose parents were previously deported or who left of their own volition, perhaps to avoid the risk of deportation and consequential life-long ban from re-entering Ireland.<sup>94</sup>

In the event that the applicant family member is the subject of a deportation order previously issued, it is necessary to revoke the deportation order for an application to be submitted. These applications are also determined at the discretion of the Minister

for Justice and Equality.<sup>95</sup> There is no statutory right of appeal in the event that any category of family reunification application is refused, although individuals may seek an administrative review<sup>96</sup> or, if there are grounds, judicial review. In terms of access to remedies, however, there is no access to legal aid in practice and the costs involved can be prohibitive.<sup>97</sup> Arising from the high levels of Ministerial discretion and low levels of actual reunification,<sup>98</sup> according to the Migrant Integration Policy Index (MIPEX),<sup>99</sup> Ireland has the least favourable family reunification policies in the EU. The Irish Human Rights Commission (IHRC) has criticised the existing framework noting that the lack of statutory rules for all applicants, especially Irish citizens, is a major gap. It has also recommended that where applications involve children, the best interests of the child should be a primary consideration and factors such as the age of the child, their situation in their country of origin and their degree of dependence on their parents should be taken into account.<sup>100</sup>

#### c) Refugees, Subsidiary Protection Holders and Qualifying Family Members

Even where statutory entitlements to reunification do exist, difficulties can nonetheless arise. Although refugees/subsidiary protection holders do enjoy rights to family reunification with particular family members, the definition of qualifying family members is very strictly applied, which can have profound impacts on family unity. Examples highlighted in available research include a minor refugee seeking reunification with a parent and siblings.<sup>101</sup> The application for the parent was approved but the siblings were refused, as they were not considered to be dependent on the refugee applicant. Despite a recommendation by the European Council on Refugees and Exiles<sup>102</sup> that a broader sense of dependence be taken into account both in psychological terms and cultural terms, this does not seem to be the practice during the Government's decision-making process. A further example is the situation of refugees who arrive in Ireland while under the age of 18, but who have turned 18 by the time their application for asylum has been determined.<sup>103</sup> In such circumstances, 'aged-out' minors have considerable difficulty in making successful applications for family reunification, as they are no longer considered to be children at the time of application.

87 [2008] IEHC 361 para 21.

88 Irish Naturalisation and Immigration Service, 'Policy Document on Non-EEA Family Reunification' (INIS 2013) <<http://www.inis.gov.ie/en/INIS/Family%20Reunification%20Policy%20Document.pdf/Files/Family%20Reunification%20Policy%20Document.pdf>> accessed 16 July 2015.

89 *M v Minister for Justice, Equality and Law Reform* [2007] IEHC 234.

90 For some discussion of issues surrounding Irish immigration law and policy and rights of the child, see, Siobhán Mullally and Liam Thornton, 'The Rights of the Child, Immigration and Article 8 in the Irish Courts' in Ursula Kilikelly (ed), *ECHR and Irish Law* (2nd ed, Bristol: Jordans 2009).

91 INIS, Policy Document on Non-EEA Family Reunification (n 88) 5.

92 *ibid* 54-56.

93 *ibid* 56.

94 Hilka Becker, 'Immigrants and the Law in Ireland' (Burren Law School, 4 June 2013) 4.

95 Immigration Act, 1999 s 3.

96 INIS, Policy Document on Non-EEA Family Reunification (n 88).

97 Catherine Cosgrave and Hilka Becker (n 78) 44.

98 Eurostat, *First Permits Issued for Family Reasons by Reason, Length of Validity and Citizenship – Annual Data* (Eurostat 2012).

99 Thomas Huddleston and others, *Migrant Integration Policy Index (MIPEX) III* (British Council and MPG, 2011) 106-107. See also MIPEX, 'Key Findings Ireland, 2014' (Migrant Integration Policy Index 2015) <<http://www.mipex.eu/ireland>> accessed, 08 July 2015.

100 IHRC, Position Paper on Family Reunification (n 88).

101 Catherine Cosgrave and Hilka Becker (n 78) 59.

102 ECRE, *Position on Refugee Family Reunification*, (ECRE 2000) 8.

103 Catherine Cosgrave (n 78) 77.



## Recommendations: Rights of Children and Family Reunification

It is questionable whether domestic legislation, administrative policies and practice, as outlined above, currently fulfil Ireland's obligations under the UNCRC. In accordance with international standards and best practice and having regard to the existing UNCRC Concluding Observations 2006,<sup>104</sup> the following recommendations for reform are made:

### Procedural:

- > An independent legal adviser and/or guardian should be appointed at the outset of all migration-related procedures before any application is made by or on behalf of a child to ensure that children are independently advised and represented and have an opportunity to have their voice heard at all stages of the application process.
- > Family reunification should take place with the least possible delay and within a period of six months from the time an application is made. Applications from or regarding separated children should be prioritised in view of the potential harm caused by long periods of separation from their parents.

### Legislative:

- > Review the current definition of qualifying family members in the Refugee Act, 1996 (as amended) and provide amendments in the International Protection Bill to better correspond to refugee situations.
- > Statutory provisions for family reunification for all other categories of family reunification be introduced in future Immigration and Residence legislation with the underlying principle of best interests of children explicitly recognised.
- > Family migration legislation and practice should ensure that children are supported to live with their parents in Ireland where their best interests require this.

## 8.4 DEPORTATION

The power to exclude non-citizens from territory is viewed as an inherent right of states. Given the profound consequences for individuals, however, it is not surprising that this power to deport is not absolute. The focus of this part of the chapter is on the rights of non-Irish citizen and non-European Union citizen children. While there is a growing questioning of the system of deportation in and of itself, neither international nor European human rights law prohibits deportation.

### International Legal Obligations and Standards

The Convention on the Rights of the Child is silent as regards the direct issue of

deportation. However, if the State does propose to deport a child and/or his or her parents, then a number of the child's rights under the UNCRC may be relevant.

- > Article 3 CRC: The best interests of the child;
- > Article 5 CRC: Respect for the responsibilities of parents;
- > Article 12 CRC: The right of a child to be heard;
- > Article 37(b) CRC: Protection of children from unfair and arbitrary detention.

The core international obligations on States, include:

- > An obligation to consider the impact of any proposed deportation on the best interests of the child;<sup>105</sup>
- > While the best interests of the child is the primary consideration, it is not the only consideration;<sup>106</sup>
- > The child has a right to be heard and involved in any decision relating to her proposed removal from a State;<sup>107</sup>
- > If it is decided that the child is to be deported, there is an absolute prohibition on placing the child in a detention facility (with or without her parents) pending deportation.<sup>108</sup>

### Irish Law, Policy and Practice

Subject to the prohibition against refoulement,<sup>109</sup> the Minister for Justice and Equality is vested with a wide discretion to deport individuals from the State in certain situations.<sup>110</sup> This power is most typically exercised against a person whose application for asylum has been refused, or who is deemed to be in the State without permission and, in the opinion of the Minister, their deportation would be in the common good.<sup>111</sup> There is no statutory bar against the deportation of a child, including unaccompanied children. Before a deportation order may be issued against a person, the Minister is obliged

105 Committee on the Rights of the Child (UNCRC), 'General Day of Discussion: The Rights of All Children in the Context of International Migration' (28 September 2012) <<http://www.refworld.org/docid/51efb6fa4.html>> accessed 16 July 2015 paras 72-74.

106 *ibid* paras 73 and 74.

107 *ibid* paras 83-85.

108 See, as examples, *Mayeka and Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006); *Muskhadzhiyeva and Others v Belgium*, App no 41442/07 (ECtHR 13 December 2011) and *Popov v. France*, App no 39474/07 (ECtHR 19 January 2012).

109 Refugee Act, 1996 s 5 provides that a person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

110 Immigration Act 1999 s 3(1).

111 Immigration Act 1999 s 3(2)(f)(g) and (i).

104 Concluding Observations (n 68) paras 30-31.



to follow a statutory procedure.<sup>112</sup> In addition, the Minister must exercise her power to deport in a manner compatible with Ireland's obligations under the European Convention on Human Rights.<sup>113</sup> Furthermore, it is clear there is legal obligation on the Minister to expressly consider the Constitutional and personal rights of the child.<sup>114</sup> In addition, the welfare or best interests of the child are a relevant consideration, albeit not the primary consideration, in the making of any decision to issue a deportation order.<sup>115</sup>

### The Rights of the Child and Inadequate Procedural Safeguards

As identified above, the best interests of the child are supposed to be examined by the Minister in the course of the determination whether to issue a deportation order. However, a legal challenge to the lack of consideration of the best interests of the child in deportation proceedings before the Irish High Court has failed. At the earlier leave for review stage of *Dos Santos*, the State argued that while the UNCRC has been ratified, it has not been incorporated into domestic law and that the 'best interests' principle does not apply in the context of deportation proceedings.<sup>116</sup> In *Dos Santos v Minister for Justice*,<sup>117</sup> McDermott J. had to consider whether the best interests of non-citizen children had to be considered by the Minister who proposed to deport the children, with their parents, to their country of nationality (Brazil).<sup>118</sup> McDermott J. held that while non-citizen children hold significant constitutional rights,<sup>119</sup> the Minister for Justice had considered these constitutional rights, along with the 'welfare of each child'<sup>120</sup> when making the deportation order. McDermott J. noted that the constitutional rights of non-citizen children derive from a number of different constitutional articles, including Article 41 on the family.<sup>121</sup> A child also enjoys a number of unenumerated rights under Article 40.3.<sup>122</sup> McDermott J. further held that the principle of the best interests of the child as the primary consideration in making a deportation order (Art 3 CRC) does not form part

of domestic Irish law.<sup>123</sup> In light of previous Supreme Court decisions as regards domestically unincorporated international human rights treaties, McDermott J. determined that the UN CRC does not form part of Irish law.<sup>124</sup> However, McDermott J. noted that this contrasts with the domestic application of the 'best interests' principle as regards immigration matters in the UK.<sup>125</sup> This decision is currently on appeal to the Supreme Court. While it is welcome that the Minister is under a legislative obligation under Section 3 of the Immigration Act, 1999 to consider the welfare of the child, this is arguably a lower threshold than the best interests as primary consideration under the UNCRC. Forthcoming legislative reforms in the area of deportation need to explicitly recognise the best interests of the child as the primary consideration.

### Manner in which removal/deportation affected

In accordance with statutory obligations, an individual, in respect of whom a deportation order is issued, must be informed of the decision in writing and is thereafter under an obligation to remove themselves from the country. In practice, individuals are notified of the decision in writing and are required to present to the GNIB on a particular date, in order to make arrangements and to facilitate their departure from the State. However, in general an individual is not removed from the State on that occasion and thereafter they are required to present regularly, usually monthly, to the GNIB. Such practices have recently been considered by the Irish courts in examining an application for an inquiry under Article 40.4.2 of the Constitution into the legality of the detention of one of the family members in the course of seeking to effect his deportation from Ireland.<sup>126</sup> The case of *Omar v Governor of Cloverhill*<sup>127</sup> illustrates the need to ensure that the best interests of the child are the primary consideration when deportations are being effected in Ireland. In this case, the Omar family, which included a seven year old child, were subjected to a number of unlawful and intrusive actions by An Garda Síochána. The family, including a seven year old child, were placed under 'de facto arrest'<sup>128</sup> by the Gardaí. Hogan J. stated:

It is simply distressing beyond words to think that a *State committed to safeguarding the best interests of children* would ever contemplate subjecting a young boy of seven years and six months to such an ordeal, even if he was not an Irish citizen and even if he had no right to be in the State.<sup>129</sup>

The best interests of children are not in any way served by when children experience trauma during the migration process arising from unnecessary and avoidable State

112 This includes: notifying the person concerned of the proposal to deport and the reasons for this decision. The person may then, within 15 working days, make representations to the Minister and, before the Minister decides the matter, he is obliged to take into consideration any representations made and then notify the person in writing of the decision and the reasons for it. Section 3(6) sets out that in determining whether or not to make a deportation order, the Minister is obliged to have regard to various matters including age, duration of residence in Ireland, family and domestic circumstances, nature of persons connection with the state, humanitarian considerations, the common good and national security.

113 See, European Convention on Human Rights Act 2003 s 3, discussed in *Siobhán Mullally and Liam Thornton* (n 90).

114 *Dimbo v Minister for Justice and Law Reform* [2008] IESC 26.

115 *Dos Santos & Ors v Minister for Justice & Ors* [2014] IEHC 559 para 41.

116 *ibid* paras 31 and 41.

117 *ibid*.

118 For the complete grounds of the applicants' arguments, see *Dos Santos* (n 115). The High Court also rejected arguments on the basis of Article 8 ECHR (paras 61-81), using similar rationale to previous deportation decisions from the Irish courts and from the European Court of Human Rights. Many of the decisions relied upon by McDermott J are discussed in *Siobhán Mullally and Liam Thornton* (n 90).

119 *Dos Santos* (n 115).

120 *ibid* para. 47.

121 *ibid* paras 29-34.

122 *ibid* paras 35-41.

123 *ibid* para 47 and para 59.

124 *ibid* para 59, with discussion of previous Irish cases at paras 50-54.

125 *ibid* para. 56, by virtue of of the Borders, Citizenship and Immigration Act 2009 s 55.

126 See, for example, *Omar v Governor of Cloverhill* [2013] IEHC 579.

127 *ibid*.

128 *ibid* para 57.

129 *ibid* para 29 (emphasis added).

practice in the context of forced removals from the State.<sup>130</sup> Fundamentally, children should never be detained on the basis of their immigration status.<sup>131</sup>

### Recommendations: Deportation

- > Head 45 of the General Scheme of the International Protection Bill 2015 should be amended to include express provision for the recognition of the best interests of the child as the primary consideration, where a decision is made on issues relating to deportation.
- > A child, who has the capacity and capability of forming his or her own views, must have an explicit right to be heard in any deportation process related to the child and/or the parent(s)/guardian(s) of the child.
- > The International Protection Bill must make it clear, that where the State proposes to deport a separated child, this can only be carried out where there is an identified responsible adult/caregiver to accompany and care for the child on return.
- > Where the State proposes to continue with a deportation (after a consideration of the best interests' principle and respect the right of a child to be heard); there must never be any resort to actual or de facto detention of the child and his/her family.
- > Given the serious nature of the exercise of the States power to deport a child, the State should provide information on the rights of child deportees; the number of child deportees; and explicitly recognise the right of child deportees to contact the Ombudsman for Children and the Irish Human Rights and Equality Commission.

# CHAPTER 9:

## Child Care Law

Brian Barrington, BL

## 9.1 INTRODUCTION

This article examines the compliance of the Child Care Act 1991 with the Convention on the Rights of the Child (hereinafter CRC).

It is not possible, unfortunately, to examine every aspect of compliance within the confines of this article. I therefore propose to focus on the role of the child in child care proceedings and, in particular, how the voice of the child is heard.

## 9.2 THE REQUIREMENTS OF THE CONVENTION ON THE RIGHTS OF THE CHILD

Article 12 CRC provides:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Clearly, Article 12.1 CRC gives the child the right to be heard. Article 12.2 CRC for its part regulates how the child is to be heard. The implementation of each of these under the Child Care Act 1991 is now considered.

### (a) The right to be heard

The right to be heard is reflected in Section 24 of the 1991 Act which provides:

24.—In any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the Constitution or otherwise, shall—

- (a) regard the welfare of the child as the first and paramount consideration, and
- (b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child.

The wording of Section 24(b) is somewhat different to Article 12.1 CRC. Should section 24(b) be interpreted in the light of Article 12.1 to ensure a harmonious interpretation?

Ireland has, of course, ratified the CRC. But because Ireland has a dualist legal system, the mere fact of ratification does not mean that rights under the CRC can be enforced in Irish courts.<sup>1</sup> However, the Irish courts have held that laws passed after the ratification of Ireland's international law commitments fall to be interpreted in the light of those commitments.<sup>2</sup> The difficulty is that the CRC was ratified by Ireland on 28 September 1992, after the passing of the Child Care Act 1991. However, Section 24(b) falls to be interpreted in the light of the new Article 42A.4 of the Constitution, as inserted the children's rights referendum. It states:

4 1° Provision shall be made by law that in the resolution of all proceedings -

- i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
- ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

It is clear that Article 42A.4.2° is at least partly modelled on Article 12 CRC and gives effect to that Article in child care proceedings. It is therefore reasonable to interpret Article 42A.4. 2° in the light of Article 12 CRC.<sup>3</sup> Since Section 24(b) of the 1991 Act, for its part, must be interpreted in the light of Article 42A.4. 2°, it follows that Section 24(b) should be interpreted in the light of Article 12 CRC - to the extent that this is warranted by Article 42A.4. 2°. This brings about a number of legal changes.

First, whereas Section 24(b) requires due consideration to the 'wishes' of the child, Article 42A.4.2° - consistent with Article 12 CRC - requires that his or her 'views' be ascertained. Whereas a wish ordinarily construed relates to things that will happen in the future, such as whether a child should enter care or stay in a particular foster placement, the term 'view' is not limited in this way. For example, the child may have views on how he or she was parented in the past or on the capacity of his or her parents to change. Section 24(b) must be expansively interpreted to ensure that these views are ascertained.

1 See Articles 15.2.1° and 29.6° Bunreacht na hEireann.

2 *Re O'Laighleis* [1960] IR 93 at 102 and 125; *O'Donnahill v Merrick* [1984] IR 151; *Dos Santos v Minister for Justice* [2013] IEHC 237.

3 See by analogy the analysis of Finlay Geoghegan J in *MN v RN* [2009] 1 IR 388 paras 24-26.

Second, consistent with Article 12 CRC, Article 42A.4.2° requires the views to be ascertained, as far as practicable, in respect of any child 'who is capable of forming his or her own views'. As with the CRC, this phrase should be seen as an obligation to assess the capacity of the child to form an autonomous opinion to the greatest extent possible.<sup>4</sup> Like Article 12 CRC, Article 42A.4.2° imposes no age limit on the right of the child to express his or her views. Section 24(b) must also be interpreted in this light.

The Committee on the Rights of the Child has clarified that full implementation of Article 12 CRC 'requires recognition of and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preference.'

It has been accepted in Irish law that a five year old may be capable of forming his or her own views.<sup>5</sup> There has, however, been reluctance to ascertain the views of children younger than this.<sup>6</sup> However, it is submitted that very young children may indicate views from their behaviour and their attachment patterns. Given all that is now known about the importance of forming secure attachments to later child development, it seems particularly important that the wishes or views of very young children are obtained in child care proceedings by observation of such matters.<sup>7</sup> As General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration states:

Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children. States must ensure appropriate arrangements, including representation, when appropriate, for the assessment of their best interests; the same applies for children who are not able or willing to express a view.<sup>8</sup>

Third, Article 42A.4.2° refers to the child's 'own' views. Similarly, Article 12 CRC refers to a child being capable of expressing his or her 'own' views and further refers to the right of the child 'to express those views freely'. As the Committee on the Rights of the Child has explained:

Freely means that the child can express his or her views without pressure and can choose whether or not she or he wants to exercise a right to be heard. 'Freely' also means that the child must not be manipulated or subjected to undue influence or

pressure. 'Freely' is further intrinsically related to the child's 'own' perspective': the child has the right to express her or his own views and not the views of others.

Fourth, it is well established in Irish law that the right to silence is a corollary to the constitutional right of freedom of expression.<sup>9</sup> The duty to ascertain the child's views in Article 42A.4.2° only applies 'as far as practicable'. Article 42A cannot therefore be interpreted as obliging the ascertainment of the views of an unwilling child. Nor, by the same logic nor can Section 24(b) of the 1991 Act be.

This is all highly relevant in child protection where, unlike in other areas of law, children are frequently scared to express a view. Courts will also have to be mindful of the need to protect a child from being manipulated into expressing a view that is not, in fact, the child's own. Sometimes how the child's views are ascertained will help to enable a child to speak freely. The closer the child is brought to confrontation with his or her parents – for example in a court room environment – the greater the risk that the child will not feel free to express his or her own views.

Child care cases also often involve the exploration of traumatic events. The Committee on the Rights of the Child has emphasized that–

a child should not be interviewed more often than necessary, in particular when harmful events are explored. The 'hearing' of a child is a difficult process that can have a traumatic impact on the child.<sup>10</sup>

In Irish child care proceedings, overinterviewing can commonly occur in two situations.

First, where the child may be interviewed by social workers and by an Garda Síochána. Unlike in the United Kingdom,<sup>11</sup> there is no protocol for joint interviewing by social workers and members of An Garda Síochána. Indeed, frequently social workers will not even have access to interviews by An Garda Síochána without first obtaining court order. Even if they do, it may still be necessary for social workers to re-interview the children. This is because social workers, particularly those social workers tasked with assessing the credibility of sex abuse allegations, are less concerned with eliciting evidence for criminal trial purposes and more concerned with an overall assessment of the credibility of the child's account.

Second, interim care orders in Ireland may only be made for a maximum of 29 days without consent of the parent, guardian or person in *loco parentis*.<sup>12</sup> In more complex

4 See UN Committee on the Rights of the Child, 'General comment No. 12 (2009): The right of the child to be heard' (20 July 2009) CRC/C/GC12 para 20.

5 *MN v. RN (Child abduction)* [2009] 1 IR 388. (6 years old), *A v A (otherwise McC)* [2009] IEHC 460 (5 years old).

6 *RP v SD* [2012] IEHC 188 and *MKD v KWD* [2012] IEHC 378.

7 Jan Hanworth (ed) *The Child's World: the Comprehensive Guide to Assessing Children in Need* (London: Jessica Kingsley 2009).

8 UN Committee on the Rights of the Child, 'General Comment No. 14 (2013): The right of a child to have his or her best interests taken as a primary consideration' (29 May 2013) para 44.

9 *Heaney v Ireland* [1996] 1 IR 580.

10 UN Committee on the Rights of the Child, General Comment 12 (n 4) para 24.

11 See Ministry of Justice, *Achieving Best Evidence – Guidance on interviewing victims and witnesses, and guidance on using special measures* <[http://www.cps.gov.uk/publications/docs/best\\_evidence\\_in\\_criminal\\_proceedings.pdf](http://www.cps.gov.uk/publications/docs/best_evidence_in_criminal_proceedings.pdf)> accessed 10 July 2015.

12 Child Care Act 1991 s 17.

cases, it can be a year or even two from the date of the first interim care order to the date of the trial. In such cases, there is a danger that if the child is interviewed by professionals about his or her views on every occasion that the interim care order is being extended, this could result in over-interviewing and the traumatising of the child.

It is important to note in this regard that the duty to ascertain the wishes of the child in Article 42A.4.2° applies to the 'resolution of all proceedings'.<sup>13</sup> It is arguable that it may not therefore apply at every interim stage in the proceedings. In any event, the duty only applies 'as far as practicable'. This should be interpreted in the light of the best interests of the child to avoid over-interviewing.

#### (b) How the child's views are ascertained

Article 12 CRC provides that the child 'shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

There are a number of ways that the child may be heard in Irish law. The strengths and weaknesses of each is considered below.

##### (i) Speaking to the judge

One possibility is for the child to speak to the judge in chambers or in an empty courtroom. Guidance on meeting the judge (in the presence of the court registrar) was given by the High Court in *SJ O'D v PC O'D*, a case under the Guardianship of Infants Act 1964.<sup>14</sup> Abbott J stated:

1. The judge shall be clear about the legislative or forensic framework in which he is embarking on the role of talking to the children as different codes may require or only permit different approaches.
2. The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and the judge's own experience.
3. The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.

<sup>13</sup> Cf Article 12 CRC which requires that the views of the child be ascertained in all matters affecting the child.  
<sup>14</sup> *SJ O'D v PC O'D* Abbott J, Unreported, High Court, 26th May, 2008.

4. The judge should explain to the children the fact that the judge is charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and should assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all) determinative of the ultimate decision of the court.
5. The judge should explain the development of the convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.
6. The court should, at an early stage, ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the court to seek expert advice from the s. 47 procedure, unless of course such qualification is patently obvious.
7. The court should avoid a situation where the children speak in confidence to the court unless of course the parents agree. In this case the children sought such confidence and I agreed to give it them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case.

In the later case, *C v W*, Abbott J commented that an expert report should be sought instead of seeing the judge if the custody or access case is more adversarial.<sup>15</sup> It also follows from the above that an expert report should also be commissioned where the issues arising in the case or the presentation of the child is more complex.

It is accepted in the UK<sup>16</sup> and Ireland<sup>17</sup> that a child should not be met by the judge for the purpose of evidence gathering. For this reason, it has been held that judges should consider whether the proceedings are to establish what has happened in the past or what should happen in the future.<sup>18</sup> In both the UK<sup>19</sup> and Ireland<sup>20</sup> it has also been accepted that the meeting should take place before the hearing, in case matters relevant to the hearing have to be disclosed to the parties.

<sup>15</sup> *C v W* [2008] IEHC 469 para 37.

<sup>16</sup> *Re KP (A Child)* [2014] EWCA 554 para 54.

<sup>17</sup> *Child and Family Agency v DE* [2014] IEHC 13 para 34.

<sup>18</sup> *Re: A (Fact-Finding Hearing: Judge meeting with Child)* [2012] EWCA Civ 185 para 52

<sup>19</sup> *ibid.*

<sup>20</sup> *Child and Family Agency v DE* (n 17) para 38.

Child care cases are often deeply adversarial. The presentation of the children who have been traumatised or abused can also be complex. Further, in child care cases the judge must be satisfied on the facts that the threshold for making a care order, interim care order or supervision order is met before making an order. Accordingly, while meeting with the judge can be a useful reassurance for the child, it is not normally an adequate way of ascertaining the child's views in child care cases.

### (ii) Ascertaining of the child's views by his or her parents

Another possibility is that the views of the child could be ascertained by the parents of the children. In many other areas of law, this would be unproblematic. In child care, where the issue to be decided is the adequacy of the care being provided by a parent, guardian or person in *loco parentis*, the potential for a conflict of interest is obvious.<sup>21</sup>

### (iii) Ascertaining of the child's views by his or her social worker of the Child and Family Agency

General Comment No 12 on the right of the child to be heard accepts that the views of the child may be obtained by a social worker. However, if the social worker is from the Child and Family Agency, there may be a difficulty. As the General Comment makes clear about persons representing a child:

The representatives must be aware that she or he represents *exclusively* the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home, administration or society.) Codes of conduct should be developed for representatives *who are appointed to represent* the child's views.<sup>22</sup> [Emphasis added]

Frequently, and perfectly legitimately, in child care proceedings social workers of the Child and Family Agency will have to give the view of the Agency on matters such as the adequacy of a child's placement or care plan or the advantages or disadvantages of the child entering care. This may, for example, involve not only an assessment of the best interests of the child in question but also of other children – such as other children placed in the same foster home. In such circumstances it is not possible to represent exclusively the interest of the child the subject of the proceedings. It is not surprising therefore that the General Comment appears to envisage a person being *specifically appointed* to represent the child's views.

This is not to say that social workers of the Child and Family Agency should not and do not ascertain the views of children. They should and they do. The point being made is that this will not always suffice to ensure that the voice of the child is heard in judicial and administrative proceedings under Article 12.2 CRC.

21 UN Committee on the Rights of the Child, General Comment 12 (n4) para 36.

22 *ibid* para 37.

### (iv) By giving evidence in the proceedings

A child may, of course, wish to give evidence in proceedings.

On occasion, older children have done so when they have brought applications under Section 47 of the Child Care Act 1991 against the Child and Family Agency seeking directions on matters such as the provision of an appropriate placement or of an aftercare plan. It is far rarer for children to want to give evidence in care proceedings against a parent, guardian or person in *loco parentis*.

General Comment No 12 states that 'preferably a child should not be heard in open court, but under conditions of confidentiality.'<sup>23</sup> It also recommends that the situation should have the format of a talk rather than a one sided examination. Irish law complies with this to an extent. Child care proceedings are heard *in camera*.<sup>24</sup> The evidence of a child may be taken by video link, thereby avoiding bringing the child into the courtroom itself.<sup>25</sup> When giving evidence by video link, questions may also be put through an intermediary appointed by the court for this purpose.<sup>26</sup> While helpful, these facilities do not entirely safeguard against a one sided examination of the child rather than a more conversational approach.

### (v) Appointment of an expert

Section 27 of the Child Care Act 1991 allows the Court, of its own motion, or on the application of any party to the proceedings to procure a report on any question affecting the welfare of a child. This provides a further mechanism for obtaining the views of the child. It has the advantage that an independent person specially trained to work with children can be appointed to ascertain the views of the child. It also allows the child's views to be obtained without involving the child in the court process itself, thereby helping to shield the child against manipulation.

### (vi) Direct representation of a child or representation through a Guardian *ad Litem*

The appointment of an expert under Section 27 allows the views of the child to be obtained satisfactorily on relatively straightforward issues like where the child would like to live.

However, child care proceedings are often long and complex. Frequently, there will be disputes as to issues of both law and fact. In order to be able to deal with such matters in litigation, it is necessary to be a party to the proceedings, with all the procedural rights

23 *ibid* para 43.

24 *ibid*.

25 Children Act 1997 s 21.

26 Children Act 1997 s 22.



that this entails, such as the right to address the court, the right to cross examine, the right to seek discovery and, if unsuccessful at first instance, the right to appeal.

Do children have these rights in child care proceedings? Before answering, it is worth considering an additional provision of the CRC. Article 9, insofar as relevant, provides:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. *In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. [Emphasis added]*

Clearly, proceedings under the Child Care Act 1991 are proceedings that may separate a child from its parents. In such proceedings, 'all interested parties' should have the opportunity to participate in the proceedings and give their views. It is hard to see how a child could not in principle be an interested party.

General Comment No 12 also envisages a certain fair procedures for the child. For example, in the context of administrative proceedings, the General Comment states:

All States should develop administrative procedures in legislation which reflect the requirements of article 12 and ensure the right to be heard along with other procedural rights, including the rights to disclosure of pertinent records, notice of hearing, and representation by parents or others.<sup>27</sup>

If this is true for administrative proceedings, it ought to be even more clearly true for judicial proceedings, such as those under the Child Care Act 1991. The General Comment also clarifies that 'if the right of the child to be heard is breached with regard to judicial and administrative proceedings (article 12, paragraph 2) the child must have access to appeals and complaints procedures which provide remedies for rights violations.'<sup>28</sup>

It is true, however, that Article 12.2 CRC does provide that the right to be heard in any judicial and administrative proceedings affecting the child must be 'in a manner

consistent with the procedural rules of national law.' However, even prior to the children's rights amendment to the Constitution the right to fair procedures of the child was recognised in Irish law.

The leading case on fair procedures in Irish law is *Re Haughey*. In that case, an Oireachtas committee was investigating whether Paraic Haughey had been involved in gun running. However, the only consequences of the investigation were for the good name of Mr Haughey – no criminal sanction or civil liability could be imposed by the Committee.

Mr Haughey challenged the procedures before the Committee. While he was allowed to be accompanied by a lawyer, that lawyer could not cross examine or make submissions on his behalf. Mr Haughey challenged this. The Supreme Court accepted that witnesses would not be entitled to have lawyers cross examine or make submissions. However, O'Dalaigh CJ stated that Mr. Haughey was more than a mere witness. The true analogy, in terms of High Court procedure, was that of a party. Mr. Haughey's conduct was the very subject matter of the Committee's examination.<sup>29</sup> O'Dalaigh CJ said that Mr Haughey should have the following rights:

the minimum protection which the State should afford (him) was (a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence.<sup>30</sup>

Like Mr Haughey, the child in child care proceedings is the subject of the proceedings. But the issues at stake for the child are far more serious than the issues that were at stake for Mr Haughey. So, in principle, the child should be equally entitled to the protections of the law on fair procedures.

Irish law has recognised that fair procedures do apply to children in guardianship and custody disputes under the Guardianship of Infants Act. In *FN and EB v CO, HO and EK Finlay Geoghegan J* stated:

It is also well established that an individual in respect of whom a decision of importance is being taken, such as those taken by the courts to which s. 3 of the Act of 1964 applies, has a personal right within the meaning of Article 40.3 of the Constitution to have such decision taken in accordance with the principles of constitutional justice. Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it

27 UN Committee on the Rights of the Child, General Comment 12 (n 4) para 65.

28 *ibid* para 47.

29 *Re Haughey* [1971] IR 217 at 263.

30 *ibid*.

appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies. Hence s. 25 [regarding ascertaining the wishes of the child] should be construed as enacted for the purpose of inter alia giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child.<sup>31</sup> *[Emphasis added]*

Given that children have the right to fair procedures, and given the seriousness of the issues involved in child care proceedings, one would expect them in principle to have all the *Re Haughey* rights set out above, in appropriate cases under the Child Care Act 1991. With this in mind, we turn to how children are represented in child care proceedings.

There are two such methods.

The first way of representing the child is by making the child directly a party to the proceedings under section 25 of the 1991 Act. Its relevant provisions state:

25.—(1) If in any proceedings under Part IV or VI the child to whom the proceedings relate is not already a party, the court may, where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so, order that the child be joined as a party to, or shall have such of the rights of a party as may be specified by the court in, either the entirety of the proceedings or such issues in the proceedings as the court may direct. The making of any such order shall not require the intervention of a next friend in respect of the child.

(2) Where the court makes an order under subsection (1) or a child is a party to the proceedings otherwise than by reason of such an order, the court may, if it thinks fit, appoint a solicitor to represent the child in the proceedings and give directions as to the performance of his duties (which may include, if necessary, directions in relation to the instruction of counsel).

It is clear from Section 25 that a child may only be made a party to the proceedings having regard to the age, understanding and wishes of the child. It would be inappropriate therefore to have a child joined directly as a party to a case in circumstances where the child lacks sufficient maturity to be joined, would not understand the proceedings or does not wish to be joined. The interests of the child and the interests of justice must also be considered before joining a child as a party. Issues that will need careful consideration in this regard will include risks of manipulation or traumatisation of the child by involving the child directly in the

proceedings,<sup>32</sup> the complexity of the child's needs or presentation and the ability of a lawyer – who is unlikely to have any specific training – to understand and manage the child's needs or presentation. Because of these factors it is relatively unusual for a child to be represented directly in proceedings.<sup>33</sup>

It is beyond doubt that, as a party, the child will be entitled to fair procedures in the same way as any other party, subject to any valid contrary provision in the order making the child a party. The child will be able to seek discovery, compel witnesses, cross examine, make submissions and apply to extend an interim care order<sup>34</sup> – just like any other party can, such as a parent.

The second way of representing the child is more common. That is by the appointment of a Guardian *ad Litem* under Section 26 of the 1991 Act. The relevant provisions of Section 26 state:

26.—(1) If in any proceedings under Part IV or VI the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian *ad litem* for the child...

(4) Where a child in respect of whom an order has been made under subsection (1) becomes a party to the proceedings in question (whether by virtue of an order under section 25 (1) or otherwise) then that order shall cease to have effect.

It is abundantly clear from both Section 26(1) and Section 26(4) that making the child a party to the proceedings under Section 25 and appointing a Guardian *ad Litem* are alternative methods of representing the child. Further, there is no presumption that a child will be represented by a Guardian *ad Litem* – and frequently children have no representation.<sup>35</sup>

This contrasts sharply with the position under the Children Act 1989 in England and Wales. There, a court must appoint a Guardian for a child in child care proceedings 'unless satisfied that it is not necessary to do so in order to safeguard his interests.'<sup>36</sup> The child will be a party to child care proceedings with his or her Guardian *ad Litem* instructing any legal representative.<sup>37</sup> But if the child instructs a lawyer directly this does

31 *FN and EB v CO, HO and EK* [2004] 4 IR 311 para 29.

32 Note that even where a child is a party, it does not follow that the child must be present in court. The child may even be prevented by the court from being present if it is not in his or her interests to be present. See *Child Care Act 1991* s 25(3) and s 30.

33 Carol Coulter, *The Child Care Law Reporting Project Second Interim Report* (Dublin 2014) 7, 61, indicates that of 486 cases covered by the Project across the country in 2013-14, children were represented by a solicitor in just seven

34 As to which see section 17 of the *Child Care Act 1991*.

35 Carol Coulter (n 33) 7, indicates that in just under half of the 486 cases covered by the Project in 2013-2014 did the children have representation.

36 *Children Act 1989* s 41(1)

37 *Family Procedure Rules 2010*, Rule 12.3.

not terminate in the involvement of the Guardian *ad Litem*. He or she will continue to be involved in the proceedings and may – with the permission of the court – also appoint a lawyer.<sup>38</sup> This appears a far better way of representing children in child care proceedings, given their complexity and difficult nature for children. It starts with the assumption that a child needs representation through a Guardian to defend the child's best interests. And even if the child is represented directly, it ensures that the best interests of the child are not overlooked.

There has been caselaw on the role of the Guardian *ad Litem* in secure care proceedings under the inherent jurisdiction of the High Court. McMenamin J stated in *Health Service Executive v DK* that the function of the guardian should be to place the views of the child before the court, and to give views as to what is in the best interests of the child. He also stated that a duty of the guardian is to ensure compliance with the child's constitutional rights.<sup>39</sup> In such cases in the High Court, children are parties through their Guardians *ad Litem*. The question arises whether this is equally true of Guardians *ad Litem* appointed under the specific statutory regime in Section 26 of the Child Care Act 1991.

This matter has not been ruled upon by the superior courts but in the District Court it has been held that a Guardian is not a party on behalf of a child.<sup>40</sup>

The view that the child, through his or her Guardian *ad Litem*, is not to be considered a party to the proceedings is based on the argument that Section 26 does not expressly make the child through his or her Guardian *ad Litem* a party to the proceedings, whereas Section 25 does, and by applying the maxim *expressio unius exclusio alterius*: to express one is to exclude the other.

However, this maxim is only a guide to interpretation. As Kelly J commented in *An Blascaod Mór Teoranta v Commissioners of Public Works* the maxim is not determinative.<sup>41</sup> It is also clear that it can be disapplied if it would deprive a person of a right.<sup>42</sup> Clearly, the application of the maxim to Section 26 would deprive the child of the rights inherent in party status, having regard to the constitutional right to fair procedures already examined above.

It is also important to bear in mind that in Ireland it is generally understood that a child cannot be joined as a party to civil proceedings since children are considered to be under a disability. Instead, a minor may sue only by a next friend and may defend only

by a Guardian *ad litem*.<sup>43</sup> Section 25 of the Child Care Act 1991 acts as an exception to the principle that children are under a disability by allowing them to be joined directly as parties to proceedings. It is for this reason that it is explicit that the child may be joined as a party to proceedings.

By contrast, Section 26 of the 1991 Act does not state that the child is a party to the proceedings. However, as an adult, the Guardian *ad Litem* can – exactly as the name suggests – act as a 'guardian *ad litem*' (to the cause) for the child in defending the proceedings on behalf of the child. Indeed, the choice of term 'guardian *ad litem*' is precisely that used for an adult acting on behalf of a child in defending ordinary civil proceedings. If the Act does not state that a child through his or her Guardian *ad Litem* is a party to proceedings, it is highly arguable that this was because there was simply no need to do so.

This interpretation accords with the definition of a party in the District Court Rules, which define a party as including 'any person entitled to appear and be heard in relation to any action, application or other proceedings.'<sup>44</sup> This definition was not considered by the District Court when it decided that a Guardian *ad Litem* was not a party on behalf of the child. Yet guardians do appear in court and are heard and there is nothing to suggest that this is by anything other than entitlement upon appointment. That being so, it is submitted that they appear to come within the definition of a party.

Children who are joined directly to proceedings will inevitably be older – given that age, understanding and wishes are all criteria under Section 25. Such criteria necessarily exclude the youngest and the most vulnerable children who may have limited understanding and, further, may not be capable of expressing a wish or may be too frightened to do so. Such children are typically represented by a Guardian *ad Litem*. It follows that a finding that a child through a Guardian *ad Litem* is not a party to proceedings would mean that:

- Older children would have procedural rights (such as to appeal, seek discovery, cross
- Younger and more vulnerable children will not be able to do so.

The Child Care Act 1991 has been found by the Supreme Court to be a remedial social statute to be interpreted as 'widely and liberally as may fairly be done'<sup>45</sup> An interpretation of the Act that denies the child through her Guardian *ad Litem* party status would appear to defeat the purpose of the Act and confer lesser protections on the youngest and most vulnerable children. It would mean that the child could not through his or her Guardian *ad Litem* – for example – appeal a decision of such fundamental importance

38 *ibid* Rule 16.21.

39 *Health Service Executive v DK* [2007] IEHC 488 para 59.

40 See in this regard the reasoning in *Health Service Executive v SO and PSA* [2013] IEHC 19. This case did not consider, however, the definition of a party in the District Court Rules.

41 *An Blascaod Mór Teoranta v Commissioners of Public Works* [1997] WJSC-HC 97 at 105.

42 [1939] IR 21 at 28. See also O'Byrne J to similar effect at 31.

43 See for example Order 7(2) District Court Rules 1997.

44 *ibid* – see introduction to same.

45 *Western Health Board v KM* [2002] 2 IR 493 at 510.

as the grant or refusal of a care order, notwithstanding that – as we have seen – General Comment No 12 envisages that the child should have access to appeals.

Also, it would arguably be difficult to sustain such a conclusion in the light of the interpretative obligation in Section 2(1) of the European Convention on Human Rights Act 2003 having regard to Article 14 of the Convention which, among other things, prohibits direct and indirect age discrimination<sup>46</sup> falling within the general scope of any Convention article.<sup>47</sup>

Even if children generally were not entitled to full procedural rights under Articles 6 and 8 ECHR, the question arises whether Ireland, having put in place a system for Guardians ad Litem, could deprive children of procedural rights when represented by them in circumstances where older children are not deprived of such rights when represented directly. A number of points can be made:

- > This would mean that younger children would be treated less favourably than both
- > Such a difference of treatment can only be justified if it serves a legitimate aim and
- > It could be argued that the difference of treatment is justified by the age and parents and older children may be; is proportionate; understanding of older children. However, it is submitted that the denial of the same rights to younger and more vulnerable children cannot be easily justified having regard to the best interests of the child. Younger and more vulnerable children are less likely to be able to protect themselves from abuse, to flee abuse or to report abuse. If anything, their need for full procedural rights is more acute.

It can further be argued that the denial of procedural rights to children represented through Guardians *ad Litem* would violate Article 6 ECHR, insofar as it would create an inequality of arms between the child and its parents in child care proceedings by placing the child at a substantial disadvantage.<sup>48</sup> It is also important to note that the European Court of Human Rights has accepted that children 'as appropriate' have procedural rights under Article 8 ECHR in child care cases.<sup>49</sup>

The courts in the UK have also repeatedly and explicitly been clear that children represented through guardians in child care proceedings are protected by Articles 6 and 8 ECHR and that this is consistent with Article 12 CRC. For example in *Re N and L (Care Order: investigations by Guardian ad Litem outside Northern Ireland)* administrative restrictions on the ability of a Guardian *ad Litem* to travel outside of Northern Ireland to investigate cases were successfully challenged. Gillen J stated:

46 *Schwizgebel v Switzerland* Application No. 25762/07 (EctHR, 10 June 2010) para 77.  
 47 *EB v France* Application No. 43546/02(EctHR 22 January 2008) para 47 to 48.  
 48 *Dombo Beheer BV v The Netherlands* (1994) 18 EHRR 213para 33.  
 49 *Dolhamre v Sweden* Application No. 67/04 (EctHR 8 September 2010)para 116.

Article 12 of the United Nation Convention on the Rights of the Child (UNCRC) 1989 requires states to provide children with 'the opportunity to be heard' in judicial or administrative proceedings affecting them on the basis that children capable of forming views have a right to express these freely. Article 6 of the European Convention on Human Rights entitles a child to a fair trial. If a child is to be denied direct access to the person who in fact is speaking for her at the trial, namely the guardian ad litem, by virtue of the fact that the guardian must interpose some agent in another country for the purpose of ascertaining her views, then a possible infringement of that child's rights could conceivably arise.<sup>50</sup>

That a child in child care proceedings is protected by Articles 6 and 8 ECHR and/or Article 12 CRC has been accepted in several other English cases including *Re PS (Voice of the Child)*,<sup>51</sup> *Re C (Care proceedings: disclosure of a local authority's decision making process)*<sup>52</sup> and *R, E, J, K v Cafcass*, a case specifically on the issue of the right of children to representation through a guardian.<sup>53</sup> Accordingly, the procedural protections of both of those Articles should apply. Indeed, as is clear from the last of these cases, the failure to appoint a Guardian for a child for an appropriate child may be reviewable under Articles 6 and 8 ECHR. If that is so, then it should equally be the case that an interpretation that would deny the child represented through a Guardian *ad Litem* procedural rights under Articles 6 and/or 8 ECHR should not be favoured. Such a conclusion is at least consistent with, if not required by, Article 12 CRC.

### (vii) Admission of a child's hearsay statements

Finally, a child's views may be heard by the admission of the child's hearsay statements.

Section 23 of the Children Act 1997 provides a mechanism for their admission. There is no caselaw of the superior courts directly considering Section 23 but it has been considered by the District Court.<sup>54</sup> Section 23 states:

23.—(1) Subject to subsection (2), a statement made by a child shall be admissible as evidence of any fact therein of which direct oral evidence would be admissible in any proceeding to which this Part applies, notwithstanding any rule of law relating to hearsay, where the court considers that—

- (a) the child is unable to give evidence by reason of age, or

50 *Re N and L (Care Order: investigations by Guardian ad Litem outside Northern Ireland)* [2003] NI Fam 1 para 11.  
 51 *Re P S* [2013] EWCA Civ 223 para 37.  
 52 *Re C (Care proceedings: disclosure of a local authority's decision making process)* [2002]EWHC 1379 (Fam) para 150.  
 53 *R, E, J, K v Cafcass* [2012] EWCA Civ 853 para 87 per McFarlane LJ.  
 54 It has been considered in the District Court. See, in particular, *Health Service Executive v SO and PSA* [2013] IEHC 19.

- (b) the giving of oral evidence by the child, either in person or under section 21, would not be in the interest of the welfare of the child.
- (2) (a) Any statement referred to in subsection (1) or any part thereof shall not be admitted in evidence if the court is of the opinion that, in the interests of justice, the statement or that part of the statement ought not to be so admitted.
  - (b) In considering whether the statement or any part of the statement ought to be admitted, the court shall have regard to all the circumstances, including any risk that the admission will result in unfairness to any of the parties to the proceedings.
- (3) A party proposing to adduce evidence admissible in proceedings to which this Part applies by virtue of subsection (1), shall give to the other party or parties to the proceedings—
  - (a) such notice, if any, of that fact, and
  - (b) such particulars of or relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling such party or parties to deal with any matter arising from its being hearsay.
- (4) Subsection (3) shall not apply where the parties concerned agree that it should not

No rule is laid down by the Children Act 1997 as to when a child is not able to give evidence by reason of age. It should be noted in this regard that Section 28(1) of the Children Act 1997 provides that a child may give evidence if the child 'is capable of giving an intelligible account of events which are relevant to the proceedings.'

The phrase that a child 'is not able to give evidence by reason of age' in Section 23 ought logically be interpreted in the light of Section 28(1) of the 1997 Act to mean that by reason of age the child is not capable of giving an intelligible account of events. Such an interpretation would be entirely consistent with Article 12.1 CRC which envisages an assessment of the capacity of the child in each individual case.

- (a) The interest of the welfare of the child

A number of points can be made about whether it is in the welfare interest of the child to come to court.

First, it is rare that a child gives evidence in childcare cases. This is a reflection of the generally accepted view that giving evidence can be harmful and retraumatising in

child care cases – and is therefore not in the welfare interest of the child, a concern acknowledged by General Comment No 12<sup>55</sup> and amply recognised by the English courts. As Wall LJ in *SW v Portsmouth City Council* commented:

[I]n my eleven years as a judge of the Family Division, I never had an application to compel the attendance of a child for cross-examination on allegations of abuse made by that child, or allegedly committed on that child, and no child was ever called to give such evidence in my court. At the same time, and during the same period, I attended numerous conferences at which every child and adolescent psychiatrist to whom I spoke, or whom I heard speak, condemned as abusive the process in criminal law whereby a child was required to attend court to be cross-examined, often many months and sometimes years after the event in order to have his or her credibility impugned over abuse allegations.<sup>56</sup>

While *Re W* abolished the presumption in British law that a child not be brought to court, this did not necessarily mean that the outcome would be any different.<sup>57</sup>

Second, there are a number of factors which should be taken into account in considering the welfare interest of the children.<sup>58</sup> As Baroness Hale points out in *Re W*:

The age and maturity of the child, along with the length of time since the events in question, will also be relevant to the second part of the inquiry, which is the risk of harm to the child. Further specific factors may be the *support which the child has from family* or other sources, or the lack of it, the child's own wishes and feelings about giving evidence, and *the views of the child's guardian* and, where appropriate, those with parental responsibility. We endorse the view that *an unwilling child should rarely, if ever, be obliged to give evidence...* Where there are parallel criminal proceedings, the likelihood of the child having to give evidence twice may increase the risk of harm. The parent may be seeking to put his child through this ordeal in order to strengthen his hand in the criminal proceedings rather than to enable the family court to get at the truth. On the other hand, as the family court has to give less weight to the evidence of a child because she has not been called, then that may be damaging too. *However, the court is entitled to have regard to the general evidence of the harm which giving evidence may do to children, as well as to any features which are particular to this child and this case... The risk, and therefore the weight, may vary from case to case, but the court must always take it into account and does not need expert evidence in order to do so.*<sup>59</sup> [Emphasis added]

55 UN Committee on the Rights of the Child, General Comment 12 (n 4) para 24.

56 *SW v Portsmouth City Council* [2009] EWCA Civ 644 para 55. Also reported as *Re W* (Care Order: Sexual Abuse) [2009] 2 FLR 1106

57 *Re W* [2010] UKSC 12 at para 2 at para 30.

58 *ibid* para 24 'When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child'

59 *ibid* para 26.

It should be noted in this regard that the Law Reform Commission in its Report on Child Sexual Abuse also stated:

There is universal agreement that it is traumatic for children to give evidence of unpleasant experiences and that it is particularly disturbing when they have been victims of parental abuse and are required to confront the abusing parent in Court.<sup>60</sup>

(b) The interests of justice

The hearsay statements of a child may be excluded under Section 23 in the interests of justice. It is important to note that the interests of justice must include the interest of the child to fair procedures,<sup>61</sup> and not just those of parents. Further, the correct balance must be struck between the rights of parents and the child. *Southern Health Board v CH* considered the balance to be achieved between the rights of a parent and a child in an inquisitorial process. O'Flaherty J stated 'that the child's welfare must always be of far graver concern to the Court' than parental rights.<sup>62</sup>

In considering the interests of justice, it is important to consider what the alternatives to admitting the statements of the child are. They are:

- > calling the child;
- > not calling the child so that no evidence from the child is before the court.

(i) Not calling the child

If, as an alternative, the child is not called, then there will be no evidence from the child before the Court. This, of itself, would not be in the interests of justice. As Denham J stated in *Eastern Health Board v MK*:

If it is determined that a child is not to give evidence because of the potential trauma of giving evidence then it could be unjust if the child's hearsay evidence, in ease of the child, relevant to the welfare of the child, was excluded from a hearing to determine the welfare of the child.<sup>63</sup> *[Emphasis added]*

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60 Law Reform Commission, Consultation paper on Child Sexual Abuse (Law Reform Commission, 1989) para 7.01.

61 *FN and EB v CO* [2004] 4 IR 311 para 29: 'It is also well established that an individual in respect of whom a decision of importance is being taken, such as those taken by the courts to which s. 3 of the Act of 1964 applies, has a personal right within the meaning of Article 40.3 of the Constitution to have such decision taken in accordance with the principles of constitutional justice. Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies.'

62 *Southern Health Board v CH* [1996] 1 IR 219 at 238.

63 *Eastern Health Board v MK* [1999] 2 I.R. 99at 114.

Barrington J also stated in that case:

I fully accept that if a child of tender years makes a complaint of sexual abuse that this matter must always be investigated by the court. *The court must always admit the child's complaint and evidence of what the child is alleged to have said. It cannot say 'We have only the word of a child who is not competent to give evidence and therefore we can do nothing'.* But while the complaint of a child of tender years may be sufficient to precipitate an inquiry into what happened it will seldom or never be sufficient to establish what happened. The admission of hearsay evidence should never be regarded as a substitute for a full rigorous inquiry into what happened. It is only after such an inquiry and after hearing the opinion of all relevant experts and the evidence of the child's parents or guardians that the court will be in a position to decide if the environment in which the child is living is unacceptable.<sup>64</sup> *[Emphasis added]*

Such a situation would also appear to conflict with the right of the child to give his or her views under Article 12 CRC.

(ii) Calling the child

In deciding whether to exclude hearsay in the interests of justice and instead call a child, the Court should it is submitted first consider Irish legislative policy. Section 23 of the Children Act 1997 allows for the admission of hearsay. Section 30 of the Child Care Act 1991 dispenses with the requirement to have the children present in court.

Second, in deciding whether or not to exclude hearsay in the interests of justice and instead call a child, the Court should consider the benefits that calling the child could bring to the case. In this regard, Baroness Hale stated in *Re W*:

The court is unlikely to be helped by generalised accusations of lying, or by a fishing expedition in which the child is taken slowly through the story yet again in the hope that something will turn up, or by a cross-examination which is designed to intimidate the child and pave the way for accusations of inconsistency in a future criminal trial. On the other hand, focussed questions which put forward a different explanation for certain events may help the court to do justice between the parties. Also relevant will be the age and maturity of the child and the length of time since the events in question, for these will have a bearing on whether an account now can be as reliable as a near-contemporaneous account, especially if given in a well-conducted ABE interview.<sup>65</sup>

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64 *ibid* at 121.

65 *Re W* [2010] (n57) para 25.



Third, as Smith LJ in *SW v Portsmouth City Council*<sup>66</sup> stated:

'It is also my experience that judges are better at assessing the credibility of adults than of children, and that judges – certainly in family proceedings – are used to the assessment of hearsay evidence.'

That being so, the risks of an injustice in the admission of hearsay are lower in family proceedings than other proceedings.

Fourth, the Court should also be cognisant of the professional judgment on the matter of those putting the case for a care order. Further, the fact of a Guardian's involvement is relevant – as an alternative to bringing the child to court.<sup>67</sup>

Fifth, due to the stress of the court environment – even by video link – and possibly the confrontation that it could bring about with the parents, the evidence of a child is likely to be less reliable than that obtained outside of court through sensitive interviewing.<sup>68</sup>

It is also submitted that in deciding whether or not to exclude hearsay in the interests of justice and instead to bring a child to court, the Court must consider the deterrent effect of bringing a child to court for cases generally.<sup>69</sup>

Section 23 of the Children Act 1997 requires that 'notice' be given of the admission of hearsay by any party. Section 23 refers to 'notice' rather than 'a notice' or 'a notice of application' and no statutory form is provided for same. The obligation is only to provide such notice as 'if any' as is 'reasonable and practicable'.

The requirement for notice reflects the law on fair procedures, as is clear from *Eastern Health Board v MK*. The law on fair procedures already requires, in effect, notice of the position of the Guardian *ad Litem* and the Child and Family Agency through the provision of a summary of evidence.<sup>70</sup> It is submitted that it is therefore both reasonable and practicable to provide notice further to Section 23 of the Children Act 1997 in the summary of evidence since it provides particulars of the interviews sought to be admitted, provided that that which it is sought to admit is readily identifiable.

However, it is generally required in the District Court in Dublin to serve a formal notice of application, although this is not generally required elsewhere in the State, or in High Court secure care proceedings.<sup>71</sup> It is not clear what advantage this has from the child's

perspective – or how it advances fair procedures for other parties if the statements are already specified in the summaries of evidence provided.

In the Dublin Metropolitan District such notices of application can be required in the context of interim care order and even emergency care order applications. This may complicate urgent action to safeguard the child and make it more difficult for the views of the child to be heard in practice.

### 9.3 CONCLUSION

Overall, the Child Care Act 1991 provides a reasonable framework consistent with Article 12 CRC to ensure that the views of the child are heard. This is particularly so now that the Act must be construed in the light of Article 42A of the Constitution. However, it could benefit from some reforms. First, the Act should be amended to ensure that a child has a Guardian *ad Litem*, unless in the specific circumstances of a case this is not necessary.<sup>72</sup> Second, it should be clarified that a child represented through a Guardian has party status. Third, the procedural requirements under Section 23 of the Children Act 1997 should be reformed to facilitate the admission of the hearsay statements of the child, particularly in the context of interim care order and emergency care order applications.

66 *SW v Portsmouth City Council* (n 56)

67 *LM v Medway Council* [2007] EWCA Civ 9 para 56.

68 *Law Reform Commission* (n 60) para 5.11.

69 *LM v Medway Council* (n 67) para 20.

70 *State (D and D) v Groarke* [1990] 1 IR 305 at 310.

71 See in this regard the reasoning in *Health Service Executive v SO and PSA* [2013] IEHC 19.

## Table of Cases

### Ireland

A Complainant v A Local Authority DEC-S2007-049  
 A v A (otherwise McC) [2009] IEHC 460  
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 B v Minister for Social Protection [2014] IEHC 186  
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 Clare v Minister for Education and Science, [2004] IEHC 350  
 Comerford v Minister for Education [1996] IEHC 48  
 CP v Chief Appeals Officer, Social Welfare Appeals Office 2013 IEHC 512  
 Crowley v Ireland [1980] IR 102  
 De Burca and Fernandez v Homelocators DEC- S2004-030/031  
 DF v the Garda Commissioner and others [2014] IEHC 213  
 DG v Eastern Health Board [1997] 3 IR 511  
 Dimbo & Ors v Minister for Justice and Law Reform [2008] IESC 36  
 Donegan v Dublin City Council [2012] IESC 18  
 Dos Santos & Ors v Minister for Justice and Equality & others [2014] IEHC 550  
 Dos Santos v Minister for Justice [2013] IEHC 237  
 Eastern Health Board v MK [1999] 2 IR 99  
 Fleming v Ireland & Ors. [2013] IESC 19  
 FN and EB v CO, HO and EK [2004] 4 IR 311  
 FN v CO [2004] IEHC 60  
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 GT v GAO [2007] IEHC 326  
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 Health Service Executive v SO and PSA [2013] IEHC 19  
 Heaney v Ireland [1996] 1 IR 580  
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 In Two Complainants v Minister for Education and Science DEC-S2006- 077  
 Jama v Department of Social Protection [2011] IEHC 379  
 JK v VW [1990] 2 IR 437  
 Jordan v Minister for Children and Youth Affairs & Ors [2013] IEHC 458

M v Minister for Justice, Equality and Law Reform [2007] IEHC 234  
 McCormack v the Minister for Social Protection [2014] IEHC 489  
 McD v PL [2010] 2 IR 199  
 McK v The Information Commissioner [2006] IESC 2  
 Minister for Justice and Equality v RPG [2013] IEHC 54  
 MKD v KWD [2012] IEHC 378  
 MN v RN [2009] 1 IR 388  
 MR v SB [2013] IEHC 647  
 MS KN v Department of Education DEC- S 2009-050  
 MX v HSE and others [2012] IEHC 491  
 Ó Domhnaill v Merrick [1984] IR 151  
 O'Carolan v Minister for Education [2005] IEHC 296  
 O'D v O'D [2008] IEHC 468  
 O'Donnell v South Dublin County Council [2007] IEHC 204  
 O'Donoghue v Minister for Health [1996] 2 IR 20  
 Olaniran v Minister for Justice, Equality and Law Reform [2010] IEHC 83  
 Omar v Governor of Cloverhill [2013] IEHC 579  
 POT v Minister for Justice, Equality and Law Reform [2008] IEHC 361  
 RC v IS [2003] 4 IR 431  
 Re Haughey [1971] IR 217  
 Re O'Laighleis [1960] IR 93  
 Re: Referendum Act & re: Jordan v Minister for Children and Youth Affairs & ors [2015] IESC 13  
 RP v SD [2012] IEHC 188  
 Shanahan v One Pico Restaurant DEC-S2003-056  
 Sinnott v Minister for Education [2001] 2 IR 545  
 SJO'D v P CO'D Abbott J, Unreported, High Court, 26th May, 2008  
 Solovastru v Minister for Social Protection [2011] IEHC 532  
 Southern Health Board v CH [1996] 1 IR 219  
 State (D and D) v Groarke [1990] 1 IR 305  
 State (M) v Attorney General [1979] IR 73  
 Stokes v Christian Brothers High School Clonmel & Anor [2015] IESC 13  
 The Minister for Education and Science v Hollingsworth, Hunt J, unreported, 10th of October 2007  
 Two complainants (Mrs A and her son M) v A Primary School, DEC-S2006-028  
 Western Health Board v KM [2002] 2 IR 493  
 XY (a minor) v Health Service Executive [2013] IEHC 490

### Northern Ireland

In the Matter of an Application for Judicial Review by ALJ and A, B and C [2013] NIQB 88

## England and Wales

Burnip v Secretary of State for Work and Pensions [2012] EWCA Civ 629  
Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112  
LM v Medway Council [2007] EWCA Civ 9  
MA v Secretary of State for Work and Pensions [2013] EWHC 2213  
Mabon v Mabon [2005] EWCA Civ 634  
R, E, J, K v Cafcass [2012] EWCA Civ 853  
Re C (Care proceedings: disclosure of a local authority's decision making process) [2002] EWHC 1379 (Fam)  
Re KP (A Child) [2014] EWCA 554  
Re L [2003] EWHC 1683  
Re N and L (Care Order: investigations by Guardian ad Litem outside Northern Ireland) [2003] NI Fam 1  
Re P S [2013] EWCA Civ 223  
Re W [2010] UKSC 12  
Re: A (Fact-Finding Hearing: Judge meeting with Child) [2012] EWCA Civ 185  
SW v Portsmouth City Council [2009] EWCA Civ 644

## European Court of Human Rights

D v Ireland App no 26499/02 (ECtHR, 27th June 2006)  
Dolhamre v Sweden Application No. 67/04 (EctHR 8 September 2010)  
Dombo Beheer BV v The Netherlands (1994) 18 EHRR 213  
EB v France Application No. 43546/02(EctHR 22 January 2008)  
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Lautsi v Italy App no 30814/06 (EctHR, 18th March 2011)  
Nielson v Denmark (1988) 11 EHRR 175  
Sahin v Germany (2003) 36 EHRR 765  
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T v UK App no 43844/98 (ECtHR, 16 December 1999)  
Tyrer v the United Kingdom (1978) 2 EHRR 1  
V v UK App no.24724/94 (EctHR, 16 December 1999)  
Vilvarajah et. al. v UK (1991) 14 EHRR  
Zaunegger v Germany Application no 22028/04 (EctHR, 3 December 2009)

## European Court of Justice

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Child Care Act, 1991  
Children Act 1908  
Children Act 2001  
Children Act, 1997  
Children and Family Relationships Act 2015  
Civil Legal Aid Act, 1995  
Criminal Evidence Act, 1992  
Criminal Justice Act 2006  
Disability Act 2005  
Education (Welfare) Act, 2000  
Education Act, 1998  
Education for Persons with Special Educational Needs Act 2004  
Employment Equality Act, 1998  
Employment Equality Acts 1998 to 2011  
Equal Status Act, 2000  
Equal Status Acts 2000 to 2012  
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European Convention on Human Rights Act 2003  
Family Law Act, 1995  
Guardianship of Infants Act, 1964  
Health Act 1953

Housing Act 1966  
Housing Miscellaneous Provisions Act 2009  
Immigration Act, 1999  
Intoxicating Liquor Act 2003  
Irish Human Rights and Equality Commission Act 2014  
Mental Health Act, 2001  
Multi-Units Development Act 2011  
Non-Fatal Offences Against the Person Act, 1997  
Ombudsman (Amendment) Act 2012  
Ombudsman for Children Act, 2002  
Refugees Act, 1996  
Social Welfare (Consolidation) Act 2005  
Social Welfare and Pensions (No. 2) Act 2013  
Status of Children Act 1987

### **England and Wales**

Borders, Immigration and Citizenship Act 2009  
Children Act 1989  
Disability Discrimination Act 2005 (UK and Northern Ireland)  
Education (Handicapped Children) Act 1970  
Equality Act 2010

### **New South Wales, Australia**

Children and Young Persons (Care and Protection) Act 1998

### **Northern Ireland**

Race Relations Order (Amendment) Regulations (Northern Ireland) 2003

### **Scotland**

Age of Legal Capacity (Scotland) Act 1991  
Children (Scotland) Act 1995

### **United States**

Education of All Handicapped Children 1975

## **Notes:**



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