

Ireland's Ombudsman for Children – advancing children's rights

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Introduction

In 1989 the United Nations adopted the Convention on the Rights of the Child setting out the rights to which children are entitled and the duties on states parties to protect, promote and fulfil those rights. In 2002, the Committee on the Rights of the Child, the body that monitors the Convention's implementation, adopted a General Comment on the role that national human rights institutions for children can play to promote greater respect for children's rights at a national level (CRC Committee, 2002). Since then, the number and variety of such institutions has continued to grow. Ireland established its Ombudsman for Children in 2002, with formal powers to investigate complaints, provide advice to government on legislation and take steps to promote wider awareness of children's rights. In the intervening years, the Ombudsman for Children has become firmly established as an independent children's rights watchdog, developing its functions and exercising its authority with positive impacts on children's rights in Ireland. In addition to its express powers, however, the Ombudsman for Children has also used soft power to advance children's rights. While the concept of soft power emanates from international relations (Pye, 2004), for the purposes of this article we understand soft power to mean: the ability to attract stakeholders to child rights concepts through political persuasion, influence and personal/institutional credibility rather than through statutory powers or those of enforcement alone. In this paper, we argue that to maximise their potential to protect, promote and fulfil children's rights, a national human rights institution for children must not only exercise its express authority, it must also use soft power to create institutional legitimacy. In particular, our analysis of the Irish Ombudsman for Children demonstrates that while the institution's independence is critical, it is the manner in which its statutory powers are exercised that is key to whether the institution genuinely holds government to account on children's rights. In particular, it is the experience of the Irish Ombudsman for Children that soft power, advocacy and the art of persuasion are vital in moving children's rights up the political and social agenda while leadership and a strategic approach are similarly crucial in choosing where to focus limited resources and how to maximise the potential of an office with broad powers.

Against this backdrop, it is the aim of this paper to explain how the Ombudsman for Children's different powers have been used to promote and protect children's rights, offering lessons for other national children's rights institutions as to how the full range of authority can be maximised to achieve greater implementation of children's rights. The paper begins with a description of the Irish model of Ombudsman for Children, before the use of its key statutory powers are analysed. This begins by looking at the role played by the Ombudsman in the provision of advice to Government, before considering the use of its investigatory powers and in both sections the experience of combining soft with statutory power is illustrated. Finally, the paper reflects on the pros and cons of the Irish approach, with some lessons for the future.

International Standards on National Children's Rights Institutions

Article 4 of the UN Convention on the Rights of the Child (CRC, 1989) requires states parties to take all appropriate measures to implement Convention rights at national level and the UN Committee on the Rights of the Child (the CRC Committee) has recommended the

establishment of independent national human rights institutions to promote and protect children's rights to this end. Building on the Paris Principles on national human rights institutions (NHRIs) (UN General Assembly 1993), the Committee's General Comment No 2 identified how these institutions were to function in order to further implementation of the CRC. According to the CRC Committee, 'every state needs an independent human rights institution with responsibility for promoting and protecting children's rights' (CRC Committee 2002, para 7) which should, if possible, be 'constitutionally entrenched', and at the very least 'legislatively mandated' (2002, para 8). Their mandate should include 'as broad a scope as possible for promoting and protecting human rights', incorporating the CRC and its Optional Protocols so that children's human rights are effectively covered (CRC Committee 2002, para 8). In line with the Paris Principles' requirements of independence, autonomy, adequate resourcing and pluralistic representation, the General Comment highlights the particular elements of NHRIs that address their accessibility and relevance to children. In particular, the CRC Committee recommends that such institutions 'reach out to all groups of children' particularly the most disadvantaged and the vulnerable, in line with Article 2 of the CRC (non-discrimination) (2002, para 15) and recommends their key role in promoting respect for the views of all children in matters that affect them, consistent with Article 12 (the right to be heard). Specifically, the Committee (2002, para 16) notes that '[i]nstitutions must ensure that they have direct contact with children', they should have 'specially tailored consultation programmes and imaginative communication strategies' to ensure full compliance with Article 12 (CRC Committee 2002, para 17).

The General Comment provides that NHRIs must have the power to 'consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children', and have the necessary powers to do so effectively (2002, para 13). They should have the power to 'support children taking cases to court', both initiating litigation on behalf of children and intervening as a third party where necessary to advise the court about the human rights issues in the case (CRC Committee 2002, para 14). The General Comment also details the type of activities that NHRIs should undertake in the promotion and protection of children's rights. This inexhaustive list includes: undertaking investigations and conducting inquiries into children's rights; preparing opinions and recommendations at the request of authorities and on their own volition; keeping law and policy under review from a children's rights perspective and promoting the harmonisation with the Convention of law, regulation and practice. The Committee also highlights the important role NHRIs play in monitoring Government implementation of the Convention and recommends that they ensure the impact of law and policy on children is carefully considered 'from development to implementation and beyond' (2002, para 19). Specific activities relating to Articles 3 (best interests) and 12 (right to be heard) of the CRC are set out, along with recommendations in line with Article 42 (duty to make the Convention known) that the mandate of NHRIs should include activities to promote and advance awareness of children's rights, both among children, among professionals working with and for children and among the public at large (2002, para 19). Collaboration with civil society is encouraged, (2002, para 25) and the merits of international and regional co-operation highlighted as a way for NHRIs to 'learn from each other's experience, collectively strengthen each other's positions and contribute to resolving human rights problems affecting both countries and regions' (2002, para 29).

The Irish Model – the Ombudsman for Children

While the first NHRI for children – established in Norway in 1981 - predated the CRC, (Seneviratne 2001), for many countries, ratification of the CRC provided impetus to the establishment of a national mechanism to protect and promote children’s rights. This was the case in Ireland where following on from a series of national reports into child abuse and ill-treatment and on the basis of strong advocacy from civil society groups, Ireland adopted the Ombudsman for Children Act in 2002, establishing its independent children’s rights institution in 2004. The model combined investigative powers with a range of proactive duties to promote children’s rights through research, awareness raising, education and advocacy, all from a children’s rights perspective. In 2004, Emily Logan, Ireland’s first Ombudsman for Children, was appointed to the role for the first of her two terms of office. The second office holder, Dr Niall Muldoon was appointed in 2015 and re-appointed in 2021.

The Ombudsman for Children has a broad legislative duty to promote the rights and welfare of children (s. 7), highlighting issues of concern relating to the rights and welfare of children that are of concern to children themselves. The Ombudsman is required to promote children’s rights under the CRC and has the power both to advise Government on the development and co-ordination of law and policy and to undertake, promote and publish research on matters relating to the rights of children. The legislation uses the language of children’s rights throughout and affirms independence as the hallmark of the institution. This is also embedded in the appointment of the office holder by the President of Ireland and their accountability to Parliament to which both annual reports on their functions (s. 13(7)) and special reports (s. 13(5, 7)) can be made. The Ombudsman for Children is expected to monitor legislation concerning the rights and welfare of children, but also to monitor and review the operation of the Ombudsman for Children Act 2002, making recommendations to Government and/or the Oireachtas (Parliament) on any amendments required (s. 7(1)(h)).

In line with the Paris Principles’ (UN, 1993) principle of ‘quasi-judicial competence’, the Ombudsman for Children has the power to investigate individual complaints made by children or on behalf of children arising in the course of administration of public bodies (ss. 8-9), and has discretion over whether to initiate, continue or discontinue an investigation (s. 10). While the power to investigate is generally used in response to an individual complaint, the Ombudsman for Children can also investigate on their own initiative where it appears in all the circumstances that this is warranted (s. 10(1)(a)).

While the power to investigate cases was a welcome addition to the powers of the institution, concern was expressed at the time that this might lead to the office being overwhelmed by individual casework to the detriment of its other more proactive functions (Martin 2004). As discussed below, however, the pattern of using advocacy to raise matters that emerge through the complaints process has not just maximised resources and effort but has also led to a more strategic approach. This has helped to strengthen its interactions with public bodies, enhancing its reputation among the public and ensuring that the experiences of children are brought to bear for the purposes of systemic reform.

In summary, the Ombudsman for Children has a strong legislative basis, with powers to promote children’s rights and specific authority to investigate and to advise government on matters of concern. The independence of the institution is expressly set out and the rights-

basis is similarly clear. While there are some gaps in the legislative – for instance the Ombudsman cannot take or intervene in litigation on behalf of a child – and there are some gaps in the remit of its complaints function – the institution is considered broadly in line with international standards (Kilkelly and Logan, 2021 forthcoming). As is often the case, however, it is the operation of this authority, not the authority itself, that determines its impact on the implementation of the CRC. This will now be examined in the two sections that follow.

Government Advice

It is evident from article 4 of the CRC that legislative measures are essential to the implementation of the Convention and according to the CRC Committee, national children's rights institutions are well placed to promote the harmonisation of law and policy with the Convention through the 'provision of advice to public and private bodies in construing and applying the Convention' (CRC Committee 2002, para 19). The Committee has highlighted the important role played by NHRIs for children in advocating for and facilitating 'meaningful participation by children's rights NGOs ...in the development of domestic legislation and international instruments on issues affecting children' (CRC Committee 2002, para 19). In Ireland, these functions are set out in the Ombudsman for Children Act 2002, which requires the Ombudsman to advise Government on the development and co-ordination of policy relating to children and to 'monitor and review' the operation of legislation concerning matters that relate to the rights and welfare of children (s 7). Separately, the Act provides that the Ombudsman may either on their own initiative or on the request of Government give advice on any matter relating to the rights and welfare of children. This specifically includes advice regarding the 'probable effect on children of the implementation of any proposals for legislation' (s 7). Over the years, the Ombudsman for Children has fulfilled this function in a number of ways. First by submitting an Annual Report to Parliament and second by providing advice to Government on draft legislation. Each is now considered in turn, with attention drawn to the ways in which the legislative authority was maximised inter alia through the use of soft power.

As mandated by the legislation (s 13), the Ombudsman has issued an Annual Report to Parliament as a key means of ensuring accountability. From the establishment of the Ombudsman in 2004 to date, the annual reports have detailed the activities and achievements of the institution, providing an important benchmark on its role and reach, documenting public engagement and highlighting the number and range of children's rights issues addressed. The reports address harmonisation of law and policy with the Convention, both by highlighting the progress made in the time period while also identifying the gaps and barriers that prevent further harmonisation. While there has as yet been no systematic analysis of the impact of this work, as a mechanism of accountability, the Reports provide an important snapshot of the diversity of activity undertaken by the Ombudsman for Children in line with its mandate, including education and promotion activity, submissions to Government in compliance with its monitoring function and the increasing recourse to the complaint function. A number of important themes can be drawn from an analysis of the Annual Reports. Chief among these is the fact that the Reports are directed at wider Government, highlighting to all Government departments the importance of seeking the independent advice of the Ombudsman on legislative matters relating to children (OCO 2008). This is vital to the wider influence of the Ombudsman for Children's authority, which is directed not only at those with an express responsibility for children's rights, but to those

wider duty bearers too. The Annual Reports also present important perspectives on children's rights issues that should be taken into account in law and policy making that cuts across the areas of health, education and justice for example (OCO 2011). Periodically, the reports are used to reflect on progress made – constitutional reform was an important milestone for instance as well the ending of child imprisonment (OCO 2013) - while the operation of the Ombudsman for Children Act has been a source of regular analysis (OCO 2018).

More specifically, the Ombudsman has also used its power under the legislation to provide advice to Government on draft laws referred to it for its consideration while also, of its own volition, providing advice on legislative proposals and other matters. This has been used strategically to keep children's rights on the political agenda, where the influence and integrity of the office was maximised to important effect. The Ombudsman for Children has an express duty to provide guidance to Government on proposals for legislative reform, both on request and on their own volition. This process can take different forms depending on the circumstances and the issue, including submissions on early legislative proposals and on draft legislation. Over the years, many legislative proposals and draft laws have been referred to the Ombudsman for review, while in other situations this advice has been invited following an intervention from the Ombudsman or in other cases, proactively presented. It is important that the Ombudsman for Children Act 2002 has both the discretion and, where requested, the duty to provide advice to Government 'on any matter (including the probable effect on children of the implementation of any proposals for legislation) relating to the rights and welfare of children' (s 7). Combined with the duty to monitor and review the operation of legislation and to advise Government on the development and co-ordination of policy (s 7), these functions have proven to be critically important to the public profile and the political influence of the institution. Government has referred multiple draft laws or legislative proposals to the institution for consideration from a children's rights perspective. These have included legislation concerning youth justice (OCO 2006), asylum and refugee law (OCO 2008) and family relationships (OCO 2014), all of which have an obvious and direct bearing on children's rights. Here, the advice aimed to strengthen the extent to which the legislation meets international human rights obligations. However, the Ombudsman for Children has also used its legitimacy to present observations to Government on legislative proposals with perhaps a less obvious impact on children's rights, such as in the area of spent convictions where the impact on children was highlighted (OCO 2009). The influence of the Ombudsman's observations has been evident in the various submissions made in the area of child protection, including legislative proposals that addressed sexual offences, safeguarding and human trafficking. In addition to making recommendations that strengthen the children's rights provisions in these laws – such as protecting from the risk of secondary victimisation and ensuring children are treated equally with regard to gender - the contribution of the Ombudsman for Children has served to identify the connections between the different pieces of legislation, highlighting the need for a consistent and integrated approach. In this way, the institution promoted a more coherent approach to the broad area of child protection, in line with children's rights, rather than improving the harmonisation of each individual piece of legislation with the Convention (OCO 2010).

There has been no systematic analysis of the impact of the Ombudsman's work in this area and this is clearly warranted to support claims as to institution's influence. Nevertheless, sustained focus on particular areas of concern over time has allowed the Ombudsman to track

the implementation of its recommendations as the legislation worked its way through Parliament. For instance, in 2009, the Ombudsman for Children made observations on civil partnership legislation, highlighting the need for the legislation to reflect children's rights and the reality of children's lives. These pieces could be seen as 'agenda setting' given that children might not otherwise have been the primary consideration in the political debate on these issues. The Ombudsman had highlighted how legislative proposals for civil partnership ignored the children living in these relationships and made recommendations for their best interests to be taken into account (OCO 2009 p. 47). When a later edition of the legislation came before the Ombudsman for comment, it was evident that the provisions had been amended in light of the recommendations previously made (OCO 2014).

In summary, then, it is clear that the Ombudsman for Children has used its statutory power to advise Parliament about the children's rights implications of both draft and operating legislation, and its soft power to advice and inform Government in a way that contributes to its 'thinking and clarification of various pieces of legislation' (OCO 2015, pp 6-7). The variety of issues that have been covered in the institution's submissions – from trafficking to court reporting, from child protection to gender recognition, from healthcare to adoption – illustrates both the range of areas where the law impacts on children's rights and the importance of ensuring that there is a dedicated office with the authority and the independence to make credible and informed observations on how to ensure the law is drafted and operates in harmony with international human rights obligations. In addition, the way in which the Ombudsman has carried out this function serves to link the different functions of the office in a strategic manner whereby, for instance, matters that are brought to its attention through the complaints function are used to illustrate the impact of the law on children's rights in submissions to Parliament. The Ombudsman's contributions in the area of child protection provide an excellent illustration of this point. For instance, when in 2006 the Ombudsman for Children made a written and oral submission to Parliament on child protection, addressing the need for reforms in the treatment of child witnesses in the criminal justice system, she noted that a confluence of important issues – a Supreme Court judgment, the enactment of legislation and the associated public debate on the issues - all indicated the need for a constitutional referendum to include explicit rights for children in the Constitution (OCO 2006).

The approach of the Ombudsman for children has highlighted the advantages of engaging with law and policy makers. First, as the above analysis shows, by drawing attention to the children's rights implications of proposed new laws, the institution can promote greater harmonisation between national law and the CRC. This has been achieved by the Ombudsman for Children making submissions on legislative proposals that shed light on their weaknesses or gaps from a children's rights perspective as well as making recommendations, in line with the CRC, as to how these might be addressed. In this way, the contribution of the institution to the law-making process reminds Parliament that its power is not unfettered. Even where the CRC is not part of national law, as is the case in Ireland, the Ombudsman for Children acts as a watchdog to ensure that its standards are met.

Second, in its advisory role to Government, the Ombudsman has become established as a trusted and authoritative source on children's rights issues. This has helped to raise its profile as a trusted and expert body on the issues within its remit. Finally, and particularly pertinent

to use of its discretionary and soft power, the approach of the Ombudsman for Children has helped to create a wider awareness of the implications for children's rights of legislative proposals that do not directly impact on children. While maintaining a wide lens, drawing on the CRC, the Ombudsman for Children has contributed to parliamentary debate on draft legislation that affects the rights and welfare of children, even though this may not have been anticipated by the drafters.

Although the Ombudsman for Children can clearly be influential in this area, it is not always successful in altering the course of legislative proposals or ensuring adequate consideration is given to the rights of the child. There are often competing considerations – the rights of parents or the due process rights of suspects for instance – and in some cases, the legislation being proposed serves a broader public interest imperative that might be inconsistent with a purely children's rights approach. Either way, as there is no duty on Parliament to report back to the Ombudsman on whether and to what extent the advice provided has been taken into account, it is not easy to track the effectiveness of the institution in this area. More generally, it is an important consideration that the Ombudsman for Children does not have unlimited resources to comment in detail on every legislative proposal. If the full harmonisation of national law with the CRC is to be achieved, therefore, more systematic reform of the parliamentary process should be pursued by the institution drawing, perhaps, on mechanisms introduced in other jurisdictions that seek to promote child impact assessment or indirect mechanisms of legal incorporation (Hoffman, 2021). The introduction of such mechanisms would go some way to remedying this gap, ensuring a greater level of transparency and accountability in the law-making process from a children's rights perspective. The experience and established credibility of the Ombudsman for Children in this area mean that it is well placed to use its soft power to advocate for such reform.

Complaints Handling and Investigations

In line with the international standards set out in the Paris Principles and the CRC Committee's General Comment No 2, the Ombudsman for Children has the power to receive complaints and conduct investigations, including of its own volition, into the treatment of a child. Described as a 'major power' (Martin 2004, p. 63), the institution can investigate complaints about any 'action' taken by or on behalf of a public body which appears to the Ombudsman following preliminary investigation, to satisfy one or more criteria. In particular, the Act requires that the action has or may have 'adversely affected a child' and separately, was or may have been, 'taken without proper authority', 'taken on irrelevant grounds', 'the result of negligence or carelessness', 'based on erroneous or incomplete information', 'improperly discriminatory', 'based on an undesirable administrative practice' or 'otherwise contrary to fair or sound administration' (s. 8). the Act does not prescribe the procedure to be followed in the investigation of a complaint, leaving it to the discretion of the institution to put such appropriate procedures in place. However, the Act (s. 6) does require that in the performance of the complaint and investigation function, the Ombudsman 'have regard to the best interests of the child concerned and shall, in so far as practicable, give due consideration, having regard to the age and understanding of the child, to his or her wishes'. Significantly, the Ombudsman for Children does not have to wait for a complaint to be received from a child to initiate an investigation, which can be done of its own volition where this is 'warranted' (Ombudsman for Children Act 2002, s. 10).

Where an action has been found to be contrary to sound and fair administration, the Ombudsman can recommend to the public body concerned that the matter be given further consideration, that measures are taken to remedy, mitigate or alter the adverse effect of the action or that the reasons for taking the action be given. No adverse finding will be made without the person impacted being given a right of reply, in order to ensure that fair procedures are followed, but in any event the recommendation of the Ombudsman shall be communicated to the parties. Martin (2004, pp. 66-67) notes that the approach set out in the Act is reflective of the fact that the Ombudsman's powers are not to be viewed as 'adversarial or confrontational', but instead and unlike the courts, are considered more in the vein of an 'inquisitorial, flexible and private process of inquiry'. At the same time, the Ombudsman cannot make binding findings or recommendations which may be said to fall short of international expectations (Rees 2010). Nonetheless, the Ombudsman has sweeping powers and can for instance (under s 14) compel a person to produce any 'document or thing' in their possession relevant to the investigation, making the institution a powerful force when investigating the actions of public bodies on behalf of children. Consistent with this authority, the Ombudsman can under s. 13(5) of the Act choose to issue a 'special report' if, for instance, 'the same complaints arise consistently, suggesting systemic faults' (Rees 2010, p 423). This acts as an important and explicit connection between the complaints function of the Ombudsman and the wider advocacy and promotion functions.

From the establishment of the Ombudsman in 2004, the complaint function has continued to grow and expand, doubling in numbers from 2005 (357) to 2007 (742), almost doubling again by 2011 when 1,393 new complaints were received. By 2019, the numbers had proven to be relatively consistent, year on year, with an approximate number of 1500 complaints received annually (OCO 2019). There is consistency too in the proportion of complaints submitted by parents – approximately 80% of those submitted - with children submitting an average of about 3% (OCO 2019). Finally, the complaints continue to cluster around a number of themes with 2019 figures showing a typical recent picture of the complaints profile, with education continuing to dominate, at close to half of all complaints received, health services attracting around 14% and family support and care about 20% (OCO 2019). Smaller numbers of complaints are made about housing, at just 5%, justice at 6%, and finance and welfare at 3%, (OCO 2019).

The substance of the complaints falls into several categories: First, they include complaints regarding decisions taken by public bodies, refusing children access to or determining children ineligible for particular services, supports, benefits or care programmes. In some cases, the decision (i.e. the refusal) is the subject of the complaint, while in others the matter of access is either unresolved or inconclusive. For instance, this might include a decision refusing a child access to school transport (OCO 2008), for which they consider themselves eligible; or failure to provide certainty, within a timely manner, with regard to a child's access to housing or to living supports (OCO 2008). In healthcare, this category includes delays accessing time and developmentally-sensitive services, such as speech and language therapy, psychology assessment and child and mental health services (OCO 2009). It might address the failure to share information, ensure proper record keeping and it can include situations where children do not receive the services to which they are entitled either because they do not meet the criteria or because the services they need are unavailable due to a lack of resources, staffing or regional variations (OCO 2007). The second category of complaints relates to situations

where the public body does not address or resolve a complaint in a satisfactory manner about the child's treatment. These types of complaints come to the Ombudsman for Children because the complainant's attempt to have them resolved locally by the public body has been unsuccessful. This may arise because the public body's complaints procedures are unclear or inaccessible (OCO 2008), because there is delay in addressing or resolving the complaint or where the outcome is considered by the complainant to be unsatisfactory or unfair. For example, in one instance, a school's handling of an allegation of inappropriate treatment by a teacher of a child demonstrated that appropriate procedures to govern the investigation of the incident by the school were not in place (OCO 2009).

Martin argued at the time that the Children's Ombudsman was established that the post holder would have to look beyond individual complaints and investigate, 'in a non-adversarial way, possible systemic weaknesses within public bodies, hospitals and schools' (2004, p 80). In fact, this has been a feature of the Ombudsman's approach in a number of ways. First, the Ombudsman has issued a number of Special Reports, arising out of individual complaints in the areas of child protection (OCO 2006a) and housing (OCO 2012a), for instance, drawing attention to systemic and structural problems in the implementation of national law and policy and making significant and detailed recommendations for improvements related to the consistency, transparency and co-ordination of services across the area. Second, in dealings with public bodies, it has sought to bring systemic issues of concern to their attention in order to address the stem of individual complaints continuing to arise. For instance, following a complaint from a child in foster care with profound special needs, the Ombudsman engaged throughout 2011 with the relevant authority as to how to translate the complaint into meaningful change for children and families (OCO 2011a). Clearly, bringing together a series of individual complaints helps to highlight the need for more structural reforms and helps to fulfil the Ombudsman's duty to promote, as well as to protect the rights of the child. Third, the Ombudsman has engaged in thematic reviews of complaints in order to identify broader issues arising from the individual complaints process, publishing learning annually in its reports to parliament.

The third approach used in this regard is a focus by the Ombudsman on how to support better decision-making and complaints handling by public bodies. In addition to drawing attention to positive experiences through the publishing of case studies, the Ombudsman published a guide to child-centred complaints handling in 2018. Informed by the experience of handling complaints and by international research on complaints mechanisms and children's rights standards like those set out in the European Guidelines on Child-friendly Justice (Council of Europe 2010), the Guidance sets out good practice in responding to complaints made by, or on behalf of, children (OCO 2018). The Guide details seven core principles - Openness and accessibility, best interests of the child, participation of children, transparency and communication, timeliness, fairness and monitoring and review. Combined with this, the Ombudsman has also made efforts to improve public administration in decision-making that impacts children. One illustration of this is the research commissioned by the Ombudsman in 2011 of a children's rights analysis of a number of complaints (Kilkelly, 2011). Shining the light of international children's rights standards on ten complaints exposed the lack of a child rights focus to the processes and decision-making of administrative bodies. The study also drew an important connection between the protection of children's rights and the function

of sound and fair administrative decision-making, highlighting the relationship between the different elements of the Ombudsman for Children's legislative mandate.

There is no doubt that the complaint and investigation power gives the Ombudsman for Children teeth insofar as it can adjudicate children's grievances while holding public bodies to account. However, the fact that the institution's resources are finite makes it essential that a strategic approach is taken in this area. The fact that the Ombudsman for Children's recommendations are not legally binding on public bodies makes it imperative that the soft power of influence and persuasion can be used effectively to push for systemic reform. Here, as elsewhere, an expansive approach to the use of statutory authority, drawn on the legitimacy of the institution, is key to the effectiveness of its approach.

The Ombudsman's Use of Soft Power

As the experience of the Irish Ombudsman for Children shows, it is important that national children's rights institutions use their powers creatively, using soft power where express statutory functions are not available or not effective. Even though the Ombudsman for Children's statutory mandate is expansive, the institution's integrity and standing has enabled it to advance children's rights in areas not strictly within its (investigatory) mandate. An excellent illustration of this is the approach of the Ombudsman for Children to the treatment of children in adult prison (St Patrick's Institution), which helped bring an end to the practice. At the time, children in adult prison fell outside the mandate of the Ombudsman for Children meaning that, unlike children in other settings, they had no access to the institution's complaints mechanism with respect to concerns about their treatment. This situation prompted the Ombudsman for Children to use its general authority under the legislation (s 7) to consult with children about their rights, to highlight children's rights issues of concern to them, to advise Ministers on matters relating to the rights and welfare of children, and to encourage public bodies to develop policies, practices and procedures that promote the rights and welfare of children. In the context of St Patrick's, the project was designed to hear directly from children about their experiences of their rights, to present these views to the authorities who would be given the opportunity to formally respond, in order to provide a much needed, children's rights perspective to the reform of their detention in Ireland. Following a creative process of engagement with children in St Patrick's, a report was published vividly capturing their experiences (2011). This stood in stark contrast to the reports of other inspection bodies of that time and prompted a change in approach, specifically by the Inspector of Prisons, who for the first time spoke directly to the children about their lived experiences. In addition to this cultural shift in the approach to monitoring the treatment of children in detention at a national level, the Ombudsman's report also had impact at an international level with the UN Committee against Torture, amongst others, expressing that it was 'gravely concerned' about the continued detention of young people in St. Patrick's. Combined with national advocacy, this helped to increase pressure on Government to end the detention of children in St Patrick's, a decision which began on a gradual basis in 2012, ultimately ending in 2017 when the prison closed.

A further example of this approach lies in the combined effect of the Ombudsman for Children's powers that have enabled a thematic approach to the work of harmonising law and policy with the Convention from time to time. Following on from the establishment of the Ombudsman for Children a concern that became the subject of sustained attention was the

absence of any procedure for child death review. This matter was first brought to the attention of Government by the Ombudsman for Children in 2007, where following a scoping review, a submission was prepared that highlighted the need to establish a child death review mechanism like that found in other jurisdictions. Having received a positive response, the Ombudsman then progressed to examine international practice and consult with key stakeholders on the matter. This culminated in a high-level seminar, in 2008, addressed by international experts, including the Commissioner for Children in New South Wales, and attended by various representatives of statutory bodies and agencies, designed to explore the model that would work best in Ireland. On foot of the recommendation made by the group, the Ombudsman produced an options paper setting out what aspects of child death were already being examined in Ireland and what issues should be considered in the context of establishing a single child death review mechanism. This paper was circulated to all key stakeholders, including the relevant Minister and in June 2009, the Ombudsman for Children presented the paper to a parliamentary committee with which it discussed its contents and recommendations. That year, the Government committed to establishing a mechanism for examining the deaths of children in care and in detention and although more limited in scope than that proposed, the development vindicated the initiative of the Ombudsman in taking on the issue notwithstanding that its approach in doing so did not fall neatly into any single statutory power. This work also illustrates a use of the institution's credibility to build consensus for reform on a difficult issue, across a wide stakeholder group (OCO, 2009).

Conclusion

There is clear guidance available at an international level on the standing and authority that independent national children's rights institutions must have if they are to promote and protect children's rights effectively. Building on research into the implementation of these standards (Sedletzki, 2012), this paper sought to widen our understanding of now just what such institutions can achieve but how they can maximise their potential to do so. It is fortunately the case that Ireland's Ombudsman for Children enjoys a strong and clear statutory mandate, with powers to investigate complaints against public bodies and advise government as to how best to achieve harmonisation of national law with the CRC. Operating largely in line with international standards, the Ombudsman has achieved legislative reform and system change across a wide variety of areas through the effective use of its statutory powers. While a comprehensive audit of the effectiveness of approaches used and the impacts achieved by the institution has not yet been undertaken, even this brief summary of indicates a worthy record of achievement.

What this paper illustrates, however, is that while the institution's express statutory powers are an important starting point to the goal of achieving children's rights protection, the full and effective implementation of children's rights requires a much more strategic and creative approach to the use of power. In particular, what this paper sought to show is that beyond or indeed combined with statutory power, the exercise of soft power – the power to influence decision-makers and generate buy-in to a shared objective - is critical to the process of bringing about change and reform in the interests of children's rights.

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The role of Ombuds institutions in defence of children and adolescents

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Adjunct Prof. & Commissioner at GSOC
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University College Cork

TOP 100

2021

Law



BY SUBJECT

- Ratification of the UNCRC - 1992
- Advocacy, research and the role of civil society - the Children's Rights Alliance (est 1995)
- Backdrop of child abuse inquiries
- Recommendation of the UN Committee following consideration of Ireland's first report in 1998
- 'Ombudsman' model chosen out of familiarity
- Ombudsman for Children Act, established as primary law in 2002

Emily Logan appointed Ireland's first Children's Ombudsman

President Mary McAleese has formally appointed Emily Logan as Ireland's first Children's Ombudsman.

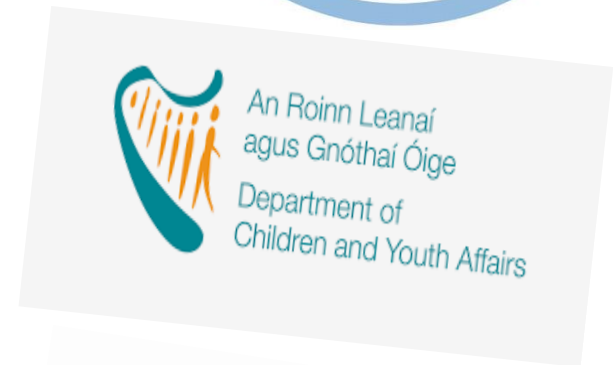
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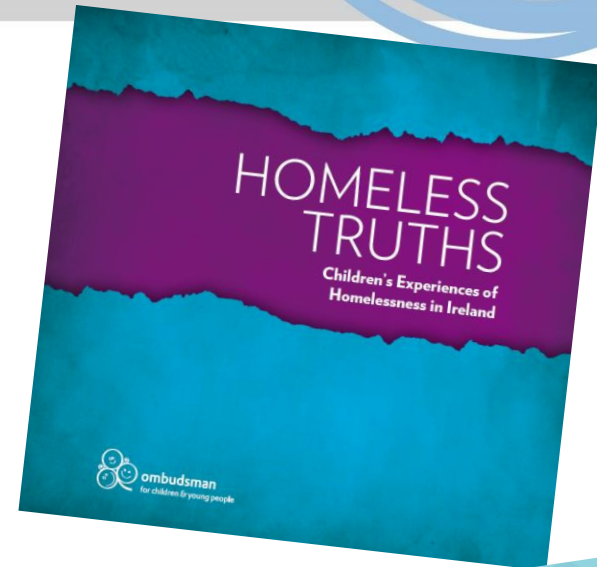
Incorporation of the UNCRC into Irish Law

- Ireland - a **written Constitution**, a dualist tradition
- UNCRC not part of domestic law, but some **sectoral incorporation** has taken place since ratification
- Strengthened political structures, including the creation of a senior cabinet **Minister for Children**, Government Department, and national strategy
- **Constitutional Referendum** in 2012 strengthened children's rights in the Irish Constitution



Powers of the Ombudsman for Children

- **Complaints:** against public bodies
- **Investigations:** own volition (systemic) investigations
- **Promotion and awareness raising:** CRC
- Independent advice and guidance to Government on draft legislation
- **Consultation** with children
- **Research** on children's rights
- **Soft power and influence**



The Big Ballot 2007

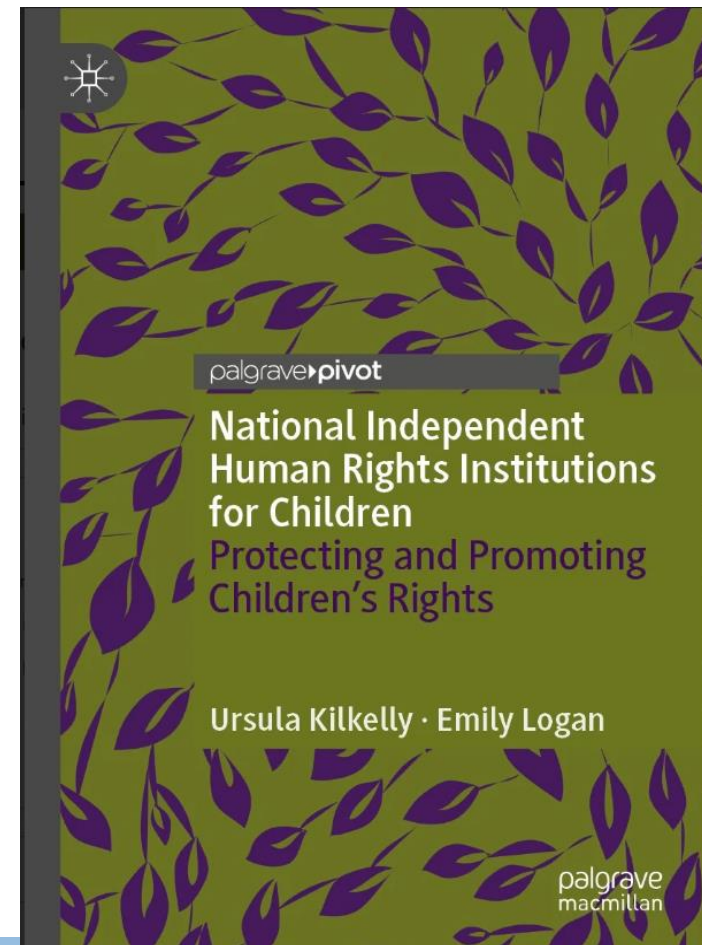
Barriers to the Realisation of Children's Rights in Ireland

by Dr Ursula Kilkelly, Senior Lecturer, Faculty of Law, University College Cork
Commissioned by the Ombudsman for Children

A CHILDREN'S RIGHTS ANALYSIS OF INVESTIGATIONS

by Dr Ursula Kilkelly, Senior Lecturer,
Faculty of Law, University College Cork
Commissioned by the
Ombudsman for Children

- UNCRC/Committee has had systematic and regular influence on Law and Policy in Ireland
- Incorporated into the OCO Act 2002, rights-based language
- OCO: Concluding Observations and General Comments used in public and media campaigns to inform and educate
- UNCRC provides normative framework but national institution has proximity and power to act as catalyst for enforcement
- OCO –active participant in **ENOC** (established 1997, permanent secretariat 2008) – sharing practices, research and lobbying
- Further collaboration across neighbouring jurisdictions eg, **BINOCC** established in 2004 – using collective weight to partner on mutually concerning issues



Limits

- No power to litigate or intervene as third party
- Exclusions: private institutions, police powers, matters before the courts

Achievements

- Grown in strength as an institution – increased **staffing** and financial **resources**
- **Examples** of achievements include: Constitutional change, legislative change in child protection, adoption. Policy change for children seeking international protection, for children detained in prison
- Increased **awareness of children's rights** and respect for their views, increased participation of children in public policy in particular health and education
- Use of **strategic influence** and **soft power** through **reputation, friends and allies** and **creativity!**

'All I have to say'

Separated children
in their own words



Young people in
St. Patrick's Institution

A report by the
Ombudsman for Children's Office

Considerations for Ararteko:

Ensuring all children and adolescents within
investigative remit – police custody, state care,
asylum system etc.,

Own volition powers

Initiation of legal action on behalf of children

Third party intervention in court – *amicus curiae*

Expanded remit to include private bodies or
institutions

Advice on draft legislation affecting children

TOP 100

2021

Law



BY SUBJECT