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Children as citizens: the public policy challenge

Speech by Ombudsman for Children, Emily Logan at the Merriman Summer School

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Introduction

In an orphanage in Warsaw in the early part of the twentieth century a man named Janusz Korczak, a paediatric doctor, created an environment for children that recognised their dignity, their capacity and above all their ability to make a significant and constructive contribution when given the opportunity and support to do so.

The children had a role in running the orphanage. The orphanage had a court and a parliament. It even had its own newspaper. The remarkable level of input by the children who were housed in the orphanage led to it being called the "republic of children". This experiment in self-government drew the attention of many educators within Poland and indeed across Europe.

The principles of respect for children and for their capacity to contribute to decisions which affect them were even maintained when the orphanage was moved into the Warsaw Ghetto during the Nazi occupation of Poland. In spite of living in some of the most brutal and dehumanising conditions imaginable, Korczak was adamant that the children's rights – especially the right to have their voice heard – should not be diminished. Their fundamental rights were not a luxury to be indulged when circumstances allowed. His commitment to the children even led him to refuse the opportunity to leave the ghetto and when the orphans were rounded up to be sent to the extermination camp at Treblinka, he chose to go with them and share their fate.

One of the most interesting aspects of Korczak's attitude towards children was that he did not glorify them. He lived among children that were used to living on the streets, with all that entailed. Korczak was well aware of the impact that deprivation has on children and of the problems to which it can give rise. However, to him this was a compelling reason to persevere in respecting children, no matter how challenging their behaviour or how difficult it was to care for them. His conviction was that there was a moral spark of enormous value in every child that had to be nurtured. Indeed, he once wrote that "it is fortunate for mankind that we are unable to force children to yield to assaults upon their common sense and humanity."

The contrast with what was happening at the same time to children in Irish institutions ostensibly set up to care for them was stark. The degradation of children chronicled in the Ryan Report was total. Even more than the appalling material conditions, this was accomplished by the assault on the self-worth of the children. They were very deliberately made to feel worthless. Whatever meagre comforts or maimed charity they received were to be regarded as gifts. For many of them, this was compounded by systematic physical, emotional and sexual abuse which represented the final erosion of dignity and annihilation of their most basic human rights.

It was no coincidence that the vast majority of children who suffered in this way came from marginalised backgrounds. It is self evident that it is easier to violate the human rights of people who are not socially powerful, those that are either unaware of what they are entitled to or have simply internalised low expectations of what their lot in life should be. Indeed, one of the core characteristics of human rights is that they act as a defensive wall against the arbitrary exercise of power by those who have it over those who don't. A society that is fully committed to promoting and protecting human rights is one which establishes systems of accountability and redress which prevent anyone from exercising power in this way.

Institutional Ireland is a very different place today from the one described in the pages of the Ryan Report. That is not to say, however, that the Report is only concerned with understanding and coming to terms with the past. It has direct contemporary relevance today. The bulk of the Commission's recommendations relate to how our current child protection and care structures can and should be improved. The Ryan Report did not therefore close the chapter on the State's failings in caring for vulnerable children – it explained where we have come from and how the legacy of those institutions has yet to be fully addressed. We can never protect every child from harm, nor can we guarantee that their rights will always be respected. It is our duty; however, to make sure that the systems we put in place to protect children are as strong as they can be.

This cannot be achieved without moving to an understanding that public policy and service provision in this area must be underpinned by a respect for children's rights, most particularly respect for the voice of the child. It is a fallacy to argue that a child's welfare can be guaranteed in the absence of such an understanding. It is too easy for the gap between the intention to secure the welfare of children and the reality of children's experience to widen.

The greatest challenge for public policy in Ireland of 2009 – and indeed for our society more generally – in relation to children is facing the fact that we are still more comfortable with the idea of guaranteeing children's welfare than with the idea of vindicating children's rights. We all seek to protect children from harm, to allow them to develop and realise their potential and to ensure the best possible outcomes for them. This one dimensional view of children ignores all that is wonderful about childhood. It ignores all the innate energy, creativity and optimism and fun that children and young people offer. It denies them the opportunity to be active citizens and it denies us, wider society, of the valuable contribution that they can make.

Focusing exclusively on the welfare of children rather than their rights means that one runs the risk of thinking of children merely as the passive recipients

of adult decision making or assistance or charity. On this view, children's immaturity demands an approach which effectively robs them of any agency and which is characterised by the "adults know best" school of thought. At its most innocuous, this is patronising. At its worst, this view can allow our thinking to become increasingly indifferent to the voices and experiences of children. This is especially true of children from marginalised backgrounds who do not have anyone to advocate on their behalf or whose advocates are themselves in some way disempowered. While this approach can create a space for wilful neglect, it can more seriously inculcate a culture of general indifference or carelessness. As was so starkly illustrated by the Ryan Report, ignorance and negligence of this kind can prepare the way for malice and abuse. Tragically, the report also records the very brave attempts made by some children to tell others about what was happening and the crushing response or deafening silence from those who should have done something to help them. Indeed, complete indifference to the voice of the child was one of the hallmarks of the exploitative, abusive and toxic environment which characterised the institutions examined by the Ryan Report. Public policy could not or would not consider listening and more importantly hearing what children had to say. We are still living with the consequences of this today.

Considering children as citizens and rights holders means that they are not passive and dependent on the generosity of adults - they are the active subject of rights and entitled to the best our society has to offer. Children should when ever appropriate be given the opportunity to participate in the decisions that affect them. When appropriate they should be asked what their views are and should feel that their opinions are respected. Obstacles to the free expression of those views should be removed and young people should never feel that the simple exercise of this right will have negative repercussions for them.

However this should not be interpreted as mandating a form of radical self-determination for children. Their evolving capacities and maturity do temper their autonomy and distinguish them from adults. They still need guidance, support, encouragement and in certain circumstances special assistance and

protection. This does not mean, however, that they are any less deserving of respect than adults. To be ignored, to have decisions made about you without any consideration for your views, to be told that others are in a better position to assess what you need and when you need it – these things bother children for exactly the same reasons they would bother an adult.

The challenge for public policy is to grow accustomed to a more balanced concept of childhood, one that takes account of children's particular needs and vulnerabilities and their differences from adults. However, it is also sensitive to the fact children are individuals in their own right and that a consideration of their views and interests must be integral to any decision made about them.

Children in residential care

Children without parental care are particularly reliant on the State and indeed on public policy to support them realising their rights. By now we are all aware of the vulnerability of children in the care of the State. While the care system in place today is radically different from that described in the pages of the Ryan Report, there is still a continuity between the two.

One area where this continuity is evident and where public policy failings arise due to a lack of sensitivity to the evolving capacities of young people is the provision of aftercare services – by aftercare I mean support for young people leaving state care. At present, there is no obligation on the state to provide aftercare services to young people once they reach their 18th birthday. This means that children who may have been in the care of the State for years are quite abruptly deprived of a right to essential support. While some children in this situation may receive support beyond their 18th birthday this practice is not consistent and it is not a statutory entitlement.

The difficulties with such a system are plain. Young people who may have experienced serious disruption during the course of their lives and have faced

challenges that most people don't have to overcome in a lifetime can find themselves adrift. Contrast this with the situation of children who have had the benefit of a stable, supportive family environment throughout their childhood and adolescence. Would it seem reasonable for parents in this instance to suggest that their obligations towards the children end at their 18th birthday? Would it be acceptable to say that although they may receive some help beyond that time, it could not be guaranteed?

The law may state that you cease to be a child at the age of 18 but we need to reflect on what the law is trying to achieve and how age thresholds like this operate. Providing age thresholds in law can be necessary to establish clarity about the roles and responsibilities of the State, of parents and of young people themselves. These thresholds vary, depending on the issue to which they apply, be it the age of consent to medical treatment or the age at which people are allowed to vote. However, we must never forget that such thresholds are always approximations and blunt instruments. There will always be some young people whose capacity exceeds that of their peers. There will always be some young people who are not as mature and capable as their peers. The question is whether in establishing an age threshold there is sufficient flexibility to account for this evolving capacity and whether enough people fall on the correct side of that threshold for it to be a valid approximation. Our law and policy relating to aftercare satisfy neither of these conditions. It cannot be argued that a majority of young people who have been in care do not need support and assistance over the age of 18. Yet this is what the current system implies.

Youth Justice

Another striking example of the lack of subtlety in our society's concept of childhood can be found in the area of youth justice. Although our society has difficulties at times accepting the evolving capacity of children in general, it is swift to attribute significant capacity and responsibility to children when they do something wrong, especially when they are in conflict with the law. Before the Children Act 2001 – was amended by the Criminal Justice Act 2006, the age of criminal responsibility in Ireland was 7. Although there is no

international consensus on what the age of criminal responsibility should be, countries with thresholds below the age of 12 are routinely criticised by the UN Committee on the Rights of the Child. Indeed, this was one of the principal criticisms of the UN Committee when it examined Ireland's first periodic report under the UN Convention on the Rights of the Child in 1998.

The Criminal Justice Act, 2006, places the age of criminal responsibility at 12. Instead of stating that children under the age of 12 did not have the *capacity* to commit a criminal offence, it provided that children under the age of 12 would not be *prosecuted*. However, an exception was made for a number of serious crimes for which children aged 10 and over could be prosecuted – in fact the more serious crimes of rape, aggravated sexual assault and murder. It is extraordinary to think that the more serious and complex the crime, it appears, the more you are considered to have the capacity to cognitively comprehend your actions.

This was a retrograde step and one which prompted yet another negative assessment of Ireland's laws relating to youth justice by the UN Committee on the Rights of the Child. Stating that young children do not have the capacity to commit a criminal offence is not that same as saying that they have no responsibility for their actions or that a significant intervention may not be required. It suggests that their situation differs from that of adults. The danger with moving too far in equating the actions of children with those of adults is that we can lose sight of the care needs of those children.

An area where this problem is thrown into sharp relief is where a young person has been identified by the HSE as needing special care but has also been charged with a criminal offence.

The Child Care Act 1991 provides for a statutory special care scheme where a court can make a special care order if it is satisfied that the behaviour of the child is such that it poses a real and substantial risk to his or her health, safety, development or welfare, and the child requires special care or

protection which he or she is unlikely to receive unless the court makes such an order.

In these situations, the Courts have determined that dealing with the criminal charges takes precedence over considering the relevant welfare issues and care order. Effectively, the young person – who remains innocent until proven guilty – can be denied access to the high level of support which he or she requires because dealing with the alleged criminal activity is regarded as the priority. This is an extraordinary and deeply worrying situation. The urgent need which could prompt the HSE to seek a special care order does not disappear in the period between this need coming to its attention and settling the question of the criminal charges. Indeed, the children in respect of whom such special care orders are sought are by definition among those in greatest need assistance.

In terms of the articulation of children's rights the two most significant documents are the Constitution and the United Nations Convention on the Rights of the Child.

International human rights framework

The United Nations Convention on the Rights of the Child (UNCRC) is the main international benchmark against which progress in advancing children's rights is measured. It was the product of over 10 years of negotiation and remains the most comprehensive single treaty in the human rights field in terms of the range of issues it covers. All but two countries in the world have ratified the Convention, also making it the most widely accepted of all the UN human rights treaties. Ireland ratified the Convention in 1992.The significance of its nearly universal ratification is that it indicates the depth of the consensus among States on the normative framework which should govern law, policy and practice relating to children. It goes without saying that the gap between the promise of the Convention and its implementation by the States remains large. However, the fact that agreement was reached in principle on the fundamental parameters of a State's obligations towards all the children in its

jurisdiction was in itself a significant achievement. Moreover, the act of ratifying the Convention specifically means that States do not regard its provisions as merely aspirational – they have voluntarily placed a legal obligation on themselves to promote and protect the rights set out in the Convention.

In commenting on Ireland's most recent report in September 2006, the UN Committee on the Rights of the Child expressed its concern that insufficient steps had been taken to recognise the status of children as individual rights holders and to adopt a child rights-based approach in the State's policies and practices. Although the criticism made by the Committee touched on many areas, I would like to draw attention to the Committee's comments with respect to the cluster of rights known as the general principles of the UNCRC as these are the most relevant to the general consideration of children as individual rights holders.

The general principles of the UN Convention are provisions that have an elevated status because of their cross-cutting nature. Their centrality stems from the fact that no matter what area of law or policy one chooses to examine – be it education, health or youth justice – they are core considerations. The general principles about which the UN Committee raised concerns with Ireland in 2006 were: children's right not to suffer discrimination; the right to have their best interests regarded as a paramount consideration in all matters affecting them; and the right to have their voices heard. The UN Committee felt that there was insufficient protection for these rights at a general level and suggested a number of ways in which Ireland could give greater effect to them, including through integrating them fully into relevant legislation and enshrining them in the Constitution.

I support this recommendation fully and have recommended on a number of occasions to the Houses of the Oireachtas that the general principles of the UNCRC be incorporated into the Constitution.

The Constitution

In February 2007, the Government published the wording of the proposed constitutional amendment on children's rights. The then Taoiseach stated, and I quote:

"It appears increasingly clear that the inadequate recognition in our constitutional law of the rights of children as individuals has to be addressed. That is an essential first step in creating a new culture of respect for the rights of the child."

It is interesting that the Taoiseach referred to amending the Constitution as a first step. I concur with this assessment. While providing express protection for children's rights in our Constitution and legislation is extremely important, it is not in and of itself sufficient to bring about the change of culture to which the Taoiseach also alluded. That takes time and effort. It is not only about changing the framework in which laws affecting children are drafted or children's services are delivered – it is about changing mental habits. While constitutional change cannot achieve that goal, it can certainly alter the legal and policy landscape such that the cultural change we need can take place.

It is important that we get the message right in the primary legal document in the State. Unlike in other countries where a written Constitution can be an abstract document, our Constitution has a real impact on every day decision-making in the State. It reflects who we are as a society, what we value and how we operate. The rules and principles it contains define our cultural values about children, our legal framework and they provide direction to decision makers in public life.

In the experience of my Office, the absence of clearer protection for children's rights in the Constitution has had an adverse effect on children across a wide range of areas. While it might be argued that discrete legal lacunae can be dealt with by means other than a Constitutional Amendment, the breadth of instances in which the same problems recur demands a greater response which in my view only a Constitutional Amendment can provide. Enshrining principles based on the UN Convention on the Rights of the Child in the

Constitution would give guidance to the Oireachtas, the Courts and those who provide services to children, encouraging a consistency of approach that is often lacking.

In addition to my Office's own experience, a piece of baseline research commissioned by my Office on the obstacles to the realisation of children's rights in Ireland identified the lack of a child-focused, rights-based platform on which policy, practice and decision-making can be based, as a major barrier to guaranteeing that children's rights are respected . The report pointed out that certain vulnerable groups – including children in the care system, the criminal justice system, Traveller children, homeless children, immigrant and asylum seeking children, children in poverty, and children at risk of abuse or neglect – face multiple barriers to the realisation of their rights, cutting across areas such as family, health, education and material deprivation. I believe that, when faced with such multiple barriers, we should be able to rely on the basic principles animating our legal system to address them. This requires a strong articulation of children's rights at a Constitutional level.

The Oireachtas Joint Committee on the Constitutional Amendment on Children was established in November 2007 to examine the wording proposed by the Government and is expected to complete its deliberations this autumn. I prepared a submission for the Committee's consideration which set out the principles I recommended for inclusion in the amendment on children's rights, based on the UNCRC. They included:

- the right to participate in matters affecting the child;
- the right to freedom from discrimination; and
- the right to have the child's best interests regarded as a primary consideration in matters affecting them.

My Office's experience of working directly with children and young people has made us aware of the value which children attach to being afforded opportunities to voice their concerns and wishes. Our experience suggests

that, for children and young people, being heard is in part about being included in processes that are important to them, about being afforded the opportunity to contribute their perspectives in the context of decision-making processes whose outcomes have or will have the potential to affect their lives profoundly.

For example, I have been contacted by a number of children who felt excluded from decisions taken concerning them in the context of family separation through the course of the complaints and investigations work of my Office. The children expressed a desire to participate in some way - some wanted to have their voice heard in court, others wanted a chance to express their views in other settings. Not one of them has suggested that they be involved in any decision about custody or access as such. All of them simply wanted to be recognised as significant participants in the process and to have their voice heard.

I consider that the lack of provision in the Constitution for the child's right to participate in relevant areas of decision-making affecting him/her is preventing the development of a culture and official practice which respects the child's right to be heard and recognises this right as a potential contributor in determining children's best interests. Hearing a child's perspective and wishes can deepen our understanding and so improve decision-making.

It is my firm belief that we also need a strong anti-discrimination statement at the heart of our Constitution. We do have robust equality legislation in the State but in some instances which have come to our attention, these protections have proved insufficient. One example is the differential treatment of children of marital and non-marital families in the area of adoption. Where a child is in long term foster care and in the opinion of the Adoption Board it is in the interests of the child to be adopted by his or her foster parents, the Board can make an adoption order if the child's birth parents are not married. If the child's parents are married, however, it becomes virtually impossible for him or her to be adopted by the foster parents, regardless of how much the child

may wish to be adopted in that way. This situation is clearly one where children are treated differently and needs to be addressed.

I also recommended the inclusion in the Constitution of a provision stating that, in all actions concerning children, the best interests of the child shall be a primary consideration. This is a recommendation to incorporate the essence of Article 3 of the UN Convention on the Rights of the Child. The best interests rule is a procedural rule; it governs how we go about decision-making with regard to children. The rule does not state that children's interests always come first. The aim of the rule is not to encroach on the rights of others, but to facilitate an examination of the interests of a vulnerable group.

It should be noted in this regard that in all of the complaints received by my Office since its establishment, not once has a conflict between the best interests of the child and the rights of parents been the subject of the complaint. When we consider the nature of parents' rights, this is hardly surprising. The rights that parents are vested with are all to do with assisting children in the exercise of their rights and protecting the rights of children. Parents and children are therefore natural allies in efforts to ensure that the rights of children are guaranteed.

The best interests principle is often misunderstood as a possible way for children to dictate the outcome of decision making. This is not the case. With the exception of child protection cases where the principle is more robust, the principle requires that the best interest of the child be a primary consideration. That is, it is not the only consideration. What the principle requires is that, during decision-making, the best interests of the child be put into the frame, together with all the other considerations at play.

The absence of express protection for this right means that there are times when the question of a child's best interests is not put into the frame. In my five years experience as Ombudsman for Children we are still not asking the right questions, still not putting the interests of children first.

I believe that for Public Policy to truly recognise the whole child – his or her capacity and strength as well as his or her vulnerability and immaturity - a process of education or re-education of us adults is required. I do not think this will necessarily be easy and I do not think it will happen overnight. But if we truly believe what we say about wanting the very best for all of our children, and if we want our children to be considered full citizens then we must commit to developing a new culture. This culture is not only about creating better policies only for children in extraordinary circumstances, it is about a future where children are more generally respected and no matter what their circumstance, we can say that we have done our best to find that balance of protection and nurturing. I believe that the first step of this challenge must be an Amendment to our Constitution.

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