Editorial

The papers in this Special Issue follow on from a colloquium held in Cambridge in July 2019, as part of the United Nations Convention on the Rights of the Child Implementation Project. The fifth event in this series (with previous events covering Articles 12, 6, 3 and 2), the colloquium brought together international experts in the fields of law, sociology and neuroscience to analyse the implementation of Article 5 of the United Nations Convention on the Rights of the Child, which reads:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Held across two days, the aim of this colloquium was to explore the challenges faced by legal systems in giving effect to this internationally-agreed standard. Contributions covered such issues as residence disputes, gender identity and bodily integrity in the context of religious and cultural practices, the significance of environment and play on the evolution of children's capacity, and parental control of access to knowledge of origins. All participants were invited to submit papers, from which the articles in this issue were selected. Serendipitously, Aoife Daly also submitted a paper to the journal during this period, focusing on Article 5, which we were delighted to be able to include in this Special Issue.

In the first substantive contribution, Elaine Sutherland appropriately seeks to explore what the drafters of Article 5 sought to achieve with this provision and highlight the most controversial issues, including the tension between protecting the family from the state and protecting the child from the family

(or indeed the wider community). She notes that Article 5's themes pervade the rest of the Convention, potentially leading to the conflicting arguments that Article 5 serves no independent purpose or should be recognised as a general principle. This conflict is arguably reflected in the fact that, as Sutherland observes, the Committee on the Rights of the Child rarely makes specific reference to Article 5 obligations, albeit that she considers the likely explanation to lie in the Convention's reporting process. It is also telling that Sutherland reports the absence of real discussion among the drafters about what the term "evolving capacities" actually means, since its elusiveness remains apparent in some of the other contributions to this journal issue. She ultimately concludes, however, that Article 5 makes 'a vital contribution to the realisation of children's rights', in squarely addressing the need to balance the roles of parents and the state respectively, and in adopting the necessary broad notion of evolving capacities.

Aoife Daly's article seeks to reconceptualise approaches to assessing children's capacity, particularly in light of Article 5. Having critically examined some previous attempts to articulate the nature of capacity in the case of children, including in English medical law, she advocates a more explicitly rights-based approach constructed around the CRC. The model Daly proposes encompasses four concepts: Autonomy (linked to Article 12 and its protection of the child's right to be heard); Protection (linked to Article 3 and its safeguarding of best interests and rights to protection from harm, with varying implications for different types of decisions); Evidence (linked to Article 2, which on her analysis requires sufficient understanding on the part of decision-makers to avoid discriminating against children as a group or against particular groups of children); and Support (linked to Article 5 and its protection of the right to receive guidance in order to maximise capacity and of relational decision-making). Importantly, her framework is thus not *limited* to Article 5, and she usefully shows how it can be linked to other provisions of the Convention. Daly argues that an insistence on understanding capacity through a children's rights lens will at least prompt challenging questions going to the heart of what it is to respect children as equals, and to respect their life experience as crucial to their best interests.

In her article, Ursula Kilkelly explores the application of Article 5 in the context of children in conflict with the law. She links the concept of "evolving capacities" in Article 5 with the concept of "responsibility" in the criminal justice system, and argues that there is no great clarity in the distinctions between the concepts of autonomy, capacity and responsibility from a children's rights perspective. She notes that criminal responsibility is the only area of the Convention where an age-based approach is mandated, requiring states

to establish a minimum age, although she suggests that the choice of this age is often a political decision rather than one that is determined by children's capacity. The downside of the concept of evolving capacities in the context of youth justice, she argues, is that the child will not always be protected from full responsibility, and she questions whether this can be compatible with the requirement to provide to children greater protection than adults on account of their special status and vulnerability. Finally, Kilkelly turns to the exercise of parental responsibility in relation to children in the youth justice system, and notes that although international instruments rely heavily on families in preventing children coming into conflict with the law and becoming involved in criminal activities, it is unclear what role they should play in decision-making around criminal responsibility. She concludes by arguing that to truly enable the exercise of the child's rights in youth justice in line with Article 5, parental responsibility should be exercised to promote mandatory independent representation for children in criminal proceedings.

Sheila Varadan examines the involvement of children in medical research and experimentation, and their right to informed consent. Although the proposed paragraph on medical decision-making was left out of the final draft of the CRC, she suggests that a number of provisions continue to have relevance for the protection of children involved in medical research, including Articles 3, 12, 13, 18, 36 and – the focus of this contribution – Article 5. This article, she argues, provides a framework to navigate the relationship between the proxy decision-maker – for example, parent or guardian – and the child, in light of their developing autonomy. She suggests that parents are obligated not only to involve their children in the informed consent process, but to foster the exercise of their rights, by enabling them to assume progressive agency and responsibility over decision-making.

Continuing the theme of medical decision-making, Lize Mills and Sabrina Thompson consider the application of Article 5 in the context of surgical interventions on intersex infants. Focusing on the interaction between parental decision-making and state authority in deciding whether to perform life-altering operations, Mills and Thompson argue that states have a duty to assist parents to make decisions in their children's best interests, and to provide appropriate direction and guidance in this respect. In doing so, they note the difficult choice faced by parents – in a world where a binary concept of gender is the norm, sex alteration surgery may prevent the child from being ridiculed, bullied and ostracised. However, they contend that the state has a duty to provide the parents of intersex infants with sufficient knowledge and support and an enabling environment that will allow them to leave the decision to be made by their child, as well as ensuring that the stigma of being born intersex is

diminished within society. Finally, Mills and Thompson provide a useful overview of a number of jurisdictions that have started to implement measures to aid parents in this regard, focusing in particular on Colombia, Malta and the United States. Despite recognising that development is piecemeal and limited, these examples nevertheless provide hope for the future.

The topic of Gillian Black's article might be considered unusual, in the sense that it concerns a government scheme that had been abandoned, following a successful court challenge, without ever having been implemented by the time she finalised her text. The initiative in question was the Scottish Government's "Named Person" scheme, whereby every child in Scotland would be allocated a particular adult, generally a health visitor, teacher or headteacher, who would be a single identified point of contact, who knew the child, and could help support and advise the child and parents. As Black explains, the scheme was dogged by controversy from the outset, with potential Named Persons concerned about resourcing, independence and liability, and parents' groups protesting against state interference even where there was no reason to believe that a child was at risk, as well as violations of privacy and data protection rights. Black nevertheless argues that the abortive scheme provides a valuable case study, in that the scheme was clearly highly pertinent to the rights protected in Article 5 but did not apparently take specific account of its requirements. She accepts that the Article 5 implications of the scheme were arguably variable. On the one hand, it could have supported children in recognising that parents' child-raising rights are fettered, and also helped parents in exercising their responsibilities. On the other, the wholesale and mandatory operation of the scheme arguably failed to respect children's evolving capacities. It is a recurring theme of the articles in this issue that Article 5, in common with the rest of the Convention, does not necessarily provide clear answers.

In his article, Mark Henaghan uses four case studies on children's upbringing from New Zealand to test the meaning and use of Article 5. On his analysis, they illustrate different "pressure points" regarding Article 5's interpretation and application, since they have ended up in court because of clear differences of opinion between the child and the state, between parents and other carers, or between parents themselves. The first case concerns a child who fell afoul of school rules by growing his hair long in tribute to his grandfather. The second concerns a child who was placed by her biological parents with wider relatives in accordance with Maori custom, and the resolution of a dispute between her *de facto* carers and her biological parents. Henaghan's third case study concerns the appropriate nature of contact between a child who is being breastfed and her non-resident father. Finally, he considers the case of two girls who had been abused while in the care of, albeit not *by*, their parents, but wanted to

leave state care and return home to live with those parents. These cases all raise issues concerned with the child's right to establish a unique identity and/or to have matters considered from the child's particular perspective. In Henaghan's view, when read from this angle, Article 5 provides 'a powerful principle and interpretative technique' to ensure that the 'particular child's uniqueness and dignity' is not lost in arguments between and within the family and the state as to the child's best interests.

The title of John Eekelaar's contribution poses a distinctly blunt question going to the heart of debates on Article 5: "do parents know best?". His particular concern is situations where parents make use of a court on a matter where children's interests are relevant but no query is raised about those interests because the parents are in apparent agreement about what those interests require. Eekelaar draws a distinction between situations where children are in an intact family and where the child's parents are separating. In the former situation, he regards it as generally appropriate for a legal system to emphasise the norms protected in Article 5, namely the parents' abilities to decide between themselves how best to guide the child. He considers the situation to be very different, however, where the parents separate and the "joint project" has failed. In such circumstances, Eekelaar regards it as potentially insufficient protection for best interests that the parents have apparently agreed arrangements for post-separation parenting between themselves, since the appearance of agreement does not necessarily indicate an absence of conflict and a more optimal solution for the child may exist. With particular reference to the policy emphasis on accepting what separating parents have agreed in England and Wales, he highlights the potentially countervailing Article 18 obligation on states to 'use their best efforts' to ensure that, in exercising their responsibility, 'the best interests of the child will be [the parents'] basic concern'.

In their contribution, Amy McEwan-Strand and Marit Skivenes explore children's capacities through an analysis of decision-making in cases concerning adoption from care. Drawing on an empirical study which examined all 169 judgments made relating to such adoptions in Norway from 2011–2016, they conclude that many children are absent in the decision-maker's justification and conclusion about whether adoption is appropriate. The study suggests that age is used as a proxy for competency and maturity, and that while young children do not have their capacity assessed at all, older children undergo a superficial assessment at best. McEwan-Strand and Skivenes conclude that decision-makers may often be unaware of their obligations in this respect, or do not have sufficient competency in assessing children's capacities, leading to a failure to implement children's rights in line with the CRC.

Brian Sloan argues in favour of the relevance of Article 5 to the involvement of fathers in adoption proceedings. In particular, he considers that such involvement can constitute 'appropriate direction and guidance' to the child or her representatives, when coupled with the child's identity-related rights in, *inter alia*, Articles 7 and 8 of the CRC. In the course of his analysis, Sloan undertakes a detailed critique of the work of Jill Marshall, a strong advocate for a mother's right to anonymous birth and relinquishment for adoption. Sloan accepts that a mother's advocacy for adoption (without paternal involvement) may also constitute 'appropriate direction and guidance' for Article 5 purposes. He suggests, however, that these conflicting implications of that Article lead to a conclusion that neither mothers nor fathers have an unfettered right to mandate or forbid adoption in the absence of an independent assessment of welfare. He then tests the law of England and Wales, Scotland and Ireland against that conclusion. He argues that, despite a very difficult history on matters surrounding adoption, Irish law potentially fits best with his analysis because it has enshrined the presumptive involvement of a potential adoptee's father in primary legislation. In closing, he highlights the inevitable difficulties with a child-centred Convention in a context where some might consider Marshall's arguments to be normatively valid.

Overall, we hope that this Special Issue will add to the understanding of this important and sometimes overlooked article of the CRC, and lead to further scholarship in this area. Such scholarship, we hope, will ultimately lead to greater awareness and recognition of Article 5's requirements and implications in the wider world. This is true even if it remains impossible conclusively to resolve conflicting interpretations and priorities within the CRC, not least the inevitable tensions involved in recognising the rights, *inter alia*, of parents and families within a children's rights convention. We must also acknowledge the limitations of attempting to focus on one CRC Article at a time in light of its considerably and deliberately interconnected nature.

Of course, the papers included in this Special Issue provide only a sample of the wide variety of papers given at the colloquium. In particular, we are aware that the papers provide a predominantly European – and more specifically, United Kingdom – perspective, and that there is a preponderance of family-law focused pieces. This was not intentional: as discussed above, the colloquium in fact drew participants from a range of disciplines and jurisdictions. Having said this, we think that the articles provide an interesting snapshot of our discussions, and we hope that they provide fascinating insights for scholars working in this area. We are pleased to have been able to include papers focusing on parental involvement *per se* as well as on evolving capacities.

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