

**SEEN *AND* HEARD**  
**PROMOTING AND PROTECTING**  
**CHILDREN'S RIGHTS IN IRELAND**

Mel Cousins

THE CHILDREN'S RIGHTS ALLIANCE - REPUBLIC OF IRELAND

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# FOREWORD

The United Nations Convention on the Rights of the Child was adopted by the General Assembly of the UN in 1989 and has now been ratified by over one hundred and seventy states, including Ireland which ratified it in 1992. The Convention contains a wide ranging set of provisions concerning issues such as health, education, cultural identity and freedom from abuse and exploitation.

The key principles of the Convention are that all of the rights included should be ensured to each child without discrimination (Article 2); that the best interests of the child shall be a primary consideration in all actions concerning children (Article 3); and that the right of children to express views freely and to have such views given due weight, according to age and maturity, should be assured (Article 12). The Convention captures and elaborates a view of children as needing to be 'seen *and* heard', suggesting a relationship between children and adults which is characterised by mutual respect whilst acknowledging children's need for guidance and the importance of the role of parents and the wider family. The recognition of children as needing care and protection is balanced by an emphasis on the importance of nurturing children's evolving capacities to take responsibility and so develop into active, participating citizens.

But how can we be sure that children's rights are respected and that the exciting possibilities which could result from Ireland's ratification of the Convention are realised? Implementing the Convention requires action by a wide range of institutions and agencies in society, both statutory and non-governmental. The Children's Rights Alliance which was founded to promote the Convention in Ireland was aware that several countries had developed specific mechanisms for the protection and promotion of children's rights, such as offices of Ombudsman or Commissioner for Children. At its first annual general meeting, in March 1995, the Alliance decided that one of its main concerns should be the establishment of a new public office of this kind, which it felt could play a significant role in implementing the Convention. The Alliance welcomed the statement of Mr Austin Currie TD, Minister of

State at the Departments of Health, Education and Justice, of his intention to examine the experience of other jurisdictions which have established arrangements, including offices of Ombudsman for Children, "in order to see what lessons can be learned in relation to our situation here."

This research project, entitled Exploring Options Concerning an Appropriate Mechanism to Promote and Protect Children's Rights in Ireland, was primarily funded by the Department of Health, at the initiative of Mr Currie. Additional funding was provided by the Calouste Gulbenkian Foundation (UK). At the public launch of the project at the end of October 1995, Mr Currie stated that he saw the research as "an important first step in establishing an appropriate mechanism to ensure that children's rights are protected and promoted."

The project was undertaken by the Children's Rights Alliance and managed by a Steering Group which included officials from the Departments of Health, Education and Justice, nominated by Mr. Currie, and members appointed by the Alliance.

This collaborative approach between governmental and non-governmental sectors proved to be particularly fruitful. It has resulted in a most valuable report which brings together detailed information on the mechanisms which exist in a number of different countries to protect and promote children's rights and examines the various options which might be considered for Ireland. It concludes that the establishment of an independent Statutory office of Children's Commissioner would be the most effective and appropriate mechanism to meet the circumstances of the Irish situation.

The Children's Rights Alliance is extremely grateful for the funding it received to enable it to undertake the research project and thanks the Department of Health and the Calouste Gulbenkian Foundation.

The Alliance expresses its gratitude to Mel Cousins for his work in carrying out the research and compiling this report, and to the members of the Steering Group which managed the project. It acknowledges the invaluable contribution made by all those who in the course of the research, both in Ireland and abroad, contributed ideas, information and documentation.

Finally, thanks are expressed to the members of the sub-committee of the Children's Rights Alliance who, during 1995, gathered material and generated ideas which helped to inform the work subsequently undertaken in this research project.

**Madeleine Clarke**

Chairperson

The Children's Rights Alliance

**August 1996**

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# **PART I**

## **THE CONTEXT**

In this part we outline the purpose of this report and then look at the existing status of children in Ireland to set the context for the examination of the need for a mechanism to promote and protect children's rights.



# CHAPTER 1

## INTRODUCTION

### 1. Research Brief

The objective of this research report is to explore mechanisms for the promotion and protection of children's rights in Ireland. Its terms of reference are:

1. to examine how arrangements for promoting and protecting children's rights in other countries could have relevance in Ireland, and
2. to make recommendations concerning appropriate options for this country.

The focus of the research is not specifically on children at risk or disadvantaged children in particular. Rather it is to look at how the rights of all children can be protected and promoted in the context of the *UN Convention on the Rights of the Child* which was ratified by Ireland in September 1992. This task, of course, includes the protection of children at risk and disadvantaged children.

### 2. Scope of the Report

For the purposes of this report, children are considered to be all persons up to the age of eighteen, this being the general age of legal majority. Children in this age group are obviously not a homogeneous group. In the lower age range, children are largely or totally dependent on adults and can express their views only on a limited range of topics. At the top of the age range, people's needs and interests do not change suddenly when they reach the age of eighteen (although their legal position changes). The National Youth Policy Committee (1984, p. 10), for example, suggested that youth policy should apply to young persons between the ages of approximately twelve and twenty-one. Any mechanism to promote and protect "children's" rights would, of course, have to reflect the fact that children have very different needs and interests.

The verb “to promote” is defined in the Oxford English Dictionary as, amongst other things, “to further the growth, development or establishment of”, “to help forward” and “to further, advance, encourage”. A further meaning for the verb “to promote” is given as “to put forth or forward into notice or attention; to publish, promulgate; to assert, advance (a claim)”. Thus, for the purposes of this report, the promotion of children’s rights is seen as involving proactive mechanisms which will further and advance the position of children in Irish society.

The verb “to protect” is defined in the Oxford English Dictionary as, amongst other things, “to defend or guard from injury or danger; to shield from attack or assault; to keep safe, take care of”. Thus, mechanisms for protecting children’s rights are seen as involving structures which defend children against an attack on their rights whether the right is set out in Irish law or in the *UN Convention*. The protection of rights is, perhaps, more a reactive rather than a proactive concept.

Thus the concepts of promoting and protecting rights are seen as involving two distinct but interrelated concepts. The extent to which these are interrelated should be emphasised. For example, one of the best ways of defending children’s rights against attack may be to assert and advance their claims in the first place.

The focus of this research project is on the establishment of independent mechanisms for the promotion and protection of rights, i.e. independent of a government department (as is the existing Ombudsman’s Office in Ireland). As such the research does not consider in detail issues relating to political responsibility for children’s policy, i.e. which department or departments and minister or ministers should have responsibility for which aspects of policies relating to children, nor whether there should be a “Department for Children”. The establishment of an independent mechanism for the promotion and protection of children’s rights is separate from and complementary to (although in many ways dependent on) the existence of a coherent political framework for policies affecting children.<sup>1</sup>

### **3. Methodology**

The methodology adopted in this report included:

#### ***1. Literature Review***

A literature review was carried out on the existing studies of mechanisms for the promotion and protection of children’s rights throughout the world and, in particular, on the Ombudsman’s

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<sup>1</sup>Research looking at *Effective Government Structures for Children* is currently being carried out in the UK with the assistance of funding from the Calouste Gulbenkian Foundation (UK).

schemes which have been established in a number of countries since the establishment of a Children's Ombudsman in Norway in 1981. Details of these publications are set out in the Bibliography.

Detailed information was also obtained in relation to the working of the offices of the Ombudsman for Children in Norway, Sweden, Finland, British Columbia (Canada) and New Zealand, and the National Council on Children's Rights in Denmark. Less detailed information was also obtained in relation to Ombuds schemes (or similar systems) or proposals to establish such systems in other European countries. This is set out in Part II of this report.

A review of the Irish literature on children's rights was also carried out and information was obtained from the relevant government departments on existing structures for the promotion and protection of children's rights within the areas of their responsibility.

## ***2. Interviews and Contacts with Key Informants***

Interviews were carried out with the Children's Ombudsmen in Sweden and Finland and information was obtained from the Ombudsmen in British Columbia, New Zealand and Norway. The researcher also attended a one-day consultation to evaluate the office of Ombudsman for Children organised by UNICEF at which presentations were made by the Ombudsmen from Norway, Finland, Salzburg (Austria), the former Ombudsman of Spain and experts in the area of children's rights.

## **4. Structure of the Report**

The first part of this report outlines its purpose and looks at the existing context in Ireland. Chapter 2 looks at the status of children in Ireland. It provides information about the total number of children, their educational participation and health status, the number of children living in poverty, the number of children at risk and other relevant data. It also looks at the status of children in the Irish Constitution and in the legal system and at the existing mechanisms for the promotion and protection of children's rights in Ireland.

In Part II we look at the options from other countries. Since the establishment of the first office of Ombudsman for Children in Norway in 1981, a number of offices have been established in other countries. For the purposes of this research, the study focused on those offices which had been established in similarly-sized European countries or in countries with a broadly similar legal and socio-economic system to

that of Ireland, i.e. Canada and New Zealand. Several different approaches to the establishment of mechanisms for the promotion and protection of children's rights have been taken in different countries. In Chapter 3 we look at those countries in which a statutory Children's Rights Commissioner or Ombudsman has been established, including Norway, Sweden and New Zealand. In Chapter 4 we examine the recently-established National Council on Children's Rights in Denmark. In Chapter 5 we look at British Columbia where a specific role for the protection and promotion of children's rights has been given to the general Ombudsman's Office and where a Children's Advocate has been established in recent years. In Chapter 6 we look at the situation in Finland where a non-statutory Ombudsman's Office has existed since 1981.

In Part III, we draw out the implications of the lessons from the other countries considered in Part II and look at how a structure to promote and protect children's rights might work in the Irish context (Chapter 7). Finally, in Chapter 8 we set out the conclusions and policy recommendations.

## **CHAPTER 2**

### **THE STATUS OF CHILDREN IN IRELAND**

This Chapter looks at the status of children in Ireland. The intention is to explain the context in which decisions concerning appropriate mechanisms for the protection and promotion of children's rights are to be made.

Given the number and importance of children in Irish society, there is a surprising absence of social policy and sociological literature either from an academic or a public policy viewpoint. Unlike youth policy there has been no official consideration of policy in relation to children generally (National Youth Policy Committee, 1984). The national report on the *UN Convention on the Rights of the Child* (Ireland, 1996) is one of the first public documents to look at the status of children in Ireland in a comprehensive way. To a large extent, discussion of the position of children in Ireland has tended to be subsumed into a more general discussion of the family (e.g. Kennedy, 1989).

The literature which does exist in relation to children has tended to focus on children in situations of disadvantage. This applies both in relation to academic publications (see, for example, McCarthy, 1945; Burke, 1981; Gilligan, 1991; McCarthy et al., 1996) and in relation to official studies (Committee on Reformatory and Industrial Schools, 1970; Task Force on Child Care Services, 1981).

In this Chapter we look first at the statistical information available in relation to children in Ireland. We go on to look at the legal position of children under the Irish Constitution and, thirdly, examine the existing structures to promote and protect children's rights in Ireland.

#### **Section I : Statistical Information**

The limited information available on children is highlighted by the fact that there is no comprehensive publication bringing together avail-

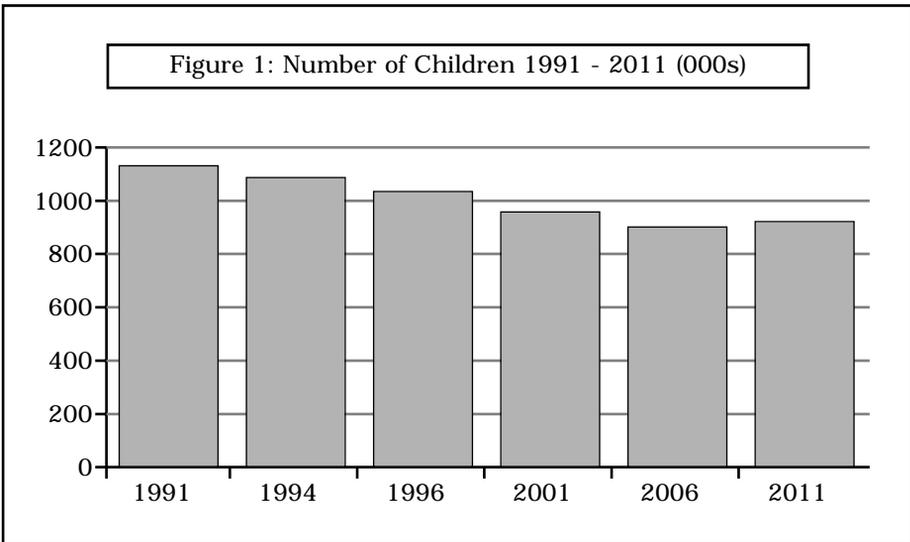
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<sup>2</sup>From an academic viewpoint see Curtin and Varley (1984). See also Berwick and Burns (1991).

able information on children in Ireland. This section simply provides some basic information in this area.

### 1. Number of Children

The 1991 Census indicated that there were over 1,100,000 children up to the age of eighteen in Ireland (31 per cent of the total population). The number of births in Ireland increased rapidly from 1960 to 1981 but has fallen by about a third since then from a high of 74,400 in 1980 to a low of 48,000 in 1994. This arises largely from a sharp drop in fertility rates. It is anticipated that the fertility rate will continue to fall in the coming years. Accordingly, the number of children is predicted to decline over the coming decades and it is estimated that by the year 2011 the number of children may have dropped to about 920,000 or 24 per cent of the total population (Central Statistics Office, 1995) (See Figure 1).<sup>3</sup>



Sources : Central Statistics Office, *Census 1991; Labour Force Survey 1994; Population Projections 1996-2011*.

### 2. Family Structure

As set out above, there has been a rapid decrease in the number of children born in Ireland, in particular since the early 1980s. This

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<sup>3</sup>This projection is based on a further small decline in fertility rates. If fertility declines more rapidly, the total number of children will be even lower.

trend - and the increasing tendency for older children to live away from home - is indicated in a drop in the average number of children per family unit from 2.6 in 1986 to 2.4 in 1991.

There has also been a significant increase in the number of children born outside marriage. From early in this century up to 1980 the numbers of births outside marriage varied between 2 and 4 per cent of total births. This figure increased rapidly throughout the 1980s and into the 1990s so that in 1994 almost 20 per cent of all births were outside marriage. This does not imply that all of those births are to lone parents as, in many cases, persons may be in on-going non-marital relationships. Figures are not available in this regard. The number of lone parents has, however, increased significantly in recent years and a study for the Combat Poverty Agency estimated that in the late 1980s there were at least 40,000 lone parent families in Ireland making up at least 10 per cent of all families with children under fifteen. The same study estimated that there were about 50,000 lone parent families with children up to the age of eighteen (Miller et al., 1993).

In 1994, 1,370 children were born to mothers aged eighteen years or under, the vast majority of these births (95 per cent) being outside marriage (Ireland, 1996).

### **3. Income Support**

In 1994 over 480,000 families were in receipt of Child Benefit in respect of over 1,000,000 children.<sup>4</sup> In addition, 11,000 families were receiving Family Income Supplement, a means-tested benefit for low income families at work. Persons in receipt of a range of social welfare payments, including old age, disability, unemployment and lone parent payments, receive additional payments in respect of child dependants. In 1994, the full rate of the child dependant payment was paid in respect of 354,000 children. In addition, child dependant allowances were paid at half rate in respect of a further 114,000 children.<sup>5</sup> In 1994, 950 children were in receipt of orphan's allowances.

In addition to the above payments which are the responsibility of the Department of Social Welfare, a Domiciliary Care Allowance is payable under the auspices of the Department of Health. This is a payment for children (between the ages of two and sixteen) who require constant

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<sup>4</sup>All data in this paragraph from Department of Social Welfare (1995).

<sup>5</sup>A child dependant allowance is payable at half rate where a spouse living with the recipient is not an adult dependant. Each spouse may receive half the child dependant allowance in certain circumstances. This can result in some double counting of the actual number of child beneficiaries.

care because of a physical or mental disability. In 1994, Domiciliary Care Allowance was paid in respect of 7,900 children.<sup>6</sup>

General tax allowances for children were abolished in the 1980s. However, the Income Tax Exemption Limits below which no income tax is payable do include an increase in respect of children. There are also small allowances for incapacitated children.

#### **4. Health Status**

The infant mortality rate in Ireland in 1992 was 6.6 per 1,000 live births (Department of Health, 1995a). This was below the average for the then twelve EC countries of 7.4. Finland, Norway and Sweden, however, had significantly lower infant mortality rates. The Irish rate reduced to 5.9 per 1,000 live births in 1993. The neonatal mortality rate (i.e. live born infants surviving less than four weeks) was 4.3 per 1,000 live births in 1992 which compared to an average for the then twelve EC countries of 4.6. The neonatal death rate reduced to 4 in 1993. The level of perinatal deaths (i.e. late fetal deaths plus deaths of live born infants aged under one week) in 1992 was 9.4. This was slightly higher than the then EC average of 8.75. Some social groups, in particular Travellers, tend to have significantly poorer health conditions than the overall population (Task Force on the Travelling Community, 1995).

In 1994, over 150 children between the ages of one and fourteen died, 52 of whom were killed in accidents (25 in road accidents) (Ireland, 1996).

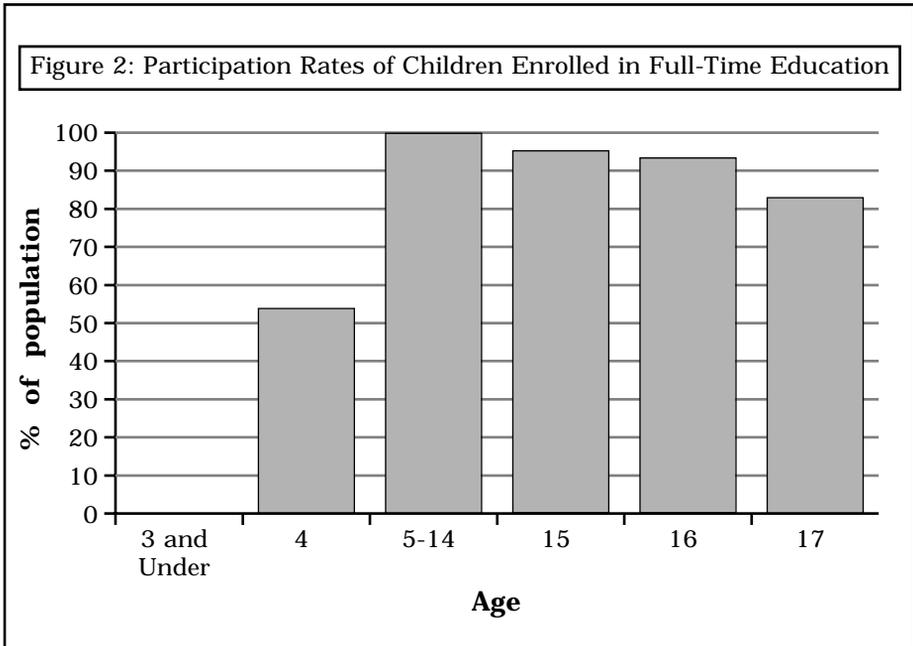
The health statistics published by the Department of Health (1995a) indicate that the incidence of infectious diseases of particular relevance to children, such as whooping cough and rubella, has tended to fall in recent years although the number of children contracting gastroenteritis (figures relate to children under two years of age) has tended to rise overall.

#### **5. Education**

The participation rate of children in the Irish education system is set out in figure 2. The participation rate in full-time education is almost nil below the age of three. Some children in this age group would attend creches and would receive preschool education on a part-time basis, for example, in the Early Start scheme recently established by the Minister for Education. It is estimated that less than 2 per cent of children under three attend publicly-funded preschool services, one of the lowest levels in the EU.

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<sup>6</sup>Figures provided by Department of Health.



Source : Department of Education, Statistical Report 1993/94, table 1.4.

The figures indicate that, at the time of the sample in January 1994, about half of all four-year-olds were attending school. In fact, however, over 80 per cent of children who are four at the beginning of the school year in September are enrolled. In the age group five to fourteen the enrolment is approaching 100 per cent.<sup>7</sup> School enrolment declines slowly after fourteen and over 80 per cent of seventeen-year-olds are enrolled in full-time education. About 10,000 children are enrolled in schools in which pupils are educated through Irish.

The above data refer to enrolment and do not reflect problems of non-attendance and school “drop-out”.<sup>8</sup> For example, it has been estimated that in Dublin schools one pupil in seven is affected to some extent by school attendance difficulties and that 8 per cent of primary school leavers may not transfer to second level school at all (Working Group, 1994). A recent OECD report estimated that 7 per cent of students left school without qualifications in 1991/92 (Ireland, 1996).

Surveys in relation to bullying in school suggest that 5-7 per cent of students are bullied regularly and that 3-5 per cent of children engage in bullying (Ireland, 1996).

<sup>7</sup>School attendance is compulsory between the ages of six and fifteen. In fact the data clearly overestimate enrolment and show figures in excess of 100 per cent.

<sup>8</sup>It has been suggested that this terminology should be changed to “push-out” to reflect the fact of institutional rather than individual causation.

## **6. Children in Employment**

The 1994 Labour Force Survey indicates that there are 68,900 (22 per cent) persons in the age group fifteen to nineteen who are in the paid labour force (i.e. who are in employment for one hour or more per week or who are unemployed and available for and actively seeking work).

## **7. Children Living in Poverty**

A study for the Combat Poverty Agency carried out in the late 1980s looked at the position of children in poverty (Nolan and Farrell, 1990). This study utilised data from a survey of 3,000 households carried out by the Economic and Social Research Institute (ESRI) in 1987. The main findings of the study were: a substantial deterioration in the relative position of households with children over the period 1973 to 1987; a relatively high risk of poverty for households with children, especially lone parent families and households with three or more children; and a greater likelihood that children will experience poverty as compared to adults. These conclusions were consistent across a range of low income thresholds. The proportion of children in households falling below an income poverty line set at 60 per cent of average household income increased by almost half between 1973 and 1987 from 27 per cent to 39 per cent. At a 50 per cent line of average household income, the proportion rose from 16 per cent to 26 per cent.

## **8. Children in Care and Adoption**

Statistics published by the Department of Health (1995b) indicate that on 31st December 1992 there were 3,090 children in care.<sup>9</sup> This number reflected an increase over the previous few years in the number of children in care: in 1988, for example, there were 2,600 children in care. The increase should, however, be seen in the context of a long-term decline in the number of children in custodial centres operated by the Department of Education. The number currently in special schools is about 200 children compared to over 2,000 in the mid 1960s.

The majority of children in care (74 per cent) in 1992 were in foster care with a further quarter in residential care. The primary reasons for the current admission of the children were given as parent or parents unable to cope (31 per cent), neglect (20 per cent of cases), parental illness (12 per cent) and physical or sexual abuse (8 and 5 per cent respectively).

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<sup>9</sup>Unless otherwise indicated, all data in this section are from Department of Health (1995b).

Just over 50 per cent of all children in care were there on a voluntary basis with somewhat less than 50 per cent being there as a result of a court order. Almost 60 per cent of children in care were between the ages of seven and sixteen with 17 per cent being over sixteen years of age, 12.5 per cent aged between four and seven years and 13 per cent aged four and under.

Of the children in care on 31st December 1992, 22 per cent had been over ten years in care, with a further 29 per cent between five and ten years and 26 per cent between two and five years. Slightly more than half the children (52 per cent) were male. The main family types of the children in care were a married couple living together (29 per cent), a one parent unmarried person (29 per cent) and a married couple living apart (22 per cent).

In total during 1992 there were 4,133 children in care of the Health Boards. During 1992, 1,181 children were admitted to care and 1,043 children were discharged. Over 80 per cent of the discharges related to children who were united with their family or relatives.

The number of adoption orders made in 1994 was 424 (Ireland, 1996). The numbers being adopted have declined sharply since the 1960s and 1970s when a peak of almost 1500 children per year were adopted.

## **9. Child Abuse**

In 1993 the Health Boards received 4,110 reports of child abuse of which over 1,600 reports were confirmed.<sup>10</sup> The number of reports has increased sharply in recent years, although it is difficult to estimate if this reflects an increased incidence of child abuse or an increased incidence of reporting. In 1995, Childline (a telephone helpline operated by the Irish Society for the Prevention of Cruelty to Children) reported over 110,000 calls from children, 10,000 of which were classified as relating to child abuse (Barnardo's, 1996).

## **10. Children and the Criminal Justice System**

The current age of criminal responsibility is still seven years of age, one of the lowest in the EU. It is proposed to raise this to ten years of age in the forthcoming Children Bill. In 1994, 12,500 juveniles (i.e. children up to eighteen) were referred to the National Juvenile Office (Garda Síochána, 1995). The vast majority (84 per cent) were male. Of the 12,500, 22 per cent were prosecuted; 54 per cent were cautioned; and no further action was taken in 24 per cent of cases.

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<sup>10</sup>Data provided by the Department of Health.

The number of children in special schools for young offenders<sup>11</sup> (under the auspices of the Department of Education) was 205 in 1994 (Ireland, 1996). In addition, in June 1995 there were 150 young people in custody in institutions under the auspices of the Department of Justice, i.e. two persons aged fifteen, 53 aged sixteen and 95 aged seventeen (Ireland, 1996).

The number of children and young people under the supervision of the Probation and Welfare Service in 1992 after a court order was 279 children under sixteen and 1500 young people in the age range sixteen to twenty-one (Probation and Welfare Service, 1995).

### **11. Disability**

There is no comprehensive information on the number of children with disabilities in Ireland. Extrapolations from a detailed survey in Northern Ireland (Smith, 1992) would suggest that there may be over 30,000 children with some form of disability. The figures set out above in relation to Domiciliary Care Allowance suggest that there are about 10,000 children in Ireland who require constant care due to disability.

### **12. Homelessness**

Comprehensive information on children's homelessness in the Eastern Health Board area is available for 1993. A study indicated that 427 young people were out-of-home in that year (O'Sullivan, 1996). Research indicates that many children who are homeless had previously been in residential care.

## **Section II: The Legal Status of Children under the Irish Constitution**

The Irish Constitution does not, in general, specifically refer to the rights of children. The rights of children are seen in the context of the rights of the family as a whole. In this regard, the Constitution sees the family as the fundamental unit of society.

Article 41.1 provides that:

1. The State recognises the Family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

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<sup>11</sup>Up to the age of sixteen in the case of boys and seventeen in the case of girls.

2. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

The courts have interpreted this Article as applying to the family based on marriage.

Article 42 of the Constitution which relates to education states that:

The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

Article 42.5 of the Constitution provides that:

In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard to the natural and imprescriptible rights of the child.

While the constitutional rights of the child are not specifically set out in the Constitution, they have been recognised on a number of occasions by the courts. For example, in the case of *G v. An Bord Uchtála* [1980] IR 32,<sup>12</sup> the then Chief Justice said that:

The child also has natural rights. Normally, these would be safe under the care and protection of its mother. Having being born, the child has a right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State.<sup>13</sup>

It has been argued that the rights of children must be seen in the context of the rights of the family and, possibly, in the context of, and subordinate to, the rights of the parent or parents (Gilligan, 1996). It has been suggested, therefore, that legislation such as the Guardianship of Infants Act, 1964, which provides that, in coming to decisions in relation to the guardianship and welfare of infants, the

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<sup>12</sup>See also *In re Article 26 and the Adoption (No. 2) Bill 1987* [1989] IR 656.

<sup>13</sup>For example, in *O'Donohue v. Minister for Education*, unreported, 1993, the High Court held that Article 42 of the Constitution obliged the State to provide for free primary education for children with severe and profound disabilities in as full and positive a manner as it has done for other children in the community. This case is under appeal to the Supreme Court. See also *FN v. Minister for Education* [1995] 2 ILRM 297.

welfare of the child must be of paramount importance, may be unconstitutional, as to accord paramount importance to the rights of the child would not be in keeping with the rights of the parents under the Irish Constitution. In practice, the courts have construed provisions concerning the welfare of the child in the light of their view that there is a constitutional presumption that the welfare of the child is generally best served by being placed with his or her parent or parents.<sup>14</sup>

Concern has been expressed in relation to the lack of clarity concerning the position of children's rights under the Irish Constitution on a number of occasions. For example, the supplementary report of the Task Force on Child Care Services recommended that children's rights under the Constitution should be clarified (Task Force, 1981, pp. 299-302). More recently, the Kilkenny Incest Investigation Team (1993, p.96) felt that:

The very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents than to the rights of children.

The Investigation Team believed that the Constitution should contain a specific and overt declaration of the rights of children and recommended that consideration be given by the government to the amendment of Articles 41 and 42 of the Constitution so as to include a statement of the constitutional rights of children, drawing on the wording of international documents such as the *UN Convention on the Rights of the Child*. These recommendations have been supported by a Committee of Inquiry (1995) appointed by the Western Health Board to investigate the death of a child.

The Constitution Review Group (1996) also recommended that the Constitution should include "an express obligation to treat the best interests of the child as a paramount consideration in any actions relating to children". It proposed that any such provision might be modelled on Article 3.1. of the *UN Convention on the Rights of the Child*. The Group also recommended that the Constitution should include an express guarantee of the rights of the child as they have been identified by the courts, such as the right to be reared with due regard for his or her welfare.

It should be emphasised that the present constitutional position poses no obstacle whatsoever to the establishment of an Ombudsman for Children or similar mechanism in Ireland. The Ombudsman or the mechanism would, of course, have to operate within the present constitutional position concerning the rights of children. Insofar as this

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<sup>14</sup>*In re JH (an infant)* [1985] IR 375.

is somewhat unclear, it might be helpful if the clarifications which have been called for are made. However, an unchanged Constitutional position is not likely to impose any significant constraints on the operation of mechanisms for the promotion and protection of children's rights in the short term.<sup>15</sup>

## **Section III: The Existing Mechanisms for the Promotion and Protection of Children's Rights in Ireland**

### **1. Policy Responsibilities**

Responsibility for policy in respect of children is spread throughout a number of government departments. In particular, the Departments of Health, Education and Justice are seen as having responsibility in relation to children in situations of disadvantage. The Department of Health has particular responsibility for the operation of the childcare system which is administered by and under the auspices of the eight regional Health Boards. The Department of Education has responsibility for the operation of the general education system and also for the operation of special schools for young offenders and disturbed children. The Department of Justice has responsibility for the general operation of the criminal justice system. In the past, there have been difficulties in relation to the coordination of the services provided by these three departments and issues in this regard have been considered by Government-appointed commissions (Committee on Reformatory and Industrial Schools, 1970; Task Force on Child Care Services, 1981). In 1994, the Government appointed Austin Currie, TD as Minister of State at the Departments of Health, Education and Justice with overall responsibility for coordinating childcare services and services for young offenders. The objective of this appointment is to ensure the effective coordination of services and policies across the three Departments and their agencies. The Minister chairs an inter-departmental committee involving representatives of the three Departments.

There are several other departments which play a key part in relation to children's policy, including the Department of Social Welfare which is responsible for the provision of income support in respect of chil-

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<sup>15</sup>See, however, the 1995 Annual Report of the New Zealand Commissioner for Children which referred to the difficulties which had arisen because of doubts as to whether the welfare and interests of the child were of paramount importance under the Children, Young Persons and their Families Act, 1989 and welcomed a 1994 amendment to that legislation which clarified the position in this regard.

dren, the Department of Enterprise and Employment which is responsible for employment and training issues and the Department of Foreign Affairs which is responsible for reporting on the *UN Convention on the Rights of the Child*. Other departments such as the Departments of Finance; Environment; Agriculture; Trade and Tourism; Transport; Energy and Communications; Equality and Law Reform; Arts, Culture and the Gaeltacht, while generally not having specific policy functions in relation to children all take actions of immediate relevance to children in their everyday lives.

## **2. Mechanisms for the Promotion of Children's Rights**

There are, at present, no independent public mechanisms for the promotion of children's rights in the sense in which the term is used in this report. This is in contrast to the situation in some other areas of policy. For example, in relation to poverty policy, the Combat Poverty Agency is an independent, government appointed body established to advise the Minister for Social Welfare on issues concerning poverty.<sup>16</sup> The main responsibility for promoting children's rights is, therefore, assumed by a wide range of voluntary organisations, many of which are affiliated to the Children's Rights Alliance.

## **3. Mechanisms for the Protection of Children's Rights**

### ***Health Boards***

There are a number of existing mechanisms for the protection of children's rights. In particular, the Child Care Act, 1991, provides that each Health Board is under a statutory duty to promote the welfare of children who are not receiving care and protection (see further Ferguson and Kenny, 1995; Gilligan, 1996).<sup>17</sup> In the performance of this function, a Health Board is to take such steps as it considers necessary to identify children who are not receiving adequate care and protection and to coordinate information from all relevant sources relating to children in its area.

Health Boards are required to regard the welfare of the child as the first and paramount consideration, having regard to the rights and duties of parents, whether under the Constitution or otherwise. Health Boards must also have regard to the principle that it is generally in the best interests of a child to be brought up in his or her own family.

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<sup>16</sup>This issue is discussed in more detail in Part III of this report.

<sup>17</sup>In fact, while the Act requires the Health Boards to "promote" the welfare of this category of children, the work of the Boards tends to focus on a preventative and reactive approach rather than on the broader meaning of promotion used in this report.

The Child Care Act sets out a range of provisions in relation to the powers and duties of Health Boards. Under the Act, Health Boards can take children into care where this appears to be necessary, children being placed either in foster care, with relatives, or in residential care.<sup>18</sup> Health Boards can provide accommodation for homeless children. The Act also allows Health Boards to make arrangements with voluntary organisations to provide child care and family support services on behalf of the Health Board.

Disputes in relation to the operation of the Child Care Act must be brought before the courts. For example, if a Health Board believes that it is necessary to take a child into care and if the parent or parents do not agree, then it is necessary for the Board to apply to the District Court for an order in this regard. In such proceedings, the court must, insofar as practicable, give due consideration to the wishes of the child having regard to his or her age and understanding. One innovation of the Child Care Act is the provision which allows for the appointment of a guardian *ad litem* to represent the child in care proceedings.

The Department of Health has issued *Child Abuse Guidelines* (1987 and 1995). A number of issues in relation to children at risk are currently under discussion including the question of mandatory reporting of abuse (Department of Health, 1996) and the appointment of an independent inspectorate to investigate the handling of child abuse cases.<sup>19</sup> This latter proposal reflects the fact that there is at present no coherent system for the independent investigation of cases in which children have been abused. This has led to the establishment of a number of ad hoc inquiry teams and to difficulties in relation to the powers of such teams and the publication of their reports (see, for example, Investigation Team, 1993; Committee of Inquiry, 1995).

The Child Care Act also provides for the establishment of standards for the provision of preschool services for children. Such services will be required to conform with new regulations to be drawn up by the Minister for Health and will be subject to supervision and inspection by the Health Boards. The relevant part of the Child Care Act has not yet come into force although it is intended to implement these provisions during 1996.

As can be seen from the above, the Child Care Act gives extensive powers to the Health Boards in relation to the protection of children's rights. In general, however, these powers relate to the position of children at risk in one way or another and do not apply to the protection and promotion of children's rights generally.

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<sup>18</sup>See Child Care Regulations, 1995.

<sup>19</sup>*Irish Times*, 27 February 1996.

### ***Education System***

The Department of Education has issued a number of guidelines to schools in relation to issues concerning the protection of children's rights, in particular *Guidelines on Countering Bullying Behaviour* (1993) and *Procedures for Dealing with Allegations or Suspicions of Child Abuse* (1991, 1992). In addition, a Child Abuse Prevention Programme (*Stay Safe*) is supported jointly by the Health Boards and the Department of Education, and research indicates that the programme has to date been effective in achieving its aims (Department of Education, 1995b). The Department has published a *Code of Ethics and Good Practice for Children's Sport in Ireland* (1996).

Disputes and complaints in schools and colleges are primarily a matter for the relevant board of management. Except in relation to issues of teaching competence, the Department of Education does not have a clearly defined role, although in practice the Department and its Inspectorate may attempt to assist in the resolution of disputes. However, there are not in general any independent appeals or complaints mechanisms in relation to the operation of the education system. It is proposed in the White Paper on Education (Department of Education, 1995a) to establish Regional Education Boards, one of whose functions would be to act as an appeal board in cases where the decisions of school boards on issues such as enrolment and discipline are disputed. It is also proposed to extend the remit of the Ombudsman to cover the proposed Regional Education Boards and to explore the extension of the Ombudsman's remit to all schools and colleges at first, second and third level.

### ***Other Public Services***

Most other government departments and public bodies do not appear to have any specific provisions in relation to the protection of children's rights. Children can avail of existing complaint and appeal mechanisms in the same way as any other person where this is relevant but, in the majority of cases, it would appear that parents would complain or appeal on behalf of the child rather than the child bringing a complaint or appeal in his or her own right.

### ***Ombudsman***

Children would have the right to complain to the Ombudsman established under the Ombudsman's Act, 1980. It would appear in practice that the number of children bringing such a complaint is quite low although detailed information in this regard is not published in the Annual Reports. Amongst the issues of relevance to children considered by the Ombudsman are complaints about Disabled Persons Maintenance Allowance, Child Benefit and Domiciliary Care Allowance

and complaints to the Department of Education about school transport and higher education grants.

### **Legal System**

In order to bring a case before the courts, a person must be recognised as having legal capacity. In general, children, i.e. persons under the age of eighteen, are not recognised as having legal capacity and, therefore, cannot bring legal proceedings before the courts. Where a child wishes to bring legal proceedings, for example, in relation to a claim for compensation, the case will generally be brought in the name of a parent or guardian acting on behalf of the child. Where compensation is awarded, this will be held by the courts until the child reaches the age of majority (the parents or guardians will be allowed to draw on the amount for the needs of the child in the meantime). In relation to family disputes, the courts are generally allowed but not obliged to hear the views of the child in matters relating to, for example, custody of the children. Under the Child Care Act, 1991, in contrast, the courts are required to take into consideration the wishes of the child, having regard to the age and understanding of the child.

### **Summary**

Three key points emerge from our consideration of the current status of children in Ireland.

1. **There is a significant number of Irish children in situations of considerable disadvantage.** These may include children in care, in legal custody, subject to abuse or neglect, homeless, and children with disabilities. In addition, we have seen that households with children, especially lone parent families and families with three or more children, are particularly likely to live in poverty. Research has indicated that the situations of disadvantage tend to be cumulative, in other words children from poorer households are more likely to be in care, in trouble with the legal system and so on.
2. The second key point is that although the provisions of the Child Care Act, 1991 have the potential to promote the rights of children in situations of disadvantage, **there are no overall public mechanisms for the promotion of the rights of children generally.**<sup>20</sup> This situation may make it more difficult for

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<sup>20</sup>For example, the Health Boards have no responsibility for promoting the implementation of the *UN Convention* outside their own sphere of responsibility - for instance, ensuring that the views of children are heard in the education system.

government and other public bodies to recognise the specific needs of children and to address these in a comprehensive and coherent manner. One could suggest that this absence of the voice of children - a situation whereby children are seen but not heard - contributes to a climate which allows children's rights to be violated. The consequences of such a climate for the protection of the rights of children have been emphasised in a number of recent inquiries and court cases in relation to child abuse.

3. Thirdly, although systems are being put in place under the Child Care Act, and are proposed in the White Paper on Education, to protect the rights of children in situations of disadvantage, **there are no structured mechanisms to protect children's rights in relation to many public and private services**, e.g. the education and medical systems. Thus, in many areas, there is an absence of structured complaint and appeal systems in relation to children's rights.

## **PART II**

# **OPTIONS FROM OTHER COUNTRIES**

In this part of the report, we look at options from other countries. Since the establishment of the first Children's Ombudsman's Office in Norway in 1981 a number of similar mechanisms have been established in countries throughout the world (Flekkøy ed. 1991; Davidson et al., 1993; Swedish Save the Children, 1995). For the purposes of this report we have concentrated on those countries which were broadly comparable to Ireland and focused on mechanisms in similar sized European countries and in other countries with a broadly similar socio-economic background. Accordingly, we look at the situation in Denmark, Norway, Sweden and Finland and in British Columbia (Canada) and New Zealand.

It is noticeable that smaller countries have tended to take the lead in adopting Ombudsman-type systems. In particular, the Scandinavian countries have played a leading role in this area and it would appear that this is not accidental as sociological studies indicate that the concept of children's rights has developed most quickly in the Scandinavian countries over the twentieth century (Therborn, 1993).

A number of other smaller European countries have, or are in the process of establishing, mechanisms for the promotion and protection of children's rights. For example, the Austrian Youth Welfare Act, 1989, provided a legal basis for the establishment of Ombudsman systems in each of the Austrian States. In addition, a National Ombudsman has been established. However, because of the federal nature of the Austrian system its operation would appear to be quite different to that which would operate in Ireland and, accordingly, the Austrian system has not been considered in detail in this report. An Ombudsman has recently been established in Iceland and a proposal

to establish an Ombuds Committee is currently under discussion in Luxembourg.<sup>21</sup>

Some larger European countries have also taken initiatives in this area.<sup>22</sup> A Parliamentary Committee on Children's Rights has been established in Germany. In Spain, an Office broadly equivalent to that of the Ombudsman - the Defensor del Pueblo - deals with children's complaints amongst other general complaints and a recent agreement has been arrived at between this Office and the Spanish UNICEF Committee in this regard. Because of the differences in scale and legal structure, these examples are of limited relevance in the Irish context and are not considered further here.

A number of countries also have mechanisms which apply to particular categories of children, for example, children in care or children in other situations of disadvantage. Because the purpose of this report is to study mechanisms for the promotion and protection of children's rights in general, we have not looked at these other examples in detail.

The Ombudsman-type schemes which have developed in the five countries examined here have developed in different ways. Norway, New Zealand and Sweden have a statutory Children's Ombudsman or Commissioner for Children's Rights. Denmark has appointed a National Council on Children's Rights. In British Columbia, the general Ombudsman's Office (which has responsibilities analogous to our own Ombudsman) has taken on particular responsibility for the promotion and protection of children's rights. In Finland, by contrast, the Ombudsman operates under the auspices of a non-governmental organisation (NGO) and is not formally linked to government. These three different models are examined in Chapters 3, 4, 5 and 6 respectively. In the case of each system we look at:

1. a brief history of the system;
2. the structure of the system;
3. the relationship to government;
4. the workload involved and the balance between the promotion and protection of rights;
5. funding and resources; and
6. evaluations of the system (insofar as these are available).

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<sup>21</sup>Because of the small size of these countries these systems are not considered further here (Iceland has a population of 260,000 and Luxembourg of 380,000).

<sup>22</sup>The UK has yet to take any initiative to establish a Children's Ombudsman or similar system although such a system has been proposed in research funded by the Calouste Gulbenkian Foundation (Rosenbaum and Newell, 1991).

In accordance with the research brief we look at:

- how these mechanisms operate (what structural processes are needed to facilitate the effective operation of the mechanisms);
- their impact in practice (what has been the experience of the use of the mechanisms and their actual effects in promoting and protecting children's rights);
- their financial implications (what are the costs associated with effectively implementing each mechanism); and
- their strengths and weaknesses (no mechanism would serve all purposes equally well - what are the strong points and weak points of each mechanism as a means of promoting and protecting children's rights).

Each of the jurisdictions examined is broadly comparable both in terms of population size and wealth to Ireland. Some basic statistics in relation to these countries are set out in an annex to this part of the report .



## **CHAPTER 3**

### **A STATUTORY CHILDREN'S RIGHTS COMMISSIONER OR OMBUDSMAN**

In this Chapter we look at the statutory systems which have been established in Norway, Sweden and New Zealand.<sup>23</sup> The populations of New Zealand (3.5 million) and Norway (4.3 million) are very similar to that of Ireland while the population of Sweden (8.7 million) is over double that of Ireland. The number of persons under fifteen in the three countries ranges from 19 per cent in Sweden to 23 per cent in New Zealand, lower than the Irish proportion of 27 per cent. To give a rough indication of the comparative wealth of the countries, the Gross Domestic Product (GDP) per capita at current prices using current purchasing power parities (which allows the differences in purchasing power to be taken into account) indicate that all three countries are somewhat better off than Ireland. GDP per capita in US Dollars ranges from 15,500 in New Zealand to 19,500 in Norway as against 13,900 in Ireland.

#### **1. History of the Schemes**

Norway was the first country to establish a Children's Ombudsman (Barneombudet) under the Ombudsman for Children Act in 1981. The present Ombudsman is now the third Ombudsman to have been appointed to this position. The New Zealand Commissioner for Children was established in 1989 under the Children, Young Persons, and their Families Act, 1989. The second Commissioner has now been appointed. The Swedish Ombudsman for Children and Young Persons (Barnombudsmannen) was established in 1993 under an Act to establish the Office of the Children's Ombudsman. Prior to that, a Swedish

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<sup>23</sup>The information for Norway is based on Flekkøy (1991) and on a presentation by the current Norwegian Ombudsman, Trond Waage; for Sweden, on a personal interview with the Swedish Ombudsman, Louise Sylwander; and, for New Zealand, on correspondence from the New Zealand Commissioner for Children, Laurie O'Reilly and on the Annual Reports of the Commissioner 1994 and 1995.

non-governmental organisation, Rädde Barnen (Save the Children) had operated an Ombudsman scheme similar to that which operates in Finland and which is discussed in Chapter 6 of this report.

## **2. Structure of the System**

In each of the three countries studied in this Chapter the mechanism chosen has been a statutory Ombudsman or Commissioner for Children. In Norway the Ombudsman is appointed by the King (in reality the government) for a period of four years and can be re-appointed for a further four-year term. The Ombudsman's Act also provides for the establishment of an advisory body of six persons with particular knowledge of children's matters. While this advisory body was of assistance in the early years of the Ombudsman system, it would appear that it had a very limited role to play once the Ombudsman's Office became established (Flekkøy, 1991). The advisory body fell into abeyance but the current Ombudsman has appointed an advisory committee chosen by himself to provide assistance and support.

In New Zealand, the Commissioner for Children is appointed by the Governor General on the recommendation of the Minister for Social Welfare.

The Swedish Ombudsman is a national body under the supervision of the Swedish Ministry of Health and Social Affairs. The Ombudsman is assisted by an Advisory Expert Committee of twelve persons appointed by the Swedish government and responsible for various policy areas. Difficulties in finding a clear role for the Advisory Committee have also emerged in Sweden.

## **3. Relationship to Government**

The Norwegian Children's Ombudsman is effectively independent of the government in terms of his or her work although the Ministry for Children and Family Affairs is responsible for budgetary arrangements. In practice, this system appears to work well in terms of ensuring the independence of the Ombudsman from political pressure (Flekkøy, 1991) although the Norwegian Ombudsman did experience difficulties in the early years due to the reluctance of the then government to provide appropriate levels of funding for her Office.

The Swedish Children's Ombudsman is independent of government. The Ombudsman reports to the government as a whole, although the office is formally under the supervision of the Ministry of Health and Social Affairs in relation to financial matters.

In contrast, the New Zealand Commissioner for Children is funded by the Department of Social Welfare and reports to the Minister for Social Welfare. There have been some criticisms of the Commissioner's status because of the perceived linkages with the Department of Social Welfare. An independent review carried out in 1992 recommended that the Office of Commissioner for Children be established under a separate Act of Parliament; that the Commissioner be elevated to the status of an Officer of Parliament; and that the Commissioner's budget be totally independent.

#### **4. Work of the Ombudsmen**

In this section we look at the responsibilities of the different systems and at the work which they carry out in practice. The duties of the different systems are set out in the relevant Norwegian, Swedish and New Zealand legislation.

##### ***Norway***

Section 3 of the Norwegian Ombudsman for Children Act provides that the duties of the Ombudsman are to promote the interests of children vis-a-vis public and private authorities and to follow up the development of conditions under which children grow up. In particular, the Ombudsman shall:

- on his or her own initiative or as a hearing instance protect the interests of children in connection with planning and study reports in all fields;
- ensure that legislation relating to the protection of children's interests is observed;
- propose measures that can strengthen children's safety under the law;
- put forward proposals for measures which can solve or prevent conflicts between children and society;
- ensure that sufficient information is given to the public and private sectors concerning children's rights and measures required for children.

The Ombudsman may act on his or her own initiative or at the request of other people. The Norwegian Ombudsman cannot consider individual conflicts between a child and its guardians; between the guardians concerning the exercise of parental responsibility; or similar matters.

There was originally a considerable emphasis in the Norwegian system on individual complaints. In 1989 about 1,600 individual complaints were received by the Ombudsman (Flekkøy, 1991). About 90 per cent of these involved individual cases; less than 10 per cent involved cases of general principle. The vast majority (70 per cent) of complaints came from individual adults with only 10 per cent coming from children. It would appear that the approach taken by the Ombudsman in relation to individual complaints was not really analogous to that of a court of law. A court would hear and adjudicate on a complaint but the then Ombudsman took a more proactive stance in relation to complaints which she felt were justified in an attempt to resolve the matter in dispute.

More recently, the focus has shifted away from individual casework and towards a greater emphasis on general issues. Individual cases are still received by the Office but the emphasis is on referring these to other bodies rather than dealing with them directly. The Office currently operates a telephone line which receives 5-10,000 calls per annum but there are many other child helplines in Norway and the Ombudsman's Office prefers to encourage and support these rather than to see itself as a primary provider.

In addition to the individual complaint-handling, the Ombudsman also carries out general promotional activities. For example, the Ombudsman has commented on proposed legislation relating to children, published information in relation to children's rights, and has appeared on Norwegian television shows on issues relating to children and young people. In general, the Ombudsman attempts to influence public opinion about children and create change in public policy at all levels of government.

Following a recent evaluation (see below) of the Ombudsman's Office, it was felt that the Office had become too reactive and was being overly influenced by media pressures. The current Ombudsman, who was appointed in 1996, aims to adopt a more long-term and strategic approach to promoting children's rights.

## ***Sweden***

Section 1 of the Swedish Act to establish the Office of the Children's Ombudsman provides that the Ombudsman has the task of observing matters affecting the rights and interests of children and young people. In particular, the Ombudsman is required to verify that laws and statutory instruments, as well as their implementation, agree with Sweden's commitments under the *UN Convention on the Rights of the Child*.

The Standing Instructions for the Children's Ombudsman provide that the Office shall :

- initiate measures to assert the rights of children and young people;
- represent and support children and young people in public debate;
- propose legislative change or other measures needed to provide for the rights of children and young people; and
- initiate the coordination of public measures of prevention in the context of child safety.

The Ombudsman is required to devote special attention to children and young persons at risk. The Ombudsman may also be given (or request) special assignments from the Government. For example, the Ombudsman was recently given a special assignment in relation to bullying.

The Swedish Ombudsman does not deal with individual cases at all although the Ombudsman's Office has established a freephone child-line service so that children can contact the Office directly in relation to their experiences and problems.<sup>24</sup> The Ombudsman has drawn up a five-year plan with a number of key priority areas. In addition, other areas of importance are addressed as they arise.

Some of the priority fields identified by the Ombudsman for 1995-96 are:

1. Information on the *UN Convention on the Rights of the Child*: the Ombudsman uses the media extensively to raise awareness of the *Convention*. She also works with local authorities so as to get such authorities - which have extensive powers in Sweden - to bring the *Convention* into their everyday activities. She is currently sitting as an expert member on a Parliamentary Committee which is reviewing Sweden's legislation to ensure compatibility with the *Convention*.
2. Victimisation and bullying in and out of school: the Ombudsman carried out an extensive research study by writing to 50,000 children seeking their views on bullying. She received 6,000 replies and published a report summarising the responses.
3. Participation of children and young people: this involves the right of children to express their views in all areas, e.g. at

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<sup>24</sup>The Office receives several thousand calls every year.

school. The question of reducing the voting age for local government elections to sixteen is also being considered.

4. Publishing data and coordinating research on children and young people: the Ombudsman produces a statistical report on children every three years from data supplied by the Swedish Statistics Office. She also draws together and reports on research and studies carried out in relation to children.
5. A number of activities are carried out in the area of child safety, including two child-safety weeks.

The Ombudsman lobbies the Swedish Parliament and Parliamentary Committees in relation to law reform of relevance to children and young people. For example, the basic principles of the *UN Convention on the Rights of the Child* have recently been incorporated into a new Social Services Bill and a new section in the Code of Parenthood.

As can be seen, the main responsibility of the Swedish Ombudsman is in relation to the promotion of rights. There was a considerable debate in the Swedish Parliament in relation to the balance which should be struck between promotion and protection of rights. It was felt that as Sweden already had authorities responsible for the protection and support of individual children and young people and as the supervision of these authorities already fell within the responsibility of the existing Parliamentary Ombudsman, it would be neither appropriate nor practical that similar duties be given to the Children's Ombudsman. It was also felt that individual complaint-handling could lead to the Ombudsman being swamped with cases, and that this would not be the best use of resources. Accordingly, the Parliament decided that the Ombudsman should work in relation to general issues.

### ***New Zealand***

The New Zealand Children, Young Persons, and their Families Act, 1989, provides that the functions of the Commissioner for Children are to:

- investigate any decision or recommendation made, or any act done or omitted, under the 1989 Act;
- monitor and assess the policies and practices of the Department of Social Welfare and of any other person, body or organisation exercising or performing any function, duty or power under the 1989 Act;
- encourage the development within the Department of Social

Welfare of policies and services designed to promote the welfare of children and young persons;

- undertake and promote research into any matter relating to the welfare of children and young persons;
- enquire generally into and report on any matter including any enactment or law or any practice or procedure relating to the welfare of children and young persons;
- receive and invite representations from members of the public on any matter relating to the welfare of children and young persons;
- increase public awareness of matters relating to the welfare of children and young persons;
- advise the Minister for Social Welfare on any matter relating to the implementation of the 1989 Act, on the Commissioner's own initiative or at the request of the Minister;
- keep under review and make recommendations on the workings of the 1989 Act.

The Commissioner cannot investigate any decision or recommendation made by, or any act or omission of, any court of law. As can be seen from the above, the legal responsibilities of the New Zealand Commissioner are quite broad and cover both the promotion and protection of children's rights in general although the responsibilities of the Commissioner are also focused on the operation of the Children, Young Persons, and their Families Act, 1989. In practice, it would appear that the New Zealand Commissioners have taken a broad approach to their functions and in the year ending 1995 about 40 per cent of total expenditure went on monitoring and reviewing the 1989 Act as opposed to 60 per cent on promoting the general welfare of children and young people.

The current Commissioner has set as the objectives for his term in office:

- to promote effective advocacy for children at every level and in every sector to ensure the welfare of children and young persons;
- to ensure that the child's voice is heard in all matters affecting the child;
- to promote knowledge and understanding of the needs and rights of children and particularly rights under the *UN Convention on the Rights of the Child*;

- to provide a forum for monitoring the implementation of obligations under the *Convention* to ensure that mechanisms are developed to allow children to access their rights;
- to implement effective monitoring procedures in respect of the Children, Young Persons and their Families Act, 1989, in respect of care and protection and youth justice;
- to promote a comprehensive perspective on the overall victimisation of children and indicate research that cuts across and integrates the various forms of child victimisation;
- to be part of a community response to prevent or reduce all forms of violence;
- to promote positive parenting and develop resources for such programmes;
- to establish a comprehensive mortality review system for children;
- to initiate the formation of links between school, home and the wider community, supporting schools in their pastoral care role;
- to establish child impact studies and assessment mechanisms in respect of legislation, policies and practice affecting the welfare of children.

As can be seen from the above, this involves a very wide range of duties primarily at a promotional level. The Commissioner's functions under the 1989 Act make it appropriate that a complaint service should be provided. In 1994-1995, 350 complaints were received. Of these, 50 per cent related to the operation of the 1989 Act with a further quarter being related to education issues. The Commissioner gave an opinion in 40 per cent of these cases and gave advice in a further 35 per cent. The Commissioner also receives a considerable number of requests for information from children. In 1994-95, 1,300 such enquiries were received. The main categories of enquiries related to care and protection (19 per cent), education (16 per cent), children's rights (15 per cent), youth justice (11 per cent), and children and their families (10 per cent).

The Commissioner promotes awareness of issues affecting the welfare of children by making links with individuals and agencies working in this area. The Office also publishes a quarterly newsletter; works with advocacy and research centres; and is involved in a range of other projects including the establishment of a pilot project for social workers in schools. The Commissioner lobbies government in relation to

legislation of relevance to children and young persons such as a current Domestic Violence Bill.

The New Zealand Children and Young Person's Service reports on the deaths of any children in New Zealand and these are reviewed by the Children's Commissioner. The Commissioner's Office has carried out a range of research studies and has developed a five-year research plan. The overall aim of this research plan is to identify and evaluate ways to prevent and intervene in situations where adverse childhood circumstances put children at risk of harm. Research which has been carried out includes studies in the area of care and protection, recidivism, victimisation, child offenders, sexual abuse, and violence against children.

## **5. Funding and Resources**

The Swedish Children's Ombudsman has a staff of fourteen and her budget for the year 1994 was 8m Swedish Kroner (about £750,000). Additional funding is also provided from time to time for specific projects, e.g. about 1m Kroner was provided for the special assignment on bullying. The New Zealand Commissioner for Children has a staff of eight and total expenditure in the year to 30th June 1995 was NZ\$925,000 (about £400,000). The current budget of the Norwegian Children's Ombudsman is 4.5m Norwegian Kroner per year (about £440,000) and he has a staff of ten.

## **6. Evaluation**

No evaluation has yet been carried out of the role of the Swedish Ombudsman. Evaluations have been carried out in New Zealand and Norway. As set out above, one of the main recommendations of the New Zealand evaluation was that the office of Commissioner should be established under a separate statute so as to emphasise its independence and that the Commissioner should be made an Officer of Parliament. The situation is currently under review and the Commissioner has recently made a presentation to a Parliamentary Committee on these issues.

A very detailed evaluation of the role of the Children's Ombudsman in Norway has been carried out by a government-appointed Commission. An English-language summary of this evaluation is being prepared but, unfortunately, this was not completed at the time of writing.



## **CHAPTER 4**

### **A NATIONAL COUNCIL ON CHILDREN'S RIGHTS**

In this Chapter we look at the National Council on Children's Rights which was established in Denmark in 1995.<sup>25</sup> The population of Denmark is about half as large again as that of Ireland, at 5.2 million people. The number of children under the age of fifteen is quite low at only 17 per cent. Denmark is one of the wealthiest countries considered in this study with an average Gross Domestic Product per capita at current prices, using current purchasing power parities, of US\$19,300.

#### **1. History of the Scheme**

The National Council on Children's Rights (Børneradet) was set up by a resolution of the Danish Parliament in 1994 and began work in January 1995. The Council has been established for a trial period of three years, ending in the summer of 1997. It appears that there had been a campaign over several years for the establishment of a Children's Ombudsman along Norwegian lines but that this did not gain sufficient political support. Instead, the National Council for Children's Rights was established on a trial basis.

#### **2. Structure of the System**

The National Council has seven members, three appointed by the Minister for Social Affairs and four by non-governmental organisations. The members appointed by the government are not, however, civil servants. The present appointees are a journalist, a psychologist and a judge.

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<sup>25</sup>This Chapter is based on information published by the National Council on Children's Rights and on information kindly provided by Peter Newell arising from his research for the study funded by the Calouste Gulbenkian Foundation on *Effective Government Structures for Children*.

### **3. Relationship to Government**

The National Council for Children's Rights does not have a statutory basis at present and has been set up on the basis of a Resolution of the Danish Parliament. However, it is seen as an independent body with its own separate budget, although currently located in a building of the Ministry of Social Affairs.

### **4. Work of the National Council**

The National Council is concerned solely with the promotion of children's rights and does not deal with any individual casework. The National Council has described its main tasks as being to :

- make visible and to communicate information about children's conditions and especially about situations where their rights and needs are not satisfied and safeguarded;
- call attention to aspects of legislation and administrative practice which infringe children's rights, to open a debate on topical issues and to make proposals for change; and
- promote and further children's possibilities of participating in public debate and having an influence on decisions.

The resolution which established the Council indicated that it should establish direct consultative contacts with children. This has been one of its main areas of work to date and the Council has established a system of formal consultation with 150 children in seven school classes and one day-care institution spread geographically throughout Denmark. The children are chosen to cover different social groups; they range in age from four to fourteen years old. The Council sends draft briefing papers to the different groups and these are discussed with the children by the relevant teachers. Each child is invited to respond individually and there may also be group responses. To date, consultations have been carried out in relation to :

- children's employment and pay;
- children's use of television and videos;
- children's participation in family decision-making;
- children's participation in local community decision-making;
- physical punishment.

The Council has also sought the views of children aged up to the age of eighteen in relation to their lives and concerns. Over 3,000 children responded individually and schools encouraged children to make

responses in the form of cartoons and posters. The largest groups of respondents were girls between the ages of twelve and fifteen, many living in rural areas. The Council has disseminated the results of this survey of views through a book, videos, tapes, posters and a travelling exhibition funded by the Ministry of Social Affairs.

Some government departments have begun to consult the Council in regard to proposals relating to children although there is no legal obligation to do so. The Council also has informal meetings with the inter-departmental committee on children which exists in Denmark. The Council has highlighted its views and ideas through the media and has, to date, produced one Annual Report.

The Council has also worked in a range of other areas to date, including the right of children to confidential advice and counselling, laws in relation to child pornography, children in care, issues concerning children's rights arising from artificial conception, children's rights to vaccination, new health legislation for home visiting following birth, and promotion of a proposed law to outlaw physical punishment.

## **5. Funding and Resources**

The Council has a staff of four, a sociologist, a lawyer, a teacher and an administrator/secretary. The total budget in 1995 was 3.2m Danish Kroner (about £345,000) of which 2.2m Danish Kroner represented a core grant from the government.

## **6. Evaluation**

A formal evaluation of the work of the Council will start this year. It appears that non-governmental organisations in Denmark are somewhat sceptical about the value of the Council and would have preferred a statutory office of Ombudsman or Commissioner which would have been clearly independent of the government and which would use the *UN Convention on the Rights of the Child* as the basis of its work.



# CHAPTER 5

## A SPECIFIC ROLE FOR THE PROTECTION AND PROMOTION OF CHILDREN'S RIGHTS WITHIN A GENERAL OMBUDSMAN'S OFFICE<sup>26</sup>

In recent decades a large number of Ombudsman's offices have been established throughout the world. Many of these offices hear complaints in relation to children's rights. However, in general, these offices do not have a specific role in relation to the protection and promotion of children's rights. One example of an office which does have a very clearly-defined role in this area is to be found in the Province of British Columbia in Canada. In this Chapter we look at the operation of this office.

British Columbia has a population of just over 3 million people. Twenty per cent of the population of Canada as a whole is under the age of fifteen. In terms of wealth, the average Gross Domestic Product per capita at current prices, using current purchasing power parities, is significantly higher in Canada (US\$19,300) than in Ireland (US\$13,900).

### 1. Brief History

British Columbia appointed its first Ombudsman in 1979. In 1987 the Ombudsman created the position of Deputy Ombudsman for Children and Youth in recognition of the particular needs of children who are in receipt of public services. A Child and Youth Team was established within the Ombudsman staff to investigate complaints about all government services for children and young people. In 1989

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<sup>26</sup>The information in this Chapter is based on correspondence from the Deputy Ombudsman for British Columbia, on the Annual Reports for 1993 and 1994 and on Public Reports 32 (*Abuse of Deaf Students at Jericho Hill School*), 34 (*Building Respect: A Review of Youth Custody Centers in British Columbia*) and 35 (*Fair Schools*).

the death of a young person in public care prompted the Ombudsman to conduct a systematic review of public services for children and young people. Two key recommendations arising out of this review were that all public services for children and young people be integrated and that the government should establish an independent Advocate for children and young people.

In response, the government suggested that the Ombudsman was in effect already acting as an Advocate for children and young people. Although the Ombudsman felt that the function of advocacy differed from that of traditional Ombudsman work, in 1990 the Ombudsman agreed to fulfil the role by defining advocacy as ensuring the child's right to be heard and considered in all decisions that affect the child.

In 1993, the position of Deputy Ombudsman for Children and Youth was altered to that of Deputy Ombudsman (with general remit). The Ombudsman and Deputy Ombudsman now share the work in relation to children and young people.

## **2. Structure**

The Ombudsman is selected by an all-party, special legislative committee and appointed by the Legislative Assembly of British Columbia. The appointment is for a term of six years and is renewable.

## **3. Relationship to Government**

The Ombudsman is an officer of the legislature and as such is impartial, non-partisan and independent of government.

## **4. The Work of the Ombudsman's Office**

In 1994, the Ombudsman's Office received a total of 23,400 enquiries and queries and it has been estimated that up to one-third of these were from or about children.<sup>27</sup> The Children and Youth Team received over 1,200 files in 1994. Over half of all complaints related to services provided by the Ministry of Social Services, with a further 20 per cent relating to schools and School Boards and another 20 per cent relating to the operation of the Ministry of the Attorney General. It would appear that a major focus of the Ombudsman's work is on dealing with individual complaints. However, the Ombudsman also has the power to carry out general investigations and to publish reports on specific issues. A number of these reports have been in relation to ser-

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<sup>27</sup>It is estimated that about one-third of these are from children themselves and two-thirds from concerned adults.

vices for children and young people, including a report on the British Columbia School System, on a Review of Youth Custody Centres in British Columbia and on an Investigation into the Abuse of Deaf Students in a particular school.

The Ombudsman also follows up these reports and lobbies for improvements in the provision of services for children and young people in the context of the *UN Convention on the Rights of the Child*. One of the issues which was advocated by the Ombudsman was the appointment of an Ombudsman or Advocate specifically for children and young people. In October 1993, the Ombudsman published a discussion document on advocacy for children in British Columbia and in May 1995 the government appointed the first independent Child, Youth and Family Advocate as an officer of the legislature. The Child, Youth, and Family Advocate Act sets out the responsibilities of this Advocate in relation to the rights of children in care of the State. The Ombudsman has welcomed the establishment of this Advocacy office but has expressed concerns about the jurisdiction involved. On the one hand the Advocate's mandate extends not only to children and young people but also to their families. On the other hand, the Advocate's mandate is limited to services provided by the Ministry of Social Services and does not extend to other public services. At present the Advocate and the Ombudsman are working together to clarify their roles and responsibilities.

## **5. Funding and Resources**

Because of the structure of the British Columbia system, where the work in relation to children is integrated into the overall work of the Ombudsman's Office, exact figures on the cost of the work relating to children are not available.

## **6. Evaluation**

The Ombudsman's Office has not been formally evaluated. However, the Deputy Ombudsman believes that the work of the Office in promoting the *UN Convention on the Rights of the Child*, in ensuring administrative fairness to children and young people in receipt of public services and in advancing the interests of the child, is respected by government and by those who have used the services.

It should be noted that the overall remit of the British Columbia Ombudsman's Office is considerably broader than that of the Irish Ombudsman and extends to schools, colleges, universities and hospitals. It is also worth noting that the Ombudsman clearly believes that it is not possible for such a general Ombudsman to act effectively as

an Advocate for all children in the longer term and the Ombudsman has consistently called for the appointment of an independent Advocate with responsibility for the general promotion of children's rights. Thus, while the Ombudsman has an important role to play in the protection of children's rights it would seem to have a much more limited role to play in terms of promoting those rights.

## CHAPTER 6

### A NON-STATUTORY OMBUDSMAN'S OFFICE

In this Chapter we look at the position in Finland where, in contrast to the other countries we have examined, the office of Children's Ombudsman is provided by a non-governmental organisation, the Mannerheim League for Child Welfare.<sup>28</sup> A similar structure existed in Sweden until the establishment of the statutory Ombudsman in 1993 (Ronstrom, 1989).

Finland has a population of just over 5 million and 19 per cent of the population is under the age of fifteen. In terms of wealth, the average Gross Domestic Product per capita at current prices, using current purchasing power parities, is US\$15,500 which is higher than that of Ireland at US\$13,900.

#### 1. Brief History

The Finland Ombudsman's Office was established by the Mannerheim League for Child Welfare in 1981. The Mannerheim League is a large and independent NGO which plays an important role in providing services to children in Finland. The majority of its funding comes from its own resources.

#### 2. Structure

The current Finnish Ombudsman is a lawyer who has worked in this position since 1981. The Ombudsman is supported by the Board of the Mannerheim League which includes experts in various areas of relevance to children. The overall guidelines for the operation of the Ombudsman are established by the Mannerheim League.

The operation of the Ombudsman forms part of the overall operation of the Mannerheim League whose activities include social policy,

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<sup>28</sup>The information in this Chapter is based on a personal interview with the Children's Ombudsman, Helena Molander, and on documentation provided by her in relation to the operation of her Office, including Molander (1996).

human rights, health, environment, youth, parent education and service provision.

### **3. Relationship to Government**

As the Ombudsman is employed by a non-governmental organisation, there is no direct relationship with the government.

### **4. Work of the Ombudsman**

The main duty of the Children's Ombudsman is to work in the interests of children and to bring forward and emphasise the child's point of view. The Ombudsman promotes the rights of children in four ways:

- through giving legal aid in individual cases concerning children or young people;
- through increasing the general awareness of children's rights in society - in particular as expressed in the *UN Convention on the Rights of the Child* - and drawing attention to deficiencies in the legal protection of children;
- lecturing and teaching on topics relating to children's rights; and
- taking initiatives concerning action needed to influence decision-makers and legislation, for example, the Ombudsman recently commented on criminal justice legislation in relation to sexual offences proposed by the Department of Justice and succeeded in having the provisions amended.

The Ombudsman can give legal advice to the child, can meet with relevant persons if the circumstances so require, can make contact with officials in relation to the progress of a case, can attempt to bring the parties together so as to resolve the case, can refer issues to the Child Welfare Authorities or to the Public Ombudsman, can report offences to the police or appear as a witness in court and, on occasion, can represent the child in court. In three cases the Ombudsman has taken cases on behalf of children before the European Commission on Human Rights.

In 1993 the Ombudsman dealt with 267 cases. In the majority of these cases, the original contact came from parents and in only 5 per cent of the cases was the contact initiated by children themselves. The main problems raised included sexual abuse of the child (30 per cent), custody and the child's own opinion (15 per cent), assault of the child (13 per cent), conflict concerning the right of access to a child (15 per cent) and child welfare issues, including care (10 per cent).

In addition to its Ombudsman role, the Mannerheim League also operates a free telephone helpline which receives up to 40,000 calls per year. This service is provided in 11 centres throughout Finland and the telephone lines are staffed by over 300 volunteers. This telephone service is supported financially by the government. Each child on starting school is given a timetable which includes information about the telephone helpline. Research carried out in 1993 indicated that 94 per cent of children and young people knew about the phone line and as many as 10 per cent had actually called it. About 80 per cent of callers were nineteen years old or under with 55 per cent being thirteen or under.

## **5. Funding and Resources**

The budget of the Children's Ombudsman is about 2.5m Finnish Marks per year (about IR£340,000). Of this, about 300-400,000 Marks goes towards the cost of the Ombudsman's service itself with the remainder going towards the telephone service. The funding of the Ombudsman's service comes entirely from the Mannerheim League which is largely self-financing.

## **6. Evaluation**

There does not appear to have been any formal evaluation of the Ombudsman system but it appears that it is generally recognised as having played an important role in promoting and protecting children's rights.

There is currently a proposal to establish a public Ombudsman for Children in Finland. The original proposal was for a system similar to the Swedish system with no individual casework. The Mannerheim League generally supports the establishment of a public Ombudsman but has criticised the specific proposal, calling instead for the establishment of Children's Rights Commissioners in each government department. The League's proposal involves Commissioners who would work with a team of experts (including NGO representatives). The Commissioners would form a Children's Council chaired by the Minister for Families and Children and including NGO representatives. In addition, the League sees the need for a continued and expanded casework role which might be operated by the League itself or by the Parliamentary Ombudsman's Office.

	Ireland	Ireland
<b>Population (millions)</b>	3.6	3.6
<b>Pop. under 15 (%)</b>	27	27
<b>GDP per capita (PPP) US\$ (000)</b>	13.9	13.9
<b>Public education expenditure % of GDP</b>	5.6	7.1
<b>Public health expenditure % of GDP</b>	6.7	7.1
<b>Tax receipts % of GDP</b>	36.6	36.6

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*Source: OECD*

<sup>1</sup>With the exception of the figure for

## **PART III**

# **OPTIONS FOR IRELAND**

Having looked at the existing context in Ireland, in particular the status of children (Part I) and the mechanisms in other countries (Part II), in this part of the report we go on to look at the options for Ireland. In particular, we look at how arrangements for promoting and protecting children's rights in other countries can have relevance for Ireland and make recommendations in this regard.

In Chapter 7 we look at a number of key issues and, in Chapter 8, set out conclusions and recommendations.



## CHAPTER 7

### KEY ISSUES

In this Chapter we look at a number of key issues concerning mechanisms for promoting and protecting children's rights in the Irish context. We look, firstly, at the advantages and disadvantages of establishing a new body to promote and protect children's rights. Secondly, we examine the potential role of such a body. We look, thirdly, at some key principles and functions which should be established for the institution and operation of any body. Finally, we consider to what extent the mechanisms in other countries might be appropriate to Ireland and discuss the options for Ireland.

In carrying out a comparative study such as this, it must be remembered that institutions which work very well in one country cannot simply be transported and expected to work in a country with a significantly different culture. What is important, therefore, is to establish the key objectives for a body and the key principles as to how it should work, based on experience from other countries.

### **Section I: Do we Need a Public Body to Promote and Protect Children's Rights?**

In this Section we look at the general arguments for and against the establishment of a public body for the promotion and protection of children's rights. The more detailed arguments in relation to the particular type of body which might be established are addressed in Section 2 of this Chapter.

#### **Arguments For<sup>29</sup>**

##### ***1. Implementing the UN Convention on the Rights of the Child***

The *UN Convention on the Rights of the Child* does not specifically require the establishment of a specific body for the promotion and

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<sup>29</sup>See Rosenbaum and Newell (1991).

protection of children's rights. However, Article 4 of the *UN Convention* provides that:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

In addition, Article 42 of the *Convention* provides that:

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Accordingly, having ratified the *Convention*, there is an obligation on the Irish Government to take steps to ensure compliance with these provisions. One mechanism for doing this is to establish an independent body for the promotion and protection of children's rights. The UN Committee on the Rights of the Child (which monitors the implementation of the *Convention* by national governments) has recommended that an Ombuds-type system be established at national level to further the implementation of the *Convention*. As we have seen, the promotion of the *UN Convention* is one of the key roles of the Children's Ombudsman in most of the countries examined in Part II of this report.

The Parliamentary Assembly of the Council of Europe in its Recommendation on a European Strategy for Children<sup>30</sup> has also recommended that member states of the Council of Europe should establish

a commissioner (ombudsman) for children or another structure offering guarantees of independence, and the responsibilities required to improve children's lives, and accessible to the public through such means as local offices.

The establishment of an independent body may be the most effective mechanism for ensuring the implementation of the *UN Convention* in Ireland. Clearly, the initial responsibility for implementing the *Convention* must rest with the individual government departments in relation to their own particular areas of responsibility. However, it may not be realistic or desirable to expect departments both to implement the *Convention* and to provide an independent evaluation of the

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<sup>30</sup>Recommendation 1286 (1996).

extent to which they have succeeded in doing this. In addition, as we have seen, responsibility in relation to children's policy in Ireland is somewhat fragmented and there may well be areas which fall between departments. At present the body responsible for reporting to the UN is the Department of Foreign Affairs. This department has no major role to play in relation to policies or services concerning children in Ireland and has no mechanisms or expertise which would allow it to oversee the implementation of the *Convention* by other departments. For all these reasons, it can be argued that an independent body should be established with a key role in relation to the implementation of the *UN Convention* in Ireland.

It is worth noting that several respondents interviewed in the course of this research indicated that although an independent body should have a key role in relation to the implementation of the *Convention*, the body should not be responsible for providing the National Report to the UN. This is the responsibility of the government which has the primary responsibility in relation to implementation of the *Convention*. A new body might, however, submit independent reports to the UN commenting on the extent to which it believes the *Convention* has been implemented in Ireland.

## ***2. The Policy and Administrative Process***

It is increasingly the case - both in Ireland and other countries - that independent bodies are being established to put forward the views of particular groups in society as part of the policy and administrative process. This perhaps reflects the growth in public policy in many areas of life and the increasing complexity in the operation of the policy and administrative system.

In the Irish context, there are a number of different examples of organisations which have been established in recent years to advise the government on the interests of particular groups in Irish society. For example, the Combat Poverty Agency was established in 1986 to advise and make recommendations to the Minister for Social Welfare on all aspects of economic and social planning in relation to poverty in Ireland; to initiate measures aimed at overcoming poverty; to examine the nature, causes and extent of poverty; and to promote greater public understanding of the nature, causes and extent of poverty and the measures necessary to overcome it.

The National Council for the Elderly (formerly the National Council for the Aged) was established in 1981. The Council advises the Minister for Health on all aspects of ageing and the welfare of older people.

The Employment Equality Agency was established in 1977 to moni-

tor the implementation of employment equality legislation in Ireland. The introduction of broader equal status legislation is currently under discussion and the Minister for Equality and Law Reform, Mervyn Taylor, TD, has announced that equal status legislation is to be published. It has been proposed that the Employment Equality Agency be expanded to become an Equality Authority with the responsibility of ensuring the implementation of equality for all persons in Irish society. This Authority would focus on particular groups including women, people with disabilities, and Travellers. It is also anticipated that the Commission on the Status of People with Disabilities will recommend the establishment of some form of statutory Disability Authority to advance the status of people with disabilities in Ireland.

Thus there is a clear tendency towards the establishment of independent statutory bodies to promote the position of potentially vulnerable groups in Irish society. No such organisation currently exists for children and young people and, in the context of the developments set out above, there is a strong case for saying that such a body is needed in order to promote the interests of children and young people. This is particularly the case given the potential vulnerability of children and the fact that they do not have a voice in the overall political process through the ballot box.

### ***3. Creating an Environment for the Protection of Rights***

It is clear that no body which might be established in the Irish context could, by itself, ensure the protection of the rights of all children. The initial responsibility in relation to the protection of rights must rest with the individual public and private authorities responsible for particular areas. For example, the Health Boards must take responsibility for the protection of children who are not receiving adequate care and attention. However, the existence of bodies responsible for the protection of children's rights in the past in Ireland has not prevented the violation of these rights in many cases. The absence of an independent authority with the specific role of promoting and protecting children's rights has arguably been a factor contributing to a situation in which children's rights could be violated. The introduction of such a body in the Irish context could help to ensure that the authorities initially responsible for the protection of children's rights are able to carry out their responsibilities in the most effective, efficient, and comprehensive way possible and in accordance with the principles set out in the *UN Convention on the Rights of the Child*.

On a practical level, there have been a number of different enquiries in recent years into abuse of particular children and young people. These have been carried out by different groups and in different

ways. This ad hoc approach involves considerable costs and means that it may not be possible to adopt a coherent approach to investigation of possible abuses. One possibility would be for the independent body to be given the function of carrying out investigations into such situations (as is the case in British Columbia). This would ensure a coherent approach to the protection of children's rights, with the body investigating either in response to requests or at its own initiative and across departmental/agency boundaries.<sup>31</sup>

## **Arguments Against**

In other countries some of the main arguments which have been put forward against the establishment of a body to promote and protect children's rights have been (1) that such a system might undermine parental authority; (2) that it might result in other organisations responsible for children abdicating their responsibilities in this area; and (3) that the costs involved would be very significant and/or that the money involved would be better used in strengthening existing mechanisms (Flekkøy, 1991).

### ***1. Undermining the Position of the Family***

The study of the experience of other countries indicates that the argument that a Children's Ombudsman might undermine the position of the family was generally made by conservative political parties and organisations at the time when the establishment of an Ombuds-type system was under discussion (Flekkøy, 1991). In reality, there have not been any empirical studies as to what was meant by "the position of the family" or what actions might have been considered to "undermine" it. However, there is no evidence from any of the countries examined that this complaint is now made against the operation of the Ombudsman systems in the countries involved. In fact, the majority of all contacts with the Ombudsman in all the countries examined are not from children themselves but from adult family members contacting the Ombudsman on behalf of their children.

### ***2. Abdication of Responsibility by Other Bodies***

This argument was again made at the time when the establishment of Ombudsman systems was under discussion. The argument was

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<sup>31</sup>A Committee of Inquiry (1995) appointed by the Western Health Board recommended "the establishment at a national level of a system for the setting and monitoring of child protection standards, to promote examples of good practice and to inquire into serious failures of practice."

that if responsibility for the promotion and protection of children's rights was given to one specific body then other public bodies would no longer see the promotion and protection of children's rights as part of their responsibility. Again, all the evidence from the countries studied in Part II of this report indicates that the Ombudsman systems have, in fact, made other public bodies more aware of their responsibilities in relation to protecting the rights of children and that the Ombudsman systems have been responsible for highlighting failures in this regard by other public authorities. Again, there is no evidence to support this argument against the establishment of an Ombudsman-type system.

### ***3. Level and Allocation of Resources***

The first point which should be made in this regard is that the evidence from the other countries studied indicates that the anticipated cost of a body for promoting and protecting children's rights in the Irish context would be relatively modest. While it is not possible to provide detailed costings without a precise definition of the system to be adopted, the costs involved in all the other countries surveyed would indicate that a body which could contribute significantly to the promotion and protection of children's rights could be established at a cost not exceeding £500,000 per annum. While this is a significant amount of money, it represents, for example, only 0.1 per cent of the expenditure on Child Benefit in 1996.

With regard to the argument that this level of funding would better be allocated through existing structures, the first point that should be made is that there is no existing structure with the overall role of promoting children's rights. Secondly, although this level of funding would no doubt be welcomed by the Health Boards as an additional contribution towards their child care services, the evidence from other countries would tend to suggest that spending a relatively small amount of money at national level can give a proportionately better return in terms of highlighting issues in relation to the promotion and protection of children's rights and that this money does, in fact, give a better return than would a similar amount invested in existing services at a local and regional level.

### ***4. Ombuds-Work as Social Control***

The argument can also be made that the growth in Ombuds-type systems in many European countries (and the fact that they are under discussion in many more) is a response not only to the threats to the rights of children themselves but also a response to the fact that chil-

dren are seen as a threat to the order of society. These “threats” arise in many ways in European countries, e.g. juvenile crime, drug abuse, school “drop-out”, “uncontrollable” children, etc. In some ways, Ombuds-work can be seen as responding to these threats by attempting to develop a dialogue with children, to establish their concerns, to remove the worst abuses of their rights and to direct their anger in a more socially “useful” direction - but without fundamentally changing underlying social and political inequalities. It can be argued that this type of “deviant” behaviour is, in fact, largely a response to social and political inequalities in European societies and that it would be preferable if the role of supporting children’s rights were to be left to non-governmental organisations which might address issues in a more overtly political way, whereas a publicly-funded body would inevitably be constrained in so doing.<sup>32</sup>

The possibility of Ombuds-work developing as a form of social control needs to be borne in mind. However, at present there is clearly a need for a body which will protect children’s rights. While it is inevitable that any type of public body will operate within the existing political structures, this does not take away from the valuable work which it can perform in promoting and protecting children’s rights, nor does it prevent non-governmental organisations addressing these issues in a more explicitly political way if they so wish. To argue against the establishment of such a body on the grounds that it may be a form of social control would be to ignore the valuable protection it could provide for the rights of children in situations of particular disadvantage in the vague hope of some more radical change in political priorities in the longer term.

In summary, the evidence in favour of the establishment of a body for the promotion and protection of children’s rights is very convincing. Such a body could play a key role in ensuring the implementation of the *UN Convention* in Ireland; in ensuring that children’s voices are heard in the policy and administrative processes; and in creating an environment in which children’s rights can be protected. The costs of such a body are not beyond the scope of what Ireland can afford and the other arguments which have been put forward against the establishment of such a body have not been found to be borne out in the countries in which Ombudsman-type systems have been established. Indeed, it is fair to say that there is almost overwhelming support for these systems in the countries in which they have been established and all the different types of systems are recognised as having made a significant contribution to the promotion and protection of children’s rights.

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<sup>32</sup>Of course, many NGOs would not wish to take this approach.

## **Section II : What Should be the Role of such a Body?**<sup>33</sup>

It is clear that, in the absence of any existing independent mechanism for the promotion of children's rights, whatever type of system is established, promoting rights should be one of its key roles. This might involve the following:

1. highlighting the importance of children's rights through the media, through contact with schools, organisations providing services for children, etc.;
2. highlighting the importance of children's rights in the Oireachtas, within public and private services and in government departments;
3. highlighting the provisions of the *UN Convention on the Rights of the Child*, for example through the media;
4. monitoring the implementation of the *UN Convention* through dialogue with government departments, public and private bodies and through commenting on government reports to the UN Committee on the Rights of the Child;
5. commenting on legislative and administrative proposals which would impact on children's rights (including making submissions to Oireachtas committees);
6. advising government departments and other public and private organisations (including the courts) on policies and procedures in order to ensure that children's rights are respected (this would include the issuing of advisory codes of practice);<sup>34</sup>
7. publishing an annual report and special reports on specific topics or investigations.

The key issue, however, in relation to a new body is the extent to which it should be involved in the protection of children's rights - if at all. As we have seen in Part II of this report, the systems which have been established in different countries have taken different approaches to this issue. While all have played a role in the promotion of rights at a general level, some have also engaged in the protection of rights through individual casework whereas others do not engage in

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<sup>33</sup>In this Section the term "body" is used for convenience to refer to a mechanism or mechanisms for the promotion and protection of children's rights.

<sup>34</sup>See section 37 of the Employment Equality Act, 1977 which empowers the Employment Equality Agency to issue codes of practice.

individual casework or investigations at all, operating entirely at a general level.

A role in relation to the protection of children's rights might include:

1. receiving and responding to individual queries and complaints from children and their parents or guardians in relation to the provision of public or private services and other aspects of children's rights;
2. providing information and advice to individuals;
3. conciliating, mediating and adjudicating in relation to complaints;
4. liaising with other relevant bodies in relation to individual complaints.

In countries where the Ombudsman system operates at a general level, they had what appeared to be a very well-developed mechanism for the protection of children's rights - in the case of Sweden, for example, through the child welfare authorities and other organisations. While significant resources are being invested in the child care system in Ireland, there continue to be a number of areas in which mechanisms for the protection of children's rights remain at a somewhat basic level and it seems unlikely that Ireland is as well served as a country such as Sweden in this regard. This situation needs to be taken into account in deciding whether the body should play a role in protecting rights through individual casework or investigation.

However, a more fundamental issue would appear to be the relationship between a body for promoting rights and those, separate, mechanisms for protecting rights at an individual level. On the one hand, the view can be taken that if the initial mechanisms do not work properly then resources and training should be put into improving these mechanisms so as to ensure that they do, rather than expecting a national body to fill the gaps. An alternative view would be that, while recognising that local services should be improved where they are inadequate, some children - particularly those who are most disadvantaged, for example, through suffering physical or sexual abuse - will always slip through the gaps no matter how well-developed primary services are. Those holding this view would argue that there must always be an independent body to which children can go, or be referred, where, for whatever reason, the primary services have not been able to protect their rights. This is one of the main arguments for including some responsibility for individual casework/investigation in the terms of reference of any body which might be established.

A further argument in favour of an individual casework role is that it can help to inform the promotional side of any such body's work. However, it can be argued that a national body could be adequately informed by consultation and discussion with those directly involved in casework.

There are several arguments against giving an individual casework role to such a body. Firstly, it is generally accepted that the primary responsibility for the protection of rights lies with the public or private services directly responsible for particular areas. Accordingly, it would not be anticipated that the national body would be generally involved at an initial stage until existing dispute-resolution mechanisms had been utilised at a local level. This principle applies in relation to the operation of the existing Ombudsman in this country: an individual cannot make a complaint to the Ombudsman until any internal complaint or appeals procedures have been exhausted.

However, in many areas of public services in Ireland there are effectively few if any internal complaint procedures and, accordingly, it might be expected that the office of Children's Ombudsman or similar body would receive a considerable number of individual complaints following its establishment. One difficulty is that it is likely that the body's staff would be quite small and, accordingly, there is the danger that they could be overwhelmed by individual casework to the detriment of the general promotional activities. A further disadvantage is that the skills involved in investigating individual complaints are not necessarily the same as those involved in playing a promotional role. One answer to the skills issue might be to separate out the promotional and protection aspects into different organisations. This is discussed further in the following section of this Chapter. An alternative would be to make certain that adequate resources and staffing are made available to ensure that the required balance of skills is achieved in one organisation.

The danger of a national body being overloaded with individual casework is a real one. It is possible that a significant number of complaints would be made to an office on its establishment and before it had time to establish other priorities. These dangers need to be borne in mind and complaints procedures at a local level should be improved where they exist and put in place where they do not.<sup>35</sup> The national body might have a role in encouraging and monitoring local complaint procedures (as in British Columbia). It is, however, likely there will always be a number of children whose needs will not be met because

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<sup>35</sup>For example, if the remit of an Ombudsman were to be extended to schools and colleges, it would be essential to put in place more structured initial complaints and appeal systems.

of gaps in the other mechanisms and, therefore, the new body should have the power to investigate particular cases where it appears that the normal mechanisms have failed to protect children's rights.

In summary, an independent body as outlined above would have a promotional role in relation to children's rights and would also have a supervisory protection role in individual cases. To ensure that such a body would not be swamped by individual complaints, local complaint and appeals procedures should be put in place where these do not exist.

## **Section III : Key Principles and Functions<sup>36</sup>**

### **Statutory Basis**

Whatever type of body is established, it is essential that it should be put on a statutory basis so as to guarantee its independence and stability. Insofar as the body would have investigative powers, a statutory basis would be essential to avoid legal challenges to its authority.

### **Independence**

It is vitally important that a national body be independent and be seen to be independent. It is generally the case in Ireland that statutory boards are responsible to particular government departments and report to particular ministers. The experience from other countries is that it is better if the Children's Ombudsman is clearly independent of any particular department and reports directly to the government or parliament. In the Irish case, there is a precedent for this in relation to the existing Ombudsman. Unlike almost all other authorities, he or she is appointed by the President acting on a proposal by the Oireachtas rather than being appointed by an individual minister or by the government. The Ombudsman is not responsible to any individual minister and reports to the Oireachtas having his own separate heading in the public spending estimates. This is clearly a useful precedent if a Children's Ombudsman or similar body is to be appointed.

It is important that the body should have security of tenure. In other countries the term of office varies from four to six years, and is generally renewable for at least one term. The Irish Ombudsman's term of office is six years and is renewable. The Ombudsman can only be removed for "stated misbehaviour, misconduct or bankruptcy" and only on resolutions passed by both Houses of the Oireachtas. This

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<sup>36</sup>See Newell (1996).

helps to guarantee the independence of the Ombudsman and again is a useful precedent.

The current moves by the Department of Finance towards three-year budgets should also help to secure an ongoing commitment to security of funding for the proposed body.

The body should have a reasonable degree of independence in terms of setting priorities within its overall terms of reference and should not be so overburdened with tasks as to prevent it developing its own priorities.

### **Dialogue with Children**

The body should be required to take account of the views of children (in line with Article 12 of the *UN Convention*). In part, this might be done through a telephone line or casework. However, there are more structured ways of doing this so as to ensure that children's voices are heard. For example, as we have seen in Part II, the Danish National Council on Children's Rights has set up a structured consultation system with a representative sample of children who are consulted on an ongoing basis; and the Swedish Ombudsman has carried out a detailed study of children's views on bullying with responses from 6,000 children.

### **Non-Binding Status of Decisions**

While it is possible in certain circumstances to give legally binding decision-making powers to bodies which are not courts, it may be preferable not to do so in relation to the body for the promotion and protection of children's rights.<sup>37</sup> If the body was able to make legally binding decisions, it would be subject to judicial review by the superior courts.<sup>38</sup> In addition, it is likely that its procedures would have to be more formal and legalistic if it was to arrive at legally binding decisions (Ombudsman, 1996, p. 7). The recommendations of the existing Ombudsman are not legally binding but, in practice, they are generally accepted by the public bodies concerned. If a public body proves recalcitrant, the Ombudsman may, as a final recourse, make a special

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<sup>37</sup>Article 37 of the Irish Constitution allows "the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court ...".

<sup>38</sup>As with any public body, it will be potentially subject to judicial review but this is much more likely to be burdensome if the body is involved in legal decision-making.

report to the Oireachtas. It appears that this approach has worked well. While the Irish Ombudsman Act does provide for a formal investigation procedure which allows all sides of the argument to be heard, in practice this is rarely used and the nature of the Ombudsman's jurisdiction allows most cases to be dealt with in a relatively informal way. Insofar as a body for children's rights were to be involved in individual casework, this approach would seem to have much to commend itself. The body would, however, need to have clear powers of investigation, power to request documents, etc. as is the case with the existing Ombudsman.

### **Ability to take Legal Action**

While it is recommended that the body should not itself be able to give legally binding decisions, it may be appropriate to allow it to take legal action in relation to a general issue or to support legal action in an appropriate case. The Employment Equality Agency has the power to refer matters to the Irish courts in relation to the operation of employment equality legislation.<sup>39</sup> This would mean that, for example, in a case where an important point of principle arose, the body would have the power to take a case (or to assist an individual in taking a case) to the Irish courts or, where appropriate, to the European Court of Human Rights. Legally, such a public body might have the power to do this in any case, even if not explicitly stated, but it would be preferable to clarify the issue.

## **Section IV : Possible Structures for Ireland**

In this Section we set out a number of possible options for Ireland, drawing on the examples set out in Part II of this report.

One key issue for this report is the extent to which the Children's Ombudsman/Commissioner mechanism would be appropriate in Ireland. In the Scandinavian countries, the Ombudsman mechanism is very well established. Sweden now has six public Ombudsmen in total. In contrast, in the Irish context there is only one public Ombudsman.<sup>40</sup> Thus there is less of a tradition of Ombudswork in Ireland. In addition, the role of the existing Irish Ombudsman is pri-

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<sup>39</sup>Under section 20 of the Employment Equality Act, 1977 the EEA may refer a case to the Labour Court where it appears that discrimination is being generally practised and it may apply to the High Court under section 33 of the Act where the Labour Court has made an order but where there is a likelihood of further discrimination.

<sup>40</sup>The Director of Consumer Affairs (although not generally dealing with individual cases) can be seen as playing an Ombuds-like role in relation to consumer issues

marily to deal with individual casework rather than a promotional one. In the Irish context, it has been more usual to appoint Boards or Councils consisting of representatives of government, voluntary organisations and other persons with expertise in particular areas to play a promotional role, e.g. the Combat Poverty Agency and the National Council for the Elderly.

On the other hand, the Ombudsman in Ireland has a very good reputation and is seen very positively by almost all sections of Irish society. The Ombudsmen in Sweden also vary greatly in their tasks with some being concerned purely with individual casework and others purely with general principles, and this does not seem to have created problems. Therefore, the difficulties in relation to opting for an Ombudsman in Ireland should not be over-estimated but should be borne in mind.

An outline of the possible structures for Ireland would include the following:

### **1. A Children's Commissioner or Ombudsman**

A Children's Rights Commissioner or Ombudsman would be based on the Norwegian and New Zealand model with a primary emphasis on policy issues but with a complaint-handling role. This system would have the advantage of being a radical new structure with a clear remit to promote and protect children's rights. Furthermore, one could argue that the appointment of one individual would make it easier for the new body to play a more dynamic role and to focus on specific issues.

### **2. A Children's Commission**

Rather than an individual Commissioner or Ombudsman, a Children's Commission might be appointed to include representatives of government departments, voluntary organisations and other persons with relevant expertise. The task to be carried out by this Commission would be the same as under option 1 above, i.e. primarily promotional with a case-handling role. The Commission would appoint a Chief Executive Officer who would be responsible on a day-to-day basis for the operation of the Commission. This might fit in bet-

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as can the Data Protection Commissioner in relation to data protection. There are also two private sector Ombudsman offices established by the credit industry and by the insurance industry.

ter with existing Irish models such as the National Council for the Elderly. On the other hand, it is possible that the appointment of a Commission would make it more difficult to adopt a dynamic approach and would make the organisation as a whole less approachable and less user-friendly (particularly for children) than would an easily identifiable Ombudsman or Commissioner.

### **3. Expanding the Existing Ombudsman's Remit**

In this approach, as in British Columbia, the existing Ombudsman would assume a specific responsibility for issues concerning children. If this were to be done, the existing remit of the Ombudsman would need to be extended to include, for example, schools, colleges and all medical services. The advantage of such an approach is that it fits very much into existing Irish structures and would utilise a system which has been seen to work well since its establishment. However, the existing Ombudsman's office plays a role primarily in relation to the protection of rights and, as we have seen in the section on British Columbia, it is difficult for an Ombudsman's office primarily charged with adjudicating on disputes to appear to be taking the side of one particular group by playing a promotional role. Thus the general Ombudsman's office could not realistically be expected to play a promotional role for children.

### **4. A Children's Commission or Advocate with a Promotional Role**

This would involve a Children's Commission as in Option 2 above or alternatively an individual Advocate as in some Canadian states. The main task of the Commission or Advocate would be the promotion of children's rights and it would not deal with individual complaints (although it might have the ability to raise issues of general importance in the courts, as does the Employment Equality Agency).

### **5. A Voluntary Sector Ombudsman**

This might involve one or more voluntary organisations appointing a person or persons to act as Ombudsman. This would be modelled on the system currently operating in Finland. It would be necessary to get government acceptance, if not support, for such a body if it was to have any chance of operating effectively. Such a body would have the advantage of being completely independent (although a question might arise as to its degree of independence if government funding were required). The fact that such a system could be put into operation fairly quickly would be a further advantage. However, the disadvantages

include the fact that it would have much less official weight than a statutory Ombudsman, would have no authority in relation to government services, and would not be able to play an investigatory or adjudicatory role. In Finland, there is currently a proposal to establish a statutory Ombudsman and this is supported in general terms by the Mannerheim League which operates the Finnish Ombudsman system. Accordingly, this is an option which might be pursued by voluntary organisations only if it appeared that government was unlikely to take any action in relation to the other options.

## **Conclusion**

The thrust of this report is that a body should be established to promote and protect children's rights in Ireland (i.e. including an individual casework role). This would involve an independent body appointed and funded by government and, therefore, would involve one of (or some combination of) the options set out at 1 to 4 above. There are two key questions to be asked as to the appropriate structures.

Firstly, should one body carry out both promotional and protection roles or should these be split? It would appear from experiences in other countries that the existing Ombudsman's office could not play an active promotional role in relation to children's rights and that some form of Children's Commission, Commissioner or Advocate would have to be appointed to do this. In practice, therefore, this first question asks whether the body responsible for promoting children's rights should also be involved in individual casework or whether this responsibility should be given to the existing Ombudsman's office? There are several arguments for the latter option given the expertise which has been developed in this office in investigating complaints and the general relationship which it has built up with government departments and other public bodies. There are, however, disadvantages. If responsibility for promoting and protecting children's rights were to be split in two rather than being dealt with by one body, it could lead to public confusion and to lack of coordination between the two bodies. In addition, at a practical level, there are several existing proposals to extend the remit of the Ombudsman to non-commercial state bodies and voluntary hospitals. The Ombudsman may also have a role in relation to the proposed Freedom of Information legislation. There is a danger that issues relating to children could get lost in this overall expansion or at least not receive the priority they would get from a Children's Commission or Commissioner.

Secondly, should the body be a collegiate one with representatives of different interests or a single individual? In other words, should the body be an individual Ombudsman or Commissioner or should it be a Children's Commission with a chief executive officer? A representative Commission would allow interested organisations to be directly represented on the body and it could benefit from the knowledge and experience of the Commission members. However, it is possible that a Commission representing potentially divergent interests could find it much more difficult to play an independent and dynamic role in promoting and protecting children's rights than would an individual Commissioner. In addition, it seems likely that a Commission would be much less approachable than would an individual Commissioner, particularly given that the organisation is intended to represent the interests of and to enter into a dialogue with children.

On balance, the considerations set out above would suggest that the preferred option for the promotion and protection of rights would be an individual Children's Commissioner with a promotional and protection (i.e. casework) role. The details of such a Commissioner's duties and functions are discussed in more detail in Chapter 8.



## CHAPTER 8

### CONCLUSIONS AND RECOMMENDATIONS

In this Chapter, we set out the conclusions and recommendations of this report. We look first at the findings in relation to the current status of children in Ireland. In the light of these findings we argue that there is a need for a body to promote and protect children's rights. We go on to set out key principles for the establishment of such a body. We recommend the establishment of a Children's Commissioner to promote and protect children's rights.

#### 1. The Status of Children in Ireland

Our examination of the current status of children in Ireland established three key points:

1. **There is a significant number of Irish children in situations of considerable disadvantage.** These may include children in care, in legal custody, subject to abuse or neglect, homeless, and children with disabilities. In addition, we have seen that households with children, especially lone parent families and families with three or more children, are particularly likely to live in poverty. Research has indicated that the situations of disadvantage tend to be cumulative, in other words children from poorer households are more likely to be in care, in trouble with the legal system and so on.
2. The second key point is that although the provisions of the Child Care Act, 1991 have the potential to promote the rights of children in situations of disadvantage, **there are no overall public mechanisms for the promotion of the rights of children generally.**<sup>41</sup> This situation may make it more difficult for government and other public bodies to recognise the specific needs of children and to address these in a comprehensive and

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<sup>41</sup>For example, the Health Boards have no responsibility for promoting the implementation of the *UN Convention* outside their own sphere of responsibility - for instance, ensuring that the views of children are heard in the education system.

coherent manner. One could suggest that this absence of the voice of children - a situation whereby children are seen but not heard - contributes to a climate which allows children's rights to be violated. The consequences of such a climate for the protection of the rights of children have been emphasised in a number of recent inquiries and court cases in relation to child abuse.

3. Thirdly, although systems are being put in place under the Child Care Act, and are proposed in the White Paper on Education, to protect the rights of children in situations of disadvantage, **there are no structured mechanisms to protect children's rights in relation to many public and private services**, e.g. the education and medical systems. Thus, in many areas, there is an absence of structured complaint and appeal systems in relation to children's rights.

## **2. Do we Need a Body to Promote and Protect Children's Rights?**

In the light of the above findings, we believe that there is a need for a body to promote and protect children's rights in Ireland. This body would have a role in relation to the implementation of the *UN Convention on the Rights of the Child*, would ensure that the voice of children was heard in the policy and administrative process and would help to create an environment more favourable to the protection of children's rights. The arguments against the establishment of such a system in other countries have not been supported by the experience of the operation of Ombudsman systems in practice. It is widely agreed that the systems which have been put in place in other countries have all, in their own different ways, contributed significantly to promoting and protecting children's rights.

Accordingly, **it is recommended that the Irish Government should take a decision to establish such a body and should put in place procedures to develop detailed proposals for its operation.**

## **3. Key Principles and Functions**

Whatever type of body is to be established, there are a number of key principles and functions which must be set in place if the body is to work in the most effective manner. These include:

- » **Statutory Basis** - To give the body stability and independence, it should be established on a statutory basis rather than as an administrative scheme.

» ***Independence*** - Children's issues are not specific to any one government department and **the body should be independent of government departments** so as to give it the freedom to relate to all public bodies dealing with children. It should be responsible to the Oireachtas, as is the existing Ombudsman, with its own separate financial vote.

» ***Dialogue with Children*** - As the body is intended to ensure that children are seen *and* heard, **it should set in place procedures to consult children in relation to all aspects of its work.**

» ***Non-Binding Decisions*** - As in the case of the existing Ombudsman, **any decisions in relation to complaints should not be legally binding.** In his most recent report, the Ombudsman states that 'this apparent weakness is, in fact, a great strength' as it allows him to operate pragmatically and flexibly, avoiding a legalistic and adversarial approach (Ombudsman, 1996, p. 7).

» ***Ability to take Legal Action*** - **The body should, where necessary, be able to take legal action before the Irish or European courts** in relation to general issues of concern to children.

#### **4. What Type of Body?**

Based on experience in other countries, there is a range of options with advantages and disadvantages. It is important to adopt a model which will work in the Irish context. Based on the discussion in Chapter 7, the preferred option would appear to be to establish a new Children's Commissioner to promote and protect children's rights

This would involve the establishment, on a statutory basis, of a new office of Children's Commissioner (or Ombudsman) with adequate staff and resources. The Commissioner would be independent of any government department and would be responsible to the Oireachtas, as is the existing Ombudsman.

The Commissioner would play a role in promoting children's rights - drawing on the *UN Convention on the Rights of the Child*. He or she would monitor the implementation of the *UN Convention*, promote children's rights with government and public and private bodies and would comment generally on legislative and administrative proposals.

The Commissioner would also have a role in relation to the protection of children's rights through the investigation of complaints and through carrying out investigations in relation to particular issues.

The precise jurisdiction in relation to complaints vis-à-vis the existing Ombudsman would need to be discussed further. In general, the Commissioner would encourage complainants to utilise existing complaints procedures and might have a role in encouraging the establishment of such procedures where none exist and in ensuring that such procedures worked well in practice.

**On the basis of the research undertaken in this study, it is recommended that Government should establish a statutory Children's Commissioner to promote and protect children's rights.**

## **5. Conclusion**

An Ombudsman system to promote and protect children's rights will work most effectively if it is set in the context of a range of other measures to ensure that children's voices are heard. While these broader issues fall outside the terms of reference of this report, it is important to note them and to realise that a Children's Commissioner is not a panacea or a solution to all problems concerning children. Firstly, it is essential to have effective government structures for children.<sup>42</sup> Secondly, it is necessary to have a range of structures - in schools, social services, the legal system and so on - which will enable and encourage children to make their voices heard.<sup>43</sup>

However, the appointment of a Children's Commissioner would establish a dynamic new body which would provide a clear focus for issues concerning children. It would be a practical mark of Ireland's commitment to the principles set out in the *UN Convention on the Rights of the Child* and would represent a tangible step towards the fulfilment of our obligations under the *Convention*.

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<sup>42</sup>As previously mentioned, a study on this issue is currently being carried out by the Calouste Gulbenkian Foundation which is looking at, *inter alia*, the Irish system, the Danish Inter-ministerial Committee on Children and the Norwegian Ministry of Children and Family Affairs.

<sup>43</sup>See, for example, the practical recommendations proposed by the Ombudsman for British Columbia (1993).

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