

Children’s Rights in Ireland – A Human Rights Imperative

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It is a great pleasure for me to attend this conference and I would like to thank Dr Power and Professor Cannon for the kind invitation to address you here today.

I have the honour of being Ireland’s first Ombudsman for Children and I am also charged with a statutory mandate to promote the rights and welfare of children.

An Ombudsman with a human rights brief is a relatively new concept in Ireland as is the area of children’s rights in Ireland generally. When considering how best to develop a culture of respect for children’s rights, there is no better example than that given by a man called Janusz Korczak. In an orphanage in Warsaw in the early part of the twentieth century, Korczak – who was 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 significant 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 or idealise 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."

Janusz Korczak's approach was therefore one that was not only concerned with protecting children; it was about respecting them, their capacity, their potential and the inherent value of giving children a space to have a meaningful input into the decisions affecting them.

Unfortunately Ireland's history of rights violations against children was all too starkly chronicled in the Ryan Report. As a society we should not simply be concerned with protecting children, laudable as this is. We should also foster an attitude whereby children, their capacity, their potential and allowing them to have a meaningful input into decisions affecting them are respected. In short we should not only focus on their welfare but also see them as individual rights holders.

This distinction is crucial because as Korczak demonstrated, the greatest challenge to developing a culture of respect for children's rights is the failure to move beyond simply being concerned about children's welfare. When you focus exclusively on the welfare of children rather than their rights it means that you run the risk of thinking of children as the passive recipients of adult decision-making, assistance or charity.

Based on this, 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 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. It is self-evident that it is easier to violate the human rights of people who are not socially powerful. Human rights in and of themselves act as a guard against the wilful exercise of power by those who have it over those who don't. For a society to be wholly committed to protecting and promoting human rights then systems of accountability need to be established in order to prevent anyone from exercising power in this way.

Our attitude to, and behaviour toward children and young people are much removed from those described in the pages of the Ryan Report. That does not mean however that it does not have contemporary relevance. It simply 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 we put in place to protect children are as strong as they can be. Unfortunately we can never protect all children from harm but we need to place as much emphasis on vindicating children's rights as we do on guaranteeing their welfare.

Public policy and service provision must therefore be underpinned by a respect for children's rights, in particular respect for the voice of the child and ensuring that children's interests are placed at the heart of government and of all decision-making which impacts on children.

Respect for the voice of the child and the formulation of a child's best interests are two of the general principles of the UNCRC. In 1989 the UN adopted the Convention on the Rights of the Child (CRC) – a unique document in terms of international consensus on how children should be treated and respected. This was ratified by Ireland in 1992. My Office is statutorily obliged to promote

and highlight the CRC and Ireland's implementation of it. The UN Convention on the Rights of the Child 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. 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.

Unfortunately the gap between the promise of the Convention and its implementation by States remains large. However, 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.

As with many other international human rights standards, the UN Convention created a monitoring mechanism which helped embed the idea that states can be held accountable for the extent to which they fulfil their children's rights obligations. Ireland's most recent experience of review of its compliance with the CRC came in 2006 when 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.

The general principles of the UN Convention - two of which I previously mentioned - 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.

It is of paramount importance that we get the message right in the primary legal document in the State. I have consistently called for the general principles (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) to be incorporated into the Constitution and thus support the recommendations of the UN Committee fully. Our Constitution 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 crucially 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. Enshrining principles based on the UN Convention on the Rights of the Child in the Constitution would give guidance to those working in the health sector, encouraging a consistency of approach.

I have been contacted by a number of children who felt excluded from decisions taken concerning them 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. All of them simply wanted to be recognised and to have their voice heard.

The majority of children who contact my Office directly are children in the care of the State. One of the issues most frequently raised by this group of young people is not being heard in the care planning process and in relation to other decisions which affect them. These difficulties can be magnified when young people in care do not have an allocated social worker or someone to advocate on their behalf. As with the situation of children in the context of family law

proceedings, these young people do not feel that their views should be absolutely decisive – they do, however, feel that they should be heard.

There are many other examples I could cite. In short, the failure to adequately take account of children's right to have their voices heard manifests itself in a wide variety of situations. In some situations, the remedy required is legislative, in others it could be a question of practice guidance. 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.

Providing for the child's right to participate in relevant areas of decision-making affecting him/her would facilitate 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. As public bodies become more familiar with applying this principle, it should become second nature to them. We should ultimately reach a point where involving young people in this way and seeking their views is no longer something unusual or novel or something for which they should feel grateful. It should become so self-evidently necessary as to be unremarkable.

In the context of healthcare the reality is that children vary in their capacity to be a part of the decision-making process. While one child may be equipped to engage in their own complex healthcare needs, others may not. I have spent the past thirty years working for children. Much of my previous career was spent working with children who had a chronic illness. They often surprised me and 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. Age limits are a convenience; 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 reality is that there is a continuum of development, particularly in relation

to capacity, and we should hear the views of children first before making any determination on their capacity to engage.

This is not to say that we should place undue 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.

As I've already mentioned, 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.

In my seven years as Ombudsman for Children I continue to see administrative authorities underestimate decisions they make and how those decisions can have a lasting effect on children. Whilst considering the view of the child, those involved in decision-making must also assess the best interest of the child. I have also recommended this inclusion in the Constitution. The best interests rule, Article 3 of the CRC is a procedural rule; it governs how we go about decision making with regard to children. It does not mean that their interests always come first, its aim is not to interfere with the rights of others but it does facilitate the acknowledgement of the interests of a vulnerable group. In relation to the work of my Office it is important to stress that in all of the complaints received, over 5000 at this stage, never has a conflict between the best interests of the child and the rights of parents been the subject of a complaint. We have found that parents are generally the main advocates for children.

The best interests principle is sometimes 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.

It is my belief that we also need a definite anti-discrimination statement at the heart of our Constitution. While we have robust equality legislation in Ireland this is not always sufficient eg we can see it in the different treatment of children of marital and non-marital families in the area of adoption.

I am convinced that as long as these principles are not incorporated into our Constitution children will not enjoy the full benefits of the Convention on the Rights of the Child. Similarly I would suggest that as long as *Vision for Change* is not fully implemented then children will not benefit from its sound basing. A lack of investment in mental health services even during the boom years has led to the continuation of gaps in support that have been raised time and time again by several agencies over the years.

In my Submission to the Oireachtas Committee on Health and Children in 2008 on primary medical care in the community I noted that many young people also experience difficulty in accessing services due to the negative attitudes which still surround mental health in Ireland. Innovative approaches to making information and support as accessible as possible should be supported and children and young people themselves should be at the heart of the design of such strategies. Mental health issues are often raised with my Office directly by children and young people and they have consistently conveyed the message that they want to have access to information and assistance locally, and that in times of crisis they would like to have a place to go to that is welcoming and non-threatening. Access to early support for young people is essential, as was pointed out in *A Vision for Change*. I note that steps are being taken to improve the involvement of children and young people in the care planning process and would encourage the replication of this practice.

My Office has received complaints regarding the availability of assessments, long waiting lists and delays caused by a lack of clarity about which service

providers should assess young people in situations where they may have multiple needs. In one particular case a child required a psychological assessment; the parent was advised that the waiting time would be two years due to staffing shortages. It appears from cases received by my Office that there can be significant regional variations in service provision. Through further investigation it appears that in some instances difficulties have arisen filling vacant posts due to budgetary constraints. This has resulted in a significant impact in services available in some areas. The complaints received by my Office have underlined the impact this can have on young people requiring these services.

However, in our experience while parents remain in the majority as most frequent advocates for children, professionals such as social workers, medical staff, teachers and school principals increasingly contact the Office. In the main, they are either supporting children to bring their own complaint, or submitting complaints on behalf of children that are often the most vulnerable: those without parental care or an adult to advocate on their behalf. Specifically mental health professionals have contacted my Office expressing their concern at the absence of dedicated child and adolescent units. Without these professionals' involvement, such children may have remained voiceless.

In line with my statutory mandate to promote the rights and welfare of children living in Ireland my Office has recently commissioned research into respecting children's rights in healthcare settings. The overall aim of this project is to assist the OCO in setting a standard of good practice in fostering a culture of respect for children's rights in healthcare settings. It intends to identify good practices and specify any policies, procedures and other supports that have proved essential as regards developing and sustaining these good practices. The results of the research will be published shortly but a couple of things of interest that have arisen over the course of the project include the strong "emphasis on primary health care, prevention and healthcare information and awareness is key here, as is the emphasis on the role of the family in

supporting children's right to health and health care. "(Kilkelly, Respecting Children's Rights in a Healthcare Setting).

The necessity of "public authorities, parents and others working with or for children to create an environment based on trust, information sharing, the capacity to listen and sound guidance that is conducive to children and young people participating" is again highlighted through this research. This is without doubt a challenge for public policy makers and in particular for those working every day with children and young people who are working under severe pressure due to staff shortages, insufficient facilities and resources.

Professionals need to be supported at every step to facilitate children being agents in their own lives, whether it be healthcare, education or youth justice. In this regard "the extent to which health professionals have been trained in child development, children's rights and communication with children will influence the extent to which they treat children as individual rights holders with the capacity to understand information about their health and healthcare, whether they participate in such decisions or not". (Kilkelly, Respecting Children's Rights in a Healthcare Setting)

This is not to suggest that there always has to be a cost implication in incorporating children's rights into decision-making by public bodies. There is no denying that at the moment the provision of additional resources is scarce to say the least. While unfortunately it looks like the full implementation of A Vision for Change is still a way off we can take encouragement from the recently reiterated commitment to hold a referendum on children's rights early next year. While changing the Constitution to include children as individual rights holders whose best interests must be considered in all decisions concerning them will not act as a panacea it is an important and necessary initial step. Changing mental habits and adjusting long-held attitudes in relation to children's capabilities, needs and wishes is key in moving forward any public policy relating to children. Constitutional change in and of itself cannot achieve that goal. However it can alter the legal and policy landscape such that the cultural change we need can take place.

Driving cultural change in how we support young people with mental health problems should go hand-in-hand with an acknowledgement of children and young people as rights holders. **Young people must be listened to, and must have a voice in the making of key decisions that affect them.**