



CENTRE *for* DISABILITY
LAW & POLICY



Access to Justice

for Children with Cognitive Disabilities

IRELAND COUNTRY REPORT

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Introduction

About the Project

This report is a product of the Access to Justice for Children with Mental Disabilities Project which ran from May 2013-April 2015. The Mental Disability Advocacy Center in Budapest, Hungary managed the project. The project included eight other country partners from Lithuania, Slovenia, Spain, Romania, Bulgaria, the Czech Republic, Latvia and the United Kingdom. This report has been written as part of the project, co-funded by the Fundamental Rights & Citizenship Programme of the European Union, on “access to justice for children with mental disabilities”.

The project included four broad objectives:

1. Development of a methodology for data gathering on access to justice for children with mental disabilities across the EU.
2. Development of standards for access to justice for children with mental disabilities (in relation to protection of privacy, child participation, accessible information about access to justice options, legal assistance, legal representation, protective measures and special assistance) based on relevant research evidence and best practice across the EU.
3. Development of training and educational materials for access to justice for children with mental disabilities. These packages will be designed to be of relevance and potential use to professional bodies (including the judiciary and the police) and to providers of academic courses in universities (including courses on law, human rights and disability studies) (Workstream 3).
4. Advocacy actions to ensure that the methodology, the standards and the training materials are disseminated to and considered by policy-makers in all EU member states.

Website

As a part of the third objective of the project, an education and training website was created. In addition to introductory information on key concepts concerning access to justice the website also contains information about examples of good practices related to access to justice for children with mental disabilities. The website also contains a sample syllabus that can be used by training and teaching professionals who want to further explore concepts that relate to access to justice for children with mental disabilities. A bibliography is available on the website and contains relevant training toolkits, reports, academic articles, and videos as well as child-friendly and easy-to-read materials. The website is available in all the national languages of countries which participated in the project.

About the Report

This report has been written and compiled from several country update reports created for the project since 2013. These reports rely heavily on desk-based research and also include information from interviews with parents of children

with intellectual disabilities, autism and mental health issues, legal professionals, social workers, NGO representatives and academics. Many excellent reports on children in care, children in the prison system, and special education in Ireland have been written by NGOs and academics; however this report examines all these processes and procedures collectively to see how children with cognitive disabilities access justice as a whole in Ireland. The other unique aspect of this project and report is its focus on children with cognitive disabilities as a distinct group. There are existing Irish reports on access to justice for adults with disabilities and for children without disabilities but little examination of how children with cognitive disabilities fare in the variety of administrative, criminal and civil proceedings they encounter in Ireland.

Meaning of Access to Justice

The project examined access to justice for children with cognitive disabilities by researching access to information, legal representation, a child's ability to participate in a proceeding, protection of children and their privacy in proceedings, accessibility of proceedings, and the availability of appropriate training to relevant professionals in the justice field.

Focus Areas on Access to Justice

The project focused on access to justice in three main areas of a child's life: education, decisions about where a child lives and the criminal justice system. For education in Ireland we focused on assessments of needs, ability to access mainstream schooling and appropriate supports. In researching decisions about where a child lives we examined relevant law on custody and care proceedings as well as institutional care. In researching criminal justice procedures and their accessibility to children with cognitive disabilities the project addressed the victim, witness and offender's involvement in the proceedings.

Definition of Disability

In the initial project proposal the term 'mental disabilities' was used and includes children with intellectual disabilities and children with psychosocial disabilities and/or mental health disabilities. This report on Ireland uses the term cognitive disabilities instead as that is a more acceptable or familiar term in Ireland than the term 'mental disabilities.' This report views disability through the lens of the social and human rights models of disability meaning that disability stems from the societal barriers imposed on a person with impairment(s) and is not inherent within the person themselves. It is important to note that while children with mental health issues are included in the definition of disability in the report, it is recognised that not all these children would identify themselves as having a disability this project does not seek to definitively label such children as children with disabilities. Research cited in this report may use a different way of identifying disability and different definitions or approaches to disability in studies cited are noted in the report when used.

The last comprehensive survey of disability in Ireland, conducted in 2006, provides an indication of the numbers of children with disabilities in Ireland who may experience barriers to accessing justice such as those identified in this report. The 2006 census found that the population of Ireland was 4,239,848; the

National Disability Survey estimated that of these, there are approximately 749,100 people with disabilities living in Ireland. It is estimated that there are 35,900 people aged 0-17 with disabilities, of which 22,900 are boys and 13,000 are girls. 26,900 children aged 0-17 are identified as having intellectual and learning disabilities, 9,900 0-17 year olds are identified as having emotional, psychological and mental health disabilities and 17,800 are identified as having disabilities related to remembering and concentrating.¹

It is important to note here that *Growing Up in Ireland*, the national longitudinal study on children, does include questions about children with disabilities; but has often focused on the negative impact of individual impairment rather than the societal and structural barriers facing children with disabilities. For example, the study includes questions to mothers concerning “the extent to which the study child’s illness or disability hampered them in their daily lives.”² Such framing stands in opposition to the spirit of the Convention on the Rights of Persons with Disabilities as well as current understandings of disability through the social and human rights models.

Methodology

The first phase of this research project and a large part of the report relies on extensive desk based research in the three main areas of the report and project. The second phase of the project involved interviews with legal professionals such as solicitors, barristers and judges; parents of children with cognitive disabilities; experts in relevant fields, representatives of NGOs and social workers. We interviewed 15 people, including five parents of children with cognitive disabilities. We exclusively used one-on-one semi structured interviews that were mainly conducted over the phone. Initially we sought to have focus groups with parents of children with disabilities who had problems accessing justice in the education system but this was ultimately not possible due to the diverse geographical locations of the respondents, and the difficulties parents faced in finding childcare to facilitate attending a focus group.

We also sought to interview young people and adults with cognitive disabilities about their experiences in the justice system regarding decisions made about them as children, with a focus on education, criminal justice and decisions about where to live. While we received approval from the NUI Galway Research Ethics Committee for this work, we were not subsequently granted access to Oberstown Children Detention Schools to interview young people in detention, and were unable to find other interview participants who met our inclusion criteria within the timeframe of the project.

¹Central Statistics Office(2010) National Disability Survey 2006: Volume 1. Dublin. Taken from Table 1.4 and Table 5.A, CSO (2010) Volume 1, pages 15 and 93

² James Williams et al.,(2009)*The Lives of 9-Years Olds*, Growing Up in Ireland-National Longitudinal Study of Children, Office of the Minister for Children and Youth Affairs.

Executive Summary and Key Findings

The focus of this report and project was to uncover barriers in Irish law and policy affecting children with cognitive disabilities' access to justice in three main areas of their lives:

1. How and where the child should be educated
2. Where the child should live (care, custody, guardianship and involuntary detention for mental health treatment) and
3. Juvenile justice proceedings (victim and offender).

The report is structured in five main parts. The first part sets out the general law and policy context in Ireland and the key Constitutional, legislative and policy provisions– as well as Ireland's international human rights obligations concerning children with disabilities. Parts two to four examine the three key focus areas of education, where to live, and juvenile justice and explore the barriers children with cognitive disabilities face in accessing justice in these areas. Part five of the report sets out our conclusions and recommendations for reform.

Our key findings from the report on access to justice for children with cognitive disabilities in Ireland can be summarised as follows:

Data Collection

The greatest obstacle in determining how children with cognitive disabilities access justice is that in many areas related to access to Justice Ireland does not collect data. For example, decisions of courts in child care proceedings are just beginning to be reported and the Central Statistics Office keeps no crime statistics on victims under the age of 18. Procedures involving a child accessing education are often administrative in nature thus not recorded or publicised. The compounding problem is that where data on children is collected it is not disaggregated so often it is not known whether the child has a disability (e.g. for children in detention and alleged offenders).

Voice of the Child

One major barrier related to the voice of the child in Ireland is that children require a next friend to bring a case to the district court.³ Aside from this law there are few explicit prohibitions children taking part in legal proceedings and many of the laws discussed further below potentially could allow for the voice of children with cognitive disabilities to be heard. However, our experience, as documented in this report, is that existing laws are not interpreted or used consistently to accommodate for the voice of the child in Ireland. Interviews with experts consistently showed that cultural and attitudinal barriers often operate to exclude children with cognitive disabilities in non-criminal proceedings.

Interviews with Parents

³ District Court (Civil Procedure) Rules 2014.

Through the course of the project we had interviews with a small sample of five parents. The parents consistently spoke of difficulties in accessing the services their child needed to receive meaningful education, healthcare and victim support. Many parents experienced retaliatory actions when they made complaints against a state body for failure to deliver services. Although this is a small sample size it is worrying that parents seeking to remove barriers faced by their children often face further barriers imposed by state bodies as a result.

Training

As Ireland perhaps moves towards the possible final enactment of the Children's Rights Amendment to the Constitution it is clear from interviews with experts that there will need to be effective training to professionals who work with and for children on how to effectively support the voice of the child as set out in the 31st amendment to the Constitution. Since the 31st amendment is limited in scope to care proceedings and issues of guardianship, custody and access, further training would be needed to ensure that professionals can facilitate the voice of the child to be heard in other legal proceedings – including education decisions and the provision of health and social care supports to children with cognitive disabilities.

Background to Rights of Children with Cognitive Disabilities in Ireland

In order to examine and determine the barriers to accessing justice facing children with cognitive disabilities in Ireland, it is important to first determine what rights children have been granted in Ireland in the three areas of focus: education, living situations and the criminal justice system. This analysis will help to demonstrate how a disability identity may affect a child's ability to exercise or claim those rights.

International Law

Ireland has ratified both the Convention on the Rights of the Child and two of its three Optional Protocols.⁴ The Convention on the Rights of the Child includes the right of a child to freely express their views on all matters affecting the child with the views being given due weight in accordance with the age and maturity of the child.⁵ Unfortunately, however, Ireland has yet to ratify the Convention on the Rights of People with Disabilities.⁶

European Law

In 2011 the Council of Europe promulgated the Child-friendly justice guidelines⁷ which draw on such fundamental principles as participation of the child, protection of the dignity of the child and a definition of best interest that states this should be determined on an individualised basis. The Victim's Directive was passed in 2012 by the European Parliament and must be implemented by member states by November 2015. It establishes the minimum standards on the rights, supports and protection of victims of crime.⁸ There is also a proposed directive that would apply to children suspected or accused in criminal proceedings.⁹ Other reports created as a part of this project more thoroughly explore both European and international standards and can be accessed at the MDAC website.¹⁰

⁴ Ireland has ratified Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and the Optional Protocol on the Convention on the Rights of the Child on a communications procedure. Ireland has not yet ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

⁵ Article 12, Convention on the Rights of the Child (1989). Available at <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> (last accessed 7 April 2015).

⁶ Parliamentary Question 39756/13. Available at <[http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/\(indexlookupdail\)/20130925~WRG?opendocument#WRG01500](http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/(indexlookupdail)/20130925~WRG?opendocument#WRG01500)> (last accessed 14 April 2015).

⁷ Committee of Ministers of the Council of Europe, Child Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum (31 May 2011). Available at <http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf> (last accessed 17 April 2015).

⁸ Directive 2012/29/EU, *Establishing minimum standards on the rights, support and protection of victims of crime* (11/25/2012)

⁹ *Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings*, COM/2013/0822.

¹⁰ Mental Disability Advocacy Center <<http://mdac.org/en>> (last accessed 17 April 2015).

Constitutional Rights

Ireland's Constitution contains very strong provisions on the protection of the family as a unit and as such parents are given the primary right to make decisions for their child, including decisions about where the child will live and how he or she will be education.¹¹ The state is required to fund public education, particularly at primary school level, but parents are free to choose the education they deem most appropriate for their child.¹² The state is obliged to take the place of the parent in making decisions for a child only in "exceptional cases."¹³

Discrimination Law

There are two main anti-discrimination provisions in Irish law which apply to children; Article 40 of the Constitution and the Equal Status Acts. Article 40 of the Constitution holds that "all citizens shall, as human persons, be held equal before the law."¹⁴ However, this provision has not generally been used to ground progressive decisions on the right to equality in the Irish courts.¹⁵

The Equal Status Act 2000 prohibits disability-based discrimination and age-based discrimination.¹⁶ Discrimination on the basis of disability includes the failure to provide reasonable accommodation.¹⁷ The Act applies to the disposal of goods or provision of services to the public. The Equal Status Act also allows for preferential treatment or positive measures intended to promote equality of opportunity or cater to the special needs of persons.¹⁸

Our research indicates, however that these laws are rarely used to uphold the rights of children with cognitive disabilities. A child rights expert stated in an interview for this project that the equality framework has not been effectively used by lawyers to address inequality that impacts on children with cognitive disabilities, since cases involving children are not generally brought under the Equal Status Acts to address on the grounds of disability-based discrimination: "The mechanism and framework that was there is valuable, and in other countries has been enough, but here it hasn't been enough. There are structural issues aside from [the fact that] lawyers aren't using it."¹⁹

Policy Guidance on Children's Rights

The key national policy on child protection in Ireland is the Children First Guidelines. These Guidelines were first published in 1999²⁰ and set out the

¹¹ Constitution of Ireland, Art. 42.

¹² Constitution of Ireland, Art 42.3, 42.4.

¹³ Constitution of Ireland, Art 42.5.

¹⁴ Constitution of Ireland, Art. 41.

¹⁵ Elaine Dewhurst, 'The Recent Development of the Irish Equality Guarantee by the Superior Courts' 17(5) *Bar Review* 115 (2012).

¹⁶ S4 Equal Status Act 2000.

¹⁷ S4 Equal Status Act 2000.

¹⁸ S14 Equal Status Act 2000.

¹⁹ Interview with Child Rights Expert conducted by Eilionoir Flynn and Jenni Kline on 24 January 2014.

²⁰ Department of Health, *Launch of Children First- National Guidelines for the Protection and Welfare of Children*, (21 September 1999) <<http://www.dohc.ie/press/releases/1999/19990921.html>> last accessed 26 September 2013.

guidance for various government agencies with regard to child safety and welfare concerns.²¹

One of the guiding principles of these Guidelines is that “Children have a right to be heard, listened to and taken seriously.”²² A survey of compliance with Children First found that less than half of the respondents surveyed felt that this principle was usually or always adhered to.²³ The respondents pointed to “inconsistencies in children’s participation in case conferences” as an example of this failing.²⁴ Some academics have also pointed out the lack of widespread compliance with Children First.²⁵ Kilkelly states that “there is ample evidence to suggest that the Children First Guidelines are not being implemented adequately or consistently” referring specifically to the lack of reporting of child abuse by professionals.²⁶

In 2014 the Minister for Children and Youth Affairs introduced *Better Outcomes, Better Futures*, a policy report which sets the Government objectives for children and young people in Ireland. The report and policies included recommendations related to children with cognitive disabilities. The report recognised the need of the Government to support effective transitions especially for children with special needs or a disability.²⁷ The report also recognised the importance of timely assessment and equity of access to appropriate disability services.²⁸

New and On-going Developments

This project began in May 2013 and since the project began there have been several new developments that may impact on how children with cognitive disabilities access justice in the future. The key developments, such as the Children’s Rights Amendment to the Constitution, the establishment of Tusla (the Child and Family Agency), the Children and Family Relationships Act 2015 are worth setting out in brief here as they provide context for children with disabilities’ opportunities to access justice in Ireland.

²¹ Department for Children and Youth Affairs, *Children First National Guidance for the Protection and Welfare of Children*, (2011) 2.

²² S1.1.1 (iv), Department for Children and Youth Affairs, *Children First National Guidance for the Protection and Welfare of Children*, (2011) 4.

²³ Office of the Minister for Children and Youth Affairs, *National Review of Compliance with Children First: National Guidelines for the Protection and Welfare of Children* (July 2008) 5. Available at <http://www.dcy.gov.ie/documents/publications/CF_Compliance.pdf>(last accessed 27 September 2013).

²⁴ Office of the Minister for Children and Youth Affairs, *National Review of Compliance with Children First: National Guidelines for the Protection and Welfare of Children* (July 2008) 5. Available at <http://www.dcy.gov.ie/documents/publications/CF_Compliance.pdf>(last accessed 27 September 2013).

²⁵ Ursula Kilkelly, *Learning Lessons from the Past: Legal Issues Arising from Ireland’s Child Abuse Reports*, Irish Journal of Applied Social Studies 12 (2) (2012) pp8-24, 16.

²⁶ Ibid.

²⁷ Minister for Children and Young People, *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014-2020* (Dublin) 35.

²⁸ Minister for Children and Young People, *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014-2020* (Dublin) 52.

Children's Rights Amendment/31st Amendment

Children's rights may be strengthened through the new 31st amendment to the constitution, which adds an explicit recognition of the rights of children to the text of Article 42. The 31st amendment, passed by referendum and the Oireachtas in 2012, amends Article 42 to better protect the rights of children. The amendment asserts, "The State recognises and affirms the natural and imperceptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."²⁹ The amendment retains a best interest approach but emphasises a "due regard for the natural and imprescriptible rights of the child".³⁰

The amendment also requires that for all proceedings brought by the state for the safety and welfare of child that legal provisions are made to ensure the respect of the views of the child.³¹ It should be noted that this provision first states that the opportunity to be heard should be granted to "any child who is capable of forming his or her own view." It is not yet clear how this provision might apply to children with cognitive disabilities who may be viewed as not capable of forming a view. This amendment would also only apply to care and guardianship proceedings.

There has been a challenge to the legality of the process that saw the passage of the children's rights referendum. This challenge was unsuccessful at the High Court level and has been appealed to the Supreme Court where it has not yet been heard. This case has put implementation on hold until the challenge is resolved.³²

Many interviewees noted that the amendment would require training, guidelines and further regulation before the aims of the amendment can be effectuated.³³ Some legal professionals interviewed for the project criticised the amendment as being largely ineffectual with regard to children's rights. One solicitor described the amendment as 'useless' for children with special needs, children needing educational supports, children needing mental health services and children in detention.³⁴

²⁹ Art.42a(1), Thirty-First Amendment of the Constitution Children Bill (2012).

³⁰ Art.42a(2), Thirty-First Amendment of the Constitution Children Bill (2012).

³¹ Art.42a(4), Thirty-First Amendment of the Constitution Children Bill (2012).

³² Deputy Minister for Children and Youth Affairs Frances Fitzgerald, *Written Answer 185-Proposed Legislation*, (14 November 2013). [48640/13]. Available at <<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013111400075?opendocument#N18>>(last accessed 10 March 2014).

³³ Interview with District Court Judge by Jenni Kline on 10 March 2014: Interview with Dublin barrister by Jenni Kline on 14 March 2014: Interview with Child Advocacy representative by Jenni Kline on 1 April 2014.

³⁴ Gareth Noble, *The Children's Referendum: Little to Write Home About*, Human Rights in Ireland, (26 October 2012). Available at <<http://humanrights.ie/children-and-the-law/the-childrens-referendum-childrens-rights-in-practice/>>(last accessed 26 March 2014); Gareth Noble, *Painting a brighter future?* Irish Examiner, (5 November 2012). Available at <<http://www.irishexaminer.com/analysis/painting-a-brighter-future-212919.html>> (last accessed 26 March 2014).

Noble states that the amendment will have little impact on existing legislation aside from adoption laws: “If you are a parent of a special needs child who requires round the clock care and attention this referendum on children’s rights achieves nothing. If you are a child in need of extra educational supports this debate is irrelevant to those needs. If you are a homeless child presenting at a Garda station for shelter and having to go through the appalling out of hours service this referendum does nothing for you. If you are a child trying to rely on our disgraceful mental health service for minors, no protection is given in this amendment to the constitution. If you are a child prisoner in St Patrick’s Institution on twenty three hour lock up without a reason, no reliance can be placed on the new provisions.”³⁵

At the time of writing, the potential impact of this Constitutional amendment remains unknown. However, it is clear that greater monitoring of the amendment is required if it is to be successful in facilitating greater access to justice for children with cognitive disabilities.

Tusla and the Child and Family Agency Act

Tusla, the Child and Family Agency in Ireland was established on January 1st, 2014, which absorbed the HSE Child and Family Services, Family Support Agency and the National Education Welfare Board.

The Act which establishes Tusla, states that when the Child and Family Agency is planning and reviewing the provision of services related to the development, welfare and protection of the child or the effective functioning of families, the agency “shall ... ensure that consideration is given to the views of children.”³⁶ However the next provision states that when the agency is performing its function with regard to care proceedings, adoptions or education then the views of the child must be heard “where the child is capable of forming and expressing his or her own views.” There is no further guidance given on how to determine if the child is capable of forming and expressing views.³⁷ This provision would only apply to the Child and Family Agency itself and would not apply to the courts if the cases proceeded. According to one interviewee for this project, earlier drafts of the Child and Family Agency Bill had a much broader scope for voice of the child, but this was ultimately narrowed because the broad scope was deemed too unwieldy.³⁸

Children and Family Relationships Act

On the 12th of March 2015 the Dáil passed the Children and Family Relationships Act and the Seanad passed it on the 31st of March 2015. The Act amends the law on adoption, guardianship, custody and access for co-habiting couples, civil partners, parents and guardianship in the case of donor assisted reproduction and also amends sections of the Guardianship of Infants Act 1964.

³⁵ Ibid.

³⁶ S9(3)Child and Family Agency Act 2013.

³⁷ S9(4)Child and Family Agency Act 2013.

³⁸ Interview with representative from a Child Advocacy organisation by Jenni Kline on 1 April 2014.

Education

History of relevant laws and policies relating to education and access to justice

As stated above, the Irish constitution contains strong provisions protecting parental rights in the education of their children. Historically however, those rights were often restricted by the way in which education is provided in Ireland – typically through State-funding of schools operated by religious bodies.³⁹ This was especially true for the education of children with disabilities in independent and mid century Ireland where education was provided to children with cognitive disabilities in residential institutions run by religious organisations.⁴⁰ In the mid to late 20th century parents associations made efforts to establish non-denominational day schools for children with cognitive disabilities, but these early efforts created tension with many religious organisations already providing educational support in a more institutional setting.⁴¹ The Education Act of 1998 provided for wider parental involvement in educational decisions for children and created more formal avenues for lodging complaints about educational provision.⁴²

In 2001 the Supreme Court ruled in *Sinnott v. the Minister for Education* that the state is obliged to provide primary education to any child up to 18 years of age. This case was brought by a mother of a child with autism concerning the lack of educational options for her adult son.⁴³ While the case was important in clarifying that the right to education applies equally to children with cognitive disabilities, it was disappointing that it did not recognise that people with disabilities might have rights to lifelong learning.⁴⁴

Parts of the Education for Persons with Special Educational Needs (EPSEN) Act came into force in 2004 to address the provision of education to persons with special needs. The ESPEN Act primarily references the rights of the parent to amend, appeal and be involved in the assessment and education plan of the child.⁴⁵ The ESPEN Act also states that inclusive education for children with special needs should occur unless it is not in the best interests of the child or

³⁹ Mary E. Daly, 'The Primary and Natural Educator'? The Role of Parents in the Education of Their Children in Independent Ireland' 44 *Eire Ireland* 1/2(Spring/Summer 2009) 195.

⁴⁰ Mary E. Daly, 'The Primary and Natural Educator'? The Role of Parents in the Education of Their Children in Independent Ireland' 44 *Eire Ireland* 1/2(Spring/Summer 2009) 195; John Sweeney, 'Attitudes of Catholic religious orders towards children and adults with an intellectual disability in postcolonial Ireland' 17 *Nursing Inquiry* (2010).

⁴¹ Mary E. Daly, 'The Primary and Natural Educator'? The Role of Parents in the Education of Their Children in Independent Ireland' 44 *Eire Ireland* 1/2(Spring/Summer 2009) 212-215.

⁴² Education Act of 1998. Available at <<http://www.irishstatutebook.ie/1998/en/act/pub/0051/>> (last accessed 6 April 2015).

⁴³ *Sinnott v. Minister for Education* [2001] 2 IR 545. Available at <<http://www.bailii.org/ie/cases/IESC/2001/63.html>> (last accessed 6 April 2015).

⁴⁴ Shivaun Quinlivan and Mary Keys, 'Official Indifference and Persistent Procrastination: An Analysis of *Sinnott*' *Judicial Studies Institute Journal* 2(2) JSIJ (2002) 163.

⁴⁵ S4, S5 Education for Persons with Special Educational Needs Act (2004). Available at <<http://www.irishstatutebook.ie/2004/en/act/pub/0030/print.html>> (last accessed 6 April 2015).

would hamper the “effective provision of education” for other children.⁴⁶ Despite the passage of the Act in 2004 the following sections of the EPSEN act have not been implemented: sections 3 to 13, 14(1)(b), 14(1)(d), 14(1)(e), 14(1)(f), 15 to 18, 38 and 39.⁴⁷ These sections include the implementation of individual education plans, making teachers aware of the special education needs of students and the importance of identifying children and students who have special education needs, creating disability awareness in schools, the special educational needs organiser, ascertaining the wishes of the child concerned, designation of liaison officers by National Council for Special Education and the Health Service Executive.

Under the EPSEN Act the National Council for Special Education, originally established in 2003, was given power to assess and review the resources required to provide education for children with special education needs.⁴⁸ The Act also established the Special Education Appeals Board (SEAB), which is empowered to hear complaints and appeals related to the EPSEN Act.⁴⁹ As noted in Inclusion Ireland’s 2013 position paper on the National Disability Strategy the SEAB never heard an appeal since its establishment and when the term of the board ended in 2010 no new board was appointed in its place.⁵⁰

Unsurprisingly, one expert on child law stated in an interview for this project that in general decisions-makers do not make serious efforts to ascertain the views of children with disabilities directly and that the level of the child’s involvement instead tends to depend on the parents’ ability to advocate.⁵¹

Barriers

The key barriers identified by parents interviewed for this report in securing access to justice for children with cognitive disabilities in decisions about education included the timeframe for complaints, delay and complexity of hearing processes, lack of support to make a complaint, and retaliation for complaints made.

One parent interviewed said that she had brought a case to the Equality Tribunal about her child being excluded on the basis of disability from a state funded

⁴⁶ S2 Education for Persons with Special Educational Needs Act (2004). Available at <<http://www.irishstatutebook.ie/2004/en/act/pub/0030/print.html>> (last accessed 6 April 2015).

⁴⁷ Written answers to Dáil Questions, 4 November 2008 for questions [38212/08 and 38016/08]. Available at <<http://www.kildarestreet.com/wrans/?id=2008-11-04.506.0>> (last accessed 10 April 2015).

⁴⁸ S20 EPSEN Act (2004). Available at <<http://www.irishstatutebook.ie/2004/en/act/pub/0030/print.html>> (last accessed 6 April 2015).

⁴⁹ S36 EPSEN Act (2004). Available at <<http://www.irishstatutebook.ie/2004/en/act/pub/0030/print.html>> (last accessed 6 April 2015).

⁵⁰ Inclusion Ireland, Implementing the National Disability Strategy, Inclusion Ireland Position Paper (January 2013). Available at <http://www.inclusionireland.ie/sites/default/files/documents/position_paper_on_implementing_the_nds_.pdf> (last accessed 7 April 2015).

⁵¹ Interview with Child Rights Expert conducted by Eilionoir Flynn and Jenni Kline on 24 January 2014.

drama group but had heard no response regarding her complaint since she initiated the process over a year ago.⁵²

Two parents spoke of children being excluded from mainstream schools because of “health and safety concerns” which they found very hard to contest.⁵³ One mother said she knew of other parents in similar situations who were unable to find a school placement for their child.⁵⁴

All in all three of the five parents we interviewed spoke of difficulties in finding mainstream schools for their children with cognitive disabilities⁵⁵ and three of the five parents spoke of difficulties accessing appropriate supports and accommodations either from the school directly or through the HSE.⁵⁶ This dissatisfaction in the process of applying for supports was also found in a large survey used by the National Council for Special Education.⁵⁷

Two of the parents said it was more difficult to get mainstream schooling in secondary school than primary school.⁵⁸ “When your child is small and cute and appealing people will help you. When your child reaches teenage years and is telling professionals to fuck-off they don’t want to know.”⁵⁹ Lack of access to mainstream schooling for children with cognitive disabilities was also addressed in a presentation to the Joint Committee on Education and Social Protection⁶⁰ and discussed in a report by the National Council for Special Education.⁶¹

Most of the cases that the Disability Appeals Officer reported on in her 2010 annual report were procedural cases based on violations of the statute of limitations for assessment requests.⁶² These cases addressed the timeframe for completion of assessments of need on children, and whether the timeframe in particular cases exceeded the statutory requirement.

⁵² Interview with Parent 2 conducted by Jenni Kline on 27 February 2014.

⁵³ Interview with Parent 5 conducted by Jenni Kline on 28 March 2014 and Interview with Parent 4 conducted by Jenni Kline on 25 March 2014.

⁵⁴ Interview with Parent 4 conducted by Jenni Kline on 25 March 2014.

⁵⁵ Interview with Parent 2 conducted by Jenni Kline 27 February 2015 : Interview with Parent 4 conducted by Jenni Kline on 25 March 2014 : Interview with Parent 5 conducted 28 March 2014.

⁵⁶ Interview with Parent 1 conducted by Jenni Kline 26 February 2014: Interview with Parent 2 conducted by Jenni Kline 27 February 2014: Interview with Parent 5 conducted by Jenni 28 March 2014.

⁵⁷ National Council for Special Education, *Supporting Students with Special Educational Needs in Schools*, NCSE Policy Advice Paper No. 4 (May 2013) 24. Available at <http://ncse.ie/wp-content/uploads/2014/09/Supporting_14_05_13_web.pdf> (last accessed 10 April 2015).

⁵⁸ Interview with Parent 2 conducted by Jenni Kline on 27 February 2014: Interview with Parent 5 conducted by Jenni Kline on 28 March 2014.

⁵⁹ Interview with Parent 2 conducted by Jenni Kline on 27 February 2014.

⁶⁰ Mark O’Connor, *Presentation to the Joint Committee on Education and Social Protection* (11 December 2013). Available at <<http://www.autismireland.ie/news-events/news/1126/>> (last accessed 10 April 2015).

⁶¹ National Council for Special Education, *Supporting Students with Special Educational Needs in Schools*, NCSE Policy Advice Paper No. 4 (May 2013) 24. Available at <http://ncse.ie/wp-content/uploads/2014/09/Supporting_14_05_13_web.pdf> (last accessed 10 April 2015).

⁶² Disability Appeals Office, *2010 Annual Report of the Disability Appeals Officer* (June 2011).

Parents were also very critical of the timeframe for decisions on assessments of need (carried out by the HSE), school placements and school accommodation. As one parent said “To take a complaint, to go to the ombudsman, it takes years and these are kids, kids don’t have years.”⁶³ Another parent whose child is 17 and was unable to get suitable mainstream schooling or services said, “He has no education, no nothing.... Basically they’ve just thrown him away.”⁶⁴

One of the more disturbing patterns that came up in the interviews was retaliatory action for making complaints against a school or the HSE. One parent who made a complaint regarding an inaccurate statement in the early intervention report that was to be used in the assessment of needs said that her three children who all had special needs were excluded from HSE services, and the family then had to pay out of pocket for the support they required.⁶⁵ Another parent who had complained against the school was threatened with litigation so ended up moving her child to a different school.⁶⁶ One parent had made a complaint about a child’s assessment of needs and wasn’t receiving services when the child was having serious health effects that the parent reached out again to the HSE for help with the parent was told that she would be reported for child neglect since she was unable to ensure the health of her child.⁶⁷

What Access to Justice for Children with Cognitive Disabilities Should Look Like in Education Settings in Ireland

Drawing from international definitions and standards related to access to justice, access to justice for children with cognitive disabilities in Ireland would include first and foremost access to education (including mainstream education) and educational supports for children with cognitive disabilities.⁶⁸ Children with cognitive disabilities should be meaningfully involved in decision making about where they attend school.⁶⁹ Access to justice in Ireland would require an accessible and effective appeals procedure for parents and children to challenge decisions about education support services. The appeals procedure should include views of the child and have the requisite supports to enable a child with a cognitive disability to do so.⁷⁰

⁶³ Interview with Parent 1 conducted by Jenni Kline 26 February 2014.

⁶⁴ Interview with Parent 2 conducted by Jenni Kline 27 February 2014.

⁶⁵ Interview with Parent 1 conducted by Jenni Kline 26 February 2014.

⁶⁶ Interview with Parent 5 conducted by Jenni Kline 28 March 2014.

⁶⁷ Interview with Parent 1 conducted by Jenni Kline 26 February 2014.

⁶⁸ Art. 14, Convention on the Rights of Persons with Disabilities (2006)
<http://www.un.org/disabilities/default.asp?id=259>.

⁶⁹ Art. 12, Convention on the Rights of the Child (1989). Available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; Article 7 Convention on the Rights of Children with Disabilities. Available at <<http://www.un.org/disabilities/default.asp?id=259>> (last accessed 6 April 2015).

⁷⁰ Art. 12, Convention on the Rights of the Child (1989). Available at <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>; Article 7 Convention on the Rights of Children with Disabilities. Available at <<http://www.un.org/disabilities/default.asp?id=259>> (last accessed 6 April 2015).

Care and Custody Proceedings

Background Information

In 2011 there were a total of 6160 children in care in Ireland,⁷¹ and 2,248 of those had been admitted to care that year. Only 1% of these admissions were for children with “mental health problems” or an intellectual disability.⁷² The term “in care” includes residential institutions as well as foster care placements and voluntary placements with a relative of the child.⁷³ In 2013 there were 321 children in general residential care centres in Ireland.⁷⁴

The report *Someone to Care* stated that professionals that worked with children in care often saw children with mental health issues, children with learning disabilities and children on the autism spectrum.⁷⁵ The Child Care Law Project found that 91 of the 333 cases studied involved one or more children with “psychological needs” for a total of 112 children.⁷⁶ These figures differ starkly from the recorded 1% of children in care with intellectual disability or mental health diagnoses in 2011.

In Ireland, family law cases, including cases about guardianship, custody and access which determine where a child should live are held *in camera* there are rarely judgments, and any judgments that may be issued tend not to be published.⁷⁷ There have been calls to reform this practice⁷⁸ and researchers are addressing this knowledge gap in the Child Care Law Reporting Project, which is publishing anonymised summaries of care proceeding cases.⁷⁹ Researchers from

⁷¹ Health Service Executive, ‘Review of Adequacy for HSE Children and Family Services’ (2011) 51. Available at <http://www.tusla.ie/uploads/content/Publications_reviewofadequacy2011.pdf> (last accessed 14 April 2015).

⁷² *Ibid.* at 50.

⁷³ Health Service Executive, ‘Review of Adequacy for HSE Children and Family Services’ (2011) 49. Available at <http://www.tusla.ie/uploads/content/Publications_reviewofadequacy2011.pdf> (last accessed 14 August 2013).

⁷⁴ Department of Children and Youth Affairs, Residential Care. Available at <http://www.dcy.gov.ie/docs/Residential_Care/2586.htm> (last accessed 7 April 2015).

⁷⁵ Children’s Mental Health Coalition and Children’s Research Network for Ireland and Northern Ireland, *Someone to Care*, (2013).

⁷⁶ Carol Coulter, *Interim Report- Child Care Law Reporting Project* (November 2013) 47. Available at <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>> (last accessed 25 March 2014).

⁷⁷ Court Service, Family Law, *General Information*, Available at <<http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/07485CD701DD7B89802577EA003FAAEA>> (last accessed 13 November 2013).

⁷⁸ Carol Coulter, *Family law should not exist in a cocoon isolated from general legal principles*, *The Irish Times* (8 August 2013). Available at <<http://www.irishtimes.com/news/crime-and-law/family-law-should-not-exist-in-a-cocoon-isolated-from-general-legal-principles-1.1487452>> (last accessed 13 November 2013).

⁷⁹ Child Law Project, Available at <<http://www.childlawproject.ie/>> (last accessed 13 November 2013); Carol Coulter, *Interim Report- Child Care Law Reporting Project* (November 2013). Available at <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>> (last accessed 25 March 2014).

UCC have also provided valuable research on District Court child care proceedings⁸⁰ to assess the level of children's participation in the proceedings.

This section addresses the three main kinds of legal proceedings in Ireland for determining where a child with a cognitive disability will live – care proceedings, guardianship, custody and access proceedings, and decisions about placing a child in voluntary or involuntary mental health treatment. These are the main procedures the government of Ireland uses when it intervenes to determine where a child shall live. Home is a very basic and central aspect of any child's life and traditionally a child's home is with the family. When a child's home must be moved or disrupted through the intervention of the state, the principle of the Convention on the Rights of the Child requires that the child is involved in such an important decision. Irish law and policy in this section is examined with this principle in mind.

Brief history of relevant laws and policies relating to care and custody and access to justice

Historically, the practice of fostering is a well-established tradition in Ireland, and was often used to offset the burden of high birth rates on families.⁸¹ Following independence, the Irish State provided for foster care under the remit of Health Boards (now the Health Service Executive) and stated a preference for foster care over residential schools.⁸²

Children with disabilities historically in Ireland were often taken from their families at a young age and placed in special residential schools, rather than being placed into foster care. Appropriate support was often not provided to families to support them to keep children with cognitive disabilities at home.⁸³ A study of older people with intellectual disabilities in Ireland recorded how many of them remember being assessed and removed from their families and schools.⁸⁴ At the time of writing, full time residential schools for children with intellectual or cognitive disabilities no longer exist in Ireland.

As previously noted, Ireland has a constitutional provision protecting the rights of the family to make decisions about children, free from arbitrary and unwarranted interference from the State.⁸⁵ Some commentators view that this

⁸⁰ Conor O'Mahony, Caroline Shore et al. 'Child Care Proceedings in the District Court: What Do We Really Know?' 2 *Irish Journal of Family Law* (2012) 49-56.

⁸¹ Rosemary Horgan, 'Foster Care in Ireland' 3(1)*Irish Journal of Applied Social Studies* (2002) 30-31. Available at <http://arrow.dit.ie/ijass/vol3/iss1/6> (last accessed 9 April 2015).

⁸² *Ibid.* at 32.

⁸³ National Federation of Voluntary Bodies, *Informing Families of their Child's Disability-National Best Practices*. Available at http://www.fedvol.ie/_fileupload/Publications/Informing_Families_Guidelines.pdf (last accessed 14 April 2015).

⁸⁴ Carol Hamilton and Dorothy Atkinson, 'A Story to Tell- learning from the life stories of older people with intellectual disabilities in Ireland' 37(4)*British Journal of Intellectual Disability* (2009) 316.

⁸⁵ Art.41, Constitution of Ireland.

constitutional provision can result in the suppression of the rights of the child for the sake of the protection of the family.⁸⁶

In 2012, 1,384 care orders, 4,862 interim care orders and 424 emergency care orders were granted in Ireland.⁸⁷ It is important to note that there are no statistics kept on voluntary placements of children – for example children being placed voluntarily with a relative, in Ireland.

In an interview for this project, one district court judge noted that many of the care cases she sees involve very young children where it would be difficult to include the voice of the child.⁸⁸ This was confirmed in the interim report of the Child Care Law Project, which stated that of the 573 children who were the subjects of care orders 186 were 0-4 years old and a further 181 were 5-9 years old.⁸⁹ Nevertheless, efforts to ascertain the views of the child, in accordance with the child's age and maturity, can still be made. While the views of children with cognitive disabilities about where and with whom to live might be even more difficult to ascertain, this process is essential to ensure effective access to justice for children with cognitive disabilities in care in Ireland.

Kilkelly's article on barriers to the realisation of children's rights highlights in particular the problems of children in care in Ireland and recommends that more effort be put into preventing the child from being placed in care in the first place.⁹⁰ Her report notes that the key barriers are the invisibility of children and failure to listen to children's views, the lack of a child focus, rights-basis and child-proofing of legislation and policy, and inadequate administrative and reporting structures. These findings are supported by McGree's research on children in foster care, which set out recommendations to better ensure that the child's voice is supported and represented in the foster care process.⁹¹ Darmody's further research on the education of children in care in Ireland also reflects these concerns;⁹² however, that report does not examine the issue of children in care with cognitive disabilities and the educational barriers and challenges they may face.

⁸⁶ Ursula Kilkelly, 'Children's Rights and the Family: Myth and Reality' 97(385) *Studies: An Irish Quarterly Review* (Spring 2008) 12.

⁸⁷ Court Service, Statistics, Childcare, <<http://www.courts.ie/courts.ie/library3.nsf/66d7c83325e8568b80256ffe00466ca0/7db7d4bcf6917f8880257a7600568afe?OpenDocument>> (last accessed 9 October 2013).

⁸⁸ Interview with District Court Judge conducted by Jenni Kline on 10 March 2014.

⁸⁹ Carol Coulter, *Interim Report- Child Care Law Reporting Project* (November 2013) 46. Available at <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>> (last accessed 25 March 2014).

⁹⁰ Ursula Kilkelly, *Barriers to the Realisation of Children's Rights in Ireland*, Commissioned by the Ombudsman for Children, (2007) 13.

⁹¹ Sheila McGree et al. *Having A Say-In Care Reviews A Study of Children in Foster Care*, Athlone Institute of Technology with the Health Service Executive (2006) 47. Available at <<http://www.dcy.gov.ie/documents/publications/Havingasay.pdf>> last accessed 28 October 2013.

⁹² Merike Darmody et al. *Education of Children in Care in Ireland: An Exploratory Study*, Commissioned by the Ombudsman for Children, (May 2013) 45.

The interim report of the Child Care Law Reporting Project analyses collected data and makes recommendations on the improvement of the child care proceedings.⁹³ This report highlights that an order for care was refused in only 4 of the 333 cases surveyed in the study – demonstrating that the courts overwhelmingly tend to approve requests to place children in care; although the level of children’s participation in these decisions seems to vary considerably, and the extent to which courts attempt to ascertain the views of children with cognitive disabilities in these processes is unknown.⁹⁴

Relevant laws and policies

Care Proceedings

There are several types of care procedures under the Child Care Act that may be used to remove a child from their current living situation in Ireland: emergency removal by a member of the Garda, emergency care orders, care orders and special care orders. The overarching guidelines for these proceedings can be found in the Child Care Act 1991 and the Child Care .⁹⁵ The following section of this report summarises the procedures for placing a child in care in Ireland in order to explore how these proceedings might apply to children with cognitive disabilities.

Voluntary Care

A child may also be taken into voluntary care with the consent of the parents where the child requires a level of protection or care that the child would be unable to receive unless in care.⁹⁶ This proceeding is conducted unilaterally between the parents and the HSE and does not involve the court and thus there is no appointment of a solicitor for the parents or involvement of a Guardian ad Litem. Since this procedure does not involve the court, the child is not entitled to be heard by a court, or to have a Guardian ad Litem appointed to ascertain his or her views. Also, since it does not take place in court, these placements are not a matter of public record and thus are difficult to research.

Removal by the Garda

A member of the Garda may remove a child without a warrant or application for an emergency care order where there is 1) “an immediate and serious risk to the health or welfare of a child” and 2) protection of the child cannot be sufficiently accomplished by waiting to make an application for an emergency care order.⁹⁷ This is a last resort measure that can only be used in cases of life or death.⁹⁸ There is nothing in this provision itself that provides for or ensures that the child is heard in this proceeding.

⁹³ Carol Coulter, *Interim Report- Child Care Law Reporting Project* (November 2013). Available at <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>> accessed 21 March 2014.

⁹⁴ Carol Coulter, *Interim Report- Child Care Law Reporting Project* (November 2013) 52. Available at <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>> accessed 25 March 2014.

⁹⁵ Child Care Act 1991

⁹⁶ S4 Child Care Act 1991.

⁹⁷ S12 Child Care Act 1991.

⁹⁸ Jim Nestor, *Law of Child Care* 2nd ed., Blackhall Publishing, Blackrock, Ireland (2009) 156.

Emergency Care Orders

Emergency care orders are made through an application to the District Court.⁹⁹ If the emergency care order is granted the child is placed under the care of Tusla.¹⁰⁰ To grant an emergency care order the court must be of the opinion that 1) “there is a serious risk to the health or welfare of the child” or 2) there is likely to be such a risk if child is not removed.¹⁰¹ Under an emergency care order the court may require a medical or psychiatric examination, treatment or assessment of the child.¹⁰² Similar to removal by the Gardaí, removal under an emergency care order is likely to occur only under exceptional circumstances “where the parents for physical or moral reasons fail in their duty to the child.”¹⁰³ This proceeding is used usually in situations of child abuse.¹⁰⁴

Care Proceedings

Care proceedings commence with an application by the HSE to the court and are granted where the court is satisfied that a) “the child has been or is being assaulted, ill-treated, neglected or sexually abused” or b) “the child’s health, development or welfare has been or is being avoidably impaired or neglected” or c) “the child’s health, development or welfare is likely to be avoidably impaired or neglected” and that without the order protection or care of the child would be unlikely to occur.¹⁰⁵

Special Care Orders

Special Care Orders can be made by application by Tusla to the court.¹⁰⁶ They are granted where the behaviour of the child poses a risk to his or her life, health, safety, development or welfare and the child is unlikely to receive the special care of protection without such an order.¹⁰⁷ Prior to applying to the court, Tusla must hold a family welfare conference.¹⁰⁸ Under a special care order a child comes under the care of Tusla and Tusla is then authorised to detain the child in a special care unit and provide appropriate care, education and treatment for the child.¹⁰⁹ A special care order may last no less than three months and no more than six and ceases as soon as the circumstances leading to the special care order cease.¹¹⁰ Generally a special care order may not exceed three months except where an extension was granted and there is a limit of two extensions.¹¹¹

⁹⁹ S13 Child Care Act 1991.

¹⁰⁰ S13 Child Care Act 1991.

¹⁰¹ S13 Child Care Act 1991.

¹⁰² S13 Child Care Act 1991.

¹⁰³ Jim Nestor, *Law of Child Care 2nd ed.*, Blackhall Publishing, Blackrock, Ireland (2009) 158: Art. 42a Constitution of Ireland.

¹⁰⁴ Jim Nestor, *Law of Child Care 2nd ed.*, Blackhall Publishing, Blackrock, Ireland (2009) 162.

¹⁰⁵ S18 Child Care Act, 1991.

¹⁰⁶ Prior to the Child and Family Agency Act 2013, these applications were made by the HSE, but this function now falls within the remit of Tusla.

¹⁰⁷ S24(b) Children Act 2001.

¹⁰⁸ S23(a) Children Act 2001.

¹⁰⁹ S23(b) Children Act 2001.

¹¹⁰ S23(b) Children Act 2001.

Care Related Policies

In any proceeding relating to the placement of a child in residential care, Tusla must, so far as is practicable, given the age and understanding of the child, give due consideration to the wishes of the child.¹¹² The Child Care Act of 1991 also specifies that the HSE (now Tusla) must take into account the wishes of children in care proceedings “having regard to the child’s age and understanding.”¹¹³ In addition, standards established by the Health Information and Quality Authority (HIQA) for children in residential centres require that “young people are cared for in a manner that respects and takes account of their wishes, preferences and individuality.”¹¹⁴ Despite the existence of these standards, there are no real mechanisms or processes to ascertain these preferences of children beyond the Children First Guidelines referenced above, which only provide guidance and do not impose legal requirements on the relevant public bodies and state agencies. In addition, studies have shown that the voices and opinions of children are often not considered in practice in these proceedings.¹¹⁵

Once a child is in care there are several HIQA standards that require information be provided to the child.¹¹⁶ Most of these guidelines concern information about the centre or placement itself. Residential centres are required to be given information about how to access their records and are guided in how to exercise this right.¹¹⁷ The centres are also required to prepare and allow children to attend review meetings.¹¹⁸

HIQA standards require that children in residential care “are provided with age appropriate written information about all aspects of the centre.”¹¹⁹ Children are to be told why they are in residential care and what their future expectations should be.¹²⁰ They must also be given their statutory care plan.¹²¹ All of the HIQA

¹¹² S4 Child Care (Placement of Children in Residential Care) Regulations 1995.

¹¹³ S3 Child Care Act 1991.

¹¹⁴ S6.1 HIQA Standards for Children Residential Centres. Available at <http://www.hiqa.ie/system/files/Standards_children_crc_DOHC.pdf> (last accessed 25 October 2013).

¹¹⁵ Merike Darmody et al. *Education of Children in Care in Ireland: An Exploratory Study*, Commissioned by the Ombudsman for Children, (May 2013) 45.

¹¹⁶ S4.10, S4.11, S4.12, S5.3, S5.4, S5.12, HIQA Standards for Children Residential Centres.

¹¹⁷ S4.11 HIQA Standards for Children in Residential Centres. Available at <http://www.hiqa.ie/system/files/Standards_children_crc_DOHC.pdf> (last accessed last 25 October 2013.)

¹¹⁸ S5.15 HIQA Standards for Children in Residential Centres. Available at <http://www.hiqa.ie/system/files/Standards_children_crc_DOHC.pdf> (last accessed last 25 October 2013)

¹¹⁹ S5.3 HIQA Standards for Children Residential Centres. Available at <http://www.hiqa.ie/system/files/Standards_children_crc_DOHC.pdf> (last accessed 25 October 2013).

¹²⁰ S5.4 HIQA Standards for Children Residential Centres. Available at <http://www.hiqa.ie/system/files/Standards_children_crc_DOHC.pdf> (last accessed 25 October 2013).

¹²¹ S5.12 HIQA Standards for Children Residential Centres. Available at <http://www.hiqa.ie/system/files/Standards_children_crc_DOHC.pdf> last accessed 25 October 2013.

standards relating to children have a “child friendly version” and a version for “young people” available on their website.¹²²

According to an expert in care proceedings interviewed for this report, children over the age of 16 are often appointed separate legal representation in cases involving their placement in residential care, although there is no legal requirement for such representation.¹²³ The possibility to provide legal representation arises in such cases where the court makes the child a party to the proceedings.¹²⁴ In other interviews for this report, we learned of a case involving a child sent to a secure care placement abroad. The child had a guardian ad litem for the case and wrote a letter to the judge following the placement. The parent of the child in this case noted that in the UK where the child was placed the child had access to a solicitor for the care related proceedings as an entitlement under law.¹²⁵

Guardians Ad Litem

Any child in care proceedings or under a care order may be appointed a guardian ad litem by the court if the court is satisfied that it is necessary in the interests of the child and an interests of justice to do so.¹²⁶ Guardians ad litem can also be appointed in custody and family law cases.¹²⁷ The HSE is responsible for paying the costs incurred by a person acting as a guardian ad litem in care proceedings and may apply to the court to have another party pay the expenses.¹²⁸ A guardian ad litem is also available in cases of special care proceedings.¹²⁹ District Court rules have expanded the use of guardians ad litem beyond care proceedings to allow the court to appoint a guardian ad litem in “any proceedings ...brought before the court on behalf or against a minor” where the court finds it appropriate.¹³⁰ A guardian ad litem may also be appointed in cases of social care services for children with disabilities brought for judicial review.¹³¹

The guidelines for the guardian ad litem, published by the now defunct Children Acts Advisory Board (CAAB), require that the guardian ad litem “meet with the child as often as needed so that the child’s wishes and interests are known and

¹²² Health Information and Quality Authority, Standards, *Social Care- Children and Young People*, <<http://www.hiqa.ie/children-and-young-people#crc>>(last accessed 25 October 2013).

¹²³ Interview with care proceedings expert conducted by Eilionoir Flynn and Jenni Kline on 7 February 2014.

¹²⁴ S25, Child Care Act 1991.

¹²⁵ Interview with Parent 2 conducted by Jenni Kline on 27 February 2014. This is because the UK has a dualist system where both a solicitor and a guardian ad litem can be appointed together. That is not the case in Ireland.

¹²⁶ S26 Child Care Act 1991.

¹²⁷ S28 Children’s Act 1997. It was proposed that this be amended in the Children and Family Relationships Act 2015, but from the version of the Act passed by the Seanad, available at the time of writing, this amendment does not appear to have been included in the final text of the Act.

¹²⁸ S26 Child Care Act 1991.

¹²⁹ S16 Children Act 2001.

¹³⁰ District Order No. 7 (S.I. 93/97).

¹³¹ Capita Consulting Ireland, *Review of Guardian Ad Litem Service*, (2 March 2004) 34.

“adequately represented to court.”¹³² Under the CAAB guidelines the guardian ad litem may also seek the appointment of a legal representative for the child.¹³³ A guardian ad litem is not a solicitor or barrister but is required to have a third level qualification in social work, psychology or other relevant field and at least five years postgraduate experience working in child welfare/protection systems.¹³⁴ Under the guidelines a guardian ad litem must be able “to communicate with and assess children in stressful situations,”¹³⁵ and conduct a detailed inquiry into the child’s psychological and emotional development and educational needs.¹³⁶

A study on child rights in Ireland noted that children “are only appointed a guardian ad litem in rare cases.”¹³⁷ A report for the Ombudsman of Children highlighted that there is no statutory provision for ensuring there are appropriately qualified guardians ad litem.¹³⁸ Although Barnardos offers a guardian ad litem service, lack of funding is a limiting factor.¹³⁹ Selection and vetting of guardians ad litem was described as “following no set pattern” in a previous study of the mechanism.¹⁴⁰ The same study indicated that demand for guardian ad litem services is far greater than the supply and availability of guardians ad litem in Ireland.¹⁴¹

Some reports have indicated that there is a general shortage of guardians ad litem and that there is little data gathering on their use.¹⁴² In 2006 the UN Committee on the Rights of the Child (‘CRC Committee’) issued its concluding observations on the state report submitted to it by Ireland. The CRC Committee expressed concern at the lack of sufficient provision for guardians ad litem across all types of proceedings, and recommended that children are provided

¹³² S1.2.1(d), S1.2.5, Children Acts Advisory Board, *Giving a voice to children’s wishes, feelings and interests: guidance on the role, criteria for appointment, qualifications and training of guardians ad litem appointed for children in Proceedings under the Child Care Act, 1991* (May 2009) 3.

¹³³ S1.2.4(f) Children Acts Advisory Board, *Giving a voice to children’s wishes, feelings and interests: guidance on the role, criteria for appointment, qualifications and training of guardians ad litem appointed for children in Proceedings under the Child Care Act, 1991* (May 2009) 4.

¹³⁴ S1.4 Children Acts Advisory Board, *Giving a voice to children’s wishes, feelings and interests: guidance on the role, criteria for appointment, qualifications and training of guardians ad litem appointed for children in Proceedings under the Child Care Act, 1991* (May 2009) 7.

¹³⁵ S2.4.3 Children Acts Advisory Board, *Giving a voice to children’s wishes, feelings and interests: guidance on the role, criteria for appointment, qualifications and training of guardians ad litem appointed for children in Proceedings under the Child Care Act, 1991* (May 2009) 10.

¹³⁶ S3.2.2 Children Acts Advisory Board, *Giving a voice to children’s wishes, feelings and interests: guidance on the role, criteria for appointment, qualifications and training of guardians ad litem appointed for children in Proceedings under the Child Care Act, 1991* (May 2009) 12.

¹³⁷ Laura Lundy et al. *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (2012) UNICEF and Queen’s University Belfast.

¹³⁸ Ursula Kilkelly, *Barriers to the Realisation of Children’s Rights in Ireland*, Commissioned by the Ombudsman for Children, (2007) 114.

¹³⁹ Ursula Kilkelly, *Barriers to the Realisation of Children’s Rights in Ireland*, Commissioned by the Ombudsman for Children, (2007) 143

¹⁴⁰ Capita Consulting Ireland, *Review of Guardian Ad Litem Service*, (2 March 2004) 40.

¹⁴¹ Capita Consulting Ireland, *Review of Guardian Ad Litem Service*, (2 March 2004) 42.

¹⁴² Ann McWilliams and Claire Hamilton, ‘There isn’t anything like a GAL’-The Guardian ad litem Service in Ireland’ (2010) *Irish Journal of Applied Social Studies* 31,32.

with the opportunity to be heard in any judicial and administrative proceedings affecting them, and that due weight is given to those views in accordance with the age and maturity of the child.¹⁴³

The interim report of the Child Care Law reporting Project highlighted the fact that the guardian ad litem's report often supports the position of the HSE (the party seeking the care order) in care proceedings.¹⁴⁴ This view was confirmed by one of the barristers interviewed for this project.¹⁴⁵ One article highlighted that appointment of guardians ad litem occur in an "ad hoc manner" and that the HSE has recommended specific Guardians ad litem to the court.¹⁴⁶

The Child Care Law Project reports found that the court appointed guardians ad litem around 50 percent of the cases (representing 70 percent of children whose cases were surveyed).¹⁴⁷ The project report also noted that outside of major cities in Ireland use of guardians ad litem was more sporadic and hardly used at all in rural areas.¹⁴⁸ The Child Care Law Project also found that Barnardos was the employer of the guardians ad litem in 45 percent of 234 cases surveyed. A regional analysis found that Barnardos supplied the guardians ad litem in the majority of cases in Cork and Dublin, but in the rest of Ireland there were a higher percentage of independent guardians ad litem.¹⁴⁹ One barrister interviewed for this project said that there has been some recent reluctance in Dublin courts to appoint guardians ad litem in part because of the lack of regulation surrounding their qualifications.¹⁵⁰

Limited research is available on children's knowledge or information about the guardian ad litem role in Ireland. However, one report found that there are differences in the levels of information provided to children, but that most children felt the guardian ad litem did his/her best for them and listened to them.¹⁵¹

¹⁴³ Committee on the Rights of the Child, *Concluding observations: Ireland*, CRC/C/IRL/CO/2 (29 September 2006). Available at: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/450/74/PDF/G0645074.pdf?OpenElement>>(last accessed 13 November 2013).

¹⁴⁴ Carol Coulter, *Interim Report- Child Care Law Reporting Project* (November 2013) 14. Available at <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>>(last accessed 21 March 2014).

¹⁴⁵ Interview with Dublin barrister conducted by Jenni Kline on 14 March 2014.

¹⁴⁶ Nicola Carr 'Guiding the GALs: A Case of Hesitant Policy-making in the Republic of Ireland' 3 *Irish Journal of Family Law* (2009) 60-71.

¹⁴⁷ Carol Coulter, *Interim Report- Child Care Law Reporting Project* (November 2013) 15.47-48. Available at <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>>(last accessed 21 March 2014).

¹⁴⁸ Carol Coulter, *Interim Report- Child Care Law Reporting Project* (November 2013) 15. Available at <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>>(last accessed 21 March 2014).

¹⁴⁹ Carol Coulter, *Interim Report- Child Care Law Reporting Project* (November 2013) 47, 62. Available at <<http://www.childlawproject.ie/wp-content/uploads/2013/11/correctedinterimreport.pdf>>(last accessed 25 March 2014).

¹⁵⁰ Interview with Dublin barrister conducted by Jenni Kline on 14 March 2014.

¹⁵¹ Children Acts Advisory Board, *Giving a voice to children's wishes, feelings and interests: guidance on the role, criteria for appointment, qualifications and training of guardians ad litem appointed for*

In discussing the reform and regulation of the guardian ad litem service in Ireland one interviewee for this project said such reform is needed but that the reform and policy discussions tend to focus on cost rather than on improving access to justice for children, including children with cognitive disabilities.¹⁵²

Barriers and Experiences of Children in Care

In researching this report, we found little information on how the voices of children, especially children with cognitive disabilities are heard in care proceedings. Voluntary care is especially difficult to research since it does not occur in a court setting. The participation of children in care proceedings seem to depend on the individual judges view on child participation and their level of comfort with facilitating the voice of the child. This may change if the 31st Amendment comes into effect.

One district judge interviewed for this project viewed that the voice of the child is heard in court for care proceedings through the appointment of a guardian ad litem and the commissioning of the psychologist's report. The judge also felt that parents could generally represent the voice of the child in proceedings. The same judge, however, also noted that she always spoke to a child if they requested to speak with her and that she took letters sent by children into account in making her final decision.¹⁵³ Another interviewee viewed that momentum was increasing towards hearing the voice of the child in legal proceedings and that many judges in Ireland are very interested in hearing the voice of the child.¹⁵⁴

An interview with a representative from a child advocacy agency for this project stated that children with cognitive disabilities in care often have their care dictated to them and are not included or involved in the process.¹⁵⁵ This sentiment is supported by a new report from EPIC which found in interviews with young people in care that some of the participants felt that their input was not valued at care review meetings and that decisions had already been made prior to the meetings.¹⁵⁶

It should be noted that while children in care should have a dedicated social worker there are hundreds of children who do not currently have a dedicated social worker, which could negatively impact accessing services and appropriate placements.¹⁵⁷

One parent interviewed for this report was told that care proceedings could be instituted against her because she was not supposed to have her child with a

children in Proceedings under the Child Care Act, 1991 (May 2009) 23. Available at <<http://www.caab.ie/Publications/PDFs---Publications/Giving-a-Voice-to-Childrens-Wishes,-Feelings-and-I.aspx>>(last accessed 24 March 2014).

¹⁵² Interview with Representative from a Child Advocacy organisation by Jenni Kline on 1 April 2014.

¹⁵³ Interview with District Court Judge conducted by Jenni Kline on 10 March 2014.

¹⁵⁴ Interview with representative from a Child Advocacy organisation by Jenni Kline on 1 April 2014.

¹⁵⁵ Interview with representative from a Child Advocacy organisation by Jenni Kline on 1 April 2014.

¹⁵⁶ EPIC, *Its About Me-Young peoples experiences of participating in Care Reviews* (2014) 67.

¹⁵⁷ Merike Darmody et al. *Education of Children in Care in Ireland: An Exploratory Study*, Commissioned by the Ombudsman for Children, (May 2013).

cognitive disability in the house with her other children, but the HSE was unable to provide any services or an alternative adequate placement for her child. For six months the child was moved between Bed and Breakfasts and holiday homes with a social worker, interrupted by stays at home when the HSE periodically removed funding. At one point the parent was told the child could go into 'out of hours care' where the child would be left at a hotel or Bed and Breakfast alone without a social worker.¹⁵⁸

An interview with a representative from a child advocacy organisation said there are huge cultural challenges to having the voice of the child heard in Ireland and that even with upcoming family law legislation there is a strong belief that children are not able to articulate or express their voice.¹⁵⁹

Guardianship and Custody Hearings

In 2013 there were 467 custody and access questions settled in judicial separation proceedings brought before the Circuit Court and 727 custody and access cases from divorce proceedings in circuit court.¹⁶⁰ In the District Court in 2013 the total number of custody and access cases heard (not withdrawn or struck out) was 6,057.¹⁶¹

Laws and Policies

The main law in Ireland governing guardianship and custody of children is the Guardianship of Infants Act 1964, which has since been amended by several other laws including most recently the Children and Family Relationships Act. The general approach in Irish law is that the father and mother are to be joint guardians of the child.¹⁶² In cases where the parents are not married and have a child; civil partners, or a cohabitating partner of no less than 12 months, as well joint declarants may be appointed guardians.¹⁶³ In making any determination relating to the custody, upbringing, access or guardianship of a child the court "shall regard the best interests of the child as the paramount consideration."¹⁶⁴ According to Mahon and Moore, joint custody is now the norm in Ireland.¹⁶⁵

There is no set procedure to hear the voice of the child in custody or guardianship proceedings in Ireland. Part III of the Children Act 1997 gives guidance on how children 'may' provide evidence, including by giving testimony via video-link etc.

¹⁵⁸ Interview with Parent 2 conducted by Jenni Kline on 27 February 2014.

¹⁵⁹ Interview with representative from a Child Advocacy organisation conducted by Jenni Kline on 1 April 2014.

¹⁶⁰ Court Service, Statistics, Custody and Access. Available at <<http://www.courts.ie/courts.ie/library3.nsf/66d7c83325e8568b80256ffe00466ca0/4f8b4949c6a3c79480257a7600372948?OpenDocument>> (last accessed 14 April 2015).

¹⁶¹ Court Service, Statistics, Custody and Access. Available at <<http://www.courts.ie/courts.ie/library3.nsf/66d7c83325e8568b80256ffe00466ca0/e1300b140d3331cc8025774c005913e9?OpenDocument>> (last accessed 14 April 2015).

¹⁶² S6(1) Guardianship of Infants Act 1964.

¹⁶³ S49 Children and Family Relationships Bill (2015).

¹⁶⁴ S45 Children and Family Relationships Bill (2015).

¹⁶⁵ Evelyn Mahon and Elena Moore, *Post Separation Parenting-A study of separation and divorce agreements made by the Family Law and Circuit Courts of Ireland and their implications for parent-child contact and family lives*, Office for the Minister for Children and Youth Affairs (January 2011).

One unreported case on custody and access in Ireland resulted in the judge dismissing the children's preference as voiced by the father stating, "Parents should not tell the truth to children in a detailed and age-inappropriate way such as to be of the adverse interests of the child or putting adverse pressure either directly or indirectly on the children in relation to them sustaining a good relationship with both parents after the divorce," and found that the father's communication with the children was inappropriate and damaging.¹⁶⁶

Some judges have used Brussels II bis Regulation as justification to speak to children in custody and access cases instead of relying on written¹⁶⁷ reports, as provided under section 47 of the Children Act.¹⁶⁸In a 2008 case in the High Court, the judge set out guidelines for hearing children in custody cases taken from judicial education seminars as follows.¹⁶⁹

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 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

¹⁶⁶ W.D. v. S.D. [2011] IEHC 120.

¹⁶⁷ S47 Family Law Act 1995 allows the judge to procure a written report on any question related to welfare of the party of the proceedings.

¹⁶⁸ S.J. O'D v. P.C. O'D [2008] IEHC 468.

¹⁶⁹ S.J. O'D v. P.C. O'D [2008] IEHC 468.

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."¹⁷⁰

Despite this ruling, children are rarely heard in private family law proceedings.¹⁷¹ Justice Michael White has written a detailed paper on how international and state legislation and court cases make space for the voice of the child in family law proceedings in Ireland.¹⁷²

The law on children's evidence in Ireland has no separate provisions for children with cognitive disabilities; however, it should be noted that the same law for children applies to adults who have a disability "to such an extent that it is not reasonably possible for the person to live independently."¹⁷³ A study of the implementation of the Convention on the Rights of the Child in twelve countries for UNICEF suggests that the Irish experience is not unique, as "children are rarely party to family law proceedings, are only appointed a guardian ad litem in rare cases."¹⁷⁴

One judge interviewed for this project said that while improvements are being made in public family law proceedings (such as care orders) there have been no improvements in private family law (e.g. in divorce and separation cases involving custody and access decisions) where children are at risk and that there is an urgent need to improve the system.¹⁷⁵

What would access to justice look like in custody and care proceedings?

For Ireland to effectively ensure access to justice for children with cognitive disabilities in care, guardianship, custody and access proceedings, several changes need to occur. First, the law should designate a space and process for the views of the child to be heard in a way that respects the child's age and evolving capacity. Judges should be trained or have access to professionals trained in communicating with all children including children with cognitive disabilities in order to ensure their voices are heard. Information on the relevant proceeding should be made available to children with cognitive disabilities not

¹⁷⁰ S.J. O'D v. P.C. O'D [2008] IEHC 468.

¹⁷¹ Barnardos, *What about Me? Prioritising Children in Family Breakdown Proceedings*, (May 2013). Available at

<<http://www.barnardos.ie/assets/files/Advocacy/Family%20Lay%20May%202013/Barnardos%20Wh at%20About%20Me%20report%20May%202013.pdf>> (last accessed 10 April 2015).

¹⁷² Mr. Justice Michael White, *Background Paper to Presentation 'Challenges in Family Law Proceedings'* Conference held by Barnardos 'What About Me? Prioritising Children in Family Breakdown Proceedings' (29 May 2013).

¹⁷³ S20(b) Children Act 1997.

¹⁷⁴ Laura Lundy et al. *The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries* (2012) UNICEF and Queen's University Belfast.

¹⁷⁵ Interview with a Judge conducted by Jenni Kline 22 August 2014.

only in child-friendly language but in easy-to-read formats accessible to children with disabilities. Children should have access to an advocate (who is trained and able to work with all children including children with cognitive disabilities) that can represent the voice of the child to the court.

Furthermore, during care placements children with cognitive disabilities should be provided with information in a way they can understand about their placement, and how to make a complaint about their placement. Children should be actively included in the care review process and the review of care plans for children with cognitive disabilities needs to be conducted in a way that is accessible to the child.

Detention under the Mental Health Act 2001

In addition to the placement of a child in residential care via a care order as discussed above, children may also be detained under the Mental Health Act 2001. In 2013 there were 13 children who were involuntarily detained in Ireland under the Mental Health Act.¹⁷⁶

The Mental Health Commission was notified of 428 admissions of 357 children to approved centres in 2012.¹⁷⁷ Of these, 106 were to adult approved centres, and 322 were to child and adolescent units. The number of specialised approved centres for children has increased to six in 2012 from three in 2008, reducing the number of children detained in adult services from 63 percent in 2008 to 25 percent. One court case on such a treatment bases detention noted that the average length of stay for minors detained under this section is 17 days.¹⁷⁸ There is no information on when admissions to the centres came through investigation or prosecution of criminal cases.

Laws and Policies

A child may be detained under this act even without the consent of the parents, where the HSE "is suffering from a mental disorder" and the child requires treatment the child is unlikely to get without such an order.¹⁷⁹ In order to detain the child the HSE makes an application to a district court to authorise the detention where the child .¹⁸⁰It should be noted that the Mental Health Act only sets out rights for those detained involuntarily and does not provide protections for children who are voluntarily admitted or for children whose parents voluntarily admit them. Children placed in an approved mental health centre with the consent of their parents are not regarded as involuntary patients and are therefore not entitled to a hearing before a Mental Health Tribunal, or a formal review of their placement or treatment. This is different than a care

¹⁷⁶ 'More than a dozen children admitted as involuntary patients in 2013' *thejournal.ie* (26 June 2014). Available at <<http://www.thejournal.ie/involuntary-admissions-to-mental-health-units-increases-2013-1537937-Jun2014/>> (last accessed 10 April 2014).

¹⁷⁷ Mental Health Commission *Annual Report 2012 Including Report of the Inspector of Mental Health Services* (2012) 28.

¹⁷⁸ X.Y., *A Minor Suing by her Guardian Ad Litem, Raymond McEvoy v. The Health Service Executive* [2013] IEHC 490.

¹⁷⁹ S25 Mental Health Act 2001.

¹⁸⁰ S25 Mental Health Act 2001.

proceeding as the child will be detained in a designated centre and the focus is on treatment of the child not removal from the family.

A district judge interviewed for this project mentioned a case where a young girl subject to a treatment and detention order under the Mental Health Act, attended court and spoke in favour of the order.¹⁸¹ A subsequent High Court case in 2013 addressed the issue of whether the treatment of a young girl with suicidal ideation against her will but with the consent of her parents constituted a violation of her rights under the European Convention on Human Rights.¹⁸² The young girl in this case was able to communicate with the district judge regarding her wishes via video link and through letters, and was also appointed a guardian ad litem.¹⁸³ The High Court found that there were adequate procedural safeguards and that the voice of the child was facilitated at the district court level.¹⁸⁴

As discussed above, Tusla is now responsible for care proceedings, child and family support services (excluding disability support services), and Children First but the Child and Adolescent Mental Health Services (CAMHS) remains a part of the HSE.¹⁸⁵ The exclusion of CAMHS from Tusla goes against the recommendations of the Report of the Task Force on the Child and Family Support Agency.¹⁸⁶ At this juncture it is too soon to tell whether or not this separation will have negative consequences for children with cognitive disabilities.

What would access to justice look like in Mental Health Detention Cases?

Children should have access to the Mental Health Tribunal regardless of whether they are admitted with the consent of their parents.¹⁸⁷ Placements in mental health centres would be age appropriate and close to their families whenever possible. Children would be given information about the proceeding in an accessible manner and be able to an advocate.

Criminal Justice

This section examines how children with cognitive disabilities can access justice as a victim or witness and as an alleged offender, in the criminal justice system in

¹⁸¹ Interview with District Court Judge conducted by Jenni Kline on 10 March 2014.

¹⁸² X.Y., A Minor Suing by her Guardian Ad Litem, Raymond McEvoy v. The Health Service Executive [2013] IEHC 490.

¹⁸³ X.Y., A Minor Suing by her Guardian Ad Litem, Raymond McEvoy v. The Health Service Executive [2013] IEHC 490.

¹⁸⁴ X.Y., A Minor Suing by her Guardian Ad Litem, Raymond McEvoy v. The Health Service Executive [2013] IEHC 490.

¹⁸⁵ Tusla website, <www.tusla.ie> (last accessed 28 March 2014).

¹⁸⁶ Minister for Children and Youth Affairs, *Report of the Task Force on the Child and Family Support Agency* (July 2012). Available at <<http://www.dcy.gov.ie/documents/ChildFamilySupportAgency/TaskForceReport.pdf>> (last accessed 8 April 2015).

¹⁸⁷ See also Department of Health, *Report of the Expert Group on the Review of the Mental Health Act 2001* (5 March 2015) 69. Available at <<http://health.gov.ie/blog/publications/report-of-the-expert-group-review-of-the-mental-health-act-2001/>> (last accessed 14 April 2015).

Ireland. The section will address not only the court proceedings themselves but also the investigation, available support services and detention. At the outset it is important to note that there is an imbalance in available supports for child victims with cognitive disabilities versus child alleged offenders with cognitive disabilities.

Victims and Witnesses

Brief Background and History on Victims with Cognitive Disabilities

Throughout the past decade (as well as throughout the 90s¹⁸⁸) there have been several important reports¹⁸⁹ on the abuse of children and people with disabilities. The reports often revealed that there was knowledge of the abuse but those with knowledge did not report suspected or alleged abuse.¹⁹⁰

In 1999 the Western Health Board began investigating allegations of historical abuse of children with intellectual disabilities who lived in residential institutions operated by the Holy Family School and Brothers of Charity in Galway. It published the results of their investigation in 2007, which became colloquially known as the McCoy Report.¹⁹¹ The McCoy report found in interviews with former pupils 21 complainants who made allegations of sexual and physical abuse against them and other students by the Brothers and lay staff members.¹⁹²

¹⁸⁸ Catherine McGuinness, *Kilkenny Incest investigation*, report presented to Brendan Howlin T.D. Minister for Health by South Eastern Health Board (May 1993).

¹⁸⁹ Commission to Inquire into Child Abuse, (Judge Ryan) *Commission to Inquire into Child Abuse Interim Report* (May 2001). Commission to Inquire into Child Abuse, (Judge Ryan) *Commission to Inquire into Child Abuse Second Interim Report* (October 2001). Commission to Inquire into Child Abuse, (Judge Ryan) *Commission to Inquire into Child Abuse Third Interim Report* (January 2004). Commission to Inquire into Child Abuse, Final Report of (Dublin Report) *Commission to Inquire into Child Abuse*, (May 2009). Available at <<http://www.childabusecommission.ie/publications/index.html>>(last accessed 27 March 2014): Commission of Investigation into Catholic Archdiocese of Dublin, (*Judge Murphy*)*Report by Commission of Investigation into the Catholic Archdiocese of Dublin*. (November 2009): Commission of Investigation into Catholic Archdiocese of Cloyne (2011).

¹⁹⁰ Ursula Kilkelly, 'Learning Lessons from the Past: Legal Issues Arising from Ireland's Child Abuse Reports' 12(2) *Irish Journal of Applied Social Studies* (2012) 8-24: Commission to Inquire into Child Abuse, (Judge Ryan) *Commission to Inquire into Child Abuse Interim Report* (May 2001). Commission to Inquire into Child Abuse, (Judge Ryan) *Commission to Inquire into Child Abuse Second Interim Report* (October 2001). Commission to Inquire into Child Abuse, (Judge Ryan) *Commission to Inquire into Child Abuse Third Interim Report* (January 2004). Commission to Inquire into Child Abuse, Final Report of (Dublin Report) *Commission to Inquire into Child Abuse*, (May 2009). Available at <<http://www.childabusecommission.ie/publications/index.html>>(last accessed 27 March 2014): Commission of Investigation into Catholic Archdiocese of Dublin, (*Judge Murphy*)*Report by Commission of Investigation into the Catholic Archdiocese of Dublin*. (November 2009): Commission of Investigation into Catholic Archdiocese of Cloyne (2011).

¹⁹¹ Kevin McCoy, *Report of Dr. Kevin McCoy on the Western Health Board Inquiry into Brothers of Charity Services in Galway* (November 2007). Available at <http://www.hse.ie/eng/services/publications/Disability/MCoy_BOC.pdf>(last accessed 9 April 2015).

¹⁹² Ibidat 70.

In 2000 the Commission to Inquire into Child Abuse was established to investigate historical abuse of children in state institutions in Ireland and found that children with learning disabilities were especially vulnerable in institutional settings.¹⁹³ The Commission documented 37 witnesses reporting abuse in special schools for children with intellectual disability.¹⁹⁴ One outcome of these reports was a criminalising of the withholding of information of abuse against a child or vulnerable person in law in the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.¹⁹⁵

Background Information

The Central Statistics Office gathers statistics on crime victims as a part of the Quarterly National Household Survey but the survey does not ask about disability nor are statistics gathered on victims under 18. The most recent statistics on crime victims in Ireland date from 2010.¹⁹⁶ These statistics are on general victims of crime with no information on what sort of crimes were committed; there is also no information on the ethnicity of crime victims.¹⁹⁷ The lack of data on victims with disabilities has been highlighted in other reports.¹⁹⁸ The absence of such data on child victims in Ireland is egregious especially in light of the McCoy and Ryan Reports.

Information on victims with disabilities is however available in reports from NGOs and other organisations. A report by the Rape Crisis Network in Ireland found that of survivors with a disability 48 percent experienced sexual violence only as a child and 10 percent as both a child and adult.¹⁹⁹ In this report the Rape Crisis Network in Ireland recommended awareness raising and working with disability service providers to develop best practices and further training.²⁰⁰ The report also recommended the collection of data on disability when collecting data on sexual violence.²⁰¹

¹⁹³ Commission to Inquire into Child Abuse, *Executive Summary* (2005). Available at <<http://www.childabusecommission.ie/rpt/ExecSummary.php>> (last accessed 9 April 2015).

¹⁹⁴ Commission to Inquire into Child Abuse, *Volume III Chapter 13* (2005). Available at <<http://www.childabusecommission.ie/rpt/pdfs/CICA-VOL3-13.pdf>> (last accessed 9 April 2015).

¹⁹⁵ Shane Kilcommins et al *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime*, Irish Council for Civil Liberties (December 2013). S2-3 Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012.

¹⁹⁶ Central Statistics Office, *Crime and Victimisation Quarterly National Household Survey*. Available at <http://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/current/crimeandvictimisation_qnhs2010.pdf> (last accessed 14 August 2013).

¹⁹⁷ Central Statistics Office, *Crime and Victimisation Quarterly National Household Survey*. Available at <http://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/current/crimeandvictimisation_qnhs2010.pdf> (accessed 14 August 2013).

¹⁹⁸ Claire Edwards et al *Access to Justice for People with Disabilities as Victims of Crime in Ireland*, School of Applied Social Studies and Centre for Criminal Justice and Human Rights, Faculty of Law, University College Cork, (February 2012) 3.

¹⁹⁹ Helen Bartlett and Elaine Mears, *Sexual Violence Against People with Disabilities: Data collection and barriers to disclosure*, Rape Crisis Network Ireland, (October 2011) 25.

²⁰⁰ Helen Bartlett and Elaine Mears, *Sexual Violence Against People with Disabilities: Data collection and barriers to disclosure*, Rape Crisis Network Ireland, (October 2011) 120.

²⁰¹ Helen Bartlett and Elaine Mears, *Sexual Violence Against People with Disabilities: Data collection and barriers to disclosure*, Rape Crisis Network Ireland, (October 2011) 121.

The National Disability Authority published a paper in 2012 that discussed the difficulties persons with disabilities faced in accessing the criminal justice system and highlighted practices in other countries that Ireland should look into in order to increase persons with disabilities access to justice, including gathering more detailed data on victims of crime with disabilities, providing individualised support to people with disabilities at all stages of the criminal process, and developing more tailored training programmes for law enforcement and those involved in the administration of justice.²⁰²

It is important to note that many of the government strategies and policies on child victims and offenders, and evaluations of existing victim support services in Ireland make absolutely no mention of children with cognitive disabilities.²⁰³

The Irish Council for Civil Liberties commissioned a comparative law report on the legal provisions and supports for people with disabilities as victims of crime, published in 2013. However, the report does not specifically examine the experiences of children as victims. The report states that victims with disabilities remain largely invisible in Ireland at all levels of the system.²⁰⁴ The report calls for training of all agencies that have contact with victims with disabilities to counter the inaccessibility of the system. It also summarises several cases that involved decisions about the capacity of adult victims and witnesses with disabilities to testify, be sworn in and give evidence in criminal cases.²⁰⁵

Relevant Laws and Policies

The Children Act of 2001 requires that the Gardaí treat children with respect and dignity and that the Garda must take into consideration any special needs of a child with a cognitive disability.²⁰⁶

The Victim's Charter of 2010 sets out that the Gardaí will treat victims with dignity and respect regardless of the age or disability of the victim.²⁰⁷ The charter also states that the police will take into account any "special needs" or requirements of victims with disabilities.²⁰⁸ Some commentators suggest that the EU Directive on Victim's Rights²⁰⁹ which must be implemented by Ireland by

²⁰² Claire Edwards et al *Access to Justice for People with Disabilities as Victims of Crime in Ireland*, School of Applied Social Studies and Centre for Criminal Justice and Human Rights, Faculty of Law, University College Cork, (February 2012).

²⁰³ See for example An Garda Síochána, 'Children and Youth Strategy' (2012-2014). Available at <<http://www.garda.ie/Documents/User/AGS%20Children%20&%20Youth%20Strategy%202012-2014.pdf>>(last accessed 20 August 2014).

²⁰⁴ Shane Kilcommins et al *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime*, Irish Council for Civil Liberties (December 2013).

²⁰⁵ Shane Kilcommins et al *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime*, Irish Council for Civil Liberties (December 2013) 37-48.

²⁰⁶ S55 Children Act 2001.

²⁰⁷ Department of Justice and Law Reform, 'Victim's Charter and Guide to Criminal Justice System' (June 2010) 21.

²⁰⁸ Department of Justice and Law Reform, 'Victim's Charter and Guide to Criminal Justice System' (June 2010) 17.

²⁰⁹ Directive 2012/29/EU establishing the minimum standards on the rights, support and protection of victims of crime (25 October 2012).

November 2015 will have immediate positive impact for victims with cognitive disability because it has several provisions protecting so-called 'vulnerable' victims of crimes.²¹⁰

After the Gardaí investigate a crime, the Director of Public Prosecutions (DPP) then decides whether or not to prosecute and what the charges should be.²¹¹ The guidelines for prosecutors require that prosecutors consider the impact on a child of going to trial and the ability of a child to provide a relevant and intelligible account at trial.²¹² Prosecutors are also required to consider the option of video testimony in cases of violent or sexual offences.²¹³ The guidelines also ask prosecutors to consider whether a witness with a disability is "capable of giving an intelligible account of events" and if the reliability of the evidence might be affected by "mental illness or infirmity".²¹⁴

Promising Practices

The Gardaí Youth and Children Strategy for 2009-2011 included a goal of training 68 police officers in recording and interviewing crime victims under 14.²¹⁵ The Youth Strategy for 2012-2014, however, has no mention of the use of or training for video recording interviews nor is there any mention of disability.²¹⁶ There is some evidence to suggest, however, that Gardaí who conduct the video recorded interviews are "more specifically trained than senior legal practitioners in the techniques of interviewing children and persons with an intellectual disability."²¹⁷ However, there is very little information on how these procedures have worked in practice. This may in part be because the section of the law that allowed for videotaped interviews to be played at trial was only commenced in 2008, 15 years after the Act itself was introduced.²¹⁸ The provision was not successfully used in criminal trials until 2010;²¹⁹ therefore, there is little evidence to date of how these provisions work in practice.

A voluntary organisation called *Victim Support at Court* accompanies victims of

²¹⁰ Interview with Victims' Rights Expert conducted by Jenni Kline on 21 March 2014.

²¹¹ S3(1) Prosecution Offences Act 1974.

²¹² Office of the Director of Public Prosecutions, 'Guidelines for Prosecutors' (November 2010) 18. Available at <http://www.dppireland.ie/filestore/documents/GUIDELINES_-_Revised_NOV_2010_eng.pdf>(last accessed 14 August 2013).

²¹³ Office of the Director of Public Prosecutions, 'Guidelines for Prosecutors' (November 2010) 18. Available at <http://www.dppireland.ie/filestore/documents/GUIDELINES_-_Revised_NOV_2010_eng.pdf>(last accessed 14 August 2013).

²¹⁴ Office of the Director of Public Prosecutions, 'Guidelines for Prosecutors' (November 2010) 18. Available at <http://www.dppireland.ie/filestore/documents/GUIDELINES_-_Revised_NOV_2010_eng.pdf>(last accessed 14 August 2013).

²¹⁵ An Garda Síochána, 'Youth and Children Strategy 2009-2011' (2009) 19.

²¹⁶ An Garda Síochána, 'Youth and Children Strategy 2012-2014' (2012).

²¹⁷ Miriam Delahunt, 'Video Evidence and s.16 (1)(b) of the Criminal Evidence Act 1992' *Bar Review* (February 2011) 5.

²¹⁸ S16(1)(b) Criminal Evidence Act 1999: Una Ni Raifeartaigh *Child Sexual Abuse Cases: The Need for Cultural Change within the Criminal Justice System*, unpublished article based on papers given by the author at a joint DPP-St. Louise's Unit, Crumlin Hospital conference on Child Witness in November 2008, and an Irish Criminal Bar Association seminar in July 2008, respectively (2008).

²¹⁹ Miriam Delahunt, *Improved measures needed for vulnerable witnesses in court*, Irish Times 7 December 2010.

crimes and witnesses to court in Ireland but only in trials involving major criminal offences.²²⁰ There are no specific victim's rights or victim support organisations that specialise in providing services to adults or children with disabilities or note that they are trained on providing services to adults or children with disabilities.²²¹

To educate children about crimes, including sexual offences, the Department of Education and Skills created "Child Protection Procedures for Primary and Post-Primary Schools" which require the teaching of Social, Personal & Health Education and the Stay Safe Programme to primary schools and the junior cycle of post primary school; Relationship and Sexuality Education is required at the senior cycle.²²² The Stay Safe Program covers inappropriate touch, secrets, stranger danger and seeks to increase children's self-protection skills.²²³ The Social, Personal & Health Education support service has resources and information on courses for teachers and parents and covers responsible decision making framework and development of skills for living in communities.²²⁴

The Court Service in Ireland also has a disability liaison officer who is responsible for providing assistance and guidance to persons with disabilities in accessing the court – which applies to both the criminal and civil justice systems.²²⁵

Barriers

There are no reports that specifically assess the treatment of child witnesses and victims with cognitive disabilities in the criminal justice system in Ireland. However, some cases reported in the media about the treatment of young adults with disabilities indicate the likelihood that crimes against children with disabilities are rarely prosecuted.²²⁶

One parent interviewed for this project said her 19 year old son with an intellectual disability had two incidents of violence perpetrated against him when he was under 18 and that when the Garda came to interview the child, 7-12 months later, the Garda just asked the young person repeatedly "is there

²²⁰ Victim Support at Court, *What we offer*. Available at <<http://www.vsac.ie/what-we-offer/>> (last accessed 28 October 2013).

²²¹ Interview with Expert on Victims' rights conducted by Jenni Kline on 21 March 2014.

²²² Department of Skills and Education, 'Child Protection Procedures for Primary and Post- Primary Schools' (2011) 8. Available at <http://www.pdst.ie/sites/default/files/CP_procedures_primary_post_primary_2011.pdf> (last accessed 14 August 2013).

²²³ Stay Safe Programme, 'What is Stay Safe?' Available at <<http://www.staysafe.ie/>> (last accessed 14 August 2013).

²²⁴ SPHE, 'Social, Personal & Health Education Support Service' Available at <<http://www.sphe.ie/Default.aspx>> (last accessed 14 August 2013).

²²⁵ Dáil Debates, Written Answers, *Department of Justice and Equality Services for People with Disabilities*, (11 June 2013) <<http://www.kildarestreet.com/wrans/?id=2013-06-11a.1789>> accessed last 24 October 2013.

²²⁶ The case involved a young women with Down Syndrome who was prevented from testifying in court about her sexual assault. Juno McEnroe, 'Family want 'archaic' law overhauled' *Irish Examiner* (30 March 2010). Available at <<http://www.irishexaminer.com/ireland/icrime/family-want-archaic-law-overhauled-115886.html>> (last accessed 13 November 2013).

anything you want to tell us?"²²⁷ One of the incidents had occurred at a day service centre where the manager had taken the young person by the throat leaving marks.²²⁸ The young person told their parents after a few days and was able to recount the incident to their advocate, solicitor, the doctor that examined him as well as a child protection worker that took a video of the young person's testimony. However, because the young person did not recount the story directly to the Gardaí, the Gardaí refused to pursue the complaint.²²⁹ The other assault occurred in the presence of the young person's sibling and even with the corroboration of the sibling the Garda would not investigate and just issued an adult caution to the person who committed the assault.²³⁰

It is important to note that in order to identify a suspect the witness or victim will often have to be in the same room as the alleged offender.²³¹ This can be a difficult process for all victims and witness but children with cognitive disabilities face specific barriers to accessing justice in this regard.

Ni Raifeartaigh's work shows that in sexual offence cases, a representative of the DPP has expressed concerns that videos taken of vulnerable witnesses or victims would end up being excluded at trial unless there had been extensive training of those involved with the questioning.²³² She also found that detailed background information about the child such as any communication or psychological difficulties are not always noted in the case file given to the DPP in criminal cases which can ultimately undermine the DPP's case at trial.²³³

Another potential barrier to accessing justice for children with disabilities in criminal cases is posed by a recent court case that disallowed the use of video link for a victim with "a mental impairment" because it would violate the defendant's right to a fair trial.²³⁴ The judge reasoned that since the defendant was being charged under the Criminal Justice Sexual Offences Act of 1993 which specifically creates an offence for sexual intercourse with a person with a "mental impairment" and the defendant's defence was that he did not know the

²²⁷ Interview with Parent 3 on 28 February 2014.

²²⁸ Interview with Parent 3 on 28 February 2014.

²²⁹ Interview with Parent 3 on 28 February 2014.

²³⁰ Interview with Parent 3 on 28 February 2014.

²³¹ Shane Kilcommins et al *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime*, Irish Council for Civil Liberties (December 2013)

²³² Una Ni Raifeartaigh *Child Sexual Abuse Cases: The Need for Cultural Change within the Criminal Justice System*, unpublished article based on papers based on papers given by the author at a joint DPP-St. Louise's Unit, Crumlin Hospital conference on Child Witness in November 2008, and an Irish Criminal Bar Association seminar in July 2008, respectively (2008).

²³³ Una Ni Raifeartaigh *Child Sexual Abuse Cases: The Need for Cultural Change within the Criminal Justice System*, unpublished article based on papers based on papers given by the author at a joint DPP-St. Louise's Unit, Crumlin Hospital conference on Child Witness in November 2008, and an Irish Criminal Bar Association seminar in July 2008, respectively (2008).

²³⁴ *D.O'D v. DPP & Anor* [2010] 2 IR 605, [2009] IEHC 559. Available at <<http://www.bailii.org/ie/cases/IEHC/2009/H559.html>> (last accessed 10 April 2015).

person had a “mental impairment” using video link would tend to disprove this defence to the jury.²³⁵

What Access to Justice Should Look Like for Child Victims with Cognitive Disabilities in Ireland?

Child victims with cognitive disabilities in Ireland when reporting a crime should be referred in a timely manner to a Garda specialist interviewer who has received training on working with child victims with disabilities. The options of providing testimony by video-link and the support of intermediaries²³⁶ (a person who can mediate or translate the question from the lawyer to the child and vice versa) for children providing testimony should widely available and used. Children with cognitive disabilities should have access to victim support services that have staff that are trained on disability issues.

Offenders with Cognitive Disabilities in the Criminal Justice System

Historical Background

Prior to 2006 the criminal age of responsibility in Ireland for children was 7. Although the Children Act 2001 raised the general age of criminal responsibility to 12, that section of the Act was not commenced until 2006.

Historically, teenagers were held together with young adults in St. Patrick’s Institution. According to the Children’s Rights Alliance, the last 16 year old in St. Patrick’s was released in July 2012 and in August 2014, there were 31 boys aged 17 years of age detained in St Patrick’s – an increase from 21 boys the previous year. The Irish Penal Reform Trust published a report in 2009 on the detention of children in Ireland in comparison with international standards.²³⁷ The recommendations of the report include that health, behaviour and education assessments should be made upon admission, and that the assignment of psychologists and where necessary psychiatrists needs to occur immediately following these assessments.²³⁸ This report also recommended the introduction of a better, more accessible complaint system that includes support mechanisms – which would be important for children with cognitive disabilities.²³⁹

The Committee for Judicial Studies in Ireland has produced a guide on appropriate treatment of people with disabilities in the court system but this

²³⁵ Ibid. For further discussion of this case see Shane Kilcommins, Susan Leahy, and Eimear Spain, *Invited Submission to the Minister for Justice on the Discussion Paper on Sexual Offences Against Vulnerable Persons, particularly in respect of the proposal to replace section 5 of the Criminal Law (Sexual Offences) Act 1993*, School of Law, University of Limerick (2 September 2014). Available at <<http://www.ul.ie/law/sites/default/files/docs/Invited%20Submission%20to%20the%20Minister%20of%20Justice%20Final.pdf>> (last accessed 10 April 2015).

²³⁶ S14 Criminal Evidence Act 1992.

²³⁷ Irish Penal Reform Trust, *Detention of Children in Ireland: International Standards and Best Practice*, IPRT, Dublin (2009).

²³⁸ Irish Penal Reform Trust, *Detention of Children in Ireland: International Standards and Best Practice*, IPRT, Dublin (2009) 87-91.

²³⁹ Irish Penal Reform Trust, *Detention of Children in Ireland: International Standards and Best Practice*, IPRT, Dublin (2009) 87-91.

guide is not widely available;²⁴⁰ and there have also been further education seminars for judges on working with children,²⁴¹ although no specific seminars for judges have been held on children with cognitive disabilities in the justice system.

Laws

Irish law contains no separate provisions for children with cognitive disabilities within the laws of evidence and criminal law. Unsworn testimony standards and alternative testifying procedures can be used by children (in general) and adults with disabilities but do not consider children with disabilities as a separate group under the law.²⁴²

For criminal matters²⁴³ or civil matters²⁴⁴ children under 14 may give unsworn testimony if “the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.” In a case examining the ability of a court to admit the unsworn testimony of an adult with cognitive disabilities the court stated that there must be an inquiry to determine that 1) the person does have a cognitive disability and that 2) the person is capable of giving a relevant and “intelligible account of events.”²⁴⁵

Corroboration of unsworn testimony is no longer required under Irish law but judges are allowed in their discretion to issue a caution to the jury about the dangers of convicting an alleged offender on uncorroborated testimony.²⁴⁶ To date, there is no information on how these laws operate in practice for children with cognitive disabilities.

As set out above, the general age of criminal responsibility in Ireland is 12, but a child of 10-11 may be charged with the crimes of murder, manslaughter, rape and aggravated sexual assault.²⁴⁷ Prosecutions of children under the age of 14 require the consent of the Director of Public Prosecution.²⁴⁸ Where a child under the age of criminal responsibility is suspected of committing a crime (not including murder, manslaughter, rape and aggravated sexual assault), the matter is to be brought to the child’s parent or guardian.²⁴⁹ A child may name a solicitor to be contacted if detained for questioning in the criminal justice system²⁵⁰ but it is the parent or guardian that must be notified of the child’s detention and who holds the right to legal representation.²⁵¹

²⁴⁰ Shane Kilcommins et al *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime*, Irish Council for Civil Liberties (December 2013).

²⁴¹ Interview with District Court Judge conducted by Jenni Kline on 10 March 2014.

²⁴² S19 Criminal Evidence Act 1992: S16 Criminal Evidence Act 1992.

²⁴³ S27(3)(1) Criminal Evidence Act 1992.

²⁴⁴ S28 Children Act 1997.

²⁴⁵ O’Sullivan v. Hamill [1999] 3 IR 9.

²⁴⁶ S28(2)(a) Criminal Evidence Act 1992.

²⁴⁷ S129 Criminal Justice Act 2006.

²⁴⁸ S129 Criminal Justice Act 2006.

²⁴⁹ S130 Criminal Justice Act 2006.

²⁵⁰ S60 Children Act 2001.

²⁵¹ S57 Children Act 2001.

Generally a suspect is only allowed reasonable access to a solicitor during questioning and the lawyer is not required to be present during interrogation.²⁵² A recent case involving a child with a “severe mental health and behavioural difficulties” affirmed that even where the person questioned was under 18 and had “severe mental health/behavioural” difficulties presence of solicitor is not required for the detention to be lawful.²⁵³ The court held that in this case the young person was adequately protected through the presence of a parent and “reasonable access” to a solicitor.²⁵⁴

The Children Act 2001 generally makes reference to protection of a child’s rights in all legal proceedings (criminal and civil) solely through the presence and notification of the child’s parent or guardian. Under s57 of the Act, an arrested child must be informed of the arresting offence, their right to consult a solicitor and that their guardian is being informed that the child is in custody, the child’s rights and that the parent or guardian presence is requested.²⁵⁵ This information must be communicated in a manner appropriate to the level of understanding of the child.²⁵⁶

The Act requires that a child’s parent or guardian is informed of their arrest as soon as practicable.²⁵⁷ The child may not be interviewed unless the parent or guardian is present.²⁵⁸ If a guardian or parent is not present then the interview cannot take place until another non-Garda adult who is nominated by the member in charge of the Garda station is present.²⁵⁹

Following questioning of a child suspect, a file may be prepared and sent to the DPP. The Guidelines for Prosecutors requires prosecutors to consider significant cognitive disability and/or youth of the alleged offender in determining whether the public interest requires a prosecution of an alleged offender.²⁶⁰

After a determination of the guilt or innocence of the alleged child offender in district court there may then be a separate proceeding in Children’s Court on the welfare of the child.²⁶¹ The Children’s Court may issue emergency supervision or orders or refer the matter to Tusla for a family welfare hearing. The Children Act 2001 also grants jurisdiction to the Children Court for cases involving child offenders where the matter is indictable but may be dealt with summarily.²⁶² This jurisdiction is discretionary rather than mandatory and the court takes into

²⁵² Lavery v. The Member in Charge of Carrickmacross Garda Station [1999] IESC 29.

²⁵³ JM (A minor) v. The Member in Charge of Coolock Garda Station [2013] IEHC 251.

²⁵⁴ JM (A minor) v. Member in Charge of Coolock Garda Station [2013] IEHC 251.

²⁵⁵ S57 Children Act 2001.

²⁵⁶ S57 Children Act 2001.

²⁵⁷ S58 Children Act 2001.

²⁵⁸ S61 Children Act 2001.

²⁵⁹ S61 Children Act 2001.

²⁶⁰ Office of the Director of Public Prosecutions, ‘Guidelines for Prosecutors’ (October 2007) 20.

²⁶¹ Jim Nestor, *Law of Child Care 2nd ed.* (Blackhall Publishing 2009)14 (citing to unreported case J. (A Minor) v. Judge Miriam Malone(2003) High Court. See section 2 above for further information on family welfare hearings.

²⁶² S75 Children Court Act 2001.

account the age and level of maturity of the child along with any other relevant facts when deciding whether or not to hear the case.²⁶³ The child must also consent to the court hearing the case.²⁶⁴

A person is deemed unfit to stand trial if he or she is unable to understand the proceedings “by reason of mental disorder.”²⁶⁵ A person may also be found not guilty if a jury finds after testimony is given by a consultant psychiatrist that the alleged offender had a “mental disorder” and because of that the alleged offender did not know the nature and quality of the act or did not know the wrongness of the act or was unable to refrain from committing the act.²⁶⁶ Mental disorder is defined under the law as “mental illness, mental disability, dementia or any disease of the mind (not intoxication).”²⁶⁷ There is no difference in treatment under this law between adults and children.

In 2006, the last year for which such data is available, 13,092 juveniles had formal contact with law enforcement in Ireland.²⁶⁸ This data is not disaggregated further so the extent of formal contact between children with cognitive disabilities and law enforcement in Ireland is unknown.

It is important to note that the video link and intermediary procedures available to children and adults with cognitive disabilities who are witnesses are not available to alleged offenders. Alleged offenders are also not entitled to a guardian ad litem. This demonstrates the disparity in approach between victims, witnesses and offenders who are children with cognitive disabilities in Ireland.

Children in Detention in the Criminal Justice System

Relevant Laws and Policies

The Children Act 2001 requires that children detained in a Garda station should be kept away from detained adults unless there is no other secure accommodation available.²⁶⁹

When a court has imposed a period of detention on a child under 18, the child will be detained at the Oberstown Children Detention Campus or in Wheatfield Prison (for boys age 17 committed to detention).²⁷⁰ It is government policy that all under 18 year olds will be detained facility at Oberstown (formerly the Children Detention Schools) but in the interim some 17 year olds continue to be detained on remand in St Patrick’s Institution (when the current capacity of Oberstown has been reached) or in Wheatfield Prison for boys sentenced to

²⁶³ S75 Children Court Act 2001.

²⁶⁴ S75 Children Court Act 2001.

²⁶⁵ S4(2) Criminal Law (Insanity) Act 2006.

²⁶⁶ S5 Criminal Law (Insanity) Act 2006.

²⁶⁷ S1 Criminal Law (Insanity) Act 2006.

²⁶⁸ UN Office on Drugs and Crime, Statistics on Criminal Justice, Persons brought into formal contact with the police (2011). Available at <<http://www.unodc.org/unodc/en/data-and-analysis/statistics/crime.html>> (last accessed 20 August 2013).

²⁶⁹ S56 Children Act 2001.

²⁷⁰ S147 Children Act 2001.

detention. The period of detention in a detention school cannot exceed what the term of imprisonment or detention for an adult would be.²⁷¹

Court service reports show that 100% of orders for committal to detention schools made by the Children's Court in 2005 and 2006 were granted.²⁷² In 2006 there were 136 children in places of detention and 1,492 people 17-21 were in prison or other places of detention.²⁷³ Very little reference is made in the policies of detention schools on the treatment of children with cognitive disabilities. The detention schools' *Safeguarding Policy* mentions disability only to say that children regardless of disability have the right to be protected from abuse.²⁷⁴

As of 7 January 2015 there were 38 boys and no girls held in the three schools.²⁷⁵ The Office for the Inspector of Prisons (OIP) reported that there were 2, 16 year old children and 17, 17 year old children, in St Patrick's Institution in June 2012.²⁷⁶ According to the Children's Rights Alliance, the last 16 year old in St. Patrick's Institution was released in July 2012 and in August 2014, there were 31 boys aged 17 years of age detained in St Patrick's Institution – an increase from 21 boys the previous year. Very little data exists on how children with cognitive disabilities are included in this system. One small study involving 30 boys in detention centres stated that 37 percent²⁷⁷ of the young offenders in the study group had a "psychological disorder" and 21 percent had an intellectual disability.²⁷⁸

According to the 2010 Annual Report of the Irish Youth Justice Service (IYJS) the IYJS is working with the HSE to "enhance services available to children in detention".²⁷⁹ Child and mental health services are now available on site to children in detention schools with no waiting list.²⁸⁰

²⁷¹ S141 Criminal Justice Act 2006.

²⁷² National Crime Council, Court Statistics-Children's Court. Available at <http://www.crimecouncil.gov.ie/statistics_cri_court_children.html#jsenabled=no>(last accessed 20 August 2013).

²⁷³ National Crime Council, Prison Statistics- Age of persons committed to prisons and places of detention. Available at <http://www.crimecouncil.gov.ie/statistics_cri_prison_table6.html>(last accessed 20 August 2013).

²⁷⁴ Irish Youth Justice Service, 'Safeguarding Policy for the Children Detention Schools' (December 2010) 10 Available at <<http://www.iyjs.ie/en/IYJS/Safeguarding%20Policy%20Document.pdf/Files/Safeguarding%20Policy%20Document.pdf>>(last accessed 21 August 2013).

²⁷⁵ Children's Rights Alliance, *Report Card 2015*, (2015). Available at <http://childrensrights.ie/sites/default/files/submissions_reports/files/ReportCard2015.pdf> (last accessed (17 April 2015).

²⁷⁶ Michael Reilly, *Report on an Inspection of St. Patrick's Institution by the Inspector of Prisons*, Office for the Inspector of Prisons, (2012) Dublin.

²⁷⁷ Jennifer Margaret Hayes and Gary O'Reilly, 'Emotional Intelligence Mental Health and Juvenile Delinquency' [May 2007] *Juvenile Health Matters* 39.

²⁷⁸ Jennifer Margaret Hayes and Gary O'Reilly, 'Emotional Intelligence Mental Health and Juvenile Delinquency' [May 2007] *Juvenile Health Matters* 49.

²⁷⁹ Irish Youth Justice Service, *Annual Report 2010*, (2010) 21.

²⁸⁰ Children's Rights Alliance, *Report Card 2015*, (2015). Available at <http://childrensrights.ie/sites/default/files/submissions_reports/files/ReportCard2015.pdf> (last accessed (17 April 2015).

According to a child rights expert interviewed for this project, the detention schools at Oberstown are in the process of making significant changes and some of those changes should greatly improve the level and quality of mental health services to children detained.²⁸¹ The whole campus is being rebuilt with more in-house clinical services designed for use by children. The new campus will also ensure that no 17 year olds are detained at St Patrick's Institution.²⁸²

Maintaining Contact with Families while in Detention

There are no specific laws in Ireland on this question of maintaining contact and the Irish Penal Reform Trust includes in its recommendations that the State should ensure that detained children can keep in contact with family and friends and that provision should be made to facilitate family visits.²⁸³

Children in detention can make complaints to the Ombudsman for Children.²⁸⁴ The Irish Youth Justice Service Standards require that detention schools have a documented complaints procedure, which staff are aware of and is readily available in written format for young people.²⁸⁵ However, the standards do not address the need for complaints mechanisms to be accessible for children with cognitive disabilities.

There are no laws in the criminal justice system in Ireland that provide for a routine assessment of disability at the outset of legal proceedings in criminal cases. An expert on child rights interviewed for this project stated, however, that judges often will request assessments and that if assessments were routinely conducted then many children in detention would be identified as having a cognitive disability.²⁸⁶

Despite Irish law seeming to provide for legal representation of children in criminal proceedings, a 2005 report stated, "in practice, some young people are charged and sentenced without the help and support of a responsible and experienced adult, who could act as an advocate for their interests."²⁸⁷ This situation occurs because of the distinction between the right to a lawyer at trial and during charge.

²⁸¹ Interview with Child Rights Expert conducted by Eilionoir Flynn and Jenni Kline on 24 January 2014.

²⁸² Christine Bohan, 'After five-year delay, work finally begins on new youth detention centre in Dublin' *thejournal.ie* (14 October 2013). Available at <<http://www.thejournal.ie/oberstown-centre-young-offenders-1128243-Oct2013/>> (last accessed 14 April 2015).

²⁸³ Irish Penal Reform Trust, *Detention of Children in Ireland: International Standards and Best Practice*, IPRT, Dublin (2009) 80.

²⁸⁴ Irish Penal Reform Trust, *Detention of Children in Ireland: International Standards and Best Practice*, IPRT, Dublin (2009) 72.

²⁸⁵ S4.1, *Irish Youth Justice Service Standards & Criteria for Children Detention Schools*, (November 2008) 9.

²⁸⁶ Interview with Child Rights Expert conducted by Eilionoir Flynn and Jenni Kline on 24 January 2014.

²⁸⁷ Law Society's Law Reform Committee, 'Rights-based Child Law-The case for reform-Part I' (December 2005) 50.

Systems of Redress in the Criminal Justice System

Garda Ombudsman Commission

Under the 2005 Garda Síochána Act the Ombudsman Commission was established to receive complaints made by members of the public against members of the Garda.²⁸⁸ Persons directly affected by the conduct or witnesses may bring complaints to the Ombudsman Commission or on behalf of someone with their written consent.²⁸⁹ Complaints may also be made on behalf of children or persons with disabilities without their consent if they are “incapable of giving consent.”²⁹⁰

There have been 37 complaints of discrimination on the basis of disability made to the Garda Ombudsman between 2007 and 2012.²⁹¹ In 2012 only 2 percent of the complaints were from the 0-17 age group and 4 percent of complainants were described as persons with a psychological or intellectual disability.²⁹² The Ombudsman Commission has only started publishing case summaries as of May 2013 and none of the published cases concern children or people with disabilities.²⁹³

General Ombudsman and Equality Tribunal

In addition to the Garda Ombudsman there is also a General Ombudsman. The General Ombudsman’s office has no published cases on discrimination complaints made by a child with cognitive disabilities against the DPP or Garda.

Discrimination by the Gardaí against a child with disabilities could also be actionable under the Equal Status Act, which prohibits discrimination on account of disability.²⁹⁴ The Equality Tribunal case law database does not contain any cases against the Garda for discrimination against children with cognitive disabilities.

Promising practices

There is no separate law for children with cognitive disabilities compared with children without cognitive disabilities, however in January of 2014 a practice directive was issued for the district court for cases concerning young defendants that stated where the young defendant required special arrangements because of a vulnerability in order “to meaningfully participate” the legal practitioner must

²⁸⁸ S67 Garda Síochána Act 2005.

²⁸⁹ S83(1)(b) Garda Síochána Act 2005.

²⁹⁰ S83(1)(b) Garda Síochána Act 2005.

²⁹¹ Garda Ombudsman, *Caseload statistics for complaints containing allegations of discrimination, 2007-2012*. Available at <<http://www.gardaombudsman.ie/docs/publications/DiscriminationStatistics2007-2012.pdf>> (last accessed 14 August 2013).

²⁹² Garda Ombudsman, *Garda Síochána Ombudsman Commission Annual Report (2012)* 14,28. Available at <http://www.gardaombudsman.ie/docs/publications/GSOC_Annual_Report_2012.pdf> (last accessed 14 August 2013).

²⁹³ Garda Ombudsman, *Case Summaries*. Available at <<http://www.gardaombudsman.ie/casesummaries.htm>> (last accessed 14 August 2013).

²⁹⁴ S4 Equal Status Act 2000.

bring this to the attention of the court as soon as possible.²⁹⁵ The directive also allows the child to see the court before the proceeding so the child can become familiar with the environment.²⁹⁶

A solicitor who often works with alleged offenders with intellectual disabilities interviewed for this report stated that at least with respect to the Children's Court in Dublin there is good cooperation between all of the stakeholders and that the presiding judges are generally helpful in making sure that the proceedings are carried out appropriately. This solicitor stated that although there are no formal safeguards, court service staff are working to address the deficits in the system.²⁹⁷ An expert on child rights interviewed for this project echoed this sentiment.²⁹⁸

Garda Specialist Interviewers

There is a two year specialist training programme for learning specialist interviewing skills for child victims and victims with intellectual disabilities. It is a selective and intensive training program that includes a placement for several months with an NGO or service that works with people with intellectual disabilities. The first year focuses on theory and the second year works on developing practical skills needed for interviewing children and people with intellectual disabilities through role playing as well as interviewing with volunteer interviewees with intellectual disability. Since the program started in 2007, 112 Garda have been trained under this program and there are 2 interviews for each of the 23 Garda divisions in Ireland.²⁹⁹

The training programme was developed in response to criticism levied at Ireland in 2006 in the concluding comments on Ireland's report for the Convention on the Rights of the Child. The training programme aims to follow the 2003 Garda interview *Good Practice Guidelines*, written by a committee that included social workers, solicitors, victim support services, judges and police officers.³⁰⁰

These interviewers can be an excellent resource for children with cognitive disabilities who wish to access justice. However, this system requires that the local Garda station knows of the specialist interviewers and contacts them in a timely manner. These specialist interviewers are not always contacted or well

²⁹⁵ S21, Practice Direction, District Court, DC04-Children Court, (30 January 2014). Available at <<http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/DE2140128F4C0E1580257C7800515BB1?opendocument>> (last accessed 26 March 2014).

²⁹⁶ S19 Practice Direction, District Court, DC04-Children Court, (30 January 2014). Available at <<http://www.courts.ie/Courts.ie/library3.nsf/pagecurrent/DE2140128F4C0E1580257C7800515BB1?opendocument>> (last accessed 26 March 2014).

²⁹⁷ Interview with Solicitor conducted by Jenni Kline 14 February 2014.

²⁹⁸ Interview with Child Rights Expert conducted by Eilionoir Flynn and Jenni Kline on 24 January 2014.

²⁹⁹ Interview with Gardai conducted by Jenni Kline on 9 June 2014.

³⁰⁰ *Good Practice Guidelines for persons involved in video recording interviews with complainants under 14 years of age (or with intellectual disability) for evidential purposes in accordance with Section 16(1)(B) of the Criminal Evidence Act, 1992 in cases involving sexual or violent offences*, (July 2003).

utilised by the local stations³⁰¹ and there are cases where victims with cognitive disabilities encountered no such interviewer when they reported the crime.³⁰²

Alternative Justice Programs

Diversion Program

The Garda Diversion Programme is available to children who commit an offence or have anti-social behaviour and accept responsibility for his or her actions (and meet other criteria).³⁰³ In 2010 there were 5,480 children participating in the diversion program;³⁰⁴ but it is not known how many of these are children with cognitive disabilities.

Restorative Justice

There is also a restorative justice program for children in a neighbourhood in Dublin that seeks to develop capacity in the community to “manage conflict and tensions by repairing harm and building relationships.”³⁰⁵ Again, the level of involvement of children with cognitive disabilities in this program is unknown.

Barriers

As outlined above, offenders with cognitive disabilities are not accorded the same rights to accommodations and flexible proceedings as victims and witnesses. Furthermore, as described, Ireland does not systematically collect data on whether offenders are identified as having any kind of disability.

Access to Mental Health Services

One solicitor who works in the Children’s Court interviewed for this project was concerned at the criminalisation of children with mental health problems, where children between 15-18 are arrested for incidents that happen in the home (destruction of property, violence) when parents call the Garda as a last resort effort to keep their child safe in the absence of adequate support services.³⁰⁶ This issue tends to arise when such crisis situations occur outside the business hours of social services. According to this interviewee, child mental health services in Ireland will often not work with children over the age of 16 while many adult mental health services would not take someone under 18.³⁰⁷

Protection of privacy of child offenders

One case that provides some insight into how children with cognitive disabilities who are alleged offenders are treated by the press is the case of a Co. Laois murder where a 15 year old killed a 14 year old in 2003. The cause of death was a blow from a hammer and the court could not establish any discernable motive

³⁰¹ Interview with Gardai conducted by Jenni Kline on 9 June 2014.

³⁰² Interview with Parent 3 on 28 February 2014.

³⁰³ S18 Children Act 2001: S123 Criminal Justice Act 2006.

³⁰⁴ Irish Youth Justice Service, ‘Irish Youth Justice Service Annual Report’ (2010) 26. Available at <<http://www.iyjs.ie/en/IYJS/IYJS%20Annual%20Report%202010.pdf/Files/IYJS%20Annual%20Report%202010.pdf>> (last accessed 15 August 2013).

³⁰⁵ Childhood Development Initiative, Restorative Practice. Available at <<http://www.twcdi.ie/our-programmes/restorative-practice>> (last accessed 28 October 2013).

³⁰⁶ Interview with Solicitor conducted by Jenni Kline on 14 February 2014.

³⁰⁷ Interview with Solicitor conducted by Jenni Kline on 14 February 2014.

in the case.³⁰⁸ Although the judge in the case found that the child “did not suffer from any formal psychiatric illness”³⁰⁹ the child was required to see a psychologist,³¹⁰ had attempted suicide in the past³¹¹ and may have had mental health issues. Headlines in the case described the child as a “vicious killer.”³¹² Much of the reporting focused on the mother of the victim and the loss she suffered³¹³ whereas the mother of the accused was noted to have given birth to the accused out of wedlock.³¹⁴ The trial judge in the case even said to the accused at trial “You have brought shame and disgrace upon your family” before sentencing him to life in prison finding no mitigating circumstance besides the child’s age despite the fact that the judge has the discretion of not imposing a life sentence in the case of children.³¹⁵ From the reporting on this case, no support measures seem to have been made available to the child offender to ensure effective participation in the trial or secure access to justice.

What access to justice for child offenders with cognitive disabilities in court proceedings and detention would look like?

Children with cognitive disabilities should have access to a legal representative at all stages of a criminal investigation and questioning. This representative should be trained or have access to someone trained in working with children with cognitive disabilities in order to effectively communicate with their client. Gardaí should also be better trained on interacting with children with cognitive disabilities. Accommodations for child offenders with cognitive disabilities should be available on an equal basis with victims and offenders and used in court proceedings. Information about the proceedings should be given to the child in a timely and accessible manner.

Children with cognitive disabilities in detention with effective access to justice would be given accessible and accurate information about their detention, their rights in detention and complaint mechanisms while in detention. Complaint mechanisms would be accessible, flexible and easily used by children with cognitive disabilities. Mental health supports, reasonable accommodation and other disability services should be freely available to all children who may come into contact with the criminal justice system.

³⁰⁸The People at the Suit of the Director of Public Prosecutions v. D.G [2005] IE CCA 75.

³⁰⁹The People at the Suit of the Director of Public Prosecutions v. D.G [2005] IE CCA 75.

³¹⁰The People at the Suit of the Director of Public Prosecutions v. D.G [2005] IE CCA 75.

³¹¹*Teen found guilty of Laois murder, breakingnews.ie* 28 July 2004. Available at <<http://www.breakingnews.ie/ireland/teen-found-guilty-of-laois-murder-159159.html>>(last accessed 26 March 2014).

³¹² Liam Collins, ‘Vicious Killer shocks court with stark lack of remorse’ *Irish Independent* 16 October 2014.

³¹³ ‘Mother says life is unbearable without her son’ *Irish Times*, 13 October 2004: Liam Collins, ‘Killer’s lack of remorse chilling-victim’s Mother’ *Irish Times*, 12 October 2004.

³¹⁴ Liam Collins, Vicious Killer shocks court with stark lack of remorse’ *Irish Independent* 16 October 2014.

³¹⁵The People at the Suit of the Director of Public Prosecutions v. D.G [2005] IE CCA 75.

Conclusions and Recommendations for Reform

At the end of this two year project amidst much legislative change for children with cognitive disabilities, we are pleased to see some potential improvement; while still noting the need for greater change in several key areas. Our research has found that children with cognitive disabilities remain invisible in the many of the laws, literature and research on both children, and people with disabilities in Ireland. It is difficult to fully ascertain the barriers faced by children with cognitive disabilities in Ireland due to a lack of information, including data and statistics, reporting and monitoring, as well as qualitative research on these children's experiences. The information we were able to obtain through our desk-based and empirical research on children with cognitive disabilities indicates that they face barriers in accessing justice related to both age and disability. Access to justice for children with cognitive disabilities in Ireland still seems to depend on the good will of individuals rather than an awareness that such access should be available as a fundamental human right.

Overall, more concrete steps must be taken towards the facilitation of the participation of children with cognitive disabilities in civil, criminal and administrative proceedings. Data collection on children (child victims especially) that involves disaggregation on the basis of disability needs to be increased in order to ensure effective monitoring of access to justice for all children in Ireland. Training of professionals (especially legal professionals) is vital; and should focus on how to work with children, regardless of disability, and facilitate their participation in a wide variety of legal proceedings and decisions made about the child's life. Finally, the government needs to ratify the UN CRPD in order to better ensure the full realisation of rights for children with cognitive disabilities in Ireland. The following sections summarise our core recommendations in each of the three focus areas of the report.

Education and Access to Justice

It was abundantly clear in speaking with parents that the appeals and redress systems for challenging decisions about educational provision are not effective for children with cognitive disabilities and their parents who advocate on their behalf. Multiple parents perceived retaliatory action against them once they had questioned or appealed a decision.

There are not enough supports available to children with cognitive disabilities in Ireland to fully enable equal access to inclusive education. Even where children access supports and improve their educational performance, parents reported that these supports can subsequently be removed and given to "needier" cases.

Several parents described problems they had in getting their children accepted into mainstream schools or once in mainstream schools having their child fully included in the same activities as other children. Access to education seems even harder to achieve for older teenagers than younger children in primary school.

In general there is a lack of accessible extra curricular activities for children with cognitive disabilities.

The process of assessing educational need in Ireland focuses on diagnosis and deficits, instead of looking at the actual needs of the child, encouraging improvement and celebrating gains.

The ESPEN Act has the potential to further children with cognitive disabilities' ability to access education, but has not been fully implemented.

There are also no guidelines on how children are involved in decisions about educational supports or provision, though it must be noted that many of the cases deal with very young children.

Care and Custody Proceedings

There is a lack of information on care and custody proceedings in Ireland though that is slowly changing. It is difficult to determine what the barriers are for children with cognitive disabilities in such proceedings given the paucity of information.

There is some evidence that in care proceedings in general that the statements of children when heard are not weighed equally, statements of abuse or poor parental behaviour are deemed true while statements of wanting to stay with the parent are not given the same weight.³¹⁶

The guardian ad litem service is unregulated in Ireland and not used in a uniform matter. In addition it is not clear if children are told of the dual roles of guardians ad litem – to communicate their views to the court, but also to advise the court on the course of action believed to be in the best interests of the child (which may conflict with the child's views).

Access to Justice in Criminal Justice Settings

Victims and Witnesses

Victims with disabilities (both children and adults) are invisible in Ireland. No data is collected about them and very little supports are available to them within the criminal justice system. Victim support services in Ireland are not currently trained to work with potential clients with disabilities, or with children.

The Irish law of evidence (especially provisions on swearing in and testifying) could present barriers to children with cognitive disabilities. Even if the law itself is not a complete bar, many of those interviewed for this project felt that the Gardaí and DPP are often unwilling to investigate and follow up such cases due to concerns about witness testimony and credibility. Although the law allows for supportive measures that would better enable child victims with cognitive disabilities to testify, video links are just beginning to be used and this research could find no example of an intermediary being used.

Crimes motivated by bias or hatred, or intentional selection of victims with disabilities do not have specific sentencing enhancements in Ireland and this gap in the law may be facilitating underreporting of disability-motivated hate crimes.

³¹⁶ Interview with Barrister conducted by Jenni Kline on 14 March 2014.

Offenders

As of yet, adequate mental health services are not widely available to young offenders with cognitive disabilities. There are also some cases of criminal detention being used as a stopgap for lack of services for children with cognitive disabilities.

Ireland must do better by its children, especially its children with cognitive disabilities. Better data must be kept on how children access justice and such data must be disaggregated so that we may swiftly identify any barriers faced by children with cognitive disabilities. When planning new policies that impact on children, the government should include children in a way that their voice may be heard. The inclusion of children's voices should be done in an accessible manner so as to ensure the meaningful inclusion of the voices of children with cognitive disabilities.



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