

CHAPTER 2:

Access to Justice and Decision Making

Siobhan Phelan, BL

2.1 INTRODUCTION

Providing for children's rights in law is only really meaningful when the measures required to enforce those rights are effective. When children are involved with the justice system, whether as victims, defendants, witnesses, asylum seekers or when their parents divorce and disagree over custody, their rights can easily be overlooked. Effective access to justice and decision making for children requires measures that promote participation by children in the decision and law making processes, that ensure appropriate representation for children in those processes, provide for the communication of information in an age appropriate manner and ensure that the professionals dealing with children within the justice system receive appropriate training.

This section focuses on participation in the justice system and decision making process and does not address the question of law reform required to protect substantive children's rights. Wide scale law reform is required to provide explicit protection for the rights of children across a range of legislative instruments and is fundamental to providing effective access to justice and protection for children's rights in the decision making process. Legislative lacunae, such as those enshrining the best interests of the child as a primary consideration required to be addressed in the decision making process, go beyond the scope of this chapter.

2.2 OVERVIEW OF RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS

Article 12 of the Convention on the Rights of the Child provides for the child's procedural rights, including the right to participate in decisions that affect them and to have representation to this end as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative of an appropriate body, in a manner consistent with the procedural rules of national law.¹

¹ Convention on the Rights of the Child (adopted and opened for signature, ratification and accession on 20 November 1989) 1577 UNTS 3 (UNCRC).

Article 12 contains both a substantive right, namely the right to be heard, to participate or to be involved in decision making and a procedural provision requiring that provision is made for the child's participation in the process. It has been described by the leading academic in this area as 'the gold standard'² and is broad in its scope and application. It applies in all matters affecting the child.

Article 24 of the European Union Charter of Fundamental Rights also recognises the rights of children to express their views freely and to have such views taken into consideration on matters which concern them in accordance with their age and maturity.

Article 13 on the Hague Convention on the Civil Aspects of International Child Abduction gives a discretion to a court to refuse to return a child to the place of his or her habitual residence based on the child's objection to such a return where the child has attained an age and degree of maturity at which it is appropriate to take account of their views.

Article 11(2) of Regulation 2201/2003 (the Brussels II A Regulation) provides that when applying Articles 12 and 13 of the Hague Convention, a child must be given an opportunity to be heard, unless this is inappropriate having regard to his or her age or degree of maturity. Recent guidelines issued by the UK Court of Appeal for Judges hearing children in this context recommend that the role of the judge is to be the passive recipient of the child's views.³

The European Convention on Human Rights, whilst silent on children's participative rights *qua* child, is also relevant because of its developed jurisprudence on procedural rights under Article 6 (fair trial) and its jurisprudence on the rights of the child under the rubric of Article 8 rights (family life). The jurisprudence of the European Court of Human Rights recognises the right of participation of the child in proceedings as stemming from the impact of the proceedings on the child and what is at stake for the child. Insofar as the child's fair trial rights are concerned, the Court has ruled that it is fundamental that the child is dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote their ability to understand and participate in the proceedings.⁴ The Court has found a violation of Article 8 arising from a failure to hear the child in Court and the absence of accurate and complete information on the child's true wishes.⁵ From the Convention case-law,

there is clear protection against delay in cases involving children. The procedural rights protected under Article 8 of the Convention apply to both administrative and judicial phases of proceedings and include a right to legal representation in certain circumstances.

Ireland has not ratified the European Convention on the Exercise of Children's Rights, signed in 1996, which provides for the separate representation of children in family law proceedings. The Convention expands upon the provisions of the Hague Convention and in Article 3, the European Convention details the right of children with sufficient understanding to receive all relevant information about family proceedings in relation to them, the right to be consulted and to express their views upon them, as well as the right to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

The EU Agenda on the Rights of the Child adopted in 2011 recognised the promotion of child friendly justice and the use of the Council of Europe Guidelines on Child Friendly Justice as EU priorities in the field of the rights of the child. The said Guidelines, published by the Committee of Ministers of the Council of Europe, identify a number of practical obstacles to access to justice required to be addressed within national legal systems. The Guidelines provide, for example, that obstacles to access to court, such as the cost of the proceedings or the lack of legal representation, should be removed. They further provide that children should have the right to their own legal representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties. The Guidelines go on to provide that children should have access to free legal aid under the same or more lenient conditions than adults. The Guidelines provide that in cases where there are conflicting interests between parents and children, the competent authority should appoint either a *Guardian ad litem* or another independent representative to represent the views and interests of the child.

2.3 REVIEW OF IRISH LAW

The Courts have traditionally recognized the desirability of ascertaining and considering the wishes of children affected by their decisions, albeit on an *ad hoc* and inconsistent basis. A practice has developed of some judges speaking to a child in chambers but the wisdom of such a practice is questionable from a child protection/welfare perspective, particularly in the absence of special training for judges. The recognition of the importance of the child's views has gained traction in more recent times through legislative acknowledgment that there are circumstances where Courts are obliged to have regard to the wishes of children affected by their decisions. Clearly, however, the

2 Ursula Kilkelly, *Children's Rights in Ireland; Law, Policy and Practice* (Tottel Publishing 2008) 201.

3 Lord Justice Thorpe's Working Party of the Family Justice Council, 'Guidelines in relation to Children giving evidence in Family Proceedings' <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Children+Giving+Evidence+Guidelines+-+Final+Version.pdf>> accessed 13 July 2015.

4 *T v UK* App no. 43844/98 (ECtHR, 16 December 1999); *V v UK* App no.24724/94 (ECtHR 16 December 1999).

5 *Sahin v Germany* (2003) 36 EHRR 765.

right of the child to be heard in matters concerning his or her welfare has not only legislative origin but also arises pursuant to the provisions of the Constitution and the requirement to comply with principles of constitutional justice in decisions affecting children.⁶

Under the Rules of Court, children cannot independently institute legal proceedings in Ireland. The Rules of Court provide⁷ that an infant may sue as plaintiff by his next friend and may defend proceedings by his guardian appointed for that purpose. Where the Plaintiff is an infant, the consent of the next friend is required to be filed in the Central Office at the same time as the summons is issued, and the person acting as next friend is required to sign a written authority to the solicitor for that purpose and the authority is required to be filed in the Central Office. The solicitor acting in the matter acts for the next friend and not for the infant. In circumstances where there may be a conflict of interest between a parent's interests and a child's or where a child is in care or is a separated child within the asylum system, the absence of a provision whereby children may institute proceedings independently can provide a real barrier to the child's access to justice.

The Irish position contrasts with the position elsewhere. For example, in England and Scotland, children are entitled to instruct a solicitor and enter the court process in any civil proceedings provided a solicitor is satisfied that the child has a general understanding of what he or she means to do. Section 11(10) of the Children (Scotland) Act 1995 provides for the presumption that a child aged 12 or more is of sufficient age and maturity to form a view both in relation to instructing a solicitor and to telling the court his views. In England and Wales, the law makes provision for children to bring their own proceedings without a next friend or Guardian *ad litem* in certain circumstances, including where leave of the court is obtained or a solicitor considers the minor is able to give instructions. Given that different provision exists for considering the wishes of the child in different areas of law, we propose to consider each area separately.

Child Care Proceedings

Section 24 of the Child Care Act, 1991 requires a Court to have regard to the welfare of the child as the first and paramount concern and insofar as it is practicable, to give due consideration to the wishes of the child having regard to his age and understanding. The manner in which section 24 is couched places primary importance on the welfare of the child (as assessed by the Court) and accords only secondary importance to the wishes of the child but it also obliges the Court to balance the rights of children and parents. This model has been criticised as falling short of what is required by Article 12 of the

Convention on the Rights of the Child.⁸ Different models of protection have been adopted in other jurisdictions where the child's participation is provided for through the express requirement to provide sufficient information to the child that explains to them why the process has been engaged with regard to them, the way in which they can participate in decision making and the way in which they can address complaints about the process. Provision is made for the child's views to be expressed, with such assistance as is necessary, and for information to be given to the child about the outcome of any decision made and the reasons for the decision.

Provision has been made under the Child Care Act, 1991 for the joinder of a child as a separate party in proceedings under that Act where the Court is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case, that it is necessary in the interests of the child and in the interests of justice to do so. The Court may order that the child be joined as a party to the case, or shall have such of the rights of a party as may be specified by the Court in, either the entirety of the proceedings or such issues in the proceedings as the Court may direct. The making of any such order is expressed as not requiring the intervention of a next friend in respect of the child. Having made an order joining the child as a party in the proceedings, the Court is also empowered to appoint a solicitor to represent the child in the proceedings. While provision is made for the costs of a solicitor appointed to act for a child are to be borne by the Child and Family Agency and they in turn can apply to recover those costs as against a party in the proceedings, orders joining the child as a party with separate legal representation are rare.

As an alternative to its power to join the child in the proceedings and to appoint a solicitor to represent the child, the Court may also appoint a Guardian *ad litem* for the child and the Guardian, in turn, may instruct legal representation. No guidance is offered in the 1991 Act, however, in relation to the circumstances in which the child's interests or the interests of justice require the appointment, but there is an onus to satisfy the Court that it is 'necessary in the interests of the child and of justice' that a guardian be appointed. This means that the appointment is far from automatic and practice varies widely from Court to Court. The default position in other jurisdictions is that a Guardian is appointed, unless it would serve no useful purpose. There is a need for guidance in this area to develop consistency and maintain standards in relation to access to justice as between different Court areas.

The Child Care Act, 1991 is silent as to the role of the Guardian *ad litem*. In the absence of a duty to appoint a Guardian *ad litem* in all child care cases the Guardian *ad litem* service is unregulated and ad hoc. No minimum qualifications have been prescribed with the result that in theory anyone can currently act in this role. The appointment of a Guardian *ad litem* is expressly precluded where the child is a party to the proceedings.

6 *FN v CO* [2004] 4 IR 311, [2004] IEHC 60.

7 Courts Service Ireland, 'Rules of the Superior Courts Order 15' r16 (and similar rules in the lower courts) <<http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/f10c1841df0af07380256d2b0046b3d4?OpenDocument>> accessed 13 July 2015.

8 Ursula Kilkelly (n 2) 216.

This is an apparent failure to recognise both that the Guardian performs the difficult role not only of communicating the views and wishes of the child but also of advising the Court as to the best interests of the child, even where these conflict and that the traditional adversarial court room scenario, which is promoted by the appointment of a solicitor for the child, is not conducive to effective access to justice for the child. A solicitor acting on the instructions of a child does not have a similar role to that of a Guardian and does not advise on the best interests of the child where the interests of the child differ from the expressed wishes of the child. The solicitor is ill equipped to assist the Court in the decision making process by reference to the best interests of the child standard.

The power of the Court to join the child as a party or to direct the appointment of a Guardian *ad litem* in respect of a child under the Child Care Act, 1991 (as amended), only arises however in the case of proceedings in being and does not address a situation where a child may seek to proactively agitate an issue under the Child Care Acts. Furthermore, the power to appoint either a solicitor or a Guardian *ad litem* appears to be mutually exclusive and the legislation does not provide for the joinder of the child as a party represented by a solicitor together with the appointment of the Guardian *ad litem*. This is perhaps due to a failure to appreciate the different role of the solicitor for the child and the Guardian *ad litem*. The solicitor for the child acts on the instructions of the child and communicates the child's wishes. The Guardian *ad litem*, in contrast, presents to the Court an assessment of what is considered to be in the child's best interests, having duly listened to and considered the child's wishes. There can be cases where a proper consideration of the child's best interests benefits from both an intervention by a solicitor on behalf of the child as an independent party in the proceedings and from the intervention of a Guardian *ad litem* who has a professional competence in assessing how the child's best interests are met.

Private Family Law Proceedings

Children remain largely invisible in Irish family law proceedings. Although there is support of a constitutional right on the part of the child to be heard in family law proceedings, the law does not reflect this by providing for the child's right to be heard, their right to have their wishes considered and the modalities of same in clear terms. The opportunity to address this lacuna was taken in the Children and Family Relationships Act 2015 with the insertion of Part V into the Guardianship of Infants Act, 1964 (particularly sections 31 and 32) which places the best interests of the child at the forefront. Section 32 of the Guardianship of Infants Act 1964 (as amended) empowers the Court to appoint an expert to determine and convey the child's views. How this will work in practice remains to be seen post commencement of the new Part V. No provision has yet been made for the appointment of the child as a party in the proceedings or for the separate representation of children in the proceedings raising clear issues as to Ireland's compliance with its obligations under Article 12(2) of the Convention on the Rights of the Child and Articles 6 and 8 of the European Convention on Human Rights.

Section 25 of the Guardianship of Infants Act, 1964 (as amended) provides that the Court shall, as it thinks appropriate and practicable, having regard to the age and understanding of the child, take into account the child's wishes in the matter. This provision was clearly designed to have the effect of increasing the extent to which a court has regard to the views and wishes of children, but the experience in practice is that its impact has been limited because the parties in private litigation will, in most cases be unable to discharge the costs associated with representing the interests of the child.⁹

In disputed cases, welfare reports can be sought which provide some opportunity for the child's views to be considered by decision makers;¹⁰ however the power of the District Court to order such reports under section 26 of the Guardianship of Infants Act, 1964 (as amended) has never been commenced. The statutory purpose of the report is to deal with welfare issues rather than to present the views of the child. The failure to require direct input from children limits the effectiveness of the report as a tool for ensuring that the child's views and wishes are brought to the attention of the Court. A further limitation on the utility of welfare reports as a tool in enhancing participation by children in the decision making process is the absence of funding in private law proceedings for reports of this nature and delays in concluding them.

Section 11 of the Children Act, 1997 inserted a new section 28 into the Guardianship of Infants Act, 1964 to make provision for the appointment by the Court of a Guardian *ad litem* in private law proceedings concerning custody, access or guardianship matters. The power as provided for was tightly circumscribed in that the Court could only exercise the power in 'special circumstances'. The provision might be criticised from a children's rights perspective as not providing more widely for the appointment of a Guardian *ad litem*; however, as it has never been commenced, its operation in practice has not been assessed and there remains no power to appoint a Guardian *ad litem* on behalf of children in private law proceedings concerning custody, access or guardianship matters.

In addition to the possibility of the child finding some voice in welfare reports prepared for the Court, a child may also give evidence in proceedings. Under section 28 of the Children Act, 1997, a judge may accept the unsworn evidence of a child under 14 years provided that the child can give an intelligible account of evidence relevant to the proceedings. It is problematic, however, in the particular context of private family law proceedings, that a child may be convicted of perjury for giving false evidence under section 28(3) of the Children Act, 1997. Whilst the ability to give evidence in Court or through video link is clearly one means of ensuring that a child's voice is heard in the proceedings, it is widely accepted that it is not appropriate to call children to give direct

9 Gerard Durcan, 'Hearing the Voice of the Child' (2012) 18(1) MLJI 21.

10 Child Care Act 1991, s 20 where there may be a child protection concern and the Family Law Act 1995, s 47 in relation to issues of custody and access.

evidence which may involve them expressing a preference for one parent over another in Court.

In the absence of other mechanisms for hearing the voice of the child in family law proceedings, judges are more likely to consider speaking with a child privately in chambers than might be considered desirable in terms of its departure from the normal forensic process and the requirement to observe fair procedures and constitutional justice in the Court's process. The taking of evidence in this manner is facilitated by sections 23, 24 and 25 of the Children Act, 1997, which provides for the admission of hearsay evidence in proceedings involving children and the reliance on this evidence in the decision making process. There may be an issue here as to whether Ireland has introduced sufficient legislative safeguards to ensure a proportionate balance between the child's right to be heard and the due process rights of the parties affected.

Also, section 11 of the Children Act, 1997 inserted a new provision (section 25) into the Guardianship of Infants Act, 1964 which requires that in any proceedings concerning matters of guardianship, custody and access, the Court shall, as it thinks appropriate and practicable, having regard to the age and understanding of the child, take into account the child's wishes in the matter. This provision has been criticised on the basis that it affords too much discretion to the judge resulting in uncertain and inconsistent application of the provision. Comparable provisions in other jurisdictions place a duty on decision makers to have regard to the views of the child and prohibit the making of court orders unless due weight has been given to any views expressed by a child. This ensures a proactive approach on the part of the Court.

Section 28(5) of the Civil Legal Aid Act, 1995 (amended by section 13 of the Children Act, 1997) provides that where the Court appoints a Guardian *ad litem* in proceedings under the Guardianship of Infants Act, 1964 and decides that the Guardian should be legally represented, legal aid shall be granted by the Legal Aid Board for the Guardian provided that one of the parties to those proceedings is in receipt of civil legal aid. The requirement that a party to the proceedings be in receipt of legal aid has the effect of seriously circumscribing the circumstances in which provision is made for legal representation for the Guardian *ad litem* in family law proceedings.

Criminal Proceedings

In contrast with family law proceedings, a child accused of a crime is always a party to the proceedings and entitled to legal representation. It has been suggested, however, that practice in Ireland is still some distance from full observance of the requirement that children enjoy effective participation in criminal proceedings in which they are involved as accused.¹¹ Legal terminology is still reported to be widespread rendering the process

inaccessible to the child. A lack of systemic training requirements for legal professionals (including judges) working with children also means that standards of representation and decision making remain inconsistent.

Representation for Separated Children

There is no provision in Irish law for a separated child to be appointed a Guardian *ad litem*. There is a serious question about the lack of guardianship, independent representation and advocacy for these children¹² prompting the Committee on the Rights of the Child to express concerns (which they have repeated subsequently, that separated children in Ireland might not receive the necessary guidance, support and protection during the asylum process, in particular with respect to access to services and independent representation.¹³ Although the treatment of separated children falls within the remit of the complaints function of the Ombudsman for Children in relation to health, education and housing matters, steps taken in the administration of the law in relation to asylum, immigration and naturalisation/citizenship fall outside the remit of the Ombudsman and no statutory redress has been provided for lack of effective and independent representation in such matters.

The Child Witness

Section 23 of the Children Act, 1997 makes extensive provision for the use of hearsay evidence and permits its inclusion as evidence of any fact in all proceedings relating to the welfare of a child in cases where a child is unable to give evidence because of age or where the giving of evidence would not be in the child's best interests. While hearsay evidence is prima facie admissible once the conditions set out in section 23 are met, the admissibility of such evidence may be challenged on grounds of fairness or the interests of justice. In this regard, we differ from the UK where the grounds for challenging the admissibility of hearsay evidence in cases involving the welfare of a child have been removed. It seems clear, however, that the requirements of constitutional justice are such that it is unlikely that the blanket admission of hearsay evidence in cases involving the welfare of the child would pass constitutional muster in this jurisdiction. Judges enjoy discretion as to the weight to be attached to hearsay evidence under section 24 of the Children Act, 1997, but in identifying the criteria to be considered by the Court in determining the weight to attach, section 24 does not require account to be taken of child specific factors such as age, the context and circumstances in which the statement was made and the child's previous behaviour. The section draws into sharp focus the need for specialised training and the desirability of joint social work/Garda interviewing.

11 Ursula Kilkelly (n 2) 230.

12 Dr Nalinie Mooten, *Making Separated Children Visible: the Need for a Child-Centred Approach* (Irish Refugee Council 2006).

13 UN Committee on the Rights of the Child, 'General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) CRC/GC/2005/6.

Provision exists for the child witness to give evidence via video link in criminal and civil cases.¹⁴ Section 14 of the Criminal Evidence Act, 1992 provides for cross-examination to be conducted through an intermediary with the intention of ensuring that questions are put in age appropriate language. Despite this, Irish law continues to permit personal cross-examination of victims by their alleged abuser.

Delay as a Barrier to Access

Notwithstanding the child's right to an expeditious determination of issues affecting their welfare, there is a documented problem of delay in the Irish Court system.

Complaints Procedure under the Child and Family Agency Act 2013

The absence of effective complaints procedures and remedies has been criticised as an apparent gap in providing access to justice in Ireland. The Child and Family Agency Act 2013 established the Child and Family Agency. The Agency was established with effect from 1 January 2014. The establishment of a dedicated Child and Family Agency was intended as a response to child protection failings, including inconsistency and fragmentation in service provision. The Agency brings together key services relevant to children and families including:

- > child protection and welfare services formerly operated by the HSE;
- > the Family Support Agency; and
- > the National Educational Welfare Board.

The legislation provides for the subsuming of functions from these three separate agencies and reassigns legal responsibilities in relation to the care and protection of children and the promotion of their welfare. Notably, the Act establishes a complaints procedure whereby a child affected by service provision under the Act may make a complaint. It is regrettable that the Act does not specify the remedies available in respect of complaints made, nor does it prescribe the procedural safeguards to be provided to a child making a complaint under the Act. The effectiveness of the newly established complaints procedure remains to be tested, but the fact that the opportunity was not taken to enshrine remedies in respect of wrongs identified under the Act, and to safeguard the procedural rights of the child in accessing those remedies, suggests that the complaints mechanism will be more theoretical than real in delivering protection for the rights of the child. Notably, the opportunity was lost in the 2013 Act to expressly oblige the Agency to respect the best interests principle in discharging its functions in relation to complaints. It is hoped that the categories of persons eligible to make complaint on behalf of a child who is unable to make a complaint on their own behalf may be expanded to include extended family members and professionals working with the child.

14 Criminal Evidence Act 1992, s21; Children Act 1997.

The Ombudsman for Children

The Ombudsman for Children in Ireland is an independent statutory office established under the Ombudsman for Children Act, 2002. The main functions of the Office are:

- > to promote and monitor the rights and welfare of children under the age of 18 living in Ireland; and
- > to investigate complaints made by children or on behalf of children in relation to the administrative actions, or inactions, of public bodies, schools and voluntary hospitals, which have had, or may have had, an adverse effect on the child or children concerned.

The Ombudsman for Children may investigate on his/her own initiative or as a result of a complaint made by a child, a family member or any other person who, by reason of that person's relationship (including professional relationship) with the child and his or her interest in the rights and welfare of the child, is considered by the Ombudsman for Children to be a suitable person to represent the child.

In its annual reports, the Office of the Ombudsman for Children has consistently highlighted certain deficiencies in the 2002 Act, particularly with respect to the Office's investigatory remit. These deficiencies have been noted by international human rights monitoring mechanisms such as the UN Committee on the Rights of the Child and the Council of Europe Commissioner for Human Rights. Of note, the Committee of the Rights of the Child recommended the extension of the remit of the Ombudsman for Children to all children in the criminal justice system, and places of detention under the aegis of the Department of Justice and Equality are now within the investigatory remit of the Ombudsman for Children's Office. The UN Committee on the Rights of the Child further recommended enhancement of the 2002 Act by broadening the scope of the Ombudsman's investigative powers with a view to eliminating gaps which could result in a violation of children's rights and safeguarding the independence of the Office by committing financial resources directly through the Oireachtas (as opposed to through a Department of State).

In addition to reiterating these long-standing concerns, the review of the 2002 Act by the Office of the Ombudsman for Children in 2012 (undertaken in accordance with section 7(1)(h) of the 2002 Act) set out a number of additional aspects of the Act that could benefit from amendment. The principal recommendations of the review of the operation of the 2002 Act were to:

- > remove existing exclusions to the investigatory remit of the Ombudsman for Children;
- > include additional public bodies with functions relating primarily or exclusively to children within the remit of the Ombudsman for Children;
- > expand and clarify the advisory functions of the Ombudsman for Children;

- > place a new duty on public bodies to provide appropriate assistance and guidance to complainants;
- > enhance the powers of the Ombudsman for Children to ensure that public bodies comply with requests for information, documents or other records in the course of investigations; and
- > clarify that the in camera rule should not operate in such a way as to frustrate statutory investigations under the Ombudsman for Children Act, 2002.

During the passage of the Ombudsman (Amendment) Bill 2008 through the Houses of the Oireachtas, an opportunity arose to address some of the recommendations contained in the review of the 2002 Act. Significant amendments to the investigatory remit and powers of the Ombudsman for Children were achieved through the Ombudsman (Amendment) Act 2012. Since 30 April 2013, the range of bodies that can be investigated by the Office of the Ombudsman for Children has widened to cover a greater number of public bodies and organisations that provide services to children on behalf of the State. However, many of the recommendations contained in the review of the 2002 Act have not yet been implemented and it is considered likely that primary legislation will be required to address these outstanding issues.

The Courts have commented on the lack of representation of the child's perspective in cases touching on the welfare of children.¹⁵ One way of addressing an apparent lacuna in this regard would be to extend the role of the Ombudsman for Children to provide for an express power to apply to appear as *amicus curiae* in cases involving the promotion or protection of children's rights. However, in so acting, the Ombudsman would not be acting for the child but as a friend of the Court.

2.4 RATIONALE FOR GAPS IN PROTECTION

The rationale for the failure to provide for separate representation for children in family law proceedings may be partly attributable to a paternalistic approach to the care of children and deference to the views of parents, which may be more deeply ingrained in Ireland than elsewhere. The view has also been expressed that providing children with representation would exacerbate the adversarial nature of already emotionally charged proceedings¹⁶ and may contribute to delays. It is likely, however, that some part of the reluctance to have children represented in proceedings is related to the added cost of same.

The failure to appoint a Guardian *ad litem* as the norm in cases may be explained by cost considerations, and the financial implications of providing for better access to

justice for children are really due to the need for the involvement of an additional professional before the Court.

Limitations on the admissibility of hearsay evidence and permitting cross-examination of children by their victims are connected with the need to ensure due process in the justice system: the balancing exercise between the rights of the child and the rights of other parties is not always a straightforward one.

Although video link evidence is admissible, the availability of technology in all courts has been restricted by financial constraints.

Delay has been identified as one of the most important factors impeding access to justice.¹⁷ The Guardianship of Infants Act, 1964 (as amended) does not make statutory provision for a duty to proceed expeditiously in children's cases. This contrasts with other jurisdictions where delay is expressly addressed as being detrimental to the welfare of the child. The rationale for the failure to make express provision may be a concern about an increased exposure to costly litigation on the part of the State arising from systemic delays in the court system and in decision making processes concerning children.

2.5 RECOMMENDATIONS TO STRENGTHEN THE PROTECTION OF RIGHTS

The Convention on the Rights of the Child should be incorporated into domestic law.

The Guardian *ad Litem* Service should be regulated and provision made for the appointment of a Guardian where appropriate in cases that impact on the rights of children.

Consideration should be given to the establishment of a Child Advocacy Service to support children seeking to be heard in decision making processes. This service could also provide useful support to children as vulnerable witnesses and children as parties in criminal cases.

The requirement to consider the wishes of the child needs to be strengthened in legislation. Whilst it is recognised that the judge should retain discretion, the requirement to hear the child should not be limited to what is 'practicable' or 'appropriate', subject of course to the right of the child to choose not to participate.

15 *McD v PL* [2010] 2 IR 199.

16 Working Group on a Courts Commission, *Sixth Report* (Government Publications 1999).

17 Geoffrey Shannon 'Fifth Report of the Special Rapporteur for Children' <<http://www.dcy.gov.ie/documents/publications/5RapporteurRepChildProtection.pdf>> accessed 13 July 2015.

The law should be amended to provide a means whereby children may pursue a legal remedy without the need for a next friend; perhaps along the lines seen in England and Scotland. Provision should be made for joinder of children as parties in all proceedings in which their interests are affected in accordance with identifiable criteria.

Effective participation of children in proceedings will also require provision for legal representation and/or the appointment of a Guardian *ad litem* in all areas of law and practice and not simply in the areas of child care. To provide for effective access to the process for children, these services must be properly resourced. Express statutory provision for publicly funded legal representation for children and the appointment of Guardians *ad litem* are necessary pre-requisites for the protection of the rights of access of children to the justice and decision making processes. Similarly, provision is required for the independent funding of welfare reports in cases affecting the rights of children. It is recommended that all necessary measures required to enable the State to ratify the European Convention on the Exercise of Children's Rights should be enacted.

Section 26 of the Child Care Act, 1991 should be strengthened to better protect children's rights by amending it both to provide for dual representation and to make statutory provision for guidance on the appointment, qualifications, role and function of a Guardian *ad litem*.

Section 10 of the Children and Young Persons (Care and Protection) Act 1998 (New South Wales) provides a useful model for prescribing participation of children in decision making by requiring that adequate information is provided to the child, in a manner and language that he or she can understand, concerning the decisions to be made, the reasons for the Department's intervention, the ways in which the child or young person can participate in decision making and any relevant complaint mechanisms. The section further requires that the child is afforded an opportunity to express his or her views freely, according to his or her abilities, any assistance that is necessary for the child or young person to express those views, information as to how his or her views will be recorded and taken into account, information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision as well as an opportunity to respond to a decision made under this Act concerning the child or young person.

Notable attempts have been made by judges of the Superior Courts to develop guidelines as to the best approach to talking to children¹⁸ and identifying the factors to be taken into account when assessing the significance of a child's wishes. However, practitioners working with children have identified a lack of consistency in the approach taken by judges as between different courts. There is a need for guidelines to be

published and formal training to be rolled out. Guidelines have been identified as necessary in areas including the factors that judges should consider when assessing the significance of a child's wishes; the age a child should be when the child's wishes are taken into account, the criteria guiding when a child should be entitled to separate representation and to attend court to give evidence, guidance as to how best to assess the child's wishes, how judges talk to or interview children, the suitability/competence of professional reports, the format service and admissibility of reports.¹⁹ Similarly, the Law Reform Committee of the Law Society has recommended that legislative guidelines and rules of professional conduct be developed for the legal representation of children.²⁰ It has been suggested that specific training and registration (including vetting) should be required for those seeking to represent children.²¹ In this context, the Council of Europe Guidelines on Child Friendly Justice emphasise the importance of specialised training for legal professionals working with children.

It is recommended that the complaints procedure established under the Child and Family Agency Act 2013 be strengthened to provide in clear terms for participation of children in the complaints process and to ensure that remedies available under the Act are effective and dissuasive.

It is further recommended that the remit of the Ombudsman for Children is extended to include, inter alia, complaints from children in the asylum and immigration system and a power for the Ombudsman for Children to seek to be joined as *amicus curiae* in proceedings concerning the welfare and rights of children.

Delays in the courts system and decision making as it affects children could be countered by specific statutory provision promoting the right to expedition. An example is provided by section 1(2) of the Children Act 1989 (UK) which provides that any proceedings in which any question with respect to the upbringing of children arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child. Tackling delay will undoubtedly have funding implications and there is a clear requirement for greater investment in the courts system, in legal aid, in the Guardian *Ad Litem* Service and in reporting services. Delay is likely to result in prejudice to the welfare of the child and requires to be tackled as a matter of priority.

One of the indicators for effective child participation has been identified as children's direct access to human rights complaints mechanisms but only a few countries collect

18 *O'D v O'D* [2008] IEHC 468.

19 Colm Roberts, 'The voice of the child in family disputes' (Legal Aid Board Family law Conference 2013) <[http://www.legalaidboard.ie/lab/publishing.nsf/7a4c7e6aa25d28734a2569fa0000ed33/3da3d208b17a327d80257bcd0045cc03/\\$FILE/C._Roberts.pdf](http://www.legalaidboard.ie/lab/publishing.nsf/7a4c7e6aa25d28734a2569fa0000ed33/3da3d208b17a327d80257bcd0045cc03/$FILE/C._Roberts.pdf)> accessed 13 July 2015.

20 Law Society Law Reform Committee, *Rights Based Child Law: The Case for Reform* (2006).

21 Ursula Kilkelly, (n 2), 228, and *Barriers to the Realisation of Children's Rights in Ireland* (2007) 163-164.

data broken down by age to reflect complaints directly from children. There is a need for collection of this type of data to measure whether effective access to justice and decision making exists for children and to assess what steps directed at promoting access succeed and why. Until resources are allocated to the strengthening of protections for children through a range of measures including awareness building and education, legislative change will not be effective in ensuring the protection of children in the justice system and in decision making.

Lessons can be learned from the approach taken in other European States to the protection of children's rights in the decision making process. Several EU Member States have amended their procedural laws to make children's involvement in justice procedures more child friendly. In Hungary, for example, a new law requires that courts use language appropriate to age when they communicate with children through summons, warnings or notices.²² In the Czech Republic, the legislative procedure for the new law on victims of criminal offences treats children as particularly vulnerable and therefore requires the use of specially trained staff in questioning children as well as allowing for the use of audio-visual equipment.²³ Denmark amended the law regulating its National Council for Children, which now states explicitly that the Council should involve children's views in its work and that the Council represents the opinion of children included in its panel on matters of law and practice identified by the Council as requiring reform²⁴.

2.6 CONCLUSION

The goal of securing children's rights in the decision making process may be enhanced by adopting specific legal measures and procedures but more fundamentally achieving this goal requires a shift in mind-set whereby decision makers - who are properly trained - proactively question whether the interests of children are affected and having identified that such interests are affected, adopt appropriate methods to ascertain what the views of the child are and weigh those views in the decision making process. Vindicating the child's rights in the decision making process will require decision makers across a broad spectrum of areas to routinely consider whether children are affected by the decisions made and to demonstrate that the decisions taken were properly informed by and had due regard to the rights of those children affected. The requirement under the constitutional amendment to give primary weight to the best interests of the child can only be achieved when children are given the possibility to express their views in matters that concern them and that those views are properly taken into account when decisions are made.

Although there have been legislative developments over the last 30 years in relation to the obligation to hear children and to have regard to their views in decisions affecting them, there remain significant identifiable gaps in certain areas of the law. It must be recalled, however, that the constitutional right of the child to be heard and have their wishes considered applies across the spectrum where important decisions affecting children are taken, whether statutory provision has been made for same or not. The failure of the State to provide effective mechanisms whereby this can be achieved may itself give rise to actions against the State for failure to vindicate constitutional rights in individual cases and may ultimately provide the necessary impetus for law reform measures directed towards providing effective access to justice and decision making processes for children.

22 Child Rights International Network, 'Access to Justice for Children: Hungary' (April 2014) <http://childhub.org/sites/default/files/library/attachments/1787_hungary_access_to_justice_original.pdf> accessed 13 July 2015.

23 Fundamental Rights Agency, *Annual Report 2012* (Fundamental Rights Agency 2013) 124.

24 *ibid* 129.