



# The Sale of Alcohol Bill (2022): An analysis of children's rights impacts

Written by;

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## Foreword

This report has been published by Alcohol Forum Ireland (AFI) and the Irish Community Action on Alcohol Network (ICAAN) who have been collectively campaigning since 2017 for changes to alcohol licensing legislation to better promote and protect the rights of children in Ireland. It is important, however, to note that is an independent report from Assistant Professor of Law, Dr Ollie Bartlett in the School of Law and Criminology, Maynooth University. The report is published as the second in a series of independent analyses of the Sale of Alcohol Bill (2022). The first, published in May, from leading global alcohol policy expert, Professor Thomas Babor presented a cost and benefits analysis of the Bill and concluded that 'it is highly likely that the bill could contribute to an upward trend in alcohol consumption and alcohol-related harm'. <https://alcoholforum.org/alcohol-bill>

AFI and ICAAN welcome the proposed streamlining of alcohol licensing laws. Consolidation of alcohol licensing law will make it more accessible to a range of stakeholders including communities, licensees and An Garda Síochána. The Department of Justice's commitment to modernising alcohol licensing law also creates an important opportunity for Government to deal with issues that a place-based and outdated licensing code has failed to keep pace with including the emergence and proliferation of drink delivery services. Without significant changes to the proposed legislation, that opportunity will be missed.

In November 2017, ICAAN hosted a National Roundtable discussion on alcohol licensing attended by representatives of several Government Departments, the Law Reform Commission and a number of statutory bodies. The Roundtable report highlighted concerns regarding underage serving, drink deliveries, underage events on licensed premises and the need to include a public health objective in the licensing code. This report from Dr Bartlett highlights the failures in the Sale of Alcohol Bill to deal adequately or effectively with those longstanding concerns.

We have been heartened by our engagements with many politicians across a number of recent events and political briefings organised by our ICAAN colleagues. Their listening and respect for the concerns of communities has, I believe, been genuine and indeed many have raised their own concerns, including the lack of adequate Garda resources to deal with the inevitable fallout should the Bill be progressed in its current form. I do not believe, however, that there been adequate consideration by Government of the concerns of communities about provisions of the Bill. We will continue to campaign on this and will continue to demand changes to the legislation. It is time to hear those voices.

This report should be read by everyone in Ireland who is concerned about the rights and wellbeing of children and young people. We are hugely thankful to Dr Bartlett for the time and expertise he has given on preparing this report.

**Paula Leonard**

CEO, Alcohol Forum Ireland

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## Abstract

Alcohol licensing in Ireland historically developed in a fragmented manner through multiple pieces of overlapping legislation. The Irish Government have championed the Sale of Alcohol Bill 2022 on the basis that it will consolidate and simplify existing licensing law, and as an exercise in better regulation this is to be welcomed. However, a legislative exercise of this magnitude should not miss other opportunities to improve the way in which other issues are treated. Unfortunately, the Sale of Alcohol Bill 2022 misses the opportunity to amend Irish alcohol licensing law so that it protects children's rights.

To date, no meaningful consideration has been given in the various licensing laws to children's rights such as the right to health, right to development, and right to leisure. If anything, the Bill actually makes it harder for children to enjoy many of these rights, and does not adequately grapple with the complexity of legislating in a manner that both protects children and respects the protections for the family that are set out in the Irish constitution. This report provides legal analysis to illustrate these issues, and explores possible arguments that public health and children's rights advocates could employ in the debate on the future of Irish alcohol licensing law.

## Introduction

**There are good reasons to subject the sale of alcohol to a licensing scheme. Controlling the persons allowed to sell alcohol protects the public from the consumption of unrecorded or unsafe alcohol that can have acute and often fatal impacts,<sup>1</sup> as well as from unsafe sales practices.<sup>2</sup> Moreover, controlling the hours of alcohol sale can reduce harms arising from excessive alcohol consumption,<sup>3</sup> reduce levels of alcohol-related violence,<sup>4</sup> and improve community safety.<sup>5</sup> However, it can be difficult to adequately incorporate public health considerations into alcohol licensing laws,<sup>6</sup> in particular where there is a combination of community, industry, and political resistance to changing a society's relationship with alcohol through law.**

Alcohol licensing law should also have a human rights function, in particular to protect the rights of the most vulnerable in society. Children are particularly vulnerable to the harmful effects of alcohol consumption,<sup>7</sup> and thus alcohol licensing laws should be designed in ways that affords specific protection of their rights. Unfortunately, the Sale of Alcohol Bill 2022 (the Bill) does not adequately address children's rights issues related to the sale of alcohol, and in some respects even lowers the level of protection given to children. Nearly every jurisdiction uses alcohol licensing law to prohibit children from buying or consuming alcohol, but alcohol licensing law can and should go further and address other ways in which children can be harmed by widespread availability of alcohol. Ireland has a unique opportunity to do this in this Bill, yet children's rights issues have been largely ignored.

## Children's Rights issues raised by Sale of Alcohol Bill 2022

The Convention on the Rights of the Child (CRC) is an international treaty, ratified by Ireland in 1992, which sets out a series of child-specific human rights.<sup>8</sup> These rights aim to advance four general principles of non-discrimination, protecting children's best interests, safeguarding the life, survival and development of the child, and ensuring that children's views are considered in all matters affecting them. Rights aimed at safeguarding life, survival and development should in particular be considered in the design of alcohol licensing law, of which the most relevant are:

**Article 6** – *The right to development (children are entitled to the best possible conditions that will allow the growth of their own physical, psychological, spiritual, social, emotional, cognitive, cultural and economic capacities<sup>9</sup>)*

**Article 17** – *The right to appropriate information (access to information which will promote their social, spiritual and moral well-being and physical and mental health, and be protected from material that is harmful to their well-being. Adolescents in particular are entitled to access adequate information that is essential for making appropriate health behaviour choices, including information on the use and abuse of alcohol, and are entitled to be protected from harmful information relating to alcohol<sup>10</sup>)*

**Article 24** – *The right to health (children should be able to grow and develop to their full potential and live in conditions that enable them to attain the highest*

*standard of health. Specifically, they are entitled to information and education that will enable them to make informed choices in relation to their lifestyle, and in particular information on the dangers of alcohol use. The right obliges states to take appropriate measures to reduce the use of alcohol amongst children, including by regulating sale<sup>11</sup>).*

**Article 31** – *The right to play and recreation (children are entitled to appropriate conditions for play, recreation and participation in cultural life that will ensure optimum development and promote resilience, as well as promote the development of creativity, imagination, self-confidence, self-efficacy, as well as physical, social, cognitive and emotional strength and skills. In particular, to provide such conditions states must ensure that children have an environment secure from social harm or violence. Even more specifically, children's play spaces should not be in locations where children are at risk or exposed to hazards<sup>12</sup>).*

**The Bill fails to protect these rights in several respects, as outlined below.**

## **Children are not sufficiently protected from exposure to drinking culture – violation of the right to development, the right to health, and the right to appropriate information**

- The Bill maintains the rather loose restrictions placed on the ability of children to access drinking establishments.
- A person aged under 15 years old, defined in the Bill as a 'child', can be in a bar accompanied by their parents until 9pm. If they are present in a bar for a private function at which a substantial meal is served, they may remain in the bar until closing time, which it seems can include a late opening (which are made easier to achieve by the Bill).
- A person aged between 15 and 18, defined in the Bill as a 'young person', can be in a bar unaccompanied by their parents until 9pm. An individual aged under 18 can be in an off-license accompanied by their parent, and can be in a bar without any restriction at times when alcohol is not being sold.
- Once in a bar during hours of sale, children have the possibility of consuming alcohol, with or without their parents' permission or knowledge. Moreover, allowing children access to a bar during hours of sale begins to normalise drinking for them, and may build expectations of drinking behaviour that might lead to riskier consumption during adulthood.<sup>13</sup> This might be particularly likely in rural areas, where drinking establishments often form a key part of the limited opportunities for socialisation and in which the presence of children is tolerated and even accepted.<sup>14</sup>
- Potentially easy access to alcohol within drinking establishments increases the risk to children's health, and presence within an environment that normalises alcohol increases the risk that children will develop inaccurate understandings of the health risks of alcohol consumption.

## **Children not sufficiently protected from online alcohol sales – violation of the right to health**

- The Minister for Justice announced that the Bill offers greater protections in relation to the online sale of alcohol, however this is misleading.
- Licensees were already under a duty not to sell or deliver alcohol to persons aged under 18, however the only additional duty that the Bill creates is a duty on a person making a delivery of alcohol that was purchased remotely to check that the person receiving that delivery is aged over 18. There are no duties imposed on the person delivering the alcohol to check that the persons actually consuming or likely to consume the alcohol are aged over 18, and no legal powers for those delivery persons to refuse to give over possession of alcohol if they reasonably believe that it will be consumed by a person aged under 18.
- The Bill preserves the ability of persons under 18 to consume alcohol in a private home with parental permission, yet the Bill places no duty on delivery persons to verify that such permission exists, or to refuse to give over alcohol if they reasonably suspect that it does not.
- The above means that growing distance sales of alcohol are subject to virtually no legal control with respect to who is actually consuming alcohol. When alcohol is sold to persons at a premises, it is straightforward for a seller to ask for age verification and then refuse to sell alcohol if they suspect a person is underage. This basic protection, intended to prevent the serious health impacts of alcohol consumption by children, is essentially circumvented by the separation of the conclusion of a contract for the sale of alcohol and the physical supply of that alcohol. Ireland is far from alone in failing to regulate online alcohol sales, but this Bill does particularly little, thus increasing the likelihood of children being able to consume alcohol.<sup>15</sup>

## Alcohol can be sold too close to places where children learn and socialize – violation of the right to play and recreation

- The Public Health (Alcohol) Act 2018 has been commended in part because it recognises that children should be protected from alcohol in places in which they are supposed to be safe. Thus, for example, alcohol advertising is prohibited within the vicinity of schools and playgrounds. The Bill makes no such effort to protect children in places in which they are supposed to feel safe, or indeed in places intended for their play and recreation, or in which they are invited to spend leisure time.
- There are no provisions in the Bill that prevent a license being granted to an establishment on the basis that it is too close to a school or a playground. There is also no ability for a party to object to the grant of an alcohol license on such grounds, and courts are not able to attach conditions to the grant of a license on such grounds.
- The Bill creates a new category of license – the Amenity License – which can be granted to theatres, galleries, museums, and other cultural establishments. The rules for the grant of Amenity Licenses are substantially the same as those which apply to regular bars and clubs – the rules do not reflect the fact that places such as theatres regularly invite children to spend their leisure time there, and often put on events specifically marketed at children. Such establishments might voluntarily restrict the sale of alcohol during such events, or in a manner that protects children, but there are no such obligations imposed in law by the Bill.
- Thus, the Bill maintains a situation in which children are not specifically protected from exposure to alcohol sale in their own play spaces, which are meant to provide a supportive and protective environment for play and development. Additionally, the Bill ensures that children will continue to be exposed to the sale of alcohol in cultural places where they are invited to spend time, in which they must remain protected.

## Duties on licensees to prevent children from consuming alcohol are too weak – violation of the right to health

- The Bill also preserves the existing set of duties placed on license holders, which make it too easy for license holders to either turn a blind eye to underage drinking, or too difficult to do anything if they suspect it.
- To be granted a license, applicants have to be of good character and must observe duties relating to the preservation of good order on their premises. However, despite placing a specific obligation upon licensees to refuse alcohol sale to persons under 18, the Bill does not place a strong duty of care towards children upon licensees.
- Licensees are obliged to remove a person under 15 (a 'child') from the bar of a premises (but not the premises entirely), if they believe that their presence in the bar could 'reasonably be regarded as injurious to his or her health, safety or welfare'. This formulation of words is difficult to interpret precisely. A licensee may claim that behaviour they witness could not reasonably be regarded as injurious to the child, or might not be confident that the behaviour could reasonably be regarded as such. The vagueness of the test allows licensees room to take no action, reducing the practical protection given to children in drinking environments.
- If licensees are prosecuted for allowing minors in their bar unlawfully, they have a defense under the Bill if they can demonstrate that they exercised all due diligence to prevent the unlawful presence of minors. In a similar manner to the above, this standard is quite vague – licensees could avoid taking actions to prevent children's exposure to alcohol consumption that are well within their abilities, while claiming that they exercised all due diligence to prevent such exposure.
- The above failures to impose clear and specific duties upon licensees with respect to protecting children from exposure to alcohol mean that substantial numbers of children will in fact be subject to harmful alcohol exposure in Irish drinking establishments, which again constitutes a violation of children's right to health.

## Complexity of protecting children's rights with alcohol licensing law

**From a theoretical perspective there are strong arguments that the Bill violates a number of children's rights. However, despite the fact that Ireland has ratified the CRC, vindicating those rights through the Irish legal system is a complex matter.**

Given that there is no international legal mechanism for pursuing a violation of a CRC right, states must incorporate these rights into their national legal orders before they are justiciable (capable of being raised in argument before a court). Following a 2012 referendum, the Irish constitution was amended in 2015 to incorporate a provision on children's rights. Article 42A.1 states that 'The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights'. This creates the possibility for CRC rights to be justiciable in Ireland. However, this constitutional provision must be balanced with other competing constitutional provisions. The most important in this regard are found in Articles 41 and 42.

### **Article 41.1.**

*1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*

*2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.*

### **Article 42.1**

*The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.*

These provisions together provide a certain level of protection for parents' decisions concerning their children's access to alcohol or awareness of drinking culture. Certain aspects of existing Irish alcohol licensing law that were preserved by the Bill cannot realistically be changed in light of these protections. For example, removing the ability for parents to consent to children drinking within a private home would constitute a strong interference with the constitutional protection of the family's authority, as well as the right to private life. Moreover, the CRC allocates primary responsibility for the upbringing of children to their parents, which is also arguably reflected in the Irish constitution's provisions on the family and education. Consequently there is a complex balance to be struck by licensing law between the rights of children and the rights of parents.

This does not mean, however, that the State can abdicate all responsibility for deciding what relationship children should or should not be allowed to develop with alcohol and drinking culture. For many years, the State could not interfere with a sincerely held parental decision, even a non-rational one, unless there was extreme risk to the child.<sup>16</sup> In recent years the Irish courts have softened this threshold in response to the introduction of Article 42A, such that parental decisions can be overridden where there is a prejudicial effect upon the safety and welfare of the child.<sup>17</sup> This shift recognises that the family unit is composed of individuals whose protection must be balanced with the protection of the family unit itself.

Although it remains difficult to override the decisions of parents concerning their children's engagement with alcohol in private spaces, the way in which children interact with alcohol in public spaces can be regulated through law to a greater extent than is attempted in the Bill. The reality is that children often do not gain an objective understanding of alcohol consumption and its associated risks and harms from family members in



the context of private spaces, even if parents believe they are making an appropriate effort to educate their children about alcohol.<sup>18</sup> Where parents do not make explicit efforts, the knowledge that children develop about alcohol is driven by observations of parental drinking in the home, other adults' drinking in public spaces, and the media, which can produce only a partial and potentially problematic understanding of the health risks of alcohol consumption.<sup>19</sup> Moreover, exposure to alcohol consumption within the home environment (both the possibility to consume and the observation of others' consumption) can have lasting harmful impacts upon children.<sup>20</sup>

This means that states have a responsibility to ensure that public spaces do not permit children to learn or develop unhealthy behaviours or understandings relating to alcohol consumption, and to ensure that the law supports parents in actively and objectively educating their children on the health risks of alcohol consumption. Indeed, some parents may have the firmest intentions to protect their children from exposure to alcohol, but might find this difficult to accomplish in the context of widespread availability of alcohol, normalisation of heavy drinking, or other socio-economic factors. While parents have primary responsibility for the upbringing of their children, the State has primary responsibility for ensuring that societal conditions exist which will facilitate the responsibilities of parents, and which will ensure an adequate level of protection for children's rights.

## Recommendations

**Certain priority alterations should be made to the Bill, to better protect children's rights in the context of the sale of alcohol.**

### **Revise the duty for licensees to remove children from their bars.**

Currently licensees must remove children where their presence could 'reasonably be regarded as injurious'. The threshold of 'injurious' could at least be lowered to 'prejudicial', in line with the above case law. Although this is arguably still vague, it may be easier to determine that a child's presence in a bar is prejudicial to their welfare than it is to determine the behaviour is injurious. Even though the duty is subjective, the use of conditional language makes it more uncertain to apply. A licensee must remove children from their bar if they believe that it could reasonably be concluded that the child would be injured. Conditional language here mixes an element of objectivity with an essentially subjective duty. This is difficult to apply in real-life. A non-conditional subjective standard may be easier for licensees to apply, and likely would be more appropriate to protecting children in each unique circumstance where they might come into contact with alcohol or drinking culture. The phrasing of the duty could be revised, for example to 'a licensee concerned reasonably believes' that the child's presence in the bar will be prejudicial to his or her health, safety or welfare'.

### **Revise the duties surrounding the distance selling of alcohol**

Currently there is no duty on the person delivering alcohol to satisfy themselves that it will not be consumed by persons under the age of 18, or to verify that explicit parental permission is given for such consumption. This must change if distance sales of alcohol are to become an easy way to circumvent the most basic of protections that have long been a part of licensing law. While a distance seller of alcohol is under the same general obligations as on-trade and off-license retailers to not sell or deliver alcohol to persons under 18, the retailer has no ability to verify that this will be complied with. This responsibility falls to the person making the physical delivery, and the law must compel them to discharge this responsibility. The law must also give that person the power to refuse to supply alcohol to a recipient who they reasonably believe will allow it to be unlawfully consumed by a person under 18.

## Revise the rules on the definition of children

Currently, the Bill separates children into two categories – a 'young person' aged 15–18, and a 'child' aged under 15. The rationale for this is not clear from the act. If the distinction is based on the notion that older children are somehow more independent and should be given more freedom within drinking establishments, this is misguided. This period of life in fact is the period in which older children, who have not yet reached physical, emotional or social maturity, might require greater protection from harmful influences and messaging around alcohol consumption. In fact, older children might be particularly vulnerable to harmful messaging around alcohol consumption precisely on account of their increasing independence and awareness. Persons aged 15–18 are still children according to the definition of a child in the Convention (persons under 18), and thus should not be subject to any dilution of rights protection. The effect of giving different levels of protection to 'children' and 'young people' achieves exactly this, and is a flaw in Irish alcohol licensing law that must be remedied. The protections currently afforded to 'children' under the Bill must be extended to all persons under the age of 18.

## Revise the conditions upon which licenses can be granted

Currently, there is no provision in the Bill to prevent a license being granted to an establishment that is in close proximity to a playground or a school. To build consistency with the protections established in the Public Health (Alcohol) Act 2018, the grant of any ordinary on and off-trade license should be made subject to the condition that the premises subject to the license is not within 200m of a playground, school, or early years establishment. Moreover, the grant of certain types of licenses, in particular amenity licenses, should be made conditional upon production of protocols by the proposed licensee on how they will safeguard children who are present on their premises when alcohol is being sold. Such additional conditions would hardly be unprecedented – for example, the Bill specifies that proposed nightclub licensees must operate continuous closed circuit television and door security before they can be granted a license.

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