

# **ACJRD and the ACJRD Juvenile Justice Working Group**

29th November, 2018.

**Judge John O'Connor, 'Challenges in Adjudicating Capacity for  
Children to Participate in Court Proceedings - Theory and  
Practice'**

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*“Oliver tried to reply, but his tongue failed him. He was deadly pale, and the whole place seemed turning round and round.”* (Charles Dickens, *Oliver Twist*).

# United Nations Convention on the Rights of the Child 1989 [CRC]-part1

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- the benchmark for children rights
- children are rights holders.
- all the rights are interdependent
- a holistic approach towards children's rights
- Binding on Ireland –ratified 1992
- does not have an individual complaint procedure

# United Nations Convention on the Rights of the Child 1989 [CRC]-part2

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- **Article 3** Best interests of the child
- **Article 5** Evolving capacities - child's 'competence to exercise his rights autonomously may be subject to limitations and fall under the responsibility of others, such as parents'
- **Article 12** Voice of the Child & **Article 42A** of the Constitution
- **Article 40** right to a fair trial for children & special treatment for children in accordance with their age and maturity.
- **Child General Comment No 10** (2007) require a different treatment for children.
- **General Comment 20** - Adolescence is a life stage characterized by growing opportunities, capacities, aspirations, energy and creativity, but also significant vulnerability''

# Guidelines on child-friendly justice adopted by the Council of Europe

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A holistic approach to CRC

# Interpreting children capacity rights in the Justice system

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- Capacity is a legal test – ultimately a judicial decision,
- Historically law made few concessions to children- exception Doli Incapax
- Rule 14.2 of the Beijing Rules (1985) juvenile justice proceedings should be in an atmosphere of understanding in which the child can participate.
- Article 29n of the Constitution –can't individually enforce the rights but can be used to interpret existing Irish Law Conway -v- Ireland, the Attorney General & ors [2017] IESC Clarke J

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- European Court of Human Right - **ECHR**
  - Article 6 ECHR ‘guarantees the right of an accused to participate effectively in a criminal trial.
  - Bulger case *T. v. U.K.* (1999) Application No. 24724/94 and *V. v. U.K.* (1999) Application No. 24888/94,
  - age, level of maturity and intellectual and emotional capacities, of the child.
  - steps to be taken to promote his ability to understand and participate in the proceedings
  - **See also** Güveç against Turkey, Salduz against Turkey , Panovitz against Cyprus and S.C. against the United Kingdom

# Ireland

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- Historic neglect of children rights
- Professor Ursula Kilkelly & academic development in last 20 years
- Children Act 2001 - in compliance with CRC- but in Practice?
- Article 38 Irish Constitution – a fair trial
- The Children Court
- Custody should be a last resort
- Establishment of Irish Youth Justice in 2006



# Child-oriented justice system—working?

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- Encouragement of the well-being of the child
- Proportionate to the circumstances of the child and the offence
- Diversion - Garda Diversion Programme
- Cases should be dealt. more rapidly than adult criminal cases.?
- Substantial case law- two pronged test - - a fair trial eg SW -v- DPP [2018] IEHC 364 and Donoghue -v- DPP [2014] IESC 56

# Existing Child procedures in Ireland

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- Adversarial
- Child doesn't usually participate in court – Why?
- Child testimony under 14
- Criminal Procedure Act 1992 as amended
- Video link in practice

# Age and maturity of the of the child

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- The minimum age of criminal responsibility[MACR]
- Abolition of Doli Incapax and Section 52 (4) CA
- Section 75 Children Act – very important.
- Section 77 Children Act –Family Welfare Conference
- relationship between juvenile justice and children with specific vulnerabilities

# Children's Rights and Developmental Psychology-Part 1

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- Children up to 12 / 13 years of age do not perceive themselves as citizens who can be called to account for their behaviour by the state -Grisso,
- Large differences between the developmental maturity of individual children age 14-18. Age is a poor indicator of capacity.
- From the age of 15 the cognitive development of adolescents starts to finalise but some children have developmental delays, intellectual deficits, learning disabilities and emotional disorders,
- Wider environmental level, many children are exposed to violence, victimisation, domestic problems, care orders and substance abuse,
- A lack of life experience and knowledge of the justice system.

# Children's Rights and Developmental Psychology-Part 2

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- Children experience emotions such as nervous tension, insecurity and self-consciousness during a court hearing
- Children value being heard in cases that affect them (Kilkelly, U., 2010)
- G. -v- Director of Public Prosecutions [2014] IEHC 33 **par 92**- O'Malley J.
- Roper v. Simmons (2005) 543 US 551
- quality of legal representation is of special importance to children

# Fitness to Plead

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- Competence to stand trial (or the capacity to defend) is defined in Section 4(2) of the Criminal Law (Insanity) Act 2006
- Best Interests” doesn’t apply to the Criminal Law (Insanity) Act 2006
- Fitness to plead case DPP v- JM (No. 2) [2016] IEDC 12
- Recognise some children can’t participate even if fit to plead

# Requirements for effective participation

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- Enhancement of capacity- using certain conversation techniques in court for effective participation.
- Who should be intermediaries?
- Training of key personnel -lawyers, gardai, social workers & judges
- Involve parents
- Involve the child

# The Future - *A paradigm shift?*

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- Change the method of Cross examination
- Advocates Gateway Tool Kit - <https://www.theadvocatesgateway.org/toolkits>
- Ground Rule hearings - Active role of Judge
- Practice Directions
- Legal aid linked to accreditation for lawyers
- Legal Regulatory Bodies to draw up rules for children involved in the juvenile justice system