

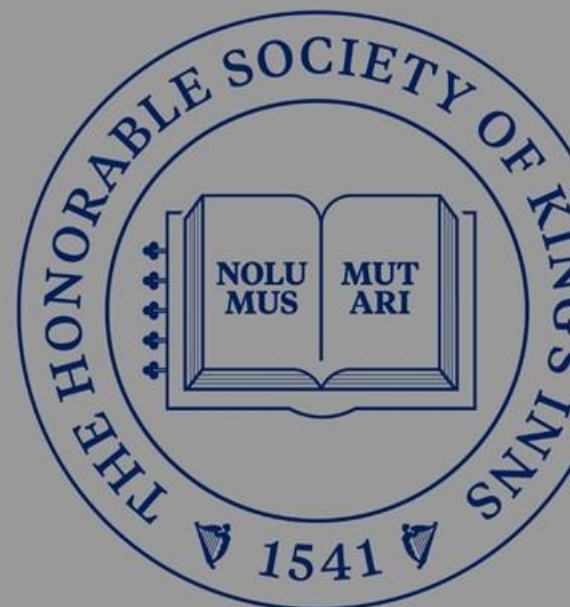
LAW STUDENTS' DEBATING SOCIETY OF IRELAND

- SESSION 192

INAUGURAL ADDRESS

AIKLING BRUEN, AUDITOR
25 MAY 2022

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INNS₁₅
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CUMANN DÍOSPÓIREACHTA MHC LÉINN DLÍ NA HÉIREANN

Law Students' Debating Society of Ireland

Founded 1830, King's Inns, Dublin

'Children in State Care and the Criminal Justice System'

AN ADDRESS

Delivered at the Inaugural Meeting of the 192nd Session
on Wednesday, May 25, 2022

Aisling Bruen

AUDITOR

His Honour Judge John O'Connor, *Judge of the Circuit Court*

PRESIDING

The Hon. Ms Bronagh O'Hanlon, *former Judge of the High Court*

Dr Niall Muldoon, *Ombudsman for Children*

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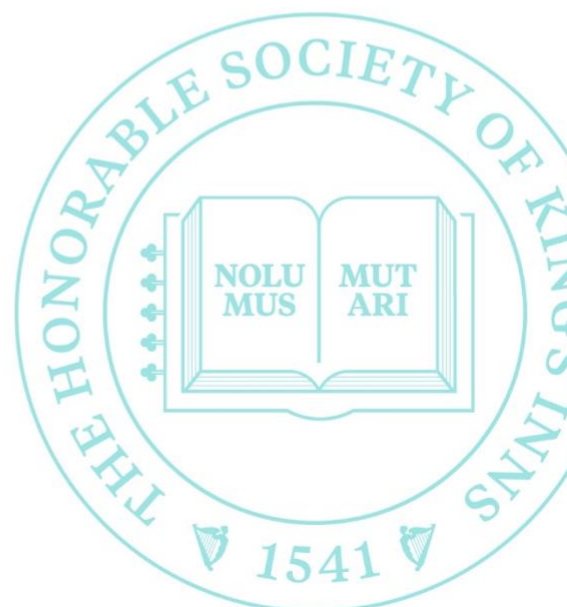
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Aisling Bruen

LSDSI Auditor, Session 192

Mr Chairman, Benchers of The Honorable Society of King's Inns, Distinguished Guests, and Members of the Law Students' Debating Society of Ireland (LSDSI), Ladies and Gentlemen:

At the outset, I would like to express my gratitude to the staff of King's Inns and Marcella Higgins Registrar for such immense encouragement and support to myself and all the students of the Inns throughout the academic year 2021-22. On behalf of Diploma students, I extend much appreciation to our course Coordinator, Ciarán Patton BL, for his unwavering guidance. I would also like to particularly thank the, Dr. Eimear Brown Dean of the School of Law, Mary Griffin CEO and David Curran Executive Assistant for organising and planning this meeting.

I am exceptionally grateful to His Honour Judge John O'Connor for chairing this evening's address, and to The Honourable Ms Bronagh O'Hanlon and Ombudsman for Children, Dr Niall Muldoon for responding.

I would also like to give a special mention to my colleagues on the LSDSI Committee who supported the facilitation of this year's programme.

Alas, I introduce the theme of tonight's address: -

'CHILDREN IN STATE CARE AND THE CRIMINAL JUSTICE SYSTEM'

INTRODUCTION:

I am going to open this address with a story, namely:

The Young Bike Enthusiast

There once was a young child (let's call them 'Child') who took a liking for a lovely, new, shiny bicycle which was locked to a lamppost just off Grafton Street. Looking around in a very "sketch" manner to see if anyone was looking, Child took heed of the moment's opportunity

being out of sight. With one swift pull broke the lock of the bike and cycled off. It was not long after cycling into the sunset, when a patrolling Garda car caught glimpse of much notable green puffer jacket. The guards stopped and called Child, asking where one purchased such a lovely bike. Unbeknownst to Child, who was acutely caught on CCTV, they began to tell the tall tale of their bike ownership. Fairly unimpressed by the lies being told to them, the Guards arrested; detained and charged child under the Children's Act 2001¹.

Those of us not far from criminal law lectures and tutorials, with the amazing lecturer that is Ciaran Patton, will know, or at least should know, that theft = crime. This is a relatively straightforward case: *the child committed an act of theft and as such will be tried in the juvenile justice system via the Children's Courts*².

But – plot twist: Child lost both parents to addiction and was placed into State care at the tender age of 5. While in State care, Child experienced multiple placements moves and a chaotic trajectory through the care system with very limited stability. There is a diagnosis of ADHD, an evident attachment disorder and recently Child began to self-harm. The current placement in which Child resides in is known by local gangs in the area and children living here are often targeted. It transpired that Child was encouraged to steal the bike to be affiliated with the gang. And, with an urgent want to belong, Child obliged.

Before moving into this evening's theme, how does one conceptualise the child in this story – do we see them as a 'child in need' or 'a young offender'?³

SETTING THE SCENE

This evening I am going to talk to you about “*children in State care and their contact with the criminal justice system*”.

For those of you not so familiar with family or child law, statutory care occurs when the State steps in to supply the place of parents. This is done in circumstances where it is determined that a child is not receiving adequate care and protection. There is both a legislative and constitutional onus on the State to care for children in need. The State is symbolically described within the “The Irish Constitution, 1937” (Bunreacht na hÉireann) as a ‘guardian of common good’, tasked with protecting the safety and welfare of children⁴. The responsibility of which is delegated to the Child and Family Agency – what we have come to know today as Tusla. In supplying the place of parents, Tusla⁵, acting on behalf of the State,

¹ See: <https://www.irishstatutebook.ie/eli/2001/act/24/enacted/en/html>

² James Austin and Barry Krisberg, 'Wider, stronger and different nets: the dialectics of criminal justice reform' (1981) 18(1) *Journal of Research in Crime and Delinquency* 165.

³ The question is paraphrased from: Barry Goldson's article – ‘`Children in need' or `young offenders'? Hardening ideology, organizational change, and new challenges for social work with children in trouble' *Child and Family Social Work* (2000) 5, pp255-265 – and will run throughout the course of this speech.

⁴ Article 42A <https://www.irishstatutebook.ie/eli/cons/en/html#article42>

⁵ See: www.tusla.ie

can apply to the courts to arrange for the placement of children into statutory care.⁶ Children living in State care represent a miniscule cohort in comparison to the general population. In any given year, there is on average between 5,500-6000 children living in statutory care.⁷

It is important to stress that majority of these children do not encounter the criminal justice system. However, there is a small cohort that do.

You might ask, why this is significant, given that, in relative terms, we are speaking of a number so few as to make it borderline irrelevant. But what we do know is that these children (while so few) are over-represented in both juvenile and adult prisons⁸. For example: the most recent figures from Oberstown Children's Detention Centre note 41% of children in its custody were either in care or had significant involvement with Tusla because of child-protection and welfare concerns⁹.

I commend Oberstown for collecting this data, as other than youth criminal detention stats, Ireland has very limited insight into the matter as a whole: we do not collect any reliable or consistent data on the numbers of children in care having cross-experience with the juvenile justice system, not just in terms of detention but also figures for children in care who come to the attention of the guards, those who are processed through the courts, youth diversion and probation programme's and for what reasons¹⁰. Nor are we collecting any data on the numbers of care-leavers post-care in adult prisons¹¹.

Given that there is a trend of over-representation internationally across all these aspects, in places like Scotland¹², Wales¹³, England¹⁴, and Australia¹⁵, one can make a comfortable

⁶ See: The *Child Care (Placement of Children in Foster Care) Regulations, 1995 (SI 260/1995)* and the *Child Care (Placement of Children in Residential Care) Regulations, 1995 (SI 259/1995)*

⁷ Figures sought from: Ruadhán Branigan & Ciarán Madden, *Spending Review 2020 Tusla Residential Care Costs (2020)* Department of Children and Youth Affairs

⁸ Nicola Carr and Paula Mayock, *Care and Justice: Children and Young People in Care and Contact with the Criminal Justice System*, Irish Penal Reform Trust (2019)

⁹ See: 2019 Data Report, accessed from <https://www.oberstown.com/campus-stats/>

¹⁰ See: Ibid. 7 and Children Acts Advisory Board, *Thematic Analysis of Irish Literature on Children in Detention and Out of Home Care in Ireland (2010)* – accessed from:

<https://assets.gov.ie/39959/78917d7f7bac49528a1752b5cefa740b.pdf>

¹¹ Ibid. 7

¹² See: Sam Armour, *Reducing the Overcriminalisation of Care-experienced Young People in Scotland: Towards a Model of Best Practice (2020)* University of the West of Scotland; The Scottish Parliament, 22nd Report: *Secure care and prison places for children and young people in Scotland (2019)* accessed from: <https://sp-bpr-en-prod-cdnepe.azureedge.net/published/J/2019/11/26/Secure-care-and-prison-places-for-children-and-young-people-in-Scotland/JS052019R22.pdf>

¹³ Ministry for Justice, *All Wales Protocol: Reducing the criminalisation of care experienced children and young adults (2022)* Welsh Government, Wales. Accessed from:

<https://gov.wales/sites/default/files/publications/2022-03/all-wales-protocol-reducing-the-criminalisation-of-care-experienced-children-and-young-adult.pdf>

¹⁴ See: Lord Laming, 'In Care, Out of Trouble' (2016) The Prison Reform Trust. Accessed from:

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/In%20care%20out%20of%20trouble%20summary.pdf> and, Rachel Blades, Di Hart, Joanna Lea, Natasha Willmott: *Care - a stepping stone to custody? The views of children in care on the links between care, offending and custody.* (2011) The Prison Reform Trust. Accessed from:

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/caresteppingstonetocustody.pdf>

¹⁵ Andrew McGrath, Alison Gerard, and Emma Colvin, 'Care-experienced children and the criminal justice system' (2020) *Australian Institute of Criminology* p2-14. Accessed from:

assumption that the same over-representation is occurring across-the-board here. But, to what extent will continue to remain uncertain until this information and deeper understanding is regarded as a necessity by the State.

To me thought, such limited insight into this matter to date remains unsurprising. In the grand scheme of things, children in care and care leavers in Ireland are predominantly a faceless cohort. And their experiences are quite often spoken of in reductionist ways, where the complicating factors influencing their trajectory in life are sided for numbers and statistics.

Only recently did the Minister for Children, Roderic O’Gorman, announce the commissioning of a longitudinal, qualitative study¹⁶ on the outcomes of care leavers. The project is quoted to be: ‘the most extensive and comprehensive examination of Ireland’s care system ever undertaken’ and is due to provide ‘new and important insights into the experiences of children in care and how they get on later in life’¹⁷. The commissioning of this research is in response to the Ryan Report which concluded with its recommendations in 2009¹⁸. We are now in 2022, a mere 13 year later and Ryan’s recommendations are finally being acted on. But it is being done with severe limitations, the study is so far silent on the critical issue of children and care-leavers in contact with the criminal justice system.

THE CONCEPTUALISATION OF CHILDREN IN STATE CARE

I return now to our young bike enthusiast. If you can recall the question posed earlier:

A ‘child in need’ or a ‘young offender’?

As professionals working with children, the semantics of words and how we speak about children, while exceptionally important, is less often considered. The conceptualisation of these young children within public discourse can have a massive impact in terms of the type of response and service provision children find themselves being met with.

Historically, the names of institutions/care homes and the labelling of children in State or religious care, dating right back to the Poor Laws¹⁹, were beyond what we would ever consider appropriate in the present:

https://www.aic.gov.au/sites/default/files/2020-09/ti600_care-experienced-children-and-the-criminal-justice-system.pdf

¹⁶ See: <https://www.gov.ie/en/press-release/d7c8d-minister-ogorman-launches-largest-ever-examination-of-the-lives-of-children-in-care-and-adults-who-were-in-care-as-children/>

¹⁷ Ibid. 16

¹⁸ Justice Sean Ryan, Commission to Inquire into Child Abuse (CICA) 2009 Vol 1 – 5

¹⁹ *Poor Relief Act 1838*

We had Homes for Ragged Boys, Homes for Strays, an array of ‘reformatory’ schools for ‘ragged’ and ‘pauper’ children²⁰.

One would think that these outdated social constructs of children in care had long left our repertoire. But we continue to narrate the lives of these children in completely unacceptable ways - quite often traumatic experiences and behaviours, whether criminal or not, are decontextualized and dematerialized within the public discourse.

To give recent examples of this, I have taken from various recent court, academic and media reports: where children in State care, specifically those who came to the attention of the juvenile justice system, were referred to as ‘unruly’, ‘delinquent’, ‘disturbed’ and ‘out of control’²¹. In one court report, the duty to care for these children is referenced as ‘burden’ on the State and noted that nobody could ‘envy the task’ of social workers and care workers working with these children²². Even currently on Tulsa’s website does it state that residential care, which is one type of care provision, is reserved for the most ‘challenging’²³.

Do we fully realise that children hear and acutely understand how we speak about them? On this point, I reference a quote from a 16-year-old girl with care-experience:

What I’ve heard from different police officers... it’s like, ‘...you’re in care, kids in care are always on drugs, kids in care always make themselves unsafe, kids in care always self-harm’. So, they sort of put a title on kids in care like they’re something bad²⁴

There are often loaded calls for these children to be ‘held to account’²⁵. Yet, when we put faces and histories to these labels what we are frequently met with is children who are victims; scarred by neglect, emotional, physical, and sexual abuse coming primarily from communities marred by poverty, marginalisation, addiction, crime, and many other social ills all jumbled into one, big complex mess. While basic theories of causation and reductionist aetiologies are problematic, the connection between them and the child’s presentation is undeniable and cannot be reasonably ignored²⁶.

²⁰ For list of these historical institutions, see: <https://www.gov.ie/en/publication/89e43-chapter-2-institutions/>

²¹ See reports such as: Colm Keena, ‘Disturbed teenager fails in appeal against special care order’ *The Irish Times* 27th April 2019; The Law Society’s Law Reform Committee, *Rights-based Child Law The case for reform* (2006) The Law Society, Ireland; Dáil Éireann Debate - Thursday, 30 Apr 1998 Vol. 490 No. 4; Dr. P. O’Connor ‘Child Care Policy: A Provocative Analysis and Research Agenda’ *Administration*, Vol. 40, No. 3 (Autumn 1992), 200-19

²² *T.D. and Others v Minister for Education* [1998] IEHC 173

²³ Full quote – ‘most [children] are placed in Residential Care because of their behaviour is too challenging to be managed in any other care setting.’ Accessed from:

<https://www.tusla.ie/services/alternative-care/residential-care/what-are-childrens-residential-services/>

²⁴ Rachel Blades, Di Hart, Joanna Lea, Natasha Willmott: *Care - a steppingstone to custody? The views of children in care on the links between care, offending and custody*. (2011) The Prison Reform Trust.

²⁵ See example: *CK v Child and Family Agency* [2019] IEHC 635

²⁶ *Ibid.* 3

WELFARE VERSUS CRIMINAL JUSTICE

A 'child in need' or a 'young offender'?

This is the juncture where specific tension unfolds, when children in State care present with complex needs and high threshold behaviours. In particular, where these children come to the attention of the criminal justice system, there is an interesting grappling that occurs between the provisions of welfare and criminal justice. To give a very brief overview of these paradigms:

On one hand we have the criminal justice approach which is deeply rooted in classical theory; the emphasis here is predominantly on the criminal act and heeds limited consideration to the individual and their circumstances²⁷.

The welfare approach, on the other hand, gives much more focus to the individual and their circumstances – the belief is that those who offend have been subject to various risk factors and these risk factors contribute to offending behaviour²⁸.

In practice these approaches are often viewed through separate prisms and attempts to define their parameters result in distinct and separate legislation governing child welfare and youth crime²⁹. Which, in theory, makes perfect sense:

A child who commits an act of theft will be met with a criminal justice approach via the Children's Act, 2001³⁰.

While a child who engages in self-harm will be met with a welfare approach via the Child Care Act, 1991³¹.

Simple, right?

Unfortunately, the reality less black and white and much more convoluted; given that a small cohort of children in State care, like the one depicted at the start of this address, often cross the parameters of these systems frequently due to their multiple and complex needs³².

If we respond solely to the child from a construct of the 'young offender,' the 'bold' and 'difficult' child we invertedly abdicate liability for the 'child in need' and simultaneously

²⁷ Judge John O'Connor 'Reflections on the Justice and Welfare Debate for Children in the Irish Criminal Justice System' (2019) Irish Judicial Studies Journal Vol 3

²⁸ Ibid. 27

²⁹ Ibid. 8

³⁰ Ibid. 1

³¹ See: <https://www.irishstatutebook.ie/eli/1991/act/17/enacted/en/html>

³² On cases of such complexity, MacMenamin J advocates in *HSE v. DK (a minor)* [2007] IECH 488 that there should be 'a hybrid form of civil/criminal proceedings' – as sourced from *DPP v AB* [2017] IEDC

proclaim the virtues of individual responsibility³³. This is evidently problematic for children in care, who are also victims with specific needs. In creating the conditions within which the well-being of these children is jeopardised and then denouncing their wrongdoings with limited reference or response to the prevalence of their trauma goes beyond problematic and becomes somewhat reprehensible.

A 'child in need' or do a 'young offender'?

Whatever side we land on will determine the type of provision to which the child is met with and may mark that child's future indefinitely. Is fair to criminalise a child for issues which were also the basis for them needing welfare in the first place?³⁴ And what about those stuck between the grapple of welfare and criminal justice, where appropriate intervention has yet to be decided on? While we debate which box the child fits into, their future dangles in the balance.

Aside from being a 'child in need' or a 'young offender', these are real lives - real children, with names and experiences.

CALL FOR ACTION

I speak on this evening's address as Auditor of the Law Students Debating Society of Ireland, but also as a care-leaver and feel exceptionally grateful for the opportunity to make some key recommendations to such an imperative audience:

(1) Identification of the matter:

My first recommendation is to identify the extent of contact between children in care/care-leavers' and the criminal justice system. Research into this matter, in an Irish context, remains at a complete deficit³⁵. In moving forward with a research agenda, we should prioritise 'need to know' information with a conscious focus on how best to improve the outcomes for these children. There may be students in the audience this evening with an interest in this matter, if so know that such inquires will be most welcomed.

(2) Conceptualisation of the child:

Secondly, in terms of negative connotations towards children in care, understanding that these labels can have a detrimental impact long-term. More thought should be given to how we conceptualise these children – let us not forget their legal status and definition as foremost a 'child.'

³³ Ibid. 3

³⁴ A question posited in the *DPP v AB* [2019] IEHC 214, as sourced from Judge John O'Connor 'Reflections on the Justice and Welfare Debate for Children in the Irish Criminal Justice System' (2019) *Irish Judicial Studies Journal* Vol 3

³⁵ Ibid. 8

(3) The need for specialised services:

The next recommendation is regarding legislation, policy, and practice. As highlighted this evening, there are a small number of children who ‘crossover’ these systems (criminal justice v welfare) frequently³⁶, those who do not neatly fit into one or the other box. It is these children, with multiple and exceptional needs, which are at risk of being sent ‘out-of-state’ for specialised care. This practice alone is evident that Ireland is desperately in need of more specialised services to work with the cohort of children carrying significant trauma. We should be able to cater to the needs of these children here, in-State and not abdicate responsibility to other jurisdictions.

Services in child trauma and mental health are chronically understaffed with limited priority lists for children in State care. Access to relevant assessments and supports can take over a year³⁷. And with the recent announcement bed closures in the Child and Adolescent Mental Health Services³⁸ it seems Ireland is regressing even further in the provision of adequate services.

(4) Judicial Leadership

Lastly, judicial leadership will be essential in promoting a ‘collaborative’ court model for juvenile justice courts where both the ‘needs and deeds’ of crossover children are addressed³⁹. And, to be most effective in achieving this purpose, juvenile courts must comprehend the impact of trauma in the lives of children *and* employ resources and interventions that address child traumatic stress⁴⁰.

³⁶ Claire Fitzpatrick, *Achieving justice for children in care and care-leavers* Howard League What is Justice? Working Papers 14/2014

³⁷ Eoghan Murphy, ‘Hundreds of children waiting over a year for a mental health appointment in Ireland’ *News Talk* 21st July 2021

³⁸ Mary Regan, ‘Government says CAMHS bed closures will impact those awaiting care’ *RTE News* 22nd May 2022

³⁹ Cashmore, J. (2011) ‘The link between child maltreatment and adolescent offending: Systems neglect of adolescents’, *Family Matters*, 89, pp 31–41.

⁴⁰ Kristine Buffington, Carly Dierkhising and Shawn Marsh *Ten Things Every Juvenile Court Judge Should Know about Trauma and Delinquency* (2010) Reno: National Council of Juvenile and Family Court Judges.

CONCLUSION

I will now conclude this evening's Address with some food for thought; namely a piece taken from the Howard League Blog⁴¹ that is entitled:

Why are we still failing children in care?

(Day, 2018)

Would I accept what the care system offers for my own children? Absolutely not.

If my daughter were placed with a family that she had never met, in an area that she did not know, sent to a school that she had not attended before, expected to 'fit in' to a family that was not her own, would I accept this? If my daughter then struggled to cope, and started running away... would I call the police and force her to return...?

If, as a result of this, she started to display challenging behaviour, would I move her to another place, to go through the whole traumatising process again? Would [I allow] this be repeated on many, many occasions, with ultimately my daughter being labelled a criminal, a runaway, difficult to engage, untrustworthy of those in authority, angry, violent, having mental health problems etc?

I can honestly say, absolutely and definitely not. As a parent I would fight hard, with all of my physical, emotional, and mental strength to protect my daughter from this. I would offer her a place of safety, warmth... near to her family and friends, so that she could continue with her life and feel as little disruption as possible.

If she misbehaved or struggled to cope and ran away, she would not be labelled as problematic or punished. Instead, she would receive support, love, care and warmth, and the opportunity to speak about whatever was worrying/bothering/concerning her.

This is the job of a parent. And we should expect no less from the corporate parent.

Thank you.

⁴¹ As sourced from: Dr. Anne-Marie Day, *Experiences, and pathways of children in care in the youth justice system* (2021) HM Inspectorate of Probation.

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