

**Emily Logan, Ombudsman for Children**

Check Against Delivery

1. It is a great pleasure for me to attend this Academic Day dedicated to the subject of children and I would like to thank Dr Mary Davin-Power for the kind invitation to address you this morning.
2. It is a great privilege to be Ireland's first Ombudsman for Children. By way of background the Office, a national human rights institution, was established in 2004 with a mandate to promote and monitor children's rights in Ireland. I was appointed by President Mc Aleese and my independence, in the form of direct accountability to the Oireachtas, has been a critical feature in the development of a credible institution.
3. The function of independent complaints handling is well understood, dating back to 1984 in Ireland, but the role of Ombudsman for Children has other unique functions; the promotion of the rights of children, including the principles of the UN Convention on the Rights of the Child and the provision of advice to Ministers on any matter relating to the rights and welfare of children including the probable effect on children of the implementation of any proposals for legislation.
4. The legislation places a positive duty on me to consult with children, to highlight issues of concern to them and an express obligation to act in their best interests. As Ombudsman for Children, the promotion, protection and vindication of the rights of all children are central principles of our work at the OCO. The organs of the State with which my Office deals most regularly are the Oireachtas, Government departments (health, education, justice,) civil and public administration, local authorities, the Health Services Executive and schools.
5. In discussion with Austin Currie, the first Minister of State with responsibility for Children I learned that there were two key reasons

behind the establishment of the Ombudsman for Children's Office in Ireland; the first was the fall of the Labour/Fianna Fáil government in 1994 following the mishandling of the extradition of Fr. Brendan Smith and subsequent political pressure to introduce mandatory reporting of child abuse. The second was that the Irish Government was on its way to the UN in Geneva to attend a first hearing on its compliance with the UN Convention on the Rights of the Child in Ireland, ratified five years earlier.

6. This week the government announced its intention to submit its third progress report to the UN in Geneva. While many significant reports including the Ryan and Murphy reports have chronicled our historic and appalling treatment of children, this morning I would like to focus on contemporary issues for children, key human rights standards and share briefly with you some of our experience in handling complaints.

### **UNCRC**

7. Hearing children's views (Article 12) and the formulation of a child's best interests (Article 3) are two of the general principles of the UNCRC.
8. The genesis of the UN Convention on the Rights of the Child dates back to the work of Janusz Korczak, a paediatric doctor and a pioneer in the area of children's rights. He spoke of the need to afford more respect for the interests of children, not out of goodness or charity but as a right.
9. The UN Convention on the Rights of the Child was the product of over 10 years of negotiation, It is the most widely and rapidly ratified human rights treaty in history. Every delegation in the negotiations leading to the adoption of a human rights treaty brings its own legal, philosophical and religious traditions to the table. The drafting process represents an attempt to find consensus on key questions, to find the

common ground between States with very different opinions. Such negotiations are of course subject to the vagaries of international politics and lead to what are necessarily compromise texts, ones which might perhaps have been stronger, the UNCRC is no exception.

10. The UN Convention monitoring mechanism – a five year cycle in the form of a hearing in front of the UN Committee on the Rights of the Child, a group of 18 international experts, helped embed the idea that states can be held accountable for the extent to which they fulfil children's rights obligations. This international monitoring mechanism has played no small part in advancing children's rights in Ireland.
11. At its first hearing in 1998 the Committee described Ireland's approach to the rights of the child as 'fragmented', At that time we did not have a national children's strategy. The Committee recommended among other things the establishment of an inspectorate for residential institutions. In addition they recommended the development of an independent mechanism of redress such as an Ombudsman for Children, which would allow not only parents but children themselves to make complaints.
12. Ireland's most recent experience of review of its compliance with the CRC came in 2006. The general principles about which the UN Committee raised most concerns with Ireland at that time were: **discrimination; the best interests; and the right hear their views.**
13. One of the criticisms made by the UN Committee on the Rights of the Child in 2006 was that these general principles have been integrated imperfectly into Irish law. In particular, the UN Committee expressed concern that the best interests principle was not fully integrated into all legislation relevant to children and that insufficient provision was made for children to be heard in judicial or administrative proceedings affecting them. Although these principles are clearly not absent from

the Irish statute book, implementation of these principles will need to be improved if Ireland is to comply in full with its international obligations.

### **Best interests**

14. The principle of best interests is not new. The Declaration of the Rights of the Child had already evoked the principle as far back as 1959. What is relatively new is that the UNCRC extends the scope of the principle to cover *all* decisions affecting children.

15. Many a practitioner in health, private and public law situations have grappled with the concept of the best interests of the child and how or who is best placed to make such a determination.

The right to have one's best interests considered does not mean a child's rights are more important than others. It simply means they have a right to have their interests considered. Children need this provision because, with no vote, no money, no power, no ability to instruct a lawyer etc. decision makers need to be reminded that they should consider the interests of a child.

16. The best interests principle encourages us to move to a culture where instead of seeing children as passive recipients of adult decision making we actively move to respecting their inherent value as human beings and instead, treat them as active participants.

17. Needless to say challenges arise in this approach but this may in part be mitigated through the use of an inclusive approach that allows children – in line with their maturity and capacity – an opportunity to express their views in decisions concerning their health. The centrality of family to children's well being is well established in Paediatric Medicine, where the model of Family-Centred care first emerged. It was through their experience that they realised the importance of the

family in aiding in a child's recovery or in coming to terms with their diagnosis.

18. In relation to the work of my Office it is important to stress that in all of the complaints received, 6000 to date, never has a conflict between the best interests of the child and the rights of parents been the subject of a complaint. We have consistently found that parents are the principal advocates for their children.

### ***Right to express views***

19. UK studies by Alderson and more recently by Kilkelly in Ireland indicate that children who because of an illness or disability have had long term exposure to the healthcare system, have a very high degree of maturity and quite a profound understanding of the issues involved in making choices about their health. In health as with private and public law children's levels of understanding are not uniformly linked to chronological age.

20. The studies by Alderson and Kilkelly also found, and this resonates with my own experience, that there is a distinction between the experiences of children treated in a specialist children's hospital than those treated in general hospitals, with children in specialist hospitals reporting a much higher degree of participation.

21. Yet again these studies indicate that children do not want to be the "main decider". However in Alderson's study children aged between 8 and 15 reported that they associated the provision of information with a feeling of respect.

In understanding what participation means I need to make the distinction between participation in decision-making and autonomous decision-

making. Participation in decision making is a much more flexible concept that allows for a range of meanings, from listening to children up to sharing power for decision making.

I wish to be clear that when I speak about participation and hearing children's views, I am not promoting autonomous decision making. What I am saying is that when making a decision that one cannot begin with the assumption that a child is incapable of expressing a view.

22. Children vary so greatly in their capacity there is a real danger of excluding many children if we simply use chronological age as a determinant of their capacity to engage. It is our experience that children often express a desire to have their views heard. Not surprisingly there will always be children who have no desire to participate and this too must be respected.

23. Ultimately the participating child's view may be overturned on the basis of best interests. However, if participation as a right is to be respected in any meaningful way, it must change the nature of the best interests test. The possibility that the child's views may not be able to be taken into account in some cases whether it be private and public law or health practice should by no means negate the process whereby they are permitted to have their views heard in the first place. In my view, it is the process that is the key.

24. As the Committee on the rights of the Child explains 'there can be no correct application of article 3 if components of article 12 are not respected.' This requires that, having taken account of the views of the child as part of the best interests assessment, if the views of the child are to be overridden, then you should explain why.

25. The reality is that children vary in their capacity to be a part of the decision-making process and our experience very much supports that.

While one child may be equipped to engage in their own complex healthcare needs, others may not. Much of my previous career was spent working with children with chronic illness. They often defied any preconceived ideas around capacity and chronological age. Their age often belies their experience and ability to engage in difficult decisions. I worked with children as young as six who were able to carry out their own dialysis. My own experience has led to my wish to encourage people not to use chronological age as a determinant of capacity, not only in healthcare but in any situation. The point is that we should hear the views of children first before making any determination on their capacity to engage.

26. Our youngest complainant thus far was a 4 year old girl with a physical disability who was refused a piece of medical equipment. The dispute centred on the age at which a child could safely use this piece of equipment. The public body held the view that the age of reason is 7 and that they would not be consider this child suitable for its use. At our request they met with the child, realised that the child had capacity beyond her years and agreed to provide the use of the new piece of equipment.

27. Oftentimes, children's perceived 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 themselves. This is not to say that we should place any pressure on children to feel any responsibility for important decisions that are to be made. It is important to make them feel part of the process without making them feel the weight of the outcome of any decision.

28. The right to participate is not a right to self-determination or emancipation from adults, it is a right to involvement in decision

making. It is about respect and dignity for children, in the same way that we talk about affording dignity and respect to adults.

29. Certainly, there are tensions between parents and professionals in legal and healthcare environments about communicating with children. Some parents do not like the idea of professionals directly communicating with their children or indeed in giving their children all the facts in relation to a diagnosis. While it is undoubtedly the case that parents have an in depth understanding and knowledge of their child that cannot be matched by health care professionals, we will hear later that children do better the more information they have.

30. The input and attitude of parents raises one of the very real barriers faced by health professionals in involving children in decision making. In the Kilkelly study in Ireland health care professionals spoke about the significance of the attitude of parents. There are a number of ways this presents:

- Parents who themselves were nervous transmitted their fears to children
- Reluctance on the part of some parents to inform their children of their illness, in particular in cases of serious illness

31. There can be no doubting the complexity of the issue and the difficulties that health professionals face daily in considering the views and capacity of the child, as well as those of the parents.

### **OCO audit**

32. Last year my Office published an audit of investigations through which we highlighted the lack of awareness of the impact of public



administrative decision-making on the lives of children and their families. Decision-making that affected children directly and sometimes indirectly was not informed by its impact on the children concerned; nor was it informed by children's rights principles. In particular, the parameters of the child's best interests and the child's right to be heard were not used to guide administrative decision making to any great extent, if at all.

33. In many cases, in particular in education stands out, there are examples of an excessively bureaucratic approach. There are instances where health professionals had indicated in writing a child's need for therapy or equipment but this was stymied in an administrative process that was not about the interests of the child. The absence from the decision-making process of an awareness of how quickly harm can be done to children is very stark, by depriving children of education, separating them from parents, lack of access to siblings.

34. This finding resonates with the work undertaken by my Office in advising Government and the Oireachtas on legislation affecting children. Over the past seven years, I have observed that at times the Oireachtas does not have the opportunity to consider broader issues that have direct bearing on the children which are related to the substance of a Bill but not explicitly addressed in it. In addition, it continues to be the case that legislation affecting children can be framed in a way that clearly does not operate in their best interests. An example of this in 2010 was the Civil Partnership Bill. Many provisions of the Bill were derived from other areas of family law where there is an obligation on the courts to consider the needs of dependent children of the family. However, in the equivalent sections of the Civil Partnership Bill, references to the need to provide for any dependent children of the family were deliberately removed. It is concerning that such an approach could underpin our lawmaking process, given that it is so out of step with our international obligations.

35. Perhaps more worrying were the cases highlighted where there was a failure to ensure the implementation of law and policy. The failure to rigorously apply the best interests principle and to ensure children's voices are heard as the Child Care Act 1991 requires is of serious concern. One thing that is abundantly clear however is that the principle of participation by young people in decisions which affect them is at worst ignored and at best inconsistently applied.
36. Our attitude to, and behaviour toward children and young people are much removed from those described in the pages of the Ryan Report. However, some Departments I deal with really cannot understand why they should have to consider children's interests or hear children's views. Others think I am a little naïve to believe reports from certain groups of children – in particular children going through the asylum determination process and children detained in St. Patrick's prison. Apparently if you have been in conflict with the law or trafficked into Ireland you lose your capacity to tell the truth. So when I said that the 16/17 year olds in St. Patrick's say their complaints are ignored or they feel physically threatened, the response is that they are no angels.
37. And so the Ryan report does have contemporary relevance. It explained where we have come from and how the legacy of those institutions has yet to be addressed. It is our duty to ensure that the systems which we put in place to protect children are as strong as they can be. Public policy and service provision must therefore be underpinned by a respect for children's rights, in particular respect for hearing children's experience and ensuring that children's best interests are placed at the heart of government and of all decision-making which impacts on children.
38. Throughout my term of office I have tried to ensure that children's rights are kept on an increasingly crowded agenda – particularly in these difficult fiscal times. The themes that I have discussed today and

indeed many of the complaints we receive are often not an issue of resource but rather process, practice and procedure. All of which require an attitudinal and cultural shift on behalf of those who work with or indeed make decisions that can have a profound impact children.

39. Much remains to be achieved in order to ensure that all children have access to the best possible services as is their right under the Convention on the Rights of the Child. As we move towards this end, we must not lose our focus on the need for cultural change in Ireland to a society where children's voices are truly respected and where they participate fully in all matters which affect them.

I thank you for your attention,