

# Incorporating the CRC in Ireland

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## 1. INTRODUCTION

Ireland makes an interesting case study for children's rights implementation. Initially slow to reform its law following its ratification of the United Nations Convention on the Rights of the Child hereinafter 'the Convention') in 1992, the last decade has seen a step change in the impact of the Convention on domestic law. The incorporation of a children's rights provision into the Constitution of Ireland in 2012 was a watershed, and the adoption of *Better Outcomes, Brighter Futures*,<sup>1</sup> a National Policy Framework for children, also represented a significant milestone in the incorporation of children's rights into Irish policy. At the same time, the legal incorporation of specific Convention provisions into domestic law has been piecemeal, and much more needs to be done to give full effect to the Convention in Irish law.

This chapter aims to critique Ireland's approach to the incorporation of the Convention by documenting the progress to date and identifying where further work is needed to ensure that Irish law is in line with international children's rights obligations. It begins by considering Ireland's approach to the incorporation of international human rights law into its domestic law, and explores the extent to which children's rights are protected within Bunreacht na hÉireann, the Irish Constitution. It then considers the progress that has been made in developing the statutory framework to support the implementation of core provisions of the Convention, before examining how the Convention has been considered by the Irish courts. Finally, it will discuss the progress that has been made in developing policy, and other administrative structures and mechanisms to support the process of implementation, concluding with some remarks as to the lessons to be learned from Ireland's approach to incorporation.

## 2. COUNTRY OVERVIEW AND CONTEXT

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<sup>1</sup> DEPARTMENT OF CHILDREN AND YOUTH AFFAIRS, *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014–2020*, Department of Children and Youth Affairs, Dublin 2014.

## 2.1. GENERAL OVERVIEW

Ireland has a population of approximately 4.8 million people, with children (aged 0–17) representing 25 per cent of the total population.<sup>2</sup> Education is compulsory for children aged 6–16 (or until children have completed at least three years of secondary education). Ireland’s formal education system includes primary and secondary school, with children generally starting primary school at 4–5 years and commencing their secondary education at 12 years. The retention rate in the Irish education system is high, with a recent study of the 2012 entry cohort (comprising 60,000 children) finding that a significant majority of students completed their state examinations: 97.6 per cent completed their Junior Certificate and 91.5 per cent completed their Leaving Certificate.<sup>3</sup> Ireland also has child-focused healthcare structures in place, including the child health programme, which provides for free health reviews, vaccinations and health screening.<sup>4</sup> This programme is applicable from the antenatal stage to the first year of secondary school and is enshrined in the legislation.<sup>5</sup> Notwithstanding its limited application, the extension of a free GP healthcare scheme to children under six years of age is a further positive initiative.<sup>6</sup> From a youth justice perspective, the Children’s Court and the Garda Diversion Programme (a system of police caution which diverts children from offending ) represent positive developments in promoting children’s rights. Whilst Ireland has taken multiple steps to improve children’s rights across a variety of domains, gaps and inadequacies continue to fracture the framework.<sup>7</sup> Recent statistics reported 3,442 homeless children, 2,000 under-18s in Direct Provision, and 1,876 children waiting for access to child and adolescent mental health services in Ireland.<sup>8</sup> Reductions in the ‘consistent poverty’ rate and the ‘at risk poverty’ rate for children have been observed from the 2018 data, yet the results indicate that a significant number of children are still living in poverty (7.7 per cent) or are at

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<sup>2</sup> CENTRAL STATISTICS OFFICE, *Census of Population, Census 2016 Summary Results – Part I* (2017). Data derived from the CSO Statbank.

<sup>3</sup> DEPARTMENT OF EDUCATION AND SKILLS, *Retention Rates of Pupils in Second-Level Schools: Entry Cohort 2012* (2019), p. 8.

<sup>4</sup> HEALTH SERVICE EXECUTIVE, ‘Child Health Services in Ireland’  
<<https://www.hse.ie/eng/about/who/healthwellbeing/our-priority-programmes/child-health-and-wellbeing/childhealthservicesireland>>.

<sup>5</sup> Health Act 1970 (No. 1 of 1970), s. 66.

<sup>6</sup> CHILDREN’S RIGHTS ALLIANCE, *Report Card 2020*, Children’s Rights Alliance, Dublin 2020, p. 61.

<sup>7</sup> See CHILDREN’S RIGHTS ALLIANCE, *Report Card 2019*, Children’s Rights Alliance, Dublin 2019; CHILDREN’S RIGHTS ALLIANCE, above n. 6.

<sup>8</sup> CHILDREN’S RIGHTS ALLIANCE, above n. 6, p. 9.

risk of this (15.9 per cent).<sup>9</sup> The global pandemic experienced throughout 2020 has no doubt exacerbated these issues.

Ireland is a democratic state, with the 1937 Irish Constitution at the foundation of the legal system, establishing the separation of powers between the legislature (the Oireachtas, with an upper and lower house), the executive (Government, led by the Taoiseach or Prime Minister)) and the judiciary.<sup>10</sup> Law-making power is assigned to the Oireachtas, with the process requiring bills to be passed by the houses of parliament and then signed into law by the head of state, the President. The new law then becomes an Act of the Oireachtas. Under the Irish Constitution, only those laws enacted by the Oireachtas are valid within the state, meaning that international law must be passed as domestic legislation if it is to have effect in the domestic legal system. By extension, international treaties like the Convention that are binding on the state but have not been incorporated into domestic law constitute merely persuasive authority in the domestic courts. As a result, individuals cannot invoke international law before the courts unless it has been given the effect of domestic law by the Oireachtas and thus cannot seek remedies for a breach of such rights before the Irish courts.

## 2.2. STATUS OF RATIFICATIONS AND RESERVATIONS

Ireland signed the Convention on the Rights of the Child on 30 September 1990 and ratified it on 28 September 1992. At the time of signature, Ireland made a declaration that it reserved the right to make ‘such declarations or ratifications as it may consider necessary’ on ratification, but in fact no such reservation was entered.

Ireland ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict on 18 November 2002. On ratification, Ireland entered a declaration with regard to the age of recruitment to the Irish armed forces, but following criticism from the UN Committee on the Rights of the Child (hereinafter ‘the CRC Committee’) in 2008,<sup>11</sup> this declaration was amended to bring Ireland into compliance with the Protocol. Ireland ratified the Optional Protocol on a Communications Procedure on 14

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<sup>9</sup> CENTRAL STATISTICS OFFICE, *Survey on Income and Living Conditions (SILC) 2018 Results* (2019), Table 3.1: ‘At Risk of Poverty, Deprivation and Consistent Poverty Rates by Year’ <<https://www.cso.ie/en/releasesandpublications/ep/p-silc/surveyonincomeandlivingconditionssilc2018/povertyanddeprivation>>.

<sup>10</sup> Bunreacht na hÉireann, Constitution of Ireland, 1937.

<sup>11</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, *Consideration of Reports Submitted by States Parties under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Concluding Observations: Ireland* (14 February 2008) CRC/C/OPAC/IRL/CO/1.

September 2014, meaning that it has accepted the right of children to complain to the CRC Committee about breaches of their Convention rights.

Although Ireland signed the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography on 7 September 2000, it has not yet been ratified. In 2019, Dr Katherine Zappone, the then Minister for Children and Youth Affairs, announced that as Ireland now met the necessary legal requirements, it was the government's intention to ratify the instrument.<sup>12</sup> At the time of writing (October 2020), ratification has not yet taken place.

Ireland is also party to a number of international human rights instruments, including the European Convention on Human Rights (ECHR), which it ratified in 1953.<sup>13</sup> In 2003, Ireland took measures to give further legal effect to the ECHR in Irish law by enacting the European Convention on Human Rights Act 2003.<sup>14</sup> This legislation requires Irish courts to take 'due account' of the jurisprudence of the European Court of Human Rights (ECtHR) and allows individuals to seek limited remedies for breaches of their ECHR rights before the Irish courts. This legislation has particular relevance in terms of considering how the courts regard claims made by individuals based on the Convention, and is discussed further below.

### 2.3. GENERAL EFFECT ON DOMESTIC LAW

As mentioned above, Ireland has a dualist legal system,<sup>15</sup> a position entrenched in Article 29.6 of the Irish Constitution, which states: 'No international agreement shall be part of domestic law save as may be determined by the Oireachtas.'

On the basis of this constitutional principle, the courts have been firm in the view that international agreements, including human rights treaties signed and ratified by Ireland, must be incorporated into domestic law by the Oireachtas before an individual can rely on it as a basis for finding a breach of his or her rights before the courts.<sup>16</sup> Therefore, as the Oireachtas has not taken steps to incorporate the Convention on the Rights of the Child into Irish law, it

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<sup>12</sup> See further 'Ireland Joining International Stand against Sale of Children, Child Pornography and Child Prostitution', 02.01.2019 <[https://merriionstreet.ie/en/News-Room/Releases/Ireland\\_joining\\_international\\_stand\\_against\\_sale\\_of\\_children\\_child\\_pornography%C2%A0and\\_child\\_prostitution.html](https://merriionstreet.ie/en/News-Room/Releases/Ireland_joining_international_stand_against_sale_of_children_child_pornography%C2%A0and_child_prostitution.html)>.

<sup>13</sup> S. EGAN, *International Human Rights: Perspectives from Ireland*, Bloomsbury Professional, Dublin 2001.

<sup>14</sup> European Convention on Human Rights Act 2003 (No. 20 of 2003).

<sup>15</sup> See further LAW REFORM COMMISSION, DISCUSSION PAPER, *Domestic Implementation of International Obligations*, LRC 124-2020, pp. 75–85, available at <[www.lawreform.ie](http://www.lawreform.ie)>.

<sup>16</sup> *McD v L & M* [2007] IESC 81.

remains a persuasive rather than a binding legal authority before the courts. As will be discussed further below, the willingness of the Irish courts to consider Convention arguments thus depends on the existence of other, directly applicable legal grounds.

#### 2.4. THE IRISH CONSTITUTION AND ARTICLE 42A

One of the most significant developments in the incorporation of children's rights in Irish law was the introduction of Article 42A into the Irish Constitution following a public referendum in November 2012.<sup>17</sup> Prior to the introduction of this provision, it was recognised that the Constitution afforded little protection to children; rather, primary constitutional protection was offered to the institution of the family, which was on numerous occasions found to supersede the rights and interests of children.<sup>18</sup> Article 42A is a lengthy and detailed provision, which remedies existing constitutional issues, mandates legislative action and inserts children's rights into the Constitution. Fundamentally, in wording that mirrors the constitutional personal rights protections, Article 42A recognises the 'natural and imprescriptible rights of all children' and requires the state to protect and vindicate these rights 'as far as practicable'. Separately, in the rewording of an existing provision, Article 42A places a duty on the state to endeavour to supply the place of parents, irrespective of their marital status, where they fail in their duty towards their children, with specific regard to the 'natural and imprescriptible rights of the child'.

Article 42A reflects the wording of the Convention in two important ways. First, Article 42A.4.1 provides that provision should be made by law to ensure that in the resolution of proceedings concerning the welfare of the child or concerning adoption, guardianship, custody or access, the 'best interests of the child shall be the paramount consideration'. This echoes the wording of Article 3 of the Convention, and indeed goes further than Article 3 in requiring the best interests of the child to be 'the' rather than 'a' primary consideration in the listed category of proceedings. However, the constitutional provision falls short of the Convention's standards in other ways, in particular by confining the application of this duty to a limited category of

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<sup>17</sup> An unsuccessful legal challenge to the referendum delayed the enactment of the Thirty-First Amendment of the Constitution (Children) Act 2012, which was passed in 2015.

<sup>18</sup> U. KILKELLY and C. O'MAHONY, 'The Proposed Children's Rights Amendment: Running to Stand Still?' (2007) 10(2) *Irish Journal of Family Law* 19.

legal proceedings, thereby stopping short of making it mandatory in areas like justice, healthcare and immigration.<sup>19</sup>

Second, Article 42A.4.2 provides that in the context of the proceedings discussed above in relation to the best interests principle, provision should be made by law to ensure that steps are taken to ascertain the views of any child who is capable of forming his or her own views, and to give these views due weight with regard to the age and maturity of the child. Again, while it is very welcome that the wording of this provision replicates the requirements of Article 12 of the Convention, it is only applicable in certain categories of cases and therefore provides less protection than the Convention, which requires that children should be heard in *all* matters affecting them.<sup>20</sup>

While the introduction of Article 42A was significant in requiring, by constitutional mandate, the introduction into domestic law of Convention requirements to ensure protection of the child's best interests and the right to be heard in certain legal proceedings, the provision represents a limited form of incorporation in other ways. Debate about the wording of the proposed constitutional provision over the years preceding the referendum arguably resulted in a dilution of the provision ultimately put to the people. Crucially, Article 42A stops short of giving constitutional expression to the Convention provisions, preferring instead to impose a requirement on the state to legislate for the best interests and the participation rights of the child. This approach means that in these provisions at least, the Constitution does not directly confer new rights on children.<sup>21</sup> Equally, the extent to which the constitutional amendment involved substantial changes to the protection of children's rights under the Constitution in Ireland has been open to question.<sup>22</sup> The lack of explicit reference to the Convention in the wording of Article 42A has also been subject to criticism.<sup>23</sup> Although the incorporation of children's rights provisions into constitutional law has significant potential to advance these

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<sup>19</sup> IRISH HUMAN RIGHTS AND EQUALITY COMMISSION, *Ireland and the United Nations Convention on the Rights of the Child: Report by the Irish Human Rights and Equality Commission to the UN Committee on the Rights of the Child on Ireland's Combined Third and Fourth Periodic Reports*, IHREC, Dublin, December 2015, p. 6; R. ARTHUR, 'Protecting the Best Interests of the Child: A Comparative Analysis of the Youth Justice Systems in Ireland, England and Scotland' (2010) 18(2) *International Journal of Children's Rights* 217.

<sup>20</sup> See further M. McMAHON, 'Can Anybody Hear Me? The Duty to Promote the Voice, Wishes and Interests of Children' (2005) 2 *Irish Journal of Family Law* 4.

<sup>21</sup> C. O'MAHONY, 'Falling Short of Expectations: The 2012 Children Amendment, from Drafting to Referendum' (2016) 31(2) *Irish Political Studies* 252.

<sup>22</sup> U. KILKELLY and C. O'MAHONY, above n. 18; E. CAROLAN, 'The Constitutional Consequences of Reform: Best Interests after the Amendment' (2007) 10(3) *Irish Journal of Family Law* 9.

<sup>23</sup> IRISH HUMAN RIGHTS AND EQUALITY COMMISSION, above n. 19, p. 6.

rights in practice,<sup>24</sup> it was highlighted in the lead-up to the referendum that a constitutional provision alone was not enough to protect children's rights; additional measures, including the development of detailed legislation, the development of core principles by the judiciary and the Oireachtas, and the provision of proper resources, are key steps that must be taken to ensure that the provision is effective in practice.<sup>25</sup> This point, which was highlighted by the CRC Committee,<sup>26</sup> has been borne out by Ireland's experience, as is illustrated further below.

## 2.5. MONITORING AND REPORTING

Ireland has had an interesting relationship with the Convention, which has been hallmarked by the effective use of the reporting mechanism by Ireland's dynamic civil society groups and statutory bodies.<sup>27</sup> In total, four state party reports have been submitted to the CRC Committee, in accordance with its reporting obligations under the Convention, with the most recent consideration of Ireland's progress in implementing the Convention taking place in 2016.<sup>28</sup> National human rights institutions – like the Ombudsman for Children and the Irish Human Rights and Equality Commission – and non-governmental organisations led by the Children's Rights Alliance, an umbrella organisation with over 100 members from the children's sector, have played an influential role in the monitoring process, providing additional information to the Committee through alternative reports<sup>29</sup> and young people's testimony.<sup>30</sup> In between reporting cycles, the Children's Rights Alliance produces an annual 'Report Card' grading Ireland's progress meeting Government commitments to children's rights; this receives significant media attention and has proven a highly effective way of monitoring progress in the implementation of children's rights between reporting cycles. For example, the most recent Report Card highlighted significant ongoing issues in relation to child and family

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<sup>24</sup> C. O'MAHONY, 'The Promises and Pitfalls of Constitutionalizing Children's Rights' in J.G. DWYER (ed.), *The Oxford Handbook of Children and the Law*, Oxford University Press, Oxford 2020.

<sup>25</sup> M. CORBETT, 'The Children's Referendum is a Game-Changer' (2012) 15(4) *Irish Journal of Family Law* 95.

<sup>26</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (2003) CRC/C/GC/2003/5.

<sup>27</sup> U. KILKELLY, 'Children's Rights in Ireland: Ireland's Relationship with the CRC' in S. EGAN (ed.), *International Human Rights: Perspectives from Ireland*, Bloomsbury Professional, Dublin 2015, pp. 199–213.

<sup>28</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, Concluding observations on the combined third and fourth periodic reports of Ireland (01.03.2016) CRC/C/IRL/CO/3-4.

<sup>29</sup> IRISH HUMAN RIGHTS AND EQUALITY COMMISSION, above n. 19; CHILDREN'S RIGHTS ALLIANCE, *Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child*, Children's Rights Alliance, Dublin, December 2015.

<sup>30</sup> CHILDREN'S RIGHTS ALLIANCE AND UNICEF IRELAND, *Picture Your Rights: A Report to the UN Committee on the Rights of the Child from Children Living in Ireland*, Children's Rights Alliance and UNICEF Ireland, Dublin, May 2015.

homelessness, provision of mental healthcare, and treatment of migrant and ethnic minority children such as Traveller and Roma children.<sup>31</sup> This advocacy has proven highly effective in holding the Government to account, maintaining visibility on key children's rights issues even when they are not in the international spotlight.

The status of the Convention in Irish law has been the subject of the Committee's concern in each reporting cycle, most recently in 2016 when it urged the state to take the necessary measures to achieve full incorporation as a matter of priority.<sup>32</sup> The Committee also acknowledged the progress achieved, including the adoption of Article 42A into the Constitution, the adoption of several legislative measures to improve rights compliance, and the adoption of policy measures like *Better Outcomes, Brighter Futures*, the national policy framework for children and young people.<sup>33</sup> Concerns were noted in a variety of areas, however, including discrimination against Traveller and Roma children, the provision and legal regulation of mental health services for children, and the increasing number of children living in consistent poverty.<sup>34</sup>

### **3. INCORPORATION INTO DOMESTIC LEGISLATION**

As noted above, Ireland has not taken steps either to directly incorporate the full Convention into Irish law or indirectly in terms of requiring decision makers to give consideration or due regard to the Convention in decisions that affect children. However, despite the fact that the constitutional amendment fell short of achieving full incorporation, it has gradually generated a momentum around law reform that has seen Irish law align more closely with the Convention's provisions. Thus, although there was some debate at the time as to the significance or indeed the necessity of the constitutional provision mandating the enacting of legislation to give effect to the principles in Articles 3 and 12 of the Convention,<sup>35</sup> the adoption of Article 42A has undoubtedly provided impetus to the legislative process in this regard.

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<sup>31</sup> CHILDREN'S RIGHTS ALLIANCE, above n. 6.

<sup>32</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, above n. 28, paras. 8–9.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> C. O'MAHONY, 'Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability' (2019) 19(3) *Human Rights Law Review* 401.



As a result, like other jurisdictions,<sup>36</sup> Ireland has begun to incorporate selected Convention provisions – mainly Article 3 and Article 12 – into specific laws primarily in the areas of child and family law. These following sections provide some illustration of this trend.

### 3.1. BEST INTERESTS

The requirement to introduce legislation to ensure that children’s best interests are taken as the primary consideration in the categories of proceedings listed in Article 42A.4 has resulted in a significant volume of new legislation to give effect to this provision. This provides significant protection for the best interests of children in specific categories of cases. In particular, these include changes to laws on child protection, adoption and guardianship, and custody and access.

The Children and Family Relationships Act enacted in 2015<sup>37</sup> brought about significant changes to Irish law relating to guardianship, custody and access.<sup>38</sup> One of the most significant changes introduced by the 2015 Act was to replace the ‘welfare’ principle with a rights-based ‘best interests’ principle that mirrors the wording of Article 3 of the Convention and of Article 42A of the Irish Constitution. Under the new law, in deciding any case relating to guardianship, custody or access, the court must ‘regard the best interests of the child as the paramount consideration’. The best interests principle is therefore the overriding consideration in these cases. In addition, a new legislative provision (section 31) introduces a list of factors that the court should consider in conducting a best interests assessment; this allows the court to take a range of factors into account relating to the physical, psychological and emotional needs of the child, his or her care history and, importantly, his or her views. The inclusion of the best interests ‘checklist’ in the Children and Family Relationships Act was a particularly welcome provision due to the level of guidance now available to the judiciary on such an assessment.<sup>39</sup>

Similar law reform introduced the best interests principle into the amendment of the Adoption Act 2010<sup>40</sup> by the Adoption (Amendment) Act 2017,<sup>41</sup> section 19 of which now requires both the courts and the Adoption Authority of Ireland to regard the best interests of

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<sup>36</sup> U. KILKELLY, ‘The UN Convention on the Rights of the Child: Incremental and Transformative Approaches to Legal Implementation’ (2019) 23(3) *International Journal of Human Rights* 323.

<sup>37</sup> Children and Family Relationships Act 2015 (No. 9 of 2015).

<sup>38</sup> Guardianship of Infants Act (No. 7 of 1964).

<sup>39</sup> C. O’MAHONY, ‘The Constitutionality of the Child and Family Relationships Bill’ (2015) 2 *Irish Journal of Family Law* 1.

<sup>40</sup> Adoption Act 2010 (No. 21 of 2010).

<sup>41</sup> Adoption (Amendment) Act 2017 (No. 19 of 2017).

the child as ‘the paramount consideration’ in all proceedings relating to the adoption of a child. Like the above law, the Adoption Act 2010 now also includes a list of factors that the court should consider in making a best interests assessment,<sup>42</sup> as well as factors relating to the child’s physical, psychological and emotional needs, the child’s relationship with his or her parents, guardians or other relatives, and the views of the child in relation to the proposed adoption. The wide-ranging nature of the list of factors to be considered in these statutory best interests assessments – both under the Guardianship of Infants Act 1964 and the Adoption Act 2010 – is reflective of guidance from the CRC Committee in relation to the comprehensive approach that should be taken to the determination of a child’s best interests.<sup>43</sup> These provisions include factors which relate to the child’s views, his or her identity, his or her relationship with family members, his or her physical, psychological and emotional needs, his or her education, and any particular circumstances or special needs he or she may have; as such, these checklists closely align with the guidance provided by the Committee in this regard and allow an approach to be taken by the courts that takes into account the individual child.<sup>44</sup>

Additional statutory development is ongoing to further incorporate principles relating to the best interests of children, and to ensure that Article 42A is given full effect in domestic law. A review of the Child Care Act 1991, which provides the basis for state intervention in family life in order to protect the interests of a child at risk of harm, is currently underway. It has been recommended that this review should include a ‘best interests’ provision like that which has been introduced in the context of guardianship, custody and access, and adoption in order to fully realise the best interests principle, as set out in Article 42A of the Constitution.<sup>45</sup> Heads of a new Bill to amend this area of law were introduced in 2019, but this lapsed with the dissolution of the last Dáil, although it is now back on the legislative agenda. This remains an important area in need of development to embed the best interests principle in Irish statute.

While these developments give effect to the constitutional direction to legislate under Article 42A, it is important to note that there is no prohibition on incorporating these and other Convention provisions into domestic law in the normal way. This has been achieved to some extent in some areas, notably the inclusion of a requirement for the courts to consider the best interests of the child in cases where children have been charged with an offence.<sup>46</sup> However,

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<sup>42</sup> Section 19(2) of the Adoption Act 2010, as amended.

<sup>43</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (2013) CRC/C/GC/14.

<sup>44</sup> *Ibid.*

<sup>45</sup> G. SHANNON, *Twelfth Report of the Special Rapporteur on Child Protection* (2019), p. 184.

<sup>46</sup> Section 96(5) of the Children Act 2001 (No. 24 of 2001).

mirroring the limited nature of the Constitutional provision, it is worth noting that the Irish statutory framework has not yet extended the application of the best interests principle to children outside of family law such as immigration<sup>47</sup> and healthcare.<sup>48</sup> The extent to which these provisions have become embedded in the statutory framework means that this is gradually becoming an imperative.

### 3.2. THE RIGHT TO BE HEARD

As discussed above, Article 42A.4 of the Constitution requires Parliament to enact legislation to give effect to Article 12 of the Convention, and in recent years a number of steps have been taken to give greater expression to this children's rights principle in Irish law.

The Children and Family Relationships Act 2015 introduced the obligation to hear the views of children in guardianship, custody and access proceedings, and introduces a consideration of the views of the child as a core part of the best interests assessment set out under section 31 of the Act. The Act also introduces some new mechanisms to hear children in this context, including the power to appoint an expert to determine the child's views and report to the court on them under section 32. Despite this legislative incorporation of Article 12, there are difficulties in its implementation due to barriers to ensuring that children are heard in these proceedings. The cost of expert reports to hear the voice of the child under this provision remains problematic;<sup>49</sup> under the legislation, this cost lies with the parties involved, and if they cannot afford the cost of appointing an expert, this may not occur. This has been said to contribute 'to the development of a two-tier system of family justice, whereby giving full effect to the constitutional right of the child for his/her voice to be heard is the preserve of the better off'.<sup>50</sup> It has also been noted that judges in Ireland are often reluctant to speak to children directly, and both guidelines and training are needed in order to enable this to be effective.<sup>51</sup>

Hearing the views of the child is also now a key aspect of the statutory framework for adoption. The Adoption Act 2010, as amended, now requires both the courts and the Adoption Authority of Ireland to hear the views of children who are capable of forming them in all

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<sup>47</sup> G. SHANNON, *Eleventh Report of the Special Rapporteur on Child Protection* (2018), pp. 62–63.

<sup>48</sup> G. SHANNON, *Seventh Report of the Special Rapporteur on Child Protection* (2014), p. 6.

<sup>49</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, above n. 28, para. 31; G. SHANNON, *Tenth Report of the Special Rapporteur on Child Protection* (2017), p. 30.

<sup>50</sup> S. Ó hUALLACHÁIN and R. BALDWIN, 'Underfunded Justice' (2020) 25(2) *The Bar Review* 56.

<sup>51</sup> A. DALY, 'The Judicial Interview in Cases on Children's Best Interests: Lessons for Ireland' (2017) 20(3) *Irish Journal of Family Law* 66.

proceedings relating to the adoption process. This is a particular requirement for the Adoption Authority before it can make a valid adoption order under the Act.<sup>52</sup>

Other mechanisms for hearing the views of the child are available under the Child Care Act 1991 in the context of child care proceedings. Section 26 of the 1991 Act allows for the appointment of a *guardian ad litem* (GAL) in child care cases, which can be an important mechanism in conveying the views of the child to the court. However, research has found significant inconsistencies in judicial approaches to hearing the views of children in child care proceedings<sup>53</sup> and also that GALs are not routinely appointed to all children in such cases.<sup>54</sup> The need for the GAL system to be placed on a statutory basis has also been noted;<sup>55</sup> relevant statutory provisions were included in the Child Care (Amendment Bill) 2019, and it remains crucially important to ensure that adequate legislative provisions are now adopted to support fuller incorporation of Article 12 of the Convention into Irish law and indeed to fulfil the expectations of Article 42A.

### 3.3. OTHER DEVELOPMENTS

The CRC Committee has emphasised the importance of ensuring a comprehensive review of legal provisions to ensure the incorporation of the Convention in domestic law.<sup>56</sup> Indirect incorporation, through the enactment of legislative provisions to give effect to specific provisions of the Convention, is increasingly common across jurisdictions,<sup>57</sup> and this certainly reflects the approach in Ireland where a number of substantive provisions have been adopted gradually into legislation.

An important piece of legislation in this regard is the Children Act 2001,<sup>58</sup> as amended, which sets out the legal framework for youth justice. The Act places a strong emphasis on diversion, reflecting the approach in Article 40 of the Convention.<sup>59</sup> Particularly important is the principle that detention should only be used as a last resort, as required by Article 37 of the

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<sup>52</sup> Section 43 of the Adoption Act 2010.

<sup>53</sup> C. O'MAHONY, K. BURNS, A. PARKES and C. SHORE, 'Child Care Proceedings in Non-specialist Courts: The Experience in Ireland' (2016) 30(2) *International Journal of Law, Policy and the Family* 131.

<sup>54</sup> C. COULTER, *Final Report, Child Care Law Reporting Project* (Child Care Law Reporting Project, November 2015).

<sup>55</sup> See further M. McMAHON, 'Can Anybody Hear Me? The Duty to Promote the Voice, Wishes and Interests of Children' (2005) 2 *Irish Journal of Family Law* 4; G. SHANNON, above n. 45, p. 45.

<sup>56</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, above n. 26.

<sup>57</sup> U. KILKELLY, above n. 36.

<sup>58</sup> Children Act 2001 (No. 24 of 2001).

<sup>59</sup> See further COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 24 on Children's Rights in the Child Justice System* (2019) CRC/C/GC/2020/24.

Convention, which is incorporated into Irish law through the explicit inclusion of the principle in section 96 of the 2001 Act.

Other important developments include the adoption of the Domestic Violence Act 2018,<sup>60</sup> which incorporated the Istanbul Convention into Irish law and improved protections for children. Of particular note is the provision under section 27 that allows a court to hear the views of the child in relation to any order made in relation to them, and provisions also exist under the Act to facilitate the provision of evidence by children in a way that does not expose them to additional harm.<sup>61</sup> This legislation is also important from the perspective of Ireland's obligations under Article 19 of the Convention.

Also important in relation to Article 19 is legislation protecting children from all types of harm, including the risk of sexual abuse. A number of legislative developments have been important in this regard. The Children First Act 2015<sup>62</sup> introduced a system of mandatory reporting of child protection concerns for specified 'mandated persons'. Other legislation, including the Criminal Law (Sexual Offences) Act 2017, the Child Trafficking and Pornography Act 1998 and the Criminal Law (Human Trafficking) Act 2008, were important developments that brought Ireland closer to Convention requirements, in particular allowing Ireland to satisfy the conditions for ratification of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.<sup>63</sup>

Overall, then, recent years have seen an increasing focus on amending and updating Irish legislation to support the improved implementation of Convention provisions. However, in the absence of a commitment to incorporation of the Convention as a whole, progress is likely to continue to be piecemeal. Although the Special Rapporteur on Child Protection recommended the introduction of a 'due regard' duty, to require decision makers to have regard to the Convention similar to the Measure in place in Wales,<sup>64</sup> this has not yet attracted any political support.

#### 4. THE CONVENTION IN THE COURTS

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<sup>60</sup> Domestic Violence Act 2018 (No. 6 of 2018).

<sup>61</sup> S. CONNEELY, R. O'SHEA and S. DEMPSEY, 'Domestic Violence in the District Court' (2019) 22(4) *Irish Journal of Family Law* 79.

<sup>62</sup> Children First Act 2015 (No. 36 of 2015).

<sup>63</sup> G. SHANNON, above n. 45, pp. 307–08.

<sup>64</sup> G. SHANNON, *Sixth Report of the Special Rapporteur on Child Protection* (2013), p. 43. See further S. HOFFMAN, 'The UN Convention on the Rights of the Child, Decentralisation and Legislative Integration: A Case Study from Wales' (2019) 23(3) *International Journal of Human Rights* 374.

Despite the Convention's lack of status in Irish law, there is evidence that the courts nonetheless reference the Convention in a wide variety of areas.<sup>65</sup> While the courts have been clear that the fact that the Convention has not been incorporated into Irish law means that a child cannot rely on or seek remedies based on its provisions, this does not preclude the courts from 'taking guidance from, and adopting as sensible' approaches that reflect Convention provisions where the court is making a determination on the basis of another legal instrument, such as the ECHR.<sup>66</sup>

#### 4.1. THE STATUS OF THE CONVENTION BEFORE THE COURTS

A number of cases have explicitly considered the status of the Convention in Irish law. In a case relating to access to a child in care, the High Court stated explicitly that the application which relied directly on the Convention could not be directly applied, as the Convention 'is not part of Irish law, although the applicant can rely on it as persuasive authority or if and to the extent that it is indirectly incorporated through the ECHR'.<sup>67</sup> A number of cases have been clear that 'no provision of the UN Convention on the Rights of the Child is directly applicable in Irish law'<sup>68</sup> and on this basis, it has been determined that arguments founded on the Convention cannot, on their own, form the basis of an annulment of otherwise valid administrative decisions that may be the subject of challenge.<sup>69</sup>

It has also been acknowledged by the lower courts that while the Convention is not directly applicable, it has been ratified and therefore can be 'of assistance indirectly' in proceedings such as child care cases.<sup>70</sup> However, it is worth noting that in a number of cases, where reference is made to the possibility of using the Convention in this way, this is not always followed through with a detailed consideration of how the Convention can assist the court in interpreting a directly relevant legal provision.

Prior to the introduction of the final wording of Article 42A, there was discussion as to whether the inclusion of a reference to the 'natural and imprescriptible rights of the child'

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<sup>65</sup> See e.g. *F.P. v The Information Commissioner* [2016] IEHC 771.

<sup>66</sup> *Minister for Justice and Equality v R.P.G.* [2013] IEHC 54.

<sup>67</sup> *F.G. v The Child and Family Agency, the Ombudsman for Children, Judge Geoffrey Browne and Her Honour Doirbhile Flanagan* [2016] IEHC 156.

<sup>68</sup> *O.P.I (A Minor) v The Refugee Appeals Tribunal, the Minister for Justice and Law Reform, the Attorney General and Ireland* [2015] IEHC 408, para. 37.

<sup>69</sup> *O.S. (A Minor) v The Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice Equality and Law Reform, Attorney General and Ireland* [2009] IEHC 450.

<sup>70</sup> *Health Service Executive v S.O. & P.S.A.* [2013] IEDC 19.

added anything to the previous level of protection which had already been recognised by the courts.<sup>71</sup> Some limited consideration has been given to how the Convention may have a bearing on the interpretation of the state's constitutional requirements under Article 42A to 'recognise and affirm the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights'. In the case of *K.R.A. and B.M.A. (A Minor) v The Minister for Justice and Equality*,<sup>72</sup> the applicants had challenged the refusal of the Minister to revoke a deportation order; in the course of their submissions to the court, they argued that Article 42A had conferred natural and imprescriptible rights on B.M.A., including the right to education, and that this right should have been considered in the context of the Minister's decision. It was argued that the protection of the right to education as a personal right under Article 42A did not distinguish between citizen and non-citizen children, in line with Article 28.1 of the Convention. In response to this argument, the court considered that while the state did have a constitutional obligation to protect the natural and imprescriptible rights of citizens under Article 42A, it was only obliged to do so 'insofar as practicable'. *Obiter*, while the court noted that the right to education had been recognised as one of the natural rights of the child in previous case law, the applicants had not shown that free primary education was a natural and imprescriptible right 'as the cited provision found in the UN Convention on the Rights of the Child is one to be aspired to'.<sup>73</sup>

Similarly, in a number of immigration cases, attempts by applicants to argue that statutory provisions relating to immigration and deportation proceedings should be read in light of the Convention have not been successful. In the case of *Dos Santos and Others v The Minister for Justice and Equality, the Attorney General and Ireland*,<sup>74</sup> the applicants argued that the statutory requirements under the Immigration Act obliging the Minister to have regard to specified factors in making deportation orders should be read in light of Ireland's international obligations under Article 3 of the of the Convention, notwithstanding the fact that the Oireachtas had not incorporated the Convention into domestic law. The Court of Appeal rejected this argument, stating that there was 'nothing in the Act which warrants such an interpretation' and that to do so would be in breach of the Constitution and would undermine the power of the Oireachtas in relation to the implementation of the CRC.<sup>75</sup> It was also

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<sup>71</sup> U. KILKELLY and C. O'MAHONY, above n. 18.

<sup>72</sup> *K.R.A. and B.M.A. (A Minor) v The Minister for Justice and Equality* [2017] IECA 284.

<sup>73</sup> *Ibid.*, para. 23.

<sup>74</sup> *Dos Santos and Others. v The Minister for Justice and Equality, the Attorney General and Ireland* [2015] IECA 210.

<sup>75</sup> *Ibid.*, para. 17.

confirmed in the course of this determination that because the best interests principle under Article 42A of the Constitution is limited to specific contexts, it also had no application in immigration decisions.<sup>76</sup> The courts have been consistent in holding that in these circumstances, the CRC has no application in Irish law.<sup>77</sup>

#### 4.2. THE CONVENTION AS A PERSUASIVE AUTHORITY?

However, the Irish courts have been more willing to consider arguments based on the Convention where another relevant and directly applicable legal provision was also at issue. In these circumstances, the courts have been willing to accept its persuasive authority. For example, in the case of *A.S.M.A & R.M.A. (A Minor) v The Minister for Justice and Equality, the Attorney General and Ireland*, the applicants sought to challenge deportation orders made against them. In finding for the applicants, the High Court referred to the failure of the respondents to consider the best interests of the child as the primary consideration, contrary to both Article 8 ECHR and Article 3 of the CRC. While it is significant that this application was granted on the basis of the court's acceptance of other grounds, including the protection of the child's best interests under Article 40.3 of the Constitution, it is nonetheless significant that explicit reference was made to the CRC as a basis for the decision.

Other more recent cases have also shown increased willingness to refer to CRC provisions, particularly where those provisions reflect ECtHR jurisprudence or constitutional provisions under Article 42A.<sup>78</sup> A number of cases that have arisen in the context of the special care system and in the context of adoption have demonstrated this approach. In one such consideration of the validity of a Special Care Order, the High Court noted that the legislation enjoys a presumption of constitutionality, but falls to be considered 'in light of the relevant provisions and with due regard to the provisions of the European Convention on Human Rights and the United Nations Convention on the Rights of the Child'.<sup>79</sup> In considering whether a Special Care Order should be granted, the Court cited Article 37 of the Convention, which sets out the rights of children in relation to deprivation of liberty. It noted that while the Convention is not part of Irish law, the fact that Ireland ratified the instrument in 1992 and the ECtHR has referred to Article 37 in its jurisprudence relating to breaches of Article 5 ECHR meant that it

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<sup>76</sup> *Ibid.*, para. 19.

<sup>77</sup> *O.P.I (A Minor)*, above n. 68; *Olaniran and Others v The Minister for Justice, Equality and Law Reform, Attorney General and Ireland* [2010] IEHC 83.

<sup>78</sup> See e.g. *F.B. v Minister for Justice and Equality (No. 2)* [2018] IEHC 716.

<sup>79</sup> *Child and Family Agency and M.L. and Orla Ryan v G.* [2019] IECA 109, para. 16.



was appropriate to ‘have regard’ to Article 37 when considering a measure involving the detention of a child under the relevant Irish legislation (the Child Care Act 1991).<sup>80</sup> It seems, in light of this and similar judgments, that the courts may indeed place greater weight on CRC provisions where they have previously been cited by the ECtHR in its jurisprudence.<sup>81</sup>

Similarly, in the case of *Child and Family Agency and T.J. and D.J. v The Adoption Authority of Ireland*,<sup>82</sup> the court referred to the state’s obligation to implement its obligations under the Convention in the context of adoption proceedings involving a vulnerable child with complex needs. Here, the foster carers and prospective adoptive parents sought to dispense with the requirement for the consent of the mother to allow the adoption to proceed, despite the birth mother’s objection in circumstances where the circumstances of the child’s birth could not be verified, and the Child and Family Agency had been unsuccessful in its attempts to contact her. In determining the application, Ms Justice Reynolds noted that Article 42A of the Constitution requires the best interests of the child to be the primary consideration. In addition, the requirements set out under Articles 6 and 7 of the CRC were referenced explicitly, with the court clearly stating that:

In circumstances where Ireland ratified the Convention in 1992, it is clear that there are obligations on the state to vindicate the rights of the child under the provisions of the Convention and to provide assistance and protection to the child with a view to re-establishing his identity.<sup>83</sup>

Although it was noted that issues relating to the child’s identity would need to be addressed in the coming years, the court determined that it was in the child’s best interests to dispense with the consent of the parents and to allow the adoption by the foster carers to proceed. While the basis for the decision was rooted in the best interests principle (which admittedly is not a constitutional principle), this case nonetheless contains a clear statement of the state’s positive obligations to ensure that children’s rights as set out under the CRC are vindicated and protected.

In more recent case law, references to CRC provisions have been used to reinforce findings made by the court in respect of other legal instruments. For example, in a determination relating to Hague Convention (Child Abduction) proceedings in *M.S. v A.R.*, Ms

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<sup>80</sup> *Ibid.*, para. 141.

<sup>81</sup> See further U. KILKELLY, ‘The Best of Both Worlds for Children’s Rights? Interpreting the European Convention on Human Rights in Light of the UN Convention on the Rights of the Child’ (2001) 23(3) *Human Rights Quarterly* 308.

<sup>82</sup> *Child and Family Agency and T.J. and D.J. v. the Adoption Authority of Ireland* [2018] IEHC 310

<sup>83</sup> *Ibid.* at para.25

Justice Whelan felt it was appropriate and relevant to take account of Articles 12 and 2 of the CRC, recognising that children's rights are 'indivisible and interdependent'.<sup>84</sup> In the context of this case, where the child in question had expressed strong objections about his proposed return to Poland, the court held that Article 13 of the Hague Convention, read in light of Article 12 of the CRC, weighed heavily against any proposed return.<sup>85</sup> Similarly, in the case of *N. v N.*, which considered the return of a child under the Hague Convention, the court was clear that the CRC 'does not form part of domestic law', because it had not been incorporated into Irish law by the Oireachtas, as required by Article 29.6 of the Constitution.<sup>86</sup> Ms Justice Finlay Geoghegan was clear that an applicant could not overstate the legal value of a provision of the Convention and rely on it alone. However, she was willing to consider Article 12 of the CRC in this case, as the domestic regulation at issue referred expressly to Article 24 of the EU Charter of Fundamental Rights, which provided for the right of all children to 'express their views freely'. She was satisfied that as the wording of Article 24 of the EU Charter and Article 12 of the CRC were worded in a similar way, 'they intend to guarantee a similar (if not the same) right to children'. On this basis, she was satisfied that it was 'permissible to have regard to Article 12'.<sup>87</sup> It seems from this judgment that while it is clear that the Convention does not form part of Irish law, where it is aligned to other justiciable legal provisions, it can be used by the court to assist it in the interpretation and application of the latter. This approach indicates a reluctance on the part of the courts to interpret relevant legislative provisions in a way that gives greater weight to the Convention principles than is explicitly set out in the statutory scheme, reflecting adherence to the constitutional separation of powers.

As a whole, while positive practice is emerging from the Irish courts with respect to breathing life into the Convention at a national level, practice is clearly inconsistent as yet. This is especially true in the lower courts, where one study noted in 2017 that a relatively low number of published District Court decisions referred explicitly to Article 42A; it was suggested at the time that this may be due to the lack of legal authority on the provision from the superior courts or to a lack of detailed legislative provisions.<sup>88</sup> However, in other cases, the CRC has been accorded significantly more weight. In one published decision of the Children Court, for instance, Judge O'Connor considered the significance of the CRC, as well as

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<sup>84</sup> *M.S. v. A.R.* [2018] IEHC 181

<sup>85</sup> *Ibid* at para.91

<sup>86</sup> *N. v N.* [2008] IEHC 382, para. 24.

<sup>87</sup> *Ibid.*, para. 25.

<sup>88</sup> M. CORBETT, 'An Analysis of Child Care Proceedings through the Lens of the Published District Court Judgments' (2018) 20(1) *Irish Journal of Family Law* 7.

supporting guidance found in the Committee’s General Comment No. 10, the Beijing Rules and the Tokyo Rules, as well as relevant European human rights standards in relation to the sentencing process for a young person who had been convicted of an offence.<sup>89</sup> Judge O’Connor also referenced the relevance of CRC provisions in the context of cases where there was a significant delay in bringing a prosecution against a child.<sup>90</sup> While this represents an important example of a Children Court judge placing significant weight on CRC principles in this context, as a District Court decision, it does not have to be followed by other courts and in the absence of more published District Court decisions, it is difficult to know how common such references are to international standards. Nonetheless, it is clear that the courts will consider the application of the Convention in cases it deems appropriate. It has been acknowledged by the Irish courts, for example, that section 143 of the Children Act 2001, which prohibits a court from making a detention order unless it is satisfied that it is the only suitable way of dealing with the child, mirrors Article 37 of the Convention.<sup>91</sup>

## **5. NON-LEGAL MEASURES OF IMPLEMENTATION**

It is clear from the CRC Committee that non-legal measures of implementation must be adopted by states if they are to fully support the realisation of children’s rights under the Convention.<sup>92</sup> The final section of this chapter considers some of the steps taken by Ireland to advance the implementation of the Convention at a national level.

### **5.1. POLICIES**

Lundy et al.’s international study of Convention implementation remarked that Ireland was ‘an example of a country where progress has been made in policy rather than legislative terms’.<sup>93</sup> Between 2012 (when this assessment was published) and 2020, a number of policies have been adopted that suggest increasing recourse to the Convention in the development of Irish national policy relating to children.

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<sup>89</sup> *D.P.P. v T.C.* [2017] IEDC 07; see also *D.P.P. v A.B.* [2017] IEDC 12.

<sup>90</sup> *D.P.P. v S.W.* [2016] IEDC 14.

<sup>91</sup> *D.P.P. v J.H.* [2017] IECA 206.

<sup>92</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, above n. 26.

<sup>93</sup> L. LUNDY, U. KILKELLY, B. BYRNE and J. KANG, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, UNICEF, Belfast 2012, p. 56.

The most important of these strategies is *Better Outcomes, Brighter Futures*, which sets out an overarching policy framework for children and young people in Ireland.<sup>94</sup> The strategy, adopted in 2014, was purportedly ‘rooted in the state’s commitments under the United Nations Convention on the Rights of the Child’,<sup>95</sup> although its emphasis is overwhelmingly on the child’s well-being rather than his or her rights as noted by the CRC Committee.<sup>96</sup> Following on from the adoption of *Better Outcomes, Brighter Futures*, a *National Youth Strategy* was adopted in 2015 to address the particular needs of young people aged 10–24.<sup>97</sup>

A number of other developments have been made in developing policy aimed at supporting implementation of children’s rights. Of particular note is the recently adopted *LGBTI+ National Youth Strategy 2018–2020*,<sup>98</sup> which sits in the overarching framework of *Better Outcomes, Brighter Futures* and aims to improve the realisation of LGBTI+ rights in Ireland. While this strategy does not explicitly reference the Convention, it is nonetheless an important step towards ensuring that the rights of LGBTI+ young people under Article 2 of the Convention are protected.

Work is currently underway to develop a new national Youth Justice Strategy. While this Strategy has not, at the time of writing (February 2021), been adopted, the draft Strategy which was the subject of extensive consultation sets out guiding principles that reflect Ireland’s Convention obligations and commit to upholding the rights of children in the youth justice system.<sup>99</sup>

Work has also been undertaken to support the improved participation of children in Ireland, in furtherance of the implementation of Article 12 obligations. One of the most important steps in this regard is the adoption of the *National Strategy on Children and Young People’s Participation in Decision-Making 2015–2020*.<sup>100</sup> This explicitly references Article 12 of the Convention and adopts the Lundy model of participation<sup>101</sup> as a basis for supporting the greater participation of children in a variety of areas impacting them. This focus at a national

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<sup>94</sup> DEPARTMENT OF CHILDREN AND YOUTH AFFAIRS, *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014–2020* (2014).

<sup>95</sup> *Ibid.*

<sup>96</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, above n. 28, para. 12.

<sup>97</sup> DEPARTMENT OF CHILDREN AND YOUTH AFFAIRS, *National Youth Strategy 2015–2020* (2015).

<sup>98</sup> DEPARTMENT OF CHILDREN AND YOUTH AFFAIRS, *LGBTI+ National Youth Strategy 2018–2020* (2018).

<sup>99</sup> See further DEPARTMENT OF JUSTICE, *Draft Youth Justice Strategy 2020–2026 (Public Consultation)* <[http://www.justice.ie/en/JELR/Draft\\_Youth\\_Justice\\_Strategy\\_2020\\_\(Public\\_Consultation\).pdf/Files/Draft\\_Youth\\_Justice\\_Strategy\\_2020\\_\(Public\\_Consultation\).pdf](http://www.justice.ie/en/JELR/Draft_Youth_Justice_Strategy_2020_(Public_Consultation).pdf/Files/Draft_Youth_Justice_Strategy_2020_(Public_Consultation).pdf)>.

<sup>100</sup> DEPARTMENT OF CHILDREN AND YOUTH AFFAIRS, above n. 93.

<sup>101</sup> L. LUNDY, ‘“Voice” is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child’ (2007) 33(6) *British Educational Research Journal* 927.

level on the participation of young people is now being replicated at a more local level in Tusla, the Child and Family Agency and in Oberstown Children Detention Campus (Oberstown) – which provides care and education to children aged under 18 detained by the courts on remand or detention orders. Oberstown adopted a participation strategy, based on the national strategy and Article 12, in 2017 to support the participation of young people in decision making in detention.<sup>102</sup> In addition, Oberstown Children Detention Campus has also explicitly introduced a new Children’s Rights Policy Framework which aims to embed children’s rights into the operation of the Campus.<sup>103</sup> These examples stand out as illustrations of how life has been breathed into the Convention’s principles and provisions through local rather than national application.

## 5.2. STRUCTURES TO SUPPORT IMPLEMENTATION

A number of structures have been created in recent years that are important in supporting fuller adherence to and incorporation of the Convention. First and foremost, the establishment of the Department of Children and Youth Affairs (now the Department of Children, Equality, Disability, Integration and Youth) in 2011 is considered ‘the most significant development in demonstrating our commitment to apply the CRC’.<sup>104</sup> The establishment of a full government department and cabinet minister dedicated to children was welcomed at the time by the CRC Committee, which urged Ireland to ensure that the department in question had a clear mandate and adequate resources to perform its role effectively.<sup>105</sup> However, future progress in this area was brought into doubt with media reports in May 2020 about the mooted abolition of the department as part of the process of forming a new coalition government.<sup>106</sup> Although this was met by opposition from children’s rights advocates,<sup>107</sup> and the feared abolition of the department did not occur, this was nonetheless a reminder of the speed with which progress can be lost if sustained attention is not given to the structures tasked with the implementation

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<sup>102</sup> OBERSTOWN CHILDREN DETENTION CAMPUS, *Strategy for the Participation of Young People in Decision-Making* (October 2017).

<sup>103</sup> OBERSTOWN CHILDREN DETENTION CAMPUS, *Annual Report 2019* (June 2020), pp. 33 and 50.

<sup>104</sup> G. SHANNON, *Fifth Report of the Special Rapporteur on Child Protection* (2011), p. 55.

<sup>105</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, above n. 28, paras. 13–14.

<sup>106</sup> C. GALLAGHER, ‘Keep Department of Children, Rights Groups Urge after Reports of Abolition’, *The Irish Times* (05.05.2020).

<sup>107</sup> See further CHILDREN’S RIGHTS ALLIANCE, ‘Over 65 Children and Youth Organisations Call for the Retention of the DCYA’ <[https://www.childrensrights.ie/sites/default/files/submissions\\_reports/files/Over%2065%20children%20and%20youth%20organisations%20call%20for%20retention%20of%20DCYA.pdf](https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Over%2065%20children%20and%20youth%20organisations%20call%20for%20retention%20of%20DCYA.pdf)>.

of a children's rights approach, as well as to the development of law and policy. It also remains the case that its mandate has been broadened, with the inevitable dilution of its previous, sole focus on children.

As noted above, particular efforts have been made across a range of sectors to increase the level of children's participation and to support the implementation of the National Participation Strategy. This has included the development of Hub na nÓg, a centre within the Department of Children, Equality, Disability, Integration and Youth, to support efforts to consult with young people and to give them a voice in decision-making processes.<sup>108</sup> These structures are important to ensure the implementation of policy in practice, and require sustained attention and resources to ensure that children can benefit from the steps taken in law and policy in this area.

Ireland also has an Ombudsman for Children, which was established by the Ombudsman for Children Act 2002.<sup>109</sup> The Ombudsman for Children's Office has a mandate to hear and to investigate complaints about the services provided to children by public entities and organisations, and also plays an important role in promoting the rights of children and advising the government on law and policy development. The office has proven an effective and influential advocate for children's rights in the public and political domains.<sup>110</sup>

### 5.3. BUDGETING

The importance of adequate budgeting for children's rights implementation has been highlighted as a critical non-legal measure to protect the rights of children.<sup>111</sup> In 2016, it was noted as a matter of concern by the CRC Committee that Ireland had not developed specific budget allocations for the implementation of the Convention, and Ireland was urged to develop a system to track and monitor budget allocations relating to children's rights, including comprehensive assessments of the budget allocation for children, and specific allocations for vulnerable groups, including children with disabilities and Traveller and Roma children.<sup>112</sup> This concern has also been echoed nationally with the call for comprehensive children's rights-

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<sup>108</sup> See further <<https://www.hubnanog.ie>>.

<sup>109</sup> Ombudsman for Children Act 2002 (No. 22 of 2002).

<sup>110</sup> See further <[www.oco.ie](http://www.oco.ie)>.

<sup>111</sup> B. BYRNE and L. LUNDY, 'Children's Rights-Based Childhood Policy: A Six-P Framework' (2019) 23(3) *International Journal of Human Rights* 357.

<sup>112</sup> COMMITTEE ON THE RIGHTS OF THE CHILD, above n. 28, paras. 15–16.

based budgeting, based on the principle of the best interests of the child, to allow for adequate allocations to protect the rights of particularly vulnerable groups.<sup>113</sup>

## **6. FUTURE DIRECTIONS**

Ireland's experience illustrates that there is no single approach to incorporating the Convention into national law and that a range of incremental approaches are necessary to promote and progress giving legal effect to children's rights in law, policy and practice. It similarly shows that even when incorporation is achieved – whether sectoral or indirect – this is only the beginning of the process of giving effect to children's rights in practice. In Ireland, once constitutional expression was given to children's rights, a steady stream of legislative amendments followed, incorporating key children's rights principles into national law. Sustained advocacy has helped to maintain political focus on these issues, while greater public awareness of their importance has inevitably played a role too. It is perhaps surprising that despite this progress, there is apparently little appetite for full incorporation of the Convention, whether direct or indirect, into Irish law, with campaigners choosing to focus on more day-to-day challenges to children's rights caused by poverty and marginalisation. At the same time, and notwithstanding the Convention's relatively weak status in Irish law, the potential of the courts as a source of support for children's rights remains alive, although the fact that such approaches are more parasitic than self-standing will continue to place limits on the remedies children enjoy under the law.

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<sup>113</sup> G. SHANNON, above n. 49, pp. 15–17.