

Initial Submission on the General Scheme of the International Protection Bill 2015

May 2015



The Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

Ag Eisteacht
Alcohol Action Ireland
Alliance Against Cutbacks in Education
Amnesty International Ireland
Arc Adoption
The Ark, A Cultural Centre for Children
ASH Ireland
Assoc. for Criminal Justice Research and Development (ACJRD)
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Barnardos
Barretstown Camp
BeLonG To Youth Services
Bessborough Centre
Border Counties Childhood Network
Carr's Child and Family Services
Catholic Guides of Ireland
Childhood Development Initiative
Children in Hospital Ireland
City of Dublin YMCA
COPE Galway
Cork Life Centre
Crosscare
Dental Health Foundation
DIT – School of Social Sciences & Legal Studies
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dun Laoghaire Refugee Project
Early Childhood Ireland
Educate Together
School of Education UCD
EPIC
Focus Ireland
Forbairt Naíonraí Teoranta
Foróige
GLEN - Gay and Lesbian Equality Network
Headstrong - The National Centre for Youth Mental Health
Healthy Food for All
Immigrant Council of Ireland
Inclusion Ireland
Independent Hospitals Association of Ireland
Inspire Ireland
Institute of Community Health Nursing
Institute of Guidance Counsellors
International Adoption Association
Irish Association of Social Care Workers (IASCW)
Irish Association of Social Workers
Irish Association of Suicidology
Irish Autism Action
Irish Centre for Human Rights, NUI Galway
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Premature Babies
Irish Primary Principals Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation (IYF)
Jack & Jill Children's Foundation
Jesuit Centre for Faith and Justice
Junglebox Childcare Centre F.D.Y.S.
Kids' Own Publishing Partnership
Law Centre for Children and Young People
Lifestart National Office
Marriage Equality – Civil Marriage for Gay and Lesbian People
Mary Immaculate College
Mental Health Reform
Mounttown Neighbourhood Youth and Family Project
MyMind
National Organisation for the Treatment of Abusers (NOTA)
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
One Family
One in Four
Parentline
Parentstop
Pavee Point
Peter McVerry Trust
Rape Crisis Network Ireland (RCNI)
Realt Beag
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
Simon Communities of Ireland
Society of St. Vincent de Paul
Sonas Housing Association
Special Needs Parents Association
SpunOut.ie
St. Nicholas Montessori Teachers Association
St. Nicholas Montessori Society
St. Patrick's Mental Health Services
Start Strong
Step by Step Child & Family Project
Sugradh
Teachers' Union of Ireland
The UNESCO Child and Family Research Centre, NUI Galway
The Guardian Children's Project
The Prevention and Early Intervention Network
Treoir
UNICEF Ireland
Unmarried and Separated Families of Ireland
youngballymun
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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1. Introduction

The Children’s Rights Alliance unites over 100 organisations working together to make Ireland one of the best places in the world to be a child. We improve the lives of all children and young people by ensuring Ireland’s laws, policies and services comply with the standards set out in the United Nations Convention on the Rights of the Child (UNCRC)¹.

Article 22 of the UN Convention on the Rights of the Child obliges States to ensure that children seeking or holding refugee status, whether unaccompanied or not, shall receive appropriate protection and assistance in the enjoyment of the rights of the Convention and other applicable human rights treaties. The State is further obliged to assist the child in the tracing of his or her family and in obtaining information relevant for their reunification. In circumstances where the child’s family cannot be found, the child is entitled to the same protections as other children deprived of their family under the Convention.

In 2006, the Committee on the Rights of the Child called on the State to ‘take necessary measures to bring [its immigration] policy, procedures and practice into line with its international obligations, as well as principles outlined in other documents, including the Statement of Good Practices produced by the United Nations High Commissioner for Refugees and Save the Children.’² Ireland’s next examination by the UN Committee on the Rights of the Child is due to take place in January 2016.

The Alliance welcomes the publication of the General Scheme of the International Protection Bill 2015 and the opportunity to be consulted on the Scheme by the Joint Committee on Justice, Equality and Defence. The Scheme has many positives, including the introduction of a single procedure for international protection applicants to replace the existing multi-layered system, and the inclusion of ‘child-specific’ forms of persecution as ground for protection.³ The Scheme’s proposals provide an important improvement to the existing legislative provisions.

We believe, however, that for the legislation to be effective, the Heads must be amended to strengthen the protections for children under the Bill. The Scheme stipulates under a number of sections that the best interests of the child is a primary consideration, however, there is a significant omission in that the best interest principle does not apply to the protection determination decision-making process, including deportation orders. The Scheme does not provide for the right of a child to lodge a separate protection application from that of his or her parents. In addition, the Scheme does not include a definition of an unaccompanied child. Also of concern is that the requirement to determine the relationship between an adult who is not the child’s parent and the child he or she is accompanying is weaker than that recommended by international best practice. In addition, concerns exist in relation to the age assessment process and the possible detention of children. Each of these issues is addressed in turn within this submission.

1 UN Convention on the Rights of the Child, A/RES/44/25

2 UN Committee on the Rights of the Child (2006) *Concluding Observations, Ireland*, CRC/C/IRL/CO/2 para. 65.

3 Head 6(2)(f).

2. The Best Interests of the Child

Article 3 of the UN Convention on the Rights of the Child states:

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of a child shall be a primary consideration.*
2. *State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and to this end, shall take all appropriate legislative and administrative measures.*

The concept of the child's best interests is a procedural rule which should be followed in all decisions that will have an impact on the rights of the child. The UN Committee on the Rights of the Child, in its 2006 *Concluding Observations* on Ireland called on the State ensure that the general principle of the best interests of the child be a primary consideration without any distinction and that it be fully integrated into all legislation relevant to children.⁴

2.1 Proposed Legislation

The Scheme provides for the best interests of the child to be a primary consideration in relation to specific sections. Head 52 stipulates that the best interests of the child shall be a primary consideration in the application of Heads 47, 48, 49, 50 and 51. These sections cover the extension to qualified persons of certain rights (Head 47), permission to reside in the State (Head 48), travel document (Head 49), permission to enter and reside for member of family of a qualified person (Head 50) and permission to reside for member of family of qualified person (Head 51).

In addition, Head 23 provides that the best interests of the child shall be a primary consideration in the application of this Head which relates to a medical examination to determine the age of an unaccompanied minor. Head 33 also provides that in light of the best interests of the child being a primary consideration, the Minister shall ensure that Tusla – the Child and Family Agency inform and prepare an unaccompanied minor for a personal interview; that the interview is conducted by a person who has the necessary knowledge of the special needs of minors; and the report together with the determination of the Minister under Head 35 is prepared by an person with the necessary knowledge of the special needs of minors.

While the inclusion of the best interests principle under certain provisions is very welcome, these measures are not sufficient to comply with the UN Convention on the Rights of the Child. A significant omission is that the best interest principle does not apply to the protection determination decision-making process, including deportation orders.⁵

2.2 Recommendation+

- The Bill should retain the current provisions on the best interest of the child contained in Heads 23, 33, and as applied under Head 52 to Heads 47, 48, 49, 50 and 51.
- The Bill should provide that the best interests principle be a primary consideration in all substantive decisions relating to the protection determination, including the identification of unaccompanied minors (Head 14) and deportation orders (Head 45).

4 UN Committee on the Rights of the Child (2006) *Concluding Observations, Ireland*, CRC/C/IRL/CO/2 para. 23.

5 Head 45.

3. Unaccompanied Minors

Unaccompanied minors are the most vulnerable of migrants and require particular safeguards and care. The 2005 *General Comment No.6 Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, issued by the UN Committee on the Rights of the Child, underlines the responsibility of States to ensure that unaccompanied and separated children have their best interests represented through the nomination of a guardian or an adviser.⁶ Furthermore, it states that unaccompanied and separated children involved in asylum, administrative or judicial procedures should be provided with legal representation.⁷

Paragraph 33 of the General Comment stipulates that:

1. States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests.
2. States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State in compliance with Convention and other international obligations.
3. The guardian should be consulted and informed regarding all actions taken in relation to the child.
4. The guardian should have the authority to be present in all planning and decision making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution.
5. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and the existing specialist agencies/individuals who provide the continuum of care required by the child.
6. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.⁸

3.1 Proposed Legislation

The Scheme does not contain a definition of unaccompanied or separated minors. The lack of a definition may be problematic in circumstances where a child may be travelling with a smuggler, trafficker or non-habitual carer.

Head 32A(7)(a) provides that '[w]here an applicant is under the age of 18 years and is accompanied by an adult other than his or her parent, the interviewer, where he or she considers it appropriate to do so, shall require the adult to satisfy him or her that the adult is taking responsibility for the care and protection of the applicant concerned.' The inclusion of the conditional phrase 'where [the interviewer] considers it appropriate to do so' is weaker than that recommended by the Separated Children in Europe Programme's *Statement of Good Practice*, which states that it is 'necessary to establish the nature of the relationship between the child and the adult'.⁹

Research, published in 2014, found that practice varies among social workers in how they carry out their duties in respect of unaccompanied minors. Some social workers delayed in making an application on behalf of the child until the child was older and could better understand the process

6 UN Committee on the Rights of the Child, *General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, Sept.2005.

7 Ibid.

8 Ibid.

9 Separated Children in Europe Programme, *Statement of Good Practice D.2 Identification*. Available at: http://www.separated-children_europe-programme.org/good_practice/SGP_2009_final_approved_for_print.pdf [Accessed 29th April 2015].

and others decided not to make an application at all, including due to a belief that the child does not have a credible case reiterating the need for an independent *guardian ad litem*.¹⁰

Head 12(4) continues with the current practice that the Child and Family Agency will make the decision on whether or not, and when, to submit a protection application on behalf of a separated child.¹¹ The Scheme fails to stipulate the key duties of the Child and Family Agency in respect of unaccompanied minors, such as ensuring that the child has access to legal advice before making a protection application or that the social worker has taken legal advice on the child's behalf and if a protection applicant is not being made than an alternative form of immigration status is sought.

The Scheme fails to provide for the appointment of a *guardian ad litem* as an independent advocate for unaccompanied minors. The responsibility of the *guardian ad litem* should be stipulated in the Bill and include ensuring that decisions have the child's best interests as a primary consideration, that the child's views are considered in all decisions affecting them, that the child has suitable care, accommodation, education, language support, health care provision, and that the child has suitable legal representation to assist in the procedures that will address his or her protection claim.

3.2 Recommendations

- The Bill should include a definition of an unaccompanied minor as a child under the age of 18, who is outside his or her country of nationality or, if stateless, outside his or her country of habitual residence and who is separated from both parents, or from his or her previous legal or customary primary caregiver. This would bring Irish law in line with the Separated Children in Europe/UNHCR definition as clarified by the UNCRC.
- Head 32A(7)(a) should be strengthened to require the interview in all circumstances to satisfy him or herself that the adult accompanying a child, who is not his or her child, is taking responsibility for the care and protection of the child, in line with the Separated Children in Europe Programme's *Statement of Good Practice*.
- The Bill should stipulate the key duties of the Child and Family Agency in respect of unaccompanied minors, in particular their role in relation to the submission of an application for protection.
- The Bill should include a provision for the mandatory appointment of a *guardian ad litem* for all unaccompanied minors as soon as possible once he or she has been identified. The responsibility of a *guardian ad litem* should be set out in the Bill.

10 E. Quinn et al (2014) *Policies and Practices on Unaccompanied Minors in Ireland*, ESRI Research Series 38.

11 Head 12 (4) "Subject to Head 21, where it appears to the Child and Family Agency, on the basis of information available to it, that an application for international protection should be made on behalf of a child in respect of whom the Agency is providing care and protection it shall arrange for the appointment of an employee of the Agency or such other person as it may determine to make an application on behalf of the child."

4. Independent Application

Every individual, including a child, has a right to seek asylum under the Universal Declaration of Human Rights and the 1951 UN Convention on the Status of Refugees or the 1967 Protocol. The UNHRC, the Office of the United Nations High Commissioner for Refugees, notes that a child's refugee application should be determined in accordance with the principle of family unity, which "operates in favour of dependants, and not against them".¹² It stated that where "the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees."¹³

4.1 Proposed Legislation

There is no mechanism under the Scheme to allow for the submission of an application by a child in their own right separate from his or her family application.

A child may have individual grounds, apart from those of their parents, upon which to seek protection. These grounds may include acts of persecution of a gender-specific or child-specific nature, such as force recruitment of children to armed services or female genital mutilation. In addition, in some cases children may join their parents in Ireland after a period of time, it may be the case that the child has experienced additional persecution following their parents' departure from their country of origin. It is essential that these experiences are taken into account.

In addition, the Scheme provides no mechanism to allow for the separate consideration of a child within a family application. Of note here is the 2007 Supreme Court decision in *A.N. & ors - v - Minister for Justice & Anor* in which the deportation orders in respect of a mother and her five children were found to be invalid.¹⁴ The court found that although the Minister had correctly considered and refused the application of the mother, the decision did not apply to her dependent children and a deportation order could thereby not be executed as the basis on which the Minister was deporting the minors did not exist. At no stage in the asylum process was reference made to applications on behalf of the children. Taking guidance from the UNHCR Handbook, the court held that, under the principle of family unity, if the head of a family meets the criteria of the definition of refugee, his dependants are normally granted refugee status. However, if this application is unsuccessful, the minor is entitled to apply for refugee status based on his/her own circumstances and reasons. The Supreme Court held that the principle of family unity operates for the benefit of the minor and not against him.

4.2 Recommendation

- The Bill should allow the submission of an application by a child in his or her own right separate from his or her family application. The legislation must ensure that the process accommodates the individual rights of children taking into account their particular vulnerabilities.
- The Bill should allow for the separate consideration of a child within a family application.

12 UNHCR (1992) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979. Para. 182 - 188.

13 Ibid.

14 [2007] IESC 44.

5. Age Assessment

The Separated Children in Europe Programme has set out that age assessment procedures should only be undertaken as a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual's age.¹⁵

The UN Committee on the Rights of the Child has states that '[i]dentification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such'.¹⁶

5.1 Proposed Legislation

Head 23 provides that in cases where doubts exist as to the child's age a medical assessment may be undertaken to determine the age of a child. The Head stipulates a number of safeguards which must be adhered to. These include that the assessment shall be the least invasive examination and shall be carried out by qualified medical professionals (Head 23(2); that it can only proceed with the consent of the child, an adult responsibility for the care and protection of the child or the Child and Family Agency (Head 23(3); and that the best interests of the child shall be a primary consideration (Head 23(5)). These safeguards are welcome.

Despite these safeguards questions, the Head is vague on what can be defined as constituting a medical assessment. Particular methods of medical assessment have been criticised for their unreliability.

5.2 Recommendations

- The Bill should maintain the provision under Head 23 that the informed consent of the child is required.
- The Bill should stipulate that an age assessment procedure should be proportionate and only be undertaken as a measure of last resort, where there are grounds for serious doubt and where other approaches have failed to establish the individual's age, in line with Separated Children in Europe Programme
- The Bill should stipulate that in cases of uncertainty following an age assessment the individual shall be given the benefit of doubt and be considered a child, in line with the UN Committee's *General Comment No.6*.
- The Bill should provide more detail on the type of medical testing that may be permit in law. The Bill should stipulate that the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, in line with the UN Committee's *General Comment No.6*.
- Head 23(4) should be amended to provide that a qualified interpreter should be used where necessary and the child should be made aware of what the procedure involves.

¹⁵ Separated Children in Europe Programme, *Statement of Good Practice D.2 Identification*. Available at: http://www.separated-children_europe-programme.org/good_practice/SGP_2009_final_approved_for_print.pdf [Accessed 29th April 2015].

¹⁶ UN Committee on the Rights of the Child, *General Comment No.6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, Sept.2005, paragraph 31(i).

6. Detention

Article 37 of the UN Convention on the Rights of the Child severely restricts the detention of children stating that '[t]he arrest, detention or imprisonment of a child shall be in conformity of the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'

6.1 Proposed Legislation

Head 19 sets out the grounds for detention of an applicant. Head 19 (6) stipulates that subject to subhead (7), the provisions relating to the detention of an application do not apply to those under 18 years.

Head 19(7) stipulates that if and for so long as the immigration officer or, as the case may be, the member of the Garda Síochána concerned has reasonable grounds for believing that the person is not under the age of 18 years, the provisions relating to detention as if the individual is 18 years.

Head 19(7) is of grave concern as it provides that a child under 18 years can be detained as an adult if there are reasonable grounds for believing the person is not under 18 years. This is a breach of the UN Committee on the Rights of the Child's General Comment No.6 which provides that in cases of uncertainty as to an individual's age, the individual shall be given the benefit of doubt and be considered a child.¹⁷

6.2 Recommendations

- Head 19(7), which allows for the detention of an individual who is age disputed, should be deleted.

17 UN High Commissioner for Human Rights, 2005, General Comment No.6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin. 31.

7. Child Specific Persecution

7.1 Proposed Legislation

The inclusion of 'child-specific' forms of persecution at Head 6(2)(f), in the context of determining whether or not the child requires protection, is to be welcomed.

7.2 Recommendation

- The Bill should maintain the inclusion of child specific forms of persecution at Head 6(2)(f).