

Ombudsman for Children Bill 2002

Submission by the Children's Rights Alliance

25 February 2002

Section 2 - the definition of "child"

The definition of child in the Bill is overly restrictive. This specific point arose in the recent decision in *Sinnott v. Minister for Education*. [*Jamie Sinnott (a person of unsound mind not so found suing by his mother and next friend Kathryn Sinnott) v. Minister for Education, Ireland and the Attorney General; Kathryn Sinnott v. Minister for Education, Ireland and the Attorney General*: unreported, Supreme Court, July 12, 2001: Record no. 326 & 327/00]. In law the age at which childhood is deemed to end and adulthood begin has always proved decidedly fluid. [See section 2 of the Family Law Act, 1995 [S.I. No. 26 of 1995] and section 2 of the Family Law (Divorce) Act, 1996 [S.I. No. 33 of 1996].

A "child" is defined in section 2 of the Bill as person under the age of 18 years. Excluded from this definition, however, are all persons who, under the stipulated age, are or have been married. The minimum age for marriage is, since 1996, 18. [Section 31 of the Family Law Act, 1995]. That said, parties of a younger age may marry, by consent of the Circuit Court where the circumstances are such as to render such a step necessary in the interests of the parties. A more expansive definition of child is therefore required.

Proposed Amendment: In Section 2 (1), in the definition of "child", delete the words "other than a person who is or has been married".

Section 7(1) - absence of reference to the Ombudsman's protection responsibility

The UN Convention on the Rights of the Child 1989 recognises children as a special group requiring particular protection because of their inherent vulnerability in a world of adults. The Child Care Act, 1991 began the protective process for children at risk and in need of protection. The absence of the word protection in section 7 (1) of the Bill fails to expressly acknowledge the Ombudsman's responsibility to protect children's rights. The failure to provide protection for vulnerable children in Ireland was commented on by the Committee on the Rights of the Child, established under the Convention on the Rights of the Child, in February 1998. The Committee was critical of the failure to provide national coordination in not only promoting but also in protecting the welfare of children.

Proposed Amendment: In Section 7(1), after the words "The Ombudsman for Children shall promote" insert the words "and protect".

Section 11 - exclusions

There are a number of exclusions contained in the Bill that would constrain the Ombudsman from conducting investigations into various types of actions taken by public bodies, schools or voluntary hospitals. While some of these exclusions may be reasonable, others would effectively discriminate against certain groups of children by relegating them to a separate status and denying them access to the Ombudsman for Children.

It is essential that the Ombudsman be given as wide a jurisdiction as possible. It is imperative that no children be excluded categorically from accessing the Ombudsman. Restrictions and exemptions should therefore be kept to a minimum. Further, by ratifying the UN Convention on the Rights of the Child 1989 on September 21, 1992, Ireland accepted its international obligations to ensure the effective implementation of children's legal entitlements. One of the fundamental principles of the Convention is non-discrimination. Article 2 of that Convention states:

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind... States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination...”

Article 12 (2) of that Convention states:

"[T]he 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 or an appropriate body..."

Two exclusions in the Bill should be considered in light of the foregoing.

Section 11 (1)(e)(i) - exclusion of refugee, asylum-seeker and immigrant children

Under Section 11 (1)(e)(i), children who are refugees, asylum-seekers and immigrants would not be able to turn to the Ombudsman for help in relation to any actions “taken in the administration of the law relating to asylum, immigration, naturalisation or citizenship.” This exclusion would go well beyond excluding complaints about official decisions regarding refugee status or citizenship claims. The Ombudsman would be constrained, for example, from investigating complaints regarding the treatment of asylum-seeker children in ‘direct provision’ under this exclusion.

This exclusion is a clear violation of the *Statement of Good Practice* included in the *Separated Children in Europe* programme, a joint initiative of the International Save the Children Alliance in Europe and the United Nations High Commissioner for Refugees. The aforementioned *Statement of Good Practice* sets out the policy and practice basis for the programme's work. In particular, the *Statement of Good Practice* provides that separated children are entitled to the same treatment and rights as national or resident children. They must be treated as children first and foremost. All consideration of their immigration status must be secondary. [See also:

1. *UN Convention on the Rights of the Child, Article 2*: The rights of the UN Convention on the Rights of the Child apply to all children of any kind and irrespective of their parents or their own race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. *UN Convention on the Rights of the Child, Article 22(1)*: Separated refugee children are entitled to protection and assistance in order to enjoy the rights of the UN Convention on the Rights of the Child.
3. *International Covenant on Civil and Political Rights, Article 24*.
4. *International Covenant on Economic, Social and Cultural Rights, Article 10(3)*.

5. *International Convention on the Elimination of All Forms of Racial Discrimination*. The entire Convention contains measures to eliminate discrimination on the basis of race, colour, descent or national or ethnic origin.
6. *European Council on Refugees and Exiles: Position on Refugee Children, paragraphs 5-7.*]

Proposed Amendment: Delete Section 11 (1)(e)(i).

Section 11 (1)(e)(iii) - exclusion of children in detention

Children in detention would face a similar denial of access to the Ombudsman in relation to matters important to their lives. The Ombudsman would be unable to undertake any investigations of actions "taken in the administration of the prisons or other places for the custody and detention of children committed to custody or detention by the courts other than reformatory schools, or industrial schools..."

Children in these circumstances should be able to access the Ombudsman for Children and the Ombudsman for Children should be allowed to conduct investigations into actions by the public bodies most relevant to the lives of these children, including "prisons or other places for the custody and detention of children".

The exclusion of children in detention is contrary to the ethos that underlines the Children Act, 2001. [S.I. No. 24 of 2001]. Furthermore, in New Zealand where there is a specific limitation on the Children's Commissioner's authority prohibiting him from investigating any decision, act or omission of any court no such restriction applies to investigating the position regarding children in police cells. [See Annual Reports (1992-1997) of the New Zealand Commissioner for Children].

Proposed Amendment: Delete Section 11 (1)(e)(iii).

Section 11 (3) - the unlimited authority given to Ministers to stop investigations

Independence is central to the success of the office of Ombudsman for Children. Without proper independence the office will be impotent to fulfil its fundamental tasks. Substantial emphasis on the independent nature of the office needs to be clearly and unambiguously stated in order to minimise potential legal challenge in the courts. Although the Ombudsman is to be independent of the Government and report directly to the Oireachtas, Section 11 (3) of the Bill seems to provide Ministers with an effective veto over investigations into actions taken by public bodies, schools and voluntary hospitals. If a Minister sends a written request to the Ombudsman concerning actions taken by a Department or a public body under the authority of the Minister, "...the Ombudsman for Children shall not investigate, or shall cease to investigate, an action specified in the request..." The only conditions attached are that the request must be in writing and be accompanied by a written explanation "setting out in full the reasons for the request." Why provide a Minister such sweeping authority to stop an investigation? The Ombudsman for Children should retain the right to commence or to proceed with an investigation if the Ombudsman determines that to do so would be in the best interests of the child.

Proposed Amendment: At the end of Section 11 (3), after the words "(...at that Department of State)" add the words ", unless the Ombudsman for Children determines that to investigate or to continue to investigate an action would be in the best interests of the child."

The Ombudsman's right of court referral and capacity to act as an *amicus curiae*

The Children's Ombudsman should have express powers of referral to either domestic or international courts particularly where important points of principle might arise. [See Cousins, *Seen and Heard: Promoting and Protecting Children's Rights in Ireland* (Dublin, 1996) p. 63]. In summary, the Bill should enable the Ombudsman to undertake an *amicus curiae* role in important court cases that concern child policy and that may have important effects in child law. [Dr Ian Hassall (a former Children's Commissioner for New Zealand) suggested such an approach recommending, *inter alia*, conferring statutory power on the Commissioner to commence or be joined in any action in any court:

"...in the name of his office to remedy any matter referred to him which affects the life or well-being of a child or young person (notwithstanding that any interested party may have commenced any action in, or about, the same matter or that the child or young is represented by a solicitor or barrister)." [See Briefing Paper from the Office of the Commissioner for Children to the Minister of Social Welfare, December 1996].]

Proposed Amendment: In Section 13, add "(9) The Ombudsman for Children may as *amicus curiae*, on his or her own initiative, refer a case to the High Court, or the Supreme Court when exercising its appellate jurisdiction, in respect of the contravention of a right of a child insofar as it affects the rights of all children."

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**Submitted on behalf of the Children's Rights Alliance
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