26TH ANNUAL NATIONAL PROSECUTORS' CONFERENCE – 15 NOVEMBER 2025

BRIGHT LINES AND BLURRED EDGES – SOME REFLECTIONS ON RECENT LITIGATION CONCERNIGN THE CHILDREN ACT 2001

Remy Farrell SC

Many of you will be aware that there has been a significant amount of litigation in the last couple of years concerning the operation of the Children Act 2001. It would be impossible to undertake a comprehensive review of the judgments that have emerged in the time available. Therefore, I want to concentrate on one relatively narrow issue that has been a common thread through most of these cases – namely the idea of a bright line distinction that is inherent in any legislative provision that is predicated on age.

It is to state the obvious to note that the law is replete with age limits of various sorts. The entitlement to vote, drive and run for public office is limited by a lower age threshold. Relatedly, many activities will have an upper age threshold – most notably mandatory retirement thresholds.

In the context of the criminal law concerning children age limits are particularly important, firstly, in the context of defilement offences and the age of consent more generally and, secondly, insofar as age is the predicate basis for the suite of substantive and procedural measures set out in the Children Act 2001.

What is perhaps less often considered is the essentially arbitrary nature of any age limit. By this I mean that when a person turns 18 and is thereby entitled to vote they are probably none the wiser and no better informed than they were the day before. Similarly, they may be no more able to hold their drink although they are now entitled to buy alcohol freely. Although their level of maturity will not be noticeably greater than it was 24 hours previously they are now subject to the full rigours of the criminal law.

It is in that sense that I describe age limits as representing bright line distinctions that are innately arbitrary in nature. This arbitrariness should not necessarily be regarded as problematic in and of itself – after all there isn't really any other coherent way that society can draw such delineations.

However, I think that it can be fairly said that whilst the law is capable of drawing these bright lines with conspicuous clarity the Children Act 2001 has been significantly less

nimble at negotiating the transitions between differing legal states – most notably in the case of the *aged out* offender – i.e. someone who has turned 18 during their participation in the criminal process.

In that context it is a remarkable fact that in the last 2 years a substantial number of cases have come before the Supreme Court that touch in this issue in different ways. That is the topic that I want to address today.

The first case I want to mention is *C.W. v. The Minister for Justice and Equality and Ors* [2023] IESC 22. This was a case concerning the defilement offence under Section 3 of the Criminal Law (Sexual Offences) Act 2006 – i.e. defilement of a child under the age of 17.

In light of the Supreme Court's judgment in *C.C v. Ireland* [2005] IESC 48, [2006] 4 IR 1 a defence of honest mistake as to age was available. However, Section 3(5) of the 2006 Act imposed a reversed burden on the accused on the question of knowledge of age. More controversially this burden was expressed to apply on the balance of probabilities – i.e. the accused had to show as a matter of probabilities that he had been mistaken as to age.

The core issue in *CW* was whether or not the imposition of a legal burden of this sort was constitutionally permissible or whether it infringed the presumption of innocence to an impermissible degree. Much of the argument in the case concerned a debate as to whether knowledge of age was properly construed as an element of the offence or was more properly considered to be something in the nature of special defence of the sort discussed in *DPP v. Heffernan* [2017] 1 IR 82. There had been some earlier (if somewhat obscure) authority on the point in the context of a similar provision concerning the unlawful sale of mass cards – *McNulty v. Ireland* [2015] 2 IR 592.

In the High Court ([2022] IEHC 336) Stack J, with admirable clarity and succinctness, concluded that this was simply a bridge too far and amounted to an impermissible interference with presumption of innocence and struck down the provision. The Supreme Court did likewise albeit at considerably greater length and by way of a joint judgment of O'Donnell CJ and O'Malley J in which they both explained why they agreed as to result (they upheld Stack J) but why they disagreed as to the route to that result.

In passing I should say that the concept of a joint disagreeing judgment is a peculiar one. Whilst it sets out what necessarily ends up being an academic debate in great detail it may be debatable as to its utility to practitioners (as distinct from academics). It strikes me that the primary purpose of such a joint judgment is to avoid the other members of the court from having to express a view as to the underlying debate – in simple terms its real purpose may be to avoid the matter coming to a vote.

In any event, for present purposes the judgment contains some useful commentary on the nature of age limits as a delineating feature – specifically the following passage in relation to the Section 3 offence:

> *…the line now drawn by the law is one between a serious criminal offence and entirely lawful permitted activity which is the right of the person to engage in without State interference. That sharp line is crossed in a single day when the child reaches the age of 17.*

The Court considered that because the offence covers both the predatory older paedophile and consensual activity with those of roughly the same age the requirement for clarity was all the more important.

Interestingly, the Court hinted that a different analysis might apply to the Section 2 offence (i.e. defilement of a child under 15) on the basis that there was no similarly bright line distinction with that offence. Rather the transition as between sex with a child under 15 and over 15 was one between two different criminal acts as opposed to a transition between a criminal act and a lawful act.

Although this might have represented a basis upon which the imposition of a legal burden in the context of the Section 2 offence might have been justified the Oireachtas in fact chose to repeal it as well in light of the judgment in *CW*.

Although *CW* is really a case about the presumption of innocence it highlights the fact that all delineations of age are essentially arbitrary. Sex with a person under 17 is a serious indictable offence which may become entirely lawful a day later when the child turns 18.

None of this is to say that such arbitrary delineations are impermissible per se. Rather it is only delineations and differentiations that are both arbitrary *and* invidious that are potentially problematic. This is because they may be seen as contravening the constitutional guarantee of equal treatment under the law.

That is essentially the issue that arose in *M and A v Ireland* [2024] IEHC 52. Both M and A had been charged with murder shortly before they reached the age of 18. They aged out during the course of the proceedings resulting in a situation whereby they were now exposed to the full rigours of the mandatory life sentence for murder. No issue of culpable prosecutorial delay arose in the case.

The sentence for murder is to be found in Section 2 of the Criminal Justice Act 1990 – i.e. mandatory imprisonment for life. This provision does not apply to children as a matter of implication in light of Section 156 of the Children Act:

> *No court shall pass a sentence of imprisonment on a child or commit a child to prison.*

Thus, the court is at large in sentencing a child for murder and, as a matter of common law, can impose any sentence up to an including life imprisonment.

A and M argued that their sentence was not dependent on their degree of culpability or age at time of offence. Rather it was now entirely dependent upon their age at time of sentencing. The contended that this was both arbitrary and invidious.

This was because two people guilty of literally the same offence (i.e. co-accused) with identical levels of responsibility would potentially get radically different sentences depending not on their level of culpability or the harm done but rather by reason of when they were charged and sentenced.

Simons J identified this differentiation based on age as arbitrary which, of itself was not necessarily constitutionally problematic. However, in the context of an equality challenge the issue became whether the differentiation was objectively justifiable. He considered it was not on the grounds that two persons identically situated but for age as of the date of sentence would be treated radically differently. He considered that there could not be any justification for such a policy and, in the absence of the statute having addressed this issue, no such policy was in any event discernible.

What is most notable about the statutory provisions that were in play in *A&M* is the extent to which they did not expressly address this issue. Rather, as I note above the resultant sentence appeared to arise more as a matter of implication than as an expression of any clear legislative policy. In that sense it was not clear that there was a coherent policy behind the differentiation – the impression was more one that the resulting disparity was an artefact of the overall legislative scheme that had not been clearly thought through.

Although I don't think that there is any empirical data on the issue, I think that it is fair to observe on an anecdotal basis that it had long been a feature of practice that an accused charged with murder with their 18th birthday approaching tended simply to plead guilty in order to avoid the prospect of a mandatory life sentence. In other words, the issue here was a fairly well embedded feature of criminal practice.

That being so it is perhaps somewhat surprising that the point was only raised as recently as *M&A*. It should also be observed that the challenge in *M&A* was pursued in a rigorous manner and took full account of recent Supreme Court jurisprudence in relation to constitutional equality cases – i.e. *Donnelly v. Minister for Social Protection* [2022] IESC 31.

It was in pointed contrast to many other constitutional challenges concerning criminal statutes that often offer little by way of analysis or rationale save for generalized assertions of unfairness or the contention that legislation might have provided for something else. I would suggest that the challenge in *M&A* should be considered by any practitioner contemplating a constitutional challenge – in my view it represents a prime example of how such cases should be brought.

Relatedly practitioners need also to familiarize themselves with the recent pronouncements of the Supreme Court in *Galvin v. DPP* [2025] IESC 35 which suggests that a much stricter approach will be taken in the future in relation to issues of prematurity.

If I am correct to observe that the sentencing provisions for children in relation to murder suffered from a lack of clarity it may also be said that this is something of a feature of the Children Act more generally. It is particularly problematic in the context of attempting to understand what procedural provisions apply to those who have aged out. In that regard I would offer the view that, for a piece of legislation concerned with children and their engagement with the often drawn-out criminal justice process, it pays remarkably little attention to the question of transition from the state of childhood to that of adulthood. Its failure to directly address such liminal cases is all the more noteworthy when it is considered that such transitions (i.e. aging out) are more or less inevitable in a large number of cases.

Little assistance is to be gleaned from the terms of the Act itself in negotiating such changes. The definition of a child is singularly unhelpful in this regard:

> *…"child" means a person under the age of 18 years;*

The definition does not indicate if the question of age is to be considered as of the time of the offence or the time of charge or the time of sentencing.

As a matter of necessary implication it can be said that many of the sentencing provisions only really apply to children if they remain children as of the point of sentencing. For example, Section 96 enjoins the sentencing court to consider the impact of removing child from the family home, the impact on education and similar matters. These are considerations that don't really apply to an aged out person.

But there remained room for lively argument as to the applicability of more innately procedural provisions to the aged out child. The most significant of these concerned Section 93 and the question of whether the accused is entitled to anonymity in the course of the proceedings. Section 93 imposes reporting restrictions in relation to:

> *"…proceedings before any court <u>concerning a child</u>"*

Again, the wording of this provision is not hugely instructive. Does it mean a child as of the time of offence, charge or sentence?

That issue was considered in *Independent Newspapers v. I.A.* [2018] IEHC 120. McDermott J considered that Section 93 was intended to apply to child at the time of the relevant court appearance. Therefore, as a matter of logic, if the child turned 18 in the course of the proceedings they would lose the benefit of the section from that point on. In other words, the aged out child was not subject to anonymity.

Although this was as logical an interpretation of the section as any it necessarily resulted in somewhat anomalous results. For example, an accused who was a child on the first day of trial couldn't be named in light of Section 93. Where the child turned 18 on the second day of the trial they could, albeit that there could be no publication naming them or connecting them with the events of the first day.

Happily, some clarity has been brought to this area by recent cases – most notable *DPP v. PB* [2025] IESC 12. In that case the accused had aged out before his appeal was concluded. The issue before the Court was whether or not he lost the benefit of Section 93. This called for a reconsideration of the words *"proceedings before any court concerning a child"*.

When the matter came before the Supreme Court O'Malley J considered various potential meanings of the section, from the approach adopted by McDermott J in *IA* to the possibility that the provision conferred life-long anonymity and various permutations in between. Many of these had the capacity to produce unsatisfactory or anomalous results.

Ultimately there was little in the statute to indicate what the Oireachtas had really intended. The Court diplomatically refrained from asking whether the question had actually been addressed by the legislature. In the face of what might otherwise have been regarded as an intractable legal problem the Court appears to have opted for the best answer in circumstances where there was no right answer.

It concluded that if the accused was still a child at the commencement of proceedings then they continue to enjoy the benefit of anonymity until the conclusion of the proceedings. The stated rationale for this interpretation was that it was the one which best avoided any arbitrary and anomalous result or discrimination.

Legal purists may criticise the judgment as being long on pragmatism and short on principle. However, given the more or less total absence of legislative guidance it is difficult to see what other approach might have been adopted. The pragmatic approach adopted by O'Malley J might actually be considered to be quite refreshing when contrasted with other recent pronouncements of the Court that tend to the academic, not to mention their length. In passing I commend for consideration Tom O'Malley's recent blogpost entitled: *The unbearable length of some recent Irish judgments* - *https://sentencingcrimeandjustice.wordpress.com/2025/09/07/the-unbearable-length-of-some-recent-irish-judgments/*

A further judgment in the context of the Children Act is *DPP v. CC* [2025] IESC 11 – which was heard at the same time as *PB*.

This case concerned the availability of sentence reviews for juvenile offenders. The judgment also provides important guidance in relation to when a life sentence may be imposed on a child – that important topic is outside the scope of these remarks. Most

importantly the judgment considered whether or not it was permissible to suspend a sentence imposed on a child.

O'Malley J, giving judgment for the Court, considered that it was not permissible, absent a very clear statutory provision to make provision for a review of sentence. Insofar as that practice had persisted over the years it appeared to be on the basis of a previous provision that had since been repealed – Section 103 of the Children Act 1908. The judgment can be seem as a salutary admonition to always interrogate the legislative underpinnings of any established practice – again, it may be considered remarkable that the practice persisted for so long as it did after the repeal of the 1908 Act.

More importantly *CC* overturned the result in *DPP v. AS* [2017] IECA 310 and found that it was permissible to impose a suspended sentence on a child where there was an expectation that the sentence of detention imposed would in due course become a sentence of imprisonment when the child aged out. This means that the potentially important tool of a suspended sentence is available to courts dealing with children.

Although one may criticize the analysis in *CC* as not necessarily fully engaging with the judgment in the Court of Appeal in *AS* this may again reflect a somewhat more pragmatic approach – certainly the result whereby the Court found that suspended sentences could be imposed is likely to be considered positively by both prosecution and defence.

Looking at the situation in relation to delay judicial reviews relating to child offenders the result in *PB* is very important. There has been a huge number of such cases in recent years – again, the detail of that line of jurisprudence falls outside the scope of these remarks.

However, at a high level at least it can be said that in those cases the courts have consistently emphasized the need for expedition in juvenile cases. This need for expedition has often given rise to a tension in the context of the Juvenile Diversion Programme which frequently adds to delay in such cases.

Nonetheless, the heart of such judicial reviews is the assertion of prejudice due to delay and potential consequences arising from aging out. The authorities suggest that the courts have been sceptical about such assertions of prejudice. The asserted loss of a Section 75 hearing is often considered to be innately speculative and of modest import. Similarly, the asserted loss of the mandatory obligation on the sentencing court to seek a probation report for a child has largely been considered to be a red herring given the inherent likelihood of a judge directing such a report for a recently aged out offender in any event.

Prior to *PB* the only concrete prejudice that could be demonstrated by the aged out offender was the loss of anonymity under Section 93. However, that was in light of the interpretation adopted in *IA*.

Since PB that point has now evaporated in a great many cases – i.e. those charged before 18 who will now not age out at least so far as Section 93 is concerned. This cohort probably represented the great majority of applicants in such judicial reviews.

Obviously there remains a cohort who will still not benefit from the provisions of Section 93 – i.e. those who commit offences whilst under 18 but are not charged until after they turn 18. Given the liminal nature of such offences this is necessarily a considerably smaller cohort.

The Supreme Court considered the position of such individuals in *Doe v. DPP* [2025 IESC 17]. This case concerned the prosecution of a number of young people for sexual offences against a child. They had all aged out prior to being charged. Therefore, on the basis of *PB* they would not have the benefit of Section 93.

Simons J had refused prohibition in the High Court on the basis that there remained a very strong public interest in the prosecution of such offences. However, he instead made Gilchrist orders (i.e. anonymity orders) in relation to the applicants – in effect these were orders which mirrored the terms of Section 93 as it was then understood to apply. This was on the basis of the full originating jurisdiction of the High Court.

When the matter came before the Supreme Court it considered that prohibition was generally not appropriate in such cases. This was so even where the delay was blameworthy. Ultimately the seriousness of such offences predicated in favour of the prosecution continuing.

Importantly, it considered that where there is loss of anonymity the lower courts might make a Gilchrist order in similar terms to Section 93. The purpose of such an order would be to restore the accused to the position they would have been had they been charged as a child.

Two important observations should be made in relation to such orders. Firstly, as a Gilchrist order may be sought from any court it would seem to be neither appropriate nor necessary to go to High Court to seek such an order by way of judicial review as was done in *Doe*. The judgment of the Supreme Court suggests that the District Court may make a pre-emptive order in similar terms to Section 93.

Secondly, given the inherently discretionary nature of such orders and the constitutional imperative to administer justice in public under Article 34 it should not be assumed that the aged out offender has an automatic entitlement to a Doe/Gilchrist order. Consider, for example, the position of a 60 year old man charged with the sexual abuse of a child 45 years in the past when he was also a child. In the absence of some element of culpable prosecutorial delay it is entirely unclear that he would have any grounds to apply for such an order. After all the purpose of such procedural protections is to offer some level of protection to children going through the process – not adults.

In light of *PB* and *Doe* it is probably legitimate to ask whether challenges of this sort have a future. The recent judgment of Simons J in *K v. DPP* [2025] IEHC 470 would suggest not – at least in cases where the offence charged can be characterized as serious.

Doe strongly suggests that prohibition is, as a rule of thumb at least, not available for serious cases. Assertions of prejudice by reason of the loss of a Section 75 hearing or a mandatory probation report have now largely been discounted. Anonymity no longer really arises by reason of the result in *PB* and the fact that a Doe/Gilchrist order can be sought in other cases.

The judgment in *K* suggests that a relatively generous margin of appreciation will be afforded to the prosecution and suggests a generally sceptical approach to assertions of prejudice.