

## Conference Report

### Getting the Bill Right – An Update Panel 3: Children and Young Peoples’ Rights

**Sorcha McKenna, formerly Children’s Law Centre and Save the Children,  
Convenor of Forum Working Group:**

A number of factors impacted on the quality and quantity of discussions with a view towards any kind of negotiation. The appointment of legal expertise was vital to addressing the imbalance of knowledge and understanding around human and the late appointment of a Legal Advisor was particularly an issue.

Working Group representatives were not effectively communicating with their Forum reps, meaning that issues that were agreed at a Working Group level were not being effectively communicated back to the plenary. So, time was being wasted going over basic arguments and rationale, again and again. There was a particular problem with political representation at the Forum changing on a kind of constant basis. There was not any kind of consistency in terms of the levels of knowledge and information about the process to date and a level of knowledge and understanding of the arguments. All of this time could have been better spent on proper negotiation rather than leaving it to the last couple of days.

In spite, or perhaps as a result of this, the Working Group produced 14 recommendations. In recommending the provisions, the Working Group was not operating with a blank canvass, quite the opposite. It had a very broad wealth of child rights standards, which were internationally recognised. Central to these was the United Nations Convention on the Right to the Child and its absolute protocols on armed conflict and sexual exploitation of children.

The Working Group recommendations are founded in established, globally recognised minimum standards of international law. Just as the Working Group recommendations were not based on a blank canvass, nor were they intended as a wish list of any kind. In adherence with the need to consider as yet undefined particular circumstances, the Working Group focused in those areas of rights, which have been overlooked, violated, or denied, either as a result of sustained conflict, or the legacy which it produced. These rights included Social and Economic rights, cultural, language and identity rights, and civil and political rights.

The recommendations provided are also supplementary to the European Convention on Human Rights and the Human Rights Act. In essence, this was the simplest box to tick because children's rights post-dated the ECHR and, like Social and Economic rights, are basically glaring absences from the Convention. Despite these efforts, the recommendations of the Children's Working Group failed to satisfy all Forum members. They did achieve consensus from over 200 groups across Northern Ireland in a consultation process, which was undertaken by myself prior to the submission of the final report. The report was well received at the Forum and all the recommendations attracted high levels of support at the Forum. However, only one recommendation in relation to the protection of all children from abuse and exploitation actually achieved full consensus.

In reading the Forum report the political, ideological, and theoretical divisions are clear. The fact that there was no overall consensus is very clear. There is, as yet, no one agreed model on what a Bill of Rights for Northern Ireland should look like. However, on closer inspection, what the report does demonstrate, through the records of engagement, through the minutes on the website, through the levels of support recorded, and, most importantly, through the supplementary statements which were made by most parties and sectors, is that all members of the Forum agreed that children's rights should enjoy strong legal protection in Northern Ireland. The only difference of opinion sent around is what this mechanism should be and whether the Bill of Rights was the most appropriate forum for this.

**Ursula Kilkelly, University College Cork:**

One of the unique things about children's rights in this process is that they are uniquely well informed and grounded in international standards which have grown in depth and breadth over the last 20 years, building on the UN Convention. Obviously the UN Convention is the most widely ratified instrument in international law, but building on that we have a whole range of other instruments. We now have a range of Council of Europe Treaties in areas like exploitation and adoption. We have the EU Charter of Fundamental Rights which puts at the heart of it also children's rights in terms of the best interest principle and children's right to be heard. Together, these represent both legally binding, widely supported standards that represent not just established consensus, but actually growing and increasing consensus around children's rights.

While the Convention is often seen as the high point, since then internationally we have seen a growth in the level of consensus and in the depth and breadth of the standards that exist around children's issues. One of the illustrations of that is how increasingly influential these international standards are. The cross-cutting nature of them throughout the international community, where domestic courts are constantly using them, even those states who have not incorporated Convention standards, but also, in the context, for example, of the European Convention - the court now referring regularly to the Convention of the Rights of the Child. So, we have quite an intricate wave of international standards out there on which to draw on in terms of this work.

In the Forum report, there are issues around mainstreaming and dedicated provision for children's rights. The report reflects both the mainstreaming and dedicated provision for children's rights, which is very welcome. There are certain areas where it is important to take a different approach.

In terms of specific provisions, the best interest principle, the right to participate, the right to family life and care, freedom from abuse and exploitation, the right to play, youth justice and protection for children in armed conflict.

It is important that the range of rights, the detail is very, impressive. When you read the report, without reference to the level of support of individual recommendations received, the substance is very strong, overall.

We have particular areas where we have exceeded international standards. One is the best interest principle the Convention provides that the best interest of the child should be a primary consideration in all matters concerning children. The provision here refers to the best interest of the child being paramount. So, a strengthening of the international provision is very welcome because Article Three in the CRC was very heavily, and has been very heavily, criticised.

The participation provision is without a doubt the most important provision in the CRC and the most unequivocally worded provision and the one that has the most importance in terms of symbolic effect as well. Here we have not only the Convention's Article 12 but we also have it accompanied by the duty to inform young people about that right

I am very disappointed in relation to the provisions around the detention of children particularly the rights that children enjoy in detention are not spelled out in any detail. There is a provision relating to the use of diversion. Those of you who work in youth justice would be familiar with this notion that, in terms of international standards, you are mandated to divert children away from the formal process, but only where their rights are fully protected, so that there is a floor below which children's treatment will not fall. This is not evident in the current proposals.

Age of criminal responsibility and armed conflict are the two other areas where we can see the standards not adequately reflected in the proposals. It is important to reflect also the use of age limits in relation to children's rights is hugely problematic. You have to acknowledge that once you bring into it an age category, you are essentially identifying that those, either above or below that age depending on the context, are not entitled to the protection of childhood. That is a sort of starting point to the general point.

In that context, looking at the international standards and the definition of the child, the right to life, and the right to protection of the unborn, these are exactly the issues that the UN Convention drafters grappled with 20 years ago in a universal context.

The CRC, as I mentioned already, represents a compromise to this issue in terms of the right to life or the right to protection for the unborn in terms of defining in Article One that everyone below the age of 18 is defined as a child and included in that, obviously, is the right to life, survival, and development in

Article Six. The reference to the unborn is contained in the Preamble to the Convention in a reference which was negotiated through a particular Working Group containing Ireland, the whole EC and others, designed to produce a compromise, which reflects the 1959 Declaration on the Rights of the Child, a reference to the child's right to protection before as well after birth. So, we can see a very similar issue and a very similar compromise being evident here. International consensus thus does not exist on this issue.

In terms of the age of criminal responsibility, international standards are very clear that there must be an age. They are also clear that the ages must be consistent throughout different areas of the child's life. So, both criminal capacity issue must be seen as consistent with or relevant to other areas where we give children capacity to make decisions like, for example, their right to consent to medical treatment, their right to marry, their right to vote. And here we have clearly a provision that is out of line with that in terms of no specific minimum age being identified. The Convention itself is silent on this point rather than recommending an age be set. But, we can clearly see in declaratory instruments, the core minimum of 12 years being identified with a recommendation that in certain contexts states where there are particularly developed systems of democracy and accountability that higher ages like 14 and 16 should be the norm.

In terms of armed conflict, we clearly have the optional protocol for armed conflict in addition to the CRC. Again, this is an area where the provisions in the CRC were deemed to fall significantly short of expectations and some identify this as actually the biggest failing of the Convention. There are two issues here, no recruitment under 18 years and also the positive duty to prohibit recruitment into non-state forces. There is no CRC consensus on these issues but certainly the option of the protocol recommends states to adopt the age of 18 and really the higher standard is vital in this context as is in the age of criminal responsibility.

The final point that I would make on this is, as I said that ages operate to exclude protection. So, while they may not be relevant or might be seen as too precise, they actually have a very limiting impact on the protection of children's rights. It is really vital to remember that it is—while ages are open for some discussion—that there is a problem ensuring children's rights are protected above those ages. So, where ever you set your age for involvement in armed conflict, where ever you set your age of criminal responsibility, in

particular, it is incredibly difficult below that age, for example in relation to criminal responsibility, to ensure that children receive a fair trial.

It is really difficult to try to ensure the protection of children's rights below the age in the relation to criminal responsibility and above the age in relation to involvement of children in armed conflict. We have got to remember that they have much wider consequences than the specific ages that we are talking about.

In relation to compromises, in terms of ways forward, clearly compromises are inevitable in any process like this. In the Convention, huge compromises were made. Some were very unhappy with that, but they are inevitable. It is important to remember that how they are resolved will have a lasting effect.

In terms of approaching negotiating processes, having a base on our floor is absolutely fundamental that everybody must understand what it is themselves, where they are bringing, what they are bringing to the process. But, the international standard is a floor these are minimum standards and minimum standards will result in minimal protection. So, none of this, even when we fall below those standards is being overly ambitious here for Northern Ireland. The Bill of Rights must really try to enshrine standards that are sufficiently high to reflect Northern Ireland's circumstances and conditions but also that relevant to Northern Ireland.

Reference to principle can be of use in this context. The broader, unequivocally, strongly worded principles are hugely valuable in terms of informing the treatment of children and the decision-making processes around them. Where standards are weak, we can see a holistic CRC approach where you look at the whole rights of the child, the rights of the whole child, if you like. That is one way of informing how the highest standards should be maintained. The reference should be not the specific, narrow issue but to the broader issues of how you guarantee the widest range of Convention rights to the greatest number of children.

## QUESTIONS

**Fearghal Barr, Inside Out Project:** There is still an issue around whether young people are perceived to have the same rights as adults. Will the Human Rights Bill protect children as well as protecting adults? In terms of societies attitudes and values around how children and young people are perceived, lots of the negative news stories that are often emanating, will ultimately a Bill protect the rights of children against the sway of public opinion that is often out there?

**Elaine Campbell, Age Concern:** Is it appropriate to put an age into the Bill of Rights?

**Elizabeth Zammit, REAL Network:** Where does the law lie with regards to the age of criminal responsibility of children with disabilities and learning difficulties? The child may be 18 or 20 years of age by a birth certificate, but may only have the capacity of a six year old. Was this discussed by the panel?

**Ursula Kilkelly:** The strength of a document like this, apart from the issues around legal status and justiciability and so on, which we can see the evidence from the convention at a standard, which is binding in theory, but without the mechanism to enforce those rights. We can still see, nonetheless, the impact that that has had on the awareness of children's rights. The consciousness that people have throughout the world, have developed around children's rights and the distinctive nature of children's rights as opposed to the rights of adults.

There is, undoubtedly, a benefit in protecting children's right in an instrument like a Bill of Rights from those perspectives—changing cultures, changing attitudes, but only of course if it comes with both the issues around enforcement. More importantly perhaps, the awareness raising, the training and that is a huge part of implementing children's rights.

A lot also depends on the substance of the provision. I mentioned Article 12 as one of those key provisions, which is a tool as well as substantive right. It is a procedural right, it is a right in substance, but it is also a tool that assists and pushes and raises the rights of children generally up the agenda because of the commitment that it represents to the visibility of children, the involvement of children, the participation of children and young people.

The Committee of the Rights of the Child has identified, as a fundamental principal and is also credited with raising the profile of children and children's issues around the world.

**Sorcha McKenna:** The definition of children, the cut off points in terms of age of criminal responsibility and children in armed conflict were a source of contention within the Working Group. Certainly, children's rights advocates would have aimed for the very highest level of protection available but there was difficulties within the group as there is an any forum which tries to get some consensus in terms of what the minimum, what the higher level of protection should be, whether they should be aiming somewhere in the middle.

There is certainly a great benefit in terms of identifying in law at what age the protection of a child extends to, which is at the very start of the Working Group recommendations. We set out the definition of the child as the basis to which all the other rights should be read against. So, we are very clearly talking about children up to the age of 18. And, we would have been throughout the document had it not been those issues of contention around age of criminal responsibility.

One of the major factors influencing the need to gain consensus was the public attitudes towards children and young people. Often the media had a big role to play in this in terms of demonising children in a way, referring to them as thugs and hooligans and yobs and everything else. It is recognising that the children are essentially advocates of rights and the bearers of rights just like everybody else. Whether or not it is appropriate to refer to a specific age in relation to Bills of Rights, I think it is sort of open—some do, some do not. I think it is open for discussion here, but I think we would be missing an opportunity to extend rights to all children if we do not draw some sort of benchmarks within it.

In terms of the particular age in relation to children with disabilities, this was something we considered very important. We had a representative on the Working Group from Disability Action who kept us in mind of all the particular issues in relation to children and young people with disabilities, learning disabilities in particular. So what we have done as a means of addressing this is in referring to the age of a child what we do is refer to the age and understanding of children to get that balance right, particularly in relation to maybe explanation of rights in custody. It is not just as straight forward as

explaining them. You have to bear in mind the particular understanding level, the capacity of the child to understand and the particular needs of a child in terms of whether it be sign language provision, interpreter provision, or somebody actually to sit down and explain to the child at a level that they can understand. That was pretty paramount in terms of our discussions.

Clearly the Convention, apart from Article One, makes no reference to ages. It does not make a reference to an age for involvement in criminal responsibility. The reason for that and for the fact that the Convention does not use ages generally is because it was a universal treaty. The overall aim of the Convention drafters was to achieve a Convention that would be as widely applicable and relevant as possible, upwards on 190 to 200 countries had to be convinced or persuaded that this was relevant to them.

This is a very different task. The Bill of Rights is not in that desperate search for universality. It is actually in the search for something that is very specific and appropriate to Northern Ireland. That is important in terms of learning from the CRC experience.

The general comment on juvenile justice, which was adopted by the Committee, went for a minimum age of 12 amid some controversy for the same reason that it was considered inappropriate to identify particular age - because of the argument that it is actually what happens to children who, for example, are prosecuted that might be more relevant as to whether they are prosecuted or treated in some other way. Having said that, the Committee has been very critical of ages of capacity, consent and responsibility in all areas.

On two grounds, one is the issue of equality and the other is the issue of capacity, that if, for example, you except the children have the capacity to drink, to drive, to have sex, to get married, at one age, would you believe that they should bear the burden of criminal responsibility with all the consequences that that involves at a much, much younger age? There is something inconsistent in what you are saying about how children should be treated. It is that goal of maximum protection that the Convention and the Committee have been very clear about. So, the issues of equality across the board in terms of capacity and in terms of gender, for example, have been core in this issue as its been discussed internationally.

The use of an age at least sets a benchmark, which if it can be changed would have to be changed with difficulty. It cannot, for example, happen like it

happened in Ireland two years ago where the Minister, with the media on his back about youth crime, decided to introduce a lower age of criminal responsibility than was ever envisaged in the law. It at least cooper fastens and secures children's protection in a more permanent way than is possible in legislation.