



**Paper submitted to the UN Committee on the Rights of the Child for its  
2005 Day of General Discussion on 'Children without Parental Care'  
by Children's Law Centre and Save the Children (NI)**

**June 2005**

**The Children's Law Centre is a voluntary organisation established in 1997. Its purpose is to use the law to promote, protect and realise children's rights. The Children's Law Centre is based at Philip House, 123-137 York Street, Belfast BT 15 1AB. Telephone 00 44 28 90 245704. Fax 00 44 28 90 245679. e-mail [paddykelly@childrenslawcentre.org](mailto:paddykelly@childrenslawcentre.org)**

**Save the Children is the UK's leading international children's charity, working to create a better future for children. It aims to help young people, their parents and professionals work with and understand the domestic and international laws which affect children. In Northern Ireland Save the Children is based at Popper House, 15 Richmond Park, BT10 OHB. Telephone 00 44 28 90 431123. Fax 00 44 28 90 431314. Email [s.chamberlain@scfuk.org.uk](mailto:s.chamberlain@scfuk.org.uk)**

**For further information about this paper contact**

**Sara Boyce**

**Children's Human Rights Advisor**

**Children's Law Centre**

**Tel: 028 90 245704**

**[sara-boyce@childrenslawcentre.org](mailto:sara-boyce@childrenslawcentre.org)**

## **Introduction**

This paper has been prepared by the Children's Law Centre and Save the Children in Northern Ireland in advance of the 2005 Day of General Discussion on Children Without Parental Care. It examines a small number of children's rights issues affecting looked after children, through the lens of the particular experience in Northern Ireland and, based on this analysis makes recommendations which it is hoped will have a broader relevance and applicability in international efforts to ensure that the rights of children living without parental care are respected.

The Children's Law Centre is a voluntary organisation established in 1997. Its purpose is to use the law to promote, protect and realise children's rights. Save the Children is the UK's leading international children's charity, working to create a better future for children. Together, CLC and SC (in NI) lead NGOs in the children and young people's sector in advocating for the implementation by government of international human rights standards as they apply to children and young people in Northern Ireland.

## **Over representation of children 'looked after' in custody**

International law is clear that children should be detained only as a measure of last resort and for the shortest period of time.<sup>1</sup> It also stipulates that deprivation of liberty should not be imposed unless the young person is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences *and* unless there is no other appropriate response.<sup>2</sup>

It is well documented that children in care and leaving care are extremely vulnerable and require a range of specialised supports to enable them to fulfil their potential and to make the transition to independent living. Yet there is evidence to indicate that in an increasing number of instances in Northern Ireland these young people find themselves shunted straight from the care system into the youth justice system, quite often for offences which do not appear to meet the level of seriousness required to justify custodial sentences under legislation.

Figures indicate that children from care are increasingly over-represented in terms of admissions to Juvenile Justice Centres.<sup>3</sup> In first six months of 2004 the numbers of children from 'looked after' care admitted to Juvenile Justice Centres rose from 4 out of a total of 18 (22%) (January 2004) to 21 out of a total of 36 (58%) (June 2004)<sup>4</sup>.

---

<sup>1</sup> Article 37 UN Convention on the Rights of the Child and Rules 1 and 2 of the UN Rules for the Protection of Juveniles deprived of their Liberty 1990

<sup>2</sup> Rule 17.1 (b) and (c) of the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules).

<sup>3</sup> Juvenile Justice Centres are part of the prison estate in Northern Ireland and are used for the detention of children aged 10 to 16 years of age, remanded or sentenced under the Criminal Justice (Children) (NI) Order 1998 or detained under the Police and Criminal Evidence (NI) Order 1989.

<sup>4</sup> Figures quoted in Kilkelly et al (eds) Children's Rights in Northern Ireland 2004. NICCY Belfast 2004. page 189.

Without a strategic and co-ordinated strategy to reduce the numbers of children who are in care moving into the justice system it seems certain that the numbers will continue to rise. Among the elements any such strategy should include are research and monitoring of patterns of movement from care into custody, training for staff in residential care homes aimed at reducing the movement from care to custody, training for magistrates aimed at reducing custodial remand from the care system and the development of a range of specialist and differentiated residential services for children in care (this issue is addressed below under provision of specialist care accommodation).

### **Age of Criminal Responsibility**

The issue of cross-over of children between care and custody in Northern Ireland is being further exacerbated by the current, totally inappropriate practice of placing 10-13 year olds in custody with older children. Legislation, still to be commenced, has been introduced that would allow for the provision of separate facilities for younger children who offend. This legislation, while welcome, can also be viewed as a way of side stepping demands for the age of criminal responsibility to be raised. The ongoing failure by the UK government to implement the recommendation from the UN CRC Committee that it substantially raise the age of criminal responsibility means that children as young as 10 years of age can be imprisoned.<sup>5</sup> The unacceptably low age of criminal responsibility that currently exists in many countries, not just the UK, has also been criticised by the UN Committee Against Torture.

Though the numbers of 10-13 year olds held in Juvenile Justice Centres admittedly remain a small proportion of the total numbers admitted, a significant number of these children are from 'looked after' care. For example, between 1 January 2002 and 31 December 2002 17 children aged 10-13 years were admitted to the Juvenile Justice Centre and of these 8 were from 'looked after care'.<sup>6</sup> While not disregarding the seriousness of the behaviour such young people were engaged in, the question has been posed as to whether different interventions might have prevented them from entering a criminal justice setting.<sup>7</sup>

Fundamentally, significantly raising of the age of criminal responsibility would ensure that young children in trouble are treated according to their best interests in a care environment, rather than a criminal justice approach. The UNCRC calls for states to establish a minimum age "*below which children shall be presumed not to have the capacity to infringe the penal law*" (article 40.3 (a)). The 'Beijing Rules' which offers the clearest guidance regarding the age of criminal responsibility does not fix an age but rather, in the Commentary to the Rules, states that the modern approach is to consider whether a child can live up to the moral and psychological components of criminal

---

<sup>5</sup> CRC/C/15/Add.188 paragraph 62 (a)

<sup>6</sup> figures cited in NICCY research, op cited at note 4 page 189

<sup>7</sup> Social Services Inspectorate and Education and Training Inspectorate Secure Care: An Inspection of Secure Accommodation at Shamrock House and Linden House Belfast DHSSPS 2002.

responsibility. However the Commentary also states that efforts should be made to agree a reasonable lowest age limit that would be internationally applicable. Such guidance in the form of a general comment would be extremely influential in ensuring that individual states amend their legislation in line with the spirit of the UNCRC.

### **Provision of specialist care accommodation**

A major review of residential services for children in Northern Ireland ‘Children Matter’, undertaken in 1998, found that while there had been a retraction of services in the residential children’s sector over the previous decade, a sustained demand for residential places continued to exist, with demand at times exceeding supply, including for children under 10 years of age.<sup>8</sup> The provision of a range of differentiated services was recommended including sub-regional specialist provision such as intensive therapeutic units for children with psychiatric/psychological needs or who present a significant risk to other children. Coupled with this the report recommended broadly based differentiated local provision such as short stay units coping with emergency admissions and homes to support the wider childcare system.

The lack of appropriate, specialist care accommodation undoubtedly contributes to the overuse of both secure accommodation<sup>9</sup> and the remanding of young people in care into the youth justice system. The following case, documented in a report by the Northern Ireland Human Rights Commission on the rights of children in custody, illustrates this point effectively. In October 2001 a 13 year old boy appeared before the court on minor charges of assaulting staff at a children’s home and causing criminal damage. The court was told that a number of factors, including solvent abuse, had led to the assessment that the teenager was a ‘classic candidate’ for a secure (care) accommodation order. However a shortage of suitable care accommodation resulted in the teenager being remanded to Lisnevin Juvenile Justice Centre. The judge, Mr. Perry commented that “[he does not] like the thought of boys of this age in Lisnevin- a place which is effectively a prison”<sup>10</sup> The woeful lack of specialist care provision meant that for this young boy the only options open for consideration, neither of which was appropriate or in the child’s best interests, and one of which was not available as an option, were secure care or a juvenile justice centre.

The Northern Ireland Human Rights Commission concluded that “*there is a need for a range of specialist and differentiated residential services to pre-empt the need for secure accommodation and/or custody for as many children as possible*”.<sup>11</sup>

---

<sup>8</sup> Social Services Inspectorate, Children Matter: A Review of residential child care services in Northern Ireland, 1998.

<sup>9</sup> The purpose of secure accommodation is to ‘restrict the liberty’ of a looked after child who absconds or who presents a danger to him/herself or others. CLC and SC (NI) have serious concerns that the use of ‘secure accommodation’ for ‘children in care’ breaches international human rights standards including the right to fair trial.

<sup>10</sup> Kilkelly Dr U et al In Our Care Promoting the Rights of Children in Custody Northern Ireland Human Rights Commission Belfast 2002

<sup>11</sup> ibid page 48

Without the provision of such a range of specialist and differentiated service provision for looked after children it is clear, as the earlier figures illustrate, that disproportionate numbers will continue to be inappropriately placed in secure accommodation and/or custody.

### **Right to independent advocacy and complaints mechanisms**

The child's right to be heard, to have their views given due weight and to participate in decision making represents a cornerstone of the UN CRC. Article 12 is unequivocal in stating that children have a right to be consulted in all matters affecting them and to have their views properly considered, in line with their age and maturity. It also places an obligation on government to ensure that children are provided with the opportunity and the mechanism to have their views heard.

General Comment No 5 outlines what is specifically required in terms of a right to independent advocacy services and complaints mechanisms: *“Because children’s special status creates real difficulties for them in pursuing remedies for breaches of their rights, there must be effective, child-sensitive procedures available to children and their representatives, including child-friendly information, advice, advocacy – including support for self-advocacy- and access to independent complaints procedures and to the courts with the necessary legal and other assistance”*.<sup>12</sup>

Looked after children have been identified as a particularly vulnerable category of children for whom advocacy services are especially important in enabling them to have their views and wishes represented. Yet there are many situations where children in care face obstacles in exercising their right to access advocacy mechanisms. These include failures to involve children in care in decisions being made regarding their care plans and decisions around their leaving care, as well as lack of provision of an effective complaints procedure.<sup>13</sup> Children in secure care are particularly vulnerable and NGO representatives working with these children have expressed concern about their ability to access advocacy services. While an Independent Representative (IR) Service for children in secure accommodation is operated by an NGO and provides a valuable service, it is not an advocacy service and operates only as a ‘go between’. It falls short of the provision of advocacy services on a statutory basis.

If a child or young person disagrees with the decisions which are being made or the services which are being provided for him/her it is important that he/she has access to an independent advocate. Recently introduced legislation in Northern Ireland, Children Leaving Care Act (NI) 2002 and the Leaving and Aftercare Regulations and Guidance is disappointingly silent on the issue of independent advocacy for children and young people leaving care. This is in contrast to similar legislation in England and Wales which

---

<sup>12</sup> CRC/GC/2003/5 paragraph 24.

<sup>13</sup> VOYPIC (2003) Regional Consultation on the Fostering Strategy, Foster Care: Views and Experiences of Young People. Belfast: VOYPIC

places advocacy services for young people on a statutory basis.<sup>14</sup> In order to fully comply with the provision of Article 12 there is a need for the administration in Northern Ireland to place advocacy services for children and young people in care on a statutory footing. All children and young people in care, without distinction, should be entitled to avail of this mechanism.

One of the most important safeguards against the violations of the rights of children in care is access to an effective complaints procedure, viewed by the UN Committee on the Rights of the Child as part of the overall implementation of Article 12. A pre-requisite to making a complaint is being aware that a complaints procedure actually exists. This appears to be a particular problem for children in care, exacerbated by their lack of knowledge as to where to go to access the information they need in child friendly form, or to get advice, advocacy and support. Children in care also need to be convinced of the independence and efficacy of any complaints mechanism that exists. NGO representatives in Northern Ireland have observed that children in care are either not aware of the existing complaints processes, or, where they are, have little confidence in them.<sup>15</sup>

The recently established Office of Commissioner for Children and Young People does have statutory power to take up individual case of complaint – however there is concern that while it may have the powers it may not always have the capacity to intervene around individual complaints due to lack of resources.<sup>16</sup>

### **Use of restraint**

The UNCRC protects children and young people from all forms of violence ( article 19) as well as specifically prohibiting the use of torture or other cruel, inhuman or degrading treatment or punishment ( article 39). A number of other articles, including articles 2,3,12, 25 and 39 are also of relevance when considering the issue of use of physical restraint against children in the care of the state. Furthermore the provisions of the UN Convention Against Torture prohibiting torture also apply to children and young people without distinction.

The use of physical restraint to contain or overpower a child in the care of the state is an emotive subject and one which raises a number of legal, ethical and practical issues. Clearly there are times when such intervention will be unavoidable in order to safeguard the child concerned or others placed at risk by the child's behaviour. Yet the use of methods of restraint against a child, while not viewed as constituting a breach of an adult's human rights or amounting to inhuman and degrading treatment, may well breach the child's rights, and herein lies the crux of the problem.

---

<sup>14</sup> Article 119 of the Adoption and Children Act 2002 which extends to England and Wales amends section 26 of the Children Act 1989 to provide a statutory basis for advocacy services for young people

<sup>15</sup> Op cited at note 4 page 19

<sup>16</sup> Ibid

In the last decade or so there have been a number of high profile inquiries into the use of dangerous or abusive measures in children's homes within the UK, all of which highlighted the use of restraint as a significant issue of concern. Despite these inquiries the whole issue of use of restraint against children continues to be a somewhat a grey area, lacking in legislative frameworks, policy guidance, training for staff concerned and research and monitoring into its use and impact.

Primary legislation makes little explicit reference to the use of restraint, with the issue being dealt with in most areas by Guidance and Regulation.<sup>17</sup> Furthermore there is no uniformity of approach across different sectors and no standard threshold indicating when such measures can legally be used.<sup>18</sup> A recent report by the National Children's Bureau drew attention to this lack of uniformity within the English context: *"It is clear that there is a huge disparity in policy and practice across services in the use of restraint on children. There are basic principles which are common to all: physical restraint as a last resort; the use of minimum force and for the shortest duration possible and that restraint must not be used as a punishment. Otherwise, there is little commonality. These differences stem not only from the legal and policy framework but from professional values and institutional culture.....given these dangers, it can be argued that there is a need to impose a single model of best practice across (children's) services"*.<sup>19</sup>

During its examination of the UK government in September 2002 the UN Committee on the Rights of the Child expressed concern at the frequent use of physical restraint in residential institutions.<sup>20</sup> It recommended the review of the use of restraint and solitary confinement in relation to children and young people in custody, education, health and welfare institutions to ensure compliance with the UNCRC, and in particular articles 25 and 37.<sup>21</sup>

Research by the Office of the Commissioner for Children and Young People in Northern Ireland (NICCY) specifically highlighted the serious concerns that exist in relation to the use of physical restraint on children in secure accommodation. The research confirmed the lack of specific legislation regulating the use of restraint on children and the lack of consistency of approach across different settings. With reference to the care setting a professional worker commented *"the existing combination of vague guidance, lack of regional training and accreditation and uncertain techniques does not provide sufficient safeguards"*.<sup>22</sup>

---

<sup>17</sup> The Department of Health, Social Services and Public Safety ( DHSSPS) in Northern Ireland is currently drafting guidance on restraint and seclusion which will underpin the development of policies and procedures regulating its use within the Health and Personal Social Services ( HPSS) or in services contracted by the HPSS. While this guidance is welcome it is the view of CLC and SC (NI) that separate and specific guidance for children and young people is required.

<sup>18</sup> The exception to this is the education sector where the use of restraint in schools by authorized persons is regulated by primary legislation and by detailed guidance.

<sup>19</sup> Hart D and Howell S Report on the use of physical intervention across children's services. NCB 2004. page 5.

<sup>20</sup> Op cited at note 6 paragraph 33

<sup>21</sup> Ibid paragraph 34

<sup>22</sup> op cited at note 4 page 91

There has been little attention paid to monitoring and evaluating the impact and indeed the efficacy of physical restraint used against children in the care of the state: *“There have been few studies of the safety and effectiveness of different restraint techniques, particularly in respect of children. Neither has the emotional and psychological impact of physical restraint, both on those undertaking the restraint and the children on the receiving end, been systematically researched.”*<sup>23</sup>

In light of the above there is an urgent need for a comprehensive independent review of the extent of use of restraint in respect of children in Northern Ireland, with a view to introducing a proper legislative framework and policy guidance. The review should also focus on the extent and methods of use of restraint, the evidential basis about what works when dealing with challenging behaviour in children and young people, training used and monitoring and reporting.

---

<sup>23</sup> Hart D and Howell S Report on the use of physical intervention across children’s services. NCB 2004. page 5.

**ANNEX 1      Suggestions from Children’s Law Centre and Save the Children (NI)  
regarding recommendations to be adopted by the CRC Committee  
following the Discussion Day on Children Without Parental Care.**

1. The disturbing phenomenon of cross-over of looked after children between care and custody, identified in the Northern Ireland context, may in fact be a more widespread one and as such requires further investigation. Evidence from this context would strongly suggest that contrary to the provisions of the CRC, custody is not always and only being used as a measure of ‘last resort’. The UN CRC Committee should recommend to state parties that they examine the extent to which this ‘leakage’ from the care system into the custody system exists as a problem within their countries and should develop co-ordinated, inter-departmental strategies to address it where necessary, in order to ensure full compliance of their law, policy and practice with the UNCRC.
2. The Commentary to the ‘Beijing Rules’ favours the introduction of an internationally acceptable and applicable lowest age limit for criminal responsibility. Such guidance in the form of a general comment would be extremely influential in ensuring that individual states amend their legislation in line with the spirit of the UNCRC. The UN Committee on the Rights of the Child should progress work on the development of a General Comment on the minimum age of criminal responsibility without further delay.
3. The UN Committee on the Rights of the Child’s General Comment No 5 is explicit in how it expects the provisions of Article 12 to be given effect with regard to children and young people’s access to independent advocacy services and complaints mechanisms. In order to ensure that such services are fully independent, child-sensitive and properly resourced they need to be established on a statutory basis for children in care and to this end the UN Committee on the Rights of the Child should urge all State parties that haven’t yet done so to adopt legislation to underpin such services. In addition to this, independent human rights institutions have a vital role to play in ensuring that mechanisms exist to challenge individual violations of children's rights and that children in care have access to these mechanisms. The UN Committee on the Rights of the Child should recommend to State parties that these institutions are fully mandated and resourced to fulfil this important function.
4. The UN Committee on the Rights of the Child should urge State parties to ensure that the provision of services for children in care is predicated on a clear recognition of the individual child as the holder of fundamental rights and freedoms and that service development and provision is guided by the best interests of the child as the primary consideration, rather than any resource or other considerations.
5. The UN Committee on the Rights of the Child should recommend to State parties that they ensure that the use of physical restraint against children is strictly legislated for, that detailed policy guidance is provided, that staff involved in deploying restraint are fully trained and that research and monitoring into its use and impact are conducted.