

# **DO CHILDREN HAVE A RIGHT TO MENTAL HEALTH?**

**The annual lecture of  
The Wales Observatory on Human Rights of Children and Young People  
delivered by the Honourable Mr Justice MacDonald  
at the College of Law and Criminology, Swansea University  
on 20 July 2017**

## **INTRODUCTION**

I have chosen this evening's topic because it seems to me that the mental health of children and young people is one that has increasingly entered the public consciousness over recent months and because it is one that is, in any event, plainly of pressing importance.

I have also chosen this topic because it seems to me that it highlights a more general issue that has been a persistent problem with children's rights, namely the extent to which children's rights are sufficiently enforceable.

Before I turn to examine the substantive matters that I wish to talk about this evening it will be apparent that many of the issues that surround the question of the extent to which children have a right to mental health are political in nature, and therefore outside my remit.

Notwithstanding that some in the media would have us believe otherwise, we judges do not make political decisions nor do we engage in politics. The role of the judge is to interpret and apply the law that our democratically elected Parliament lays down. As the current Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd said at a speech at the Mansion House last year:

“Whatever may be the speed or nature of changes in matters political, the judiciary does not comment. The business of the judiciary is not politics. It is the business of upholding the rule of law.”

In the circumstances, in seeking to illuminate this topic, I confine my observations to the legal question of whether children have a right to mental health and to the related question of the difficulties in enforcing any such right. Given the scope of the question I have chosen, this lecture will necessarily be a broad overview of a very complex topic.

## **THE IMPORTANCE OF MENTAL HEALTH FOR CHILDREN**

It may be said that the importance of mental health to children is young people is entirely self-evident and, therefore, to steal from Rousseau, I hope that I may

proceed without seeking to prove the importance of my subject.<sup>1</sup> If you will permit me however, I make the following points by way of introduction to it.

Mental health is, of course, important to individual children and young people. Sound mental health is a vital for physical health and is central to a child or young person's ability to succeed in school, in higher education, in work and in society. In short, to locate it in the language of child welfare, a child or young person *needs* sound mental health. Addressing mental health problems early in life can lead to decreases in emotional and behavioral problems, decreases in functional impairment, and a lower likelihood of contact with police and the criminal justice system. It can also lead to improvements in social and behavioral adjustment, learning outcomes, and school performance.<sup>2</sup>

If left untreated, mental disorders can impede all aspects of individual health, including emotional well-being and social development, leaving children and young people feeling socially isolated, stigmatised, and unable to optimise their social, vocational, and interpersonal contributions to society.<sup>3</sup> Within this context, the mental health of children and young people is also, self-evidently, important to society.

As I observe in a chapter I have contributed to a book shortly to be published by the Royal College of Psychiatrists, the concept of children's rights recognises that upon the birth of the child that child becomes part of the human family, benefiting from all the rights attendant on his or her equal status in human society. The corollary of this position is that human society benefits from the addition of the child as a member of that society.

However, such benefit is dependent upon the child developing to his or her full potential physically, emotionally and educationally under the protection of the human rights conferred upon him or her. The development of children and the development of society are thus intrinsically and, indeed inseparably, linked. In a very real sense, the health of our society is dependent upon the physical, emotional and educational health of our children. As was recognised in the American case of *Brooks v Brooks*<sup>4</sup> in 1861, the sound development of the child in all aspects is indispensable to the good order and the just protection of society.

Thus, as Shulman observes,<sup>5</sup> in the Lockean tradition, what is due to the child is defined, in a general sense, by basic developmental needs and, more

---

<sup>1</sup> Jean-Jacques Rousseau *Le Contrat Social* (1762) p.1.

<sup>2</sup> The National Institute for Healthcare Management Research and Education Foundation (NIHCM) *Children's Mental Health: An Overview and Key Considerations for Health System Stakeholders*, Washington, DC: NIHCM; 2005. NIHCM Foundation Issue Paper.

<sup>3</sup> McKewan K, Waddell C, Barker J. Bringing children's mental health "out of the shadows." *CMAJ*. 2007;176:471–472.

<sup>4</sup> *Brooks v Brooks*, 35 Barb at 87-88

<sup>5</sup> Shulman J, (2014) *The Constitutional Parent*. Yale p7.

particularly, by the developmental needs of the child destined from birth to be a member of the community at large. Whilst Shulman articulates this argument within the context of what is due to the child from the parent, by extension society itself has a responsibility for ensuring the development of the child not only to the benefit of the individual child, but also to ensure the child is able, in due course, to assume his or her place in that liberal, democratic society such that it can flourish to the benefit of each and all its members, including that child.

## CURRENT ISSUES

Moving away from high principle, these points can be equally well demonstrated in more graphic terms by the statistics in relation to the mental health of children and young people in this jurisdiction.

With respect to the impact on children and young people themselves, the Department of Health Government report *Future in Mind*<sup>6</sup> in 2013, citing figures from 2004,<sup>7</sup> records that 9.6% or nearly 850,000 children and young people aged between 5-16 years have a mental disorder, 7.7% or nearly 340,000 children aged 5-10 years have a mental disorder and 11.5% or about 510,000 young people aged between 11-16 years have a mental disorder. This means in an average class of 30 schoolchildren, 3 will suffer from a diagnosable mental health disorder.

The most common diagnostic categories were conduct disorders, anxiety, depression and hyperkinetic disorders.<sup>8</sup> Within this context, the report highlights the fact that over half of all mental ill health starts before the age of fourteen years, and seventy-five per cent has developed by the age of eighteen.<sup>9</sup> The report also highlighted the fact that children with mental health problems are at greater risk of physical health problems, they are also more likely to smoke than children who are mentally healthy and that children and young people with eating disorders and early onset psychosis are particularly at risk. The report goes on to note that mental health problems not only cause distress, but can be associated with significant problems in other aspects of life and affect life chances and that all forms of mental disorder are associated with an increased risk of disruption to education and school absence.<sup>10</sup>

---

<sup>6</sup> DOH/NHS England 2013.

<sup>7</sup> Green H, McGinnity A, Meltzer H, Ford T, Goodman R (2005). *Mental health of children and young people in Great Britain, 2004*. A survey carried out by the Office for National Statistics on behalf of the Department of Health and the Scottish Executive. Basingstoke: Palgrave Macmillan.

<sup>8</sup> Green H, McGinnity A, Meltzer H, Ford T, Goodman R (2005). *Mental health of children and young people in Great Britain, 2004*. A survey carried out by the Office for National Statistics on behalf of the Department of Health and the Scottish Executive. Basingstoke: Palgrave Macmillan.

<sup>9</sup> Murphy M and Fonagy P (2012). *Mental health problems in children and young people*. In: Annual Report of the Chief Medical Officer 2012. London: Department of Health.

<sup>10</sup> Meltzer H, Gatward R, Goodman R, Ford T (1999). *The mental health of children and adolescents in Great Britain*. The report of a survey carried out in 1999 by Social Survey Division of the Office for National

The report highlights the fact that research on the longer-term consequences of mental health problems in childhood adolescence has found associations with poorer educational attainment and poorer employment prospects, including the probability of ‘not being in education, employment or training’.<sup>11</sup>

With respect to the impact on society more widely, the report makes clear that in addition to the impact on the individual child and family, mental health problems in children and young people result in an increased cost to the public purse and to wider society. The report cites a study by Friedli and Parsonage<sup>12</sup> which estimates additional lifetime costs of around £150,000 per case, or around £5.3bn for a single cohort of children in the UK. Costs relating to crime are the largest component, accounting for 71% of the total, followed by costs resulting from mental illness in adulthood (13%) and differences in lifetime earnings (7%). The report avers that in 2012/13, it is estimated the total NHS expenditure on dedicated children’s mental health services was £0.70bn.

## FOUNDATIONS

Within this stark context, as Feldman suggests, the idea at the root of human rights thinking is that there are certain rights which are so fundamental to society’s wellbeing and to peoples’ chances of leading a fulfilling life that governments are obliged to respect them, and the international order, whatever that term may now mean, must protect them.<sup>13</sup>

In the context of the patent benefits to children, and to society more widely, of good child and adolescent mental health, the question arises whether children have a substantive *right* to mental health that supports those patent benefits? If so, how do we properly articulate that right and can such a right be enforced?

### *Domestic Legislation*

In Wales, the National Health Service (Wales) Act 2006 s 1 requires the Welsh Ministers to continue the promotion in Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of Wales. In England, pursuant to s 1 of the Health and Social Care Act 2012 the Secretary of State for Health has a duty to continue to promote in the physical and mental health of the people of England and in the prevention, diagnosis and treatment of physical and mental illness.

---

Statistics on behalf of the Department of Health, the Scottish Health Executive and the National Assembly for Wales. London: The Stationery Office and Green H, McGinnity A, Meltzer H, Ford T, Goodman R (2005). *Mental health of children and young people in Great Britain, 2004*. A survey carried out by the Office for National Statistics on behalf of the Department of Health and the Scottish Executive. Basingstoke: Palgrave Macmillan.

<sup>11</sup> Goodman A, Joyce R, Smith JP (2011). The long shadow cast by childhood physical and mental health problems on adult life. *Proc Natl Acad Sci* 108(15): 6032-6037.

<sup>12</sup> Friedli L, Parsonage M (2007). *Mental Health Promotion: Building an Economic Case*. Northern Ireland Association for Mental Health.

<sup>13</sup> Feldman, D. *Civil Liberties and Human Rights in England and Wales* (2002) Oxford, pp 34-35.

Both statutes require the respective governments to make provision for health services. Within this context, the NHS in Wales and in England makes provision for child and adolescent mental health services (CAMHS), providing services that work with children and young people who have difficulties with their emotional or behavioural wellbeing, and specialist CAMHS for children who are suffering from severe or complex mental health conditions that are not amenable to treatment by community CAMHS. I of course do not wish to suggest that these are the only sources of mental health support for children. Education services, children's social services and the Health Visiting service are other examples of mental health support for children. However, for my purposes it is the law that makes provision for the services I have outlined that is important.

Beyond this, a number of other pieces of domestic legislation are relevant to the mental health of children and young persons. The Mental Health Act 1983 articulates the law concerning the assessment, treatment and rights of people with a mental health disorder. The Mental Capacity Act 2005 applies to young people in the last two years of their minority and allows best interests decisions to be made on their behalf where it is demonstrated that they lack capacity for the purposes of the Act. The effect of ss 17(10)(c) and 17(11) of the Children Act 1989 means that a local authority has a duty to safeguard and promote the welfare of a child suffering from a mental disorder of any kind.

### ***The ECHR***

The enactment of the Human Rights Act 1998 brought the cannon of rights encompassed by the ECHR into the core of our domestic law and allowed those dealing with cases involving children in this jurisdiction to take full advantage of its provisions in those cases. In determining whether we can articulate a right to mental health for children, the Human Rights Act 1998 plays a key role in the context of the domestic legislation that I have just outlined.

By the terms of the Human Rights Act 1998 s 3(1), so far as it is possible to do so, the statutes governing the provision of mental health services and the safeguarding of mental wellbeing that I have outlined must be read and given effect in a way which is compatible with Convention Rights. Further, by the terms of s 6(1) of the Human Rights Act 1998 it is unlawful for a public authority engaged in providing the mental health services mandated by those statutes to act in a manner incompatible with a Convention right.

Within this context, the Art 8 right to respect for private life is supremely relevant to the question of whether a child has a right to mental health.

It is well established that the right to respect for private life under Art 8 of the ECHR encompasses the concept of mental health. The ECtHR has repeatedly

emphasised that the concept of respect for private life includes respect for the ‘physical and psychological integrity of a person’.

In *Bensaid v United Kingdom*,<sup>14</sup> in comments endorsed in the House of Lords by Lord Bingham in *R(Razgar) v Secretary of State for the Home Department*,<sup>15</sup> the ECtHR observed as follows:

“Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world...The preservation of mental stability is in that context an indispensable precondition to the enjoyment of the right to respect for private life.”

This sounds very much like a right to mental health, albeit one that is an element of, and derived from another, wider substantive right, namely the right to respect for private life. At the very least, the right to respect for private life is a right that seeks to protect and preserve the mental health of the individual.

Further, in accordance with well-established general principle and as made clear in *YF v Turkey*,<sup>16</sup> Art 8 encompasses a positive right to protection of physical and psychological integrity. The positive obligations inherent in Art 8 have, traditionally, been relatively widely drawn. In *Stubbings v United Kingdom* as follows:

“It is to be recalled that although the object of Art 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: there may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves.”<sup>17</sup>

Within the context of mental health, this positive duty has found expression in compelling State parties to act in a manner that will prevent actions and events that may give rise to mental trauma, such as ensuring effective criminal and civil sanctions against child abuse, as in *Stubbings*, or deprecating the failure to provide any effective sanction against date rape, as in *MC v Bulgaria*.<sup>18</sup>

---

<sup>14</sup> (2001) 33 EHRR 205.

<sup>15</sup> [2004] 2 AC 368.

<sup>16</sup> (2004) EHRR 715 at 33.

<sup>17</sup> (1996) 23 EHRR 213 at [60].

<sup>18</sup> (2005) 40 EHRR 459.

A failure of a local authority to provide a house to a claimant may amount to a breach of Art 8 where provision of a house was necessary to secure the claimant's physical and psychological integrity and restored her dignity as a human being and will give rise to a positive duty to make housing provision.<sup>19</sup>

Within this context, it is also surely arguable that Art 8 will require the state not only to desist from actions which would have an adverse impact upon an individual child's mental health to such an extent that such actions may be said to be a disproportionate interference in the child's right to respect for private life, but to take positive steps to promote mental health in circumstances where mental health is a crucial aspect of a child's Art 8 right to respect for private life.

### ***The United Nations Convention on the Rights of the Child***

Where else may we derive assistance in determining whether a child has a right to mental health? The obvious omission in what I have said so far is the absence of any reference to the United Nations Convention on the Rights of the Child. It is that instrument to which I now turn.

One can, I think, detect that over the past twenty-five years there has been a gradual, if sporadic, trend towards greater reference being made to the UNCRC at appellate level and, although less commonly, within first instance proceedings at High Court level.

Just as domestic law must be interpreted in light of the obligations imposed by the ECHR as give effect in domestic law by the Human Rights Act 1998, the ECHR, and the rights it enshrines, must be interpreted in accordance with the United Nations Convention on the Rights of the Child.<sup>20</sup> This provides what has been called "*jurisprudential space*" to significantly improve the protection of children's civil rights using the ECHR.<sup>21</sup>

Further, the higher domestic courts have likewise made clear that domestic statute law and common law must be interpreted in a manner that does not infringe, and which promotes the rights of children as enshrined in the UNCRC.<sup>22</sup> The domestic courts have also made clear that public authorities

---

<sup>19</sup> *R (Bernard) v LB Enfield* [2002] EWHC 2282 (Admin).

<sup>20</sup> See *Al Adsani v United Kingdom* (2001) BHRC 88 at 103, *Sahin v Germany*; *Sommerfeld v Germany* [2003] 2 FLR 671 and *Juppala v Finland* [2009] 1 FLR 617 amongst others.

<sup>21</sup> Van Bueren, G. *Child Rights in Europe* (2007) Council of Europe Publishing, p. 23.

<sup>22</sup> *Smith v Secretary of State for Work and Pensions* [2006] 1 WLR 2024, *ZH (Tanzania)(FC) v Secretary of State for the Home Department* [2011] UKSC 4, *Hunter and others v Canary Wharf Ltd*; *Hunter and Others v London Docklands Corporation* [1997] AC 655 and *R (on the application of Axon) v Secretary of State for Health* [2006] 1 FCR 175.

exercising administrative discretion must have regard to the United Kingdom's obligations under the UNCRC.<sup>23</sup>

Within this context, which articles then, of the UNCRC might be said to support a substantive right to mental health for children and young people?

Art 6(2) of the UNCRC provides that States Parties shall ensure to the maximum extent possible the survival and development of the child. The right to survival and development is not limited to a physical perspective but about promoting a life of right quality compatible with the dignity of the child.

The concept of development as applied to children is not simply about preparing a child for adulthood but requires the provision of optimal conditions in the child's life at all times during childhood. Within this context, as Van Beuren has made clear, the right of development refers to a level of health and development of the individual child which enables to the child to benefit from the exercise of all the other rights of the child. It is almost axiomatic that this must include the child's mental health.

Art 24 of the UNCRC stipulates the child's right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health. It is a matter of note that Art 24(2), which particularises aspects of this right, does not single out mental health as an aspect of the duty to pursue full implementation of the right. Indeed, it is a notable feature of some rights instruments more widely that mental health is often 'forgotten' aspect of a child's health.

However, the list contained in Art 24(2) is non-exhaustive.<sup>24</sup> Further, other articles make clear that, in speaking of a child's health, the Convention contemplates both the child's physical and mental health.

Within this context, Art 25 of the UNCRC requires States Parties to recognise the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health to a periodic review of treatment provided, Art 17 of the UNCRC requires States Parties to ensure the child has access to information aimed at the promotion of his or her physical and mental health and Art 27(1) articulates the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Also of note in this context, Art 12 (1) of the Covenant of Economic, Social and Cultural Rights enshrines a right of everyone (including children) to the enjoyment of the highest attainable standard of physical and mental health.

---

<sup>23</sup> *D v Home Office* [2006] 1 All ER 183 and *R (on the application of MXL and others v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin).

<sup>24</sup> Newell, P. and Hodgkin, R. *Implementation Handbook for the Convention on the Rights of the Child* (2008) 3<sup>rd</sup> Edn. UNICEF).



Perhaps the most explicit indication that the UNCRC articulates a child's right to mental health is Art 39. Art 39 provides that:

“States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflict. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child”

Art 39 is supplemented by similar provisions in the Optional Protocols on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict be perverse if that right restricted only to children.

## **A RIGHT TO MENTAL HEALTH?**

Having regard to what I have said about the ECHR and the UNRCR, I suggest that there are solid foundations for an argument that children have a substantive right to mental health. Once again, at the very least, the right to respect for private life under Art 8 read with the relevant rights under the UNCRC is a right that seeks to protect and preserve the mental health of the individual child.

To bring together the strands using some examples, having regard to the formulation of Art 8 in *Bensaid*, with respect to a child who has suffered abuse in a residential placement as the result of an inappropriate placement or breach of regulations designed to safeguard the child, leading to frank and chronic long term mental illness, it would be relatively straightforward, subject to the question of causation, to argue that this constituted a breach of their Art 8 right to private life in circumstances where mental health must also be regarded as a crucial part of that private life.

Further, it may be possible to argue that there is a positive obligation under Art 8 to provide treatment in respect to a child with mental health issues. As made clear in *Botta v Italy*,<sup>25</sup> such a positive obligation will exist under Art 8 where there is a direct and immediate link between the measures sought by the applicant and the applicant's private and/or family life.

In the same way a failure of a local authority to provide house to a claimant may amount to a breach of Art 8 where provision of a house was necessary to secure the claimant's physical and psychological integrity and restored her dignity as a human being and will give rise to a positive obligation to make housing provision,<sup>26</sup> it may be said that where there is a direct link between the need for

---

<sup>25</sup> (1998) 26 EHRR 241.

<sup>26</sup> *R (Bernard) v LB Enfield* [2002] EWHC 2282 (Admin).

treatment and the child's right to physical and psychological integrity under Art 8 this will give rise to a positive obligation to provide such treatment.

Thus, it could be argued that it is a breach of the Art 8 right to respect for private life of a particular child where a local CAMHS has failed, after the requisite assessment, to provide to that individual child the course of treatment with respect to the child's mental health mandated by that assessment in circumstances where that treatment would have secured the child's physical and psychological integrity and restored his or her dignity as a human being.

The argument in respect of the existence of a positive obligation is reinforced by the terms of Art 39 of the UNCRC, which plainly provide support for the argument that it would be a breach of a child's right to respect for private life under Art 8 for the State to fail to provide to a child the treatment that child required to ensure the child's psychological recovery from abuse. That is of course if the point were taken.

Even though Art 39 of the UNCRC places an obligation (in obligatory language) on State parties to take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse, it is in my experience rarely, if ever, cited in support of arguments seeking ensure that the therapeutic and other services necessary for children who are found to have suffered significant harm are provided by local authorities.

In the circumstances, beyond the moral and philosophical justification for such a right, founded upon the seminal importance to the individual child and to society of good mental health, I would contend that it is eminently arguable that there is a legal foundation for what can be termed a right to mental health in the legal instruments that I have discussed.

## **SOME CAVEATS**

Some significant caveats must however, be levelled. First, some caution is required with respect to the question of a positive obligation.

As was also pointed out in *Botta*, in order to determine whether positive obligations under Art 8 exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation. Within this context, and historically, the ECtHR stopped short of holding that there is an obligation under Art 8 to provide medical treatment at any specific level.<sup>27</sup> Within this context, the domestic courts have been reluctant to interfere with the decision by a health authority in respect of the allocation of a limited budget, even where

---

<sup>27</sup> *Tysiac v Poland* (2007) 45 EHRR 947 and *R (A) v West Middlesex University Hospital NHS Trust* [2008] EWHC 855 (Admin). And see also *N v United Kingdom* (2008) 47 EHRR 885 at [44].

a child's life expectancy is in issue.<sup>28</sup> This is, in particular, likely to limit the ability to use any right to mental health to address the stark demographic and epidemiological issues that I set out earlier, as distinct from addressing individual cases, although achieving the latter will, or course, slowly begin to achieve the former.

Second, the concept of mental health and the nature of mental health conditions cover a very wide spectrum. That spectrum runs from severe mental illnesses such as schizophrenia all the way through to low level anxiety and depression. Whilst for an individual child the latter can, subjectively, be felt to be as debilitating as the former, the arguments I have outlined are likely to be easier to apply to children laboring under the former rather than the latter.

The wide spectrum of mental health conditions that may beset children also gives rise to a potential, and counter-intuitive problem with seeking to articulate a right to mental health for children. That is the potential problem of 'medicalisation'. Human rights are capable being enforced. Indeed, where human rights are breached it is to be hoped that there is enthusiasm for enforcing them so as to obtain relief for the person who is the subject of the breach. However, if one articulates a right to mental health for children then one must also, I think, take care to ensure that erroneous application of that right does not lead to the unnecessary 'medicalisation' of children's psychological wellbeing.

Third, there is a potential problem of enforceability. It is widely accepted that children are entitled to certain fundamental rights carrying the force of international law. However, with respect to some rights, there remains a stubborn distinction in practice between children's *entitlement* to specific rights and the ability of children to enforce those rights.<sup>29</sup> To be of real value to children, the rights articulated by international and regional legal instruments must, in concert with domestic legal provisions and procedure, be capable both of effective practical application and of effective enforcement, so as to maintain the integrity of those rights and to achieve proper redress on those occasions when they are violated. As Fortin observes, this leap from the theoretical to the practical presents considerable difficulties.<sup>30</sup>

These issues may impact on our putative right to mental health. The key issue is that the child's right to mental health is not articulated expressly. Rather it is derived from the interpretation of a right to respect for private life and this is, for many, difficult, conceptually, to recognise as a right to mental health. Exacerbating this difficulty is the fact that the rights of children enshrined in the UNCRC that support or themselves articulate the right to mental health likewise

---

<sup>28</sup> *R v Cambridgeshire District Health Authority ex p B* [1995] 2 All ER 129.

<sup>29</sup> See Van Bueren *The International Law on the Rights of the Child* (1998) Martinus Nijhoff, p 378.

<sup>30</sup> Fortin, *J Children's Rights and the Developing Law* (2005) 2nd edn, Cambridge, p 27.

do not expressly articulate such a right. In addition, those articles of the UNCRC tend to be expressed in declaratory rather than obligatory language, Art 39 being a notable exception.

To be enforceable, the precise nature and extent of a legal right in question must be capable of being ascertained with certainty. The more Delphic or declaratory the article or articles said to enshrine the right in question the less certain will be its legal scope and an absence of certainty over the scope of a right will militate against its consistent enforcement by the courts. This has led Wellman to question the moral and legal reality of social and welfare rights.<sup>31</sup> Certainly, these issues make the legal enforcement of a substantive right to mental health, as opposed to a more abstract right to psychological integrity as an element of the right to respect for private life, potentially harder to achieve.

However, the biggest caveat with respect to enforceability that must be levelled is a more prosaic one. It arises out of what in my view is the biggest challenge with respect to each and every right of the child, namely the question of how, practically and on the ground, a child gains 'access' his or her human rights. How is a child whose rights have been breached to know he or she has rights, to know that those rights have not been respected, to know that they may seek relief and to know where to go and who to talk to about achieving this end. This, above all other difficulties, limits the efficacy of any right to mental health for children. It is also why the 'Children's Legal Centre' initiative being pursued by the Observatory are so important.

## CONCLUSION

All that said, these difficulties, challenging as they may be, should not detract from the fact that Art 8, interpreted by reference to the rights enshrined in the UNCRC, does protect the psychological integrity of children in circumstances where preservation of mental stability is an indispensable precondition to the enjoyment of the right to respect for private life. In this context, I would argue that the child can be said, in broad terms, to have a right to mental health.

Problems of recognition, application and enforcement remain. I am afraid I do not have the answers to them and it is for invaluable organisations such as yours to examine these difficulties and discover ways to address them. The Observatory's 'Children's Legal Centre' initiative is one of the ways of achieving this. However, I hope that I have demonstrated during this lecture, the starting point is that the answer to the question posed in the title of this annual lecture is a *qualified* "yes".

20 July 2017

---

<sup>31</sup> Wellman, C. *The Proliferation of Rights: Moral Progress of Empty Rhetoric?* (1999) Westview Press, pp. 20-29.