

Seventh Report of the Special Rapporteur on Child Protection

A Report Submitted to the Oireachtas

Dr. Geoffrey Shannon

2014

TABLE OF CONTENTS	PAGE
Acknowledgements	4
Executive Summary	5
Recommendations	12

Section 1: Child Protection and Developments in International Law

1.1	Introduction	29
1.2	General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration	29
1.3	General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health	39
1.4	‘Direct Provision’ in Ireland	56
1.5	European Developments	64

Section 2: General Trends Emerging from the Courts

2.1	Introduction	70
2.2	Right to Privacy	70
2.3	Section 23 of Children Act 1997	73
2.4	Consent to Medical Treatment	75
2.5	Jurisdiction, Transfer of Proceedings and Council Regulation EC 2201/2003	76
2.6	Children Known to the Child and Family Agency	78
2.7	Entitlement of Children to Remission	79
2.8	Court Orders Affecting Children	80
2.9	Emergency Reliefs	83
2.10	Challenges to Care Orders	90
2.11	Care Order Threshold and Considerations	93
2.12	Interim Care Order Threshold and Considerations	95
2.13	Miscellaneous Domestic Issues	97
2.14	Appointment and Role of Guardian <i>ad litem</i>	107
2.15	The Right to the Provision of After-care Services	109
2.16	Homelessness	110
2.17	Alternative Dispute Resolution (ADR) and Child Care Proceedings	112
2.18	The Child Care Act 1991-Miscellaneous Reforms	115

2.19 Legal Support Network for Trafficked Children	118
2.20 Jurisdiction	119
2.21 Appeals	119

Section 3: Children and Internet Safety

3.1 Introduction	121
3.2 The Empirical Context	121
3.3 International Legal Instruments Impacting on Online Safety for Children	123
3.4 Domestic Legislation and Compatibility with International Instruments	134
3.5 Recommendations	140

Section 4: Forced Marriages

4.1 Introduction	143
4.2 Existing Irish Law and Practice	144
4.3 International Human Rights Standards and Forced Marriage	146
4.4 Recommendations	149

Appendix 1: Overview of Reports into Child Abuse

Introduction	151
Report of the Independent Child Death Review Group (ICDRG)	151
Report of the Inter-Departmental Committee to Establish the Facts of State	
Involvement with the Magdalene Laundries (McAleese Report)	155
The Ryan Report	156
The Ferns Report	159
The Report of the Commission of Investigation into the Catholic Archdiocese of	
Dublin (The Murphy Report)	162
The Cloyne Report	165
Roscommon Child Care Case Report of the Inquiry Team to the Health Service	
Executive (HSE)	166
Kilkenny Incest Investigation	169
Lessons to be Learned from Past Reports	172

Appendix 2: Statistics from the Courts Service for 2012	174
--	------------

ACKNOWLEDGEMENTS

I would like to acknowledge the assistance of the following people in the preparation of this Report:

Ross Aylward

Meg McMahon

Aoife Daly

Anne Marie O'Sullivan

Kieran Walsh

Full responsibility for this Report, however, lies with the author.

The Report reflects the law and practice as at December 31, 2013, but it has been possible to include new developments since that date.

23 January 2014

EXECUTIVE SUMMARY

General Introduction

2013 was a significant year for child protection. In particular, the formal establishment of Ireland's first Child and Family Agency on January 1st offers the opportunity to harmonise the sometimes disparate aspects of child protection services in this country. It is a development for which the Minister for Children, Frances Fitzgerald TD, deserves particular credit. In November of last year the Government approved a policy proposal to strengthen legislative provisions for after-care. The Child Care Act 1991 will be amended to incorporate a statutory right to the preparation of an after-care plan. This development is to be welcomed.

The year also witnessed a wide variety of other developments, many of which are discussed in this report. The enhanced protection provided by these measures underlines Minister Fitzgerald's commitment to providing a firm foundation for continued and improved protection of children and vulnerable persons in Ireland. Looking forward, the year ahead will see consideration of the Children First legislation and the introduction of measures to provide by law for the new Article 42A of the Constitution (if the referendum petition lodged is not successful). It is hoped that the year ahead will also provide an opportunity for reflection and/or action upon several of the issues discussed in this Report, including its Recommendations section.

EXECUTIVE SUMMARY

SECTION 1: CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

2012 heralded a significant development in the sphere of child protection and welfare in Ireland by way of an amendment to the Constitution which, amongst other things, afforded constitutional recognition to the ‘best interests’ principle. This is in keeping with international best practice. As a concept the ‘best interests’ principle is laudable. In practice, however, its application can be unclear. The United Nations Committee on the Rights of the Child has, by way of General Comment No. 14, explored the substance of this principle and in so doing expounded guidelines as to its application. As the ‘best interests’ principle has been afforded constitutional recognition in Ireland it is necessary to ensure that it is applied in a proper manner in respect of all decisions that might affect the welfare of children.

Further, the ‘best interests’ of children ought to be considered in the context of ensuring the health and wellbeing of children. This has been the subject of analysis in previous reports of the Special Rapporteur on Child Protection, but in 2013 the United Nations Committee on the Rights of the Child considered this issue in General Comment No. 15. It is essential that children be afforded a role in decisions to be made concerning their health and wellbeing. This is an issue that has yet to be comprehensively addressed in Ireland and is connected to the issue of consent to medical treatment, particularly in the sphere of mental health treatment. Children are best placed to assess and contend with their own health issues. A prime example of this is the increasing prevalence of obesity amongst children in Ireland. Greater communication with children on proper eating habits would go a long way towards tackling this serious issue. In that regard the concern is not simply what should be communicated to children, but also what should not be communicated through advertisement of particular food types. Moreover, research now shows a link between breastfeeding and lower levels of obesity in children. Arguably, not enough is done to promote breastfeeding in Ireland and this is evident when compared against statistics from other countries. Breastfeeding is proven to be beneficial not only in respect of children, but also to the economy of the State in the long term.

Since the turn of the century Ireland has witnessed significant increases in the numbers of those seeking asylum in this country, although the numbers have decreased in recent years. To cope with this the State developed a system of ‘direct provision’. That system, from the perspective of child protection and welfare, has been the subject of comment in a previous report of the Special Rapporteur on Child Protection. During 2013 the Government made progress on immigration reform. However, the direct provision system has been the subject of further criticism and there is scope to argue that it is contrary to both international and domestic law as it applies to children.

Finally, this section of the Report examines developments and initiatives in 2013 at the level of the European Union and Council of Europe impacting upon the rights and entitlements of children. Whilst many of these developments are not binding on Ireland, it is nonetheless beneficial to consider them with a view to ensuring that child protection and welfare in Ireland is in accordance with international best practice.

SECTION 2: GENERAL TRENDS EMERGING FROM THE COURTS

A feature of previous reports of the Special Rapporteur on Child Protection has been the operation and application of the *in camera* rule in respect of matters pertaining to the protection and welfare of children. The Courts and Civil Law (Miscellaneous Provisions) Act 2013 amends the application of this rule so as to provide for greater access to such proceedings. The Act has now been commenced insofar as it applies to the *in camera* rule. It represents a positive development in ensuring a fair, transparent and accountable system of justice.

A number of notable cases came before the Irish courts in 2013. A constitutional challenge was brought to section 25 of the Mental Health Act 2001 providing for the involuntary admission of children for mental treatment, but this failed mainly on the basis that the section was capable of application in accordance with the best interests of the child in question: *X.Y. v. HSE* [2013] IEHC 490. The High Court determined that children detained in detention centres, such as Oberstown School, are entitled to remission in the same manner as adult prisoners: *Byrne v. Director of Oberstown School* [2013] IEHC 562. In *F.H. v. Staunton* [2013] IEHC 533 it was held that neither section 19 nor 47 of the Child Care Act 1991 permit a court to make directions

imposing positive obligations on a parent by way of condition to a supervision order, or general direction of the court. That said, it is apparent from a number of cases that have come before the courts that child protection and welfare needs can be met by providing supports, where required, to parents. To be effective, these supports ought to be tailored to the specific needs of those adults. Otherwise little or no real benefit will accrue to the child.

The past number of years have seen an increasing trend in cases with cross border elements with respect to another country within the EU, most notably Northern Ireland and England and Wales. Council Regulation (EC) 2201/2003 provides a legal framework to deal with such cases. There has been a marked increase in the number of applications brought by the HSE (now the Child and Family Agency) seeking to transfer cases back to the member state from which the child originated so as to determine the child's welfare. To date the courts in Ireland have been receptive to such applications where the facts justify same.

The use of emergency powers under the Child Care Act 1991 came into sharp focus in 2013 as a result of two separate cases where Roma children were removed from their parents and taken into the care of the Child and Family Agency in circumstances where it was mistakenly believed that the children were not the biological children of the persons claiming to be their parents. The circumstances surrounding these two cases remain the subject of investigation by the Ombudsman for Children. The manner in which these powers are applied ought to be considered so as to ensure that the rights and interests of all persons concerned are properly accounted for.

Further, there have been a number of cases whereby the Child and Family Agency have sought emergency care orders immediately upon the birth of a child. Clearly any decision to bring such an application would have been formed prior to the birth of the child. Where such an application is brought immediately after the birth of the child the birth mother cannot reasonably be expected to be in a position to take legal advice and contend with the application. This also raises the issue of the right of a respondent parent to be heard at an application for an emergency care order. This latter issue is currently before the Supreme Court following an earlier High Court case where such an application was brought shortly after the birth of a child. Where

concerns as to the welfare of a child are formed by the Child and Family Agency prior to the birth of that child, a procedure ought to be provided for so as to bring such concerns to the fore and to provide the parents with an opportunity to consider same and take appropriate legal advice in advance of the birth of the child.

Whilst the present system for granting care orders has been in place for over 20 years now there is still scope for reform and improvement. Recent cases that have come before the courts highlight some of the deficiencies of the system. The operation of voluntary care, supervision orders, interim care orders and care orders is considered in detail in this Report.

Often discussions surrounding the reform of child protection and welfare systems focus on legal reform, however structural reform is equally important. 2013 saw increased debate on the establishment of a family law court structure designed to address the special requirements of family law. This debate is an opportunity to implement a number of reforms that have been proposed over the last number of years. For example with the recent constitutional amendment the necessity to provide a child with an opportunity to be heard is afforded a greater status. To give effect to this change proper structures need to be established to accommodate this to the benefit of the child and the court. A review of the systems in operation in England and Wales and Australia could inform this debate. In addition, appropriate structures, regulations and facilities need to be put in place so as to properly regulate the appointment and activities of guardians *ad litem*, and also to promote and make available the use of alternative dispute resolution mechanisms.

SECTION 3: CHILDREN AND INTERNET SAFETY

In comparison to other EU countries internet usage amongst children in Ireland exceeds the average, but Irish children tend to be more conscious of the need to be vigilant on the internet particularly when disclosing personal information. The internet is clearly a tool that can be used to the detriment of children by those so minded. It warrants a particular concern in relation to child pornography and the grooming of children for sexual exploitation. As the internet is accessible worldwide international regulation is required so as to ensure that a uniform and coherent system of regulation and protection is engaged in to the benefit of children. Ireland is a

signatory to both the Budapest Convention and the Lanzarote Convention, but it has yet to ratify both. In addition, the EU Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography was to have been transposed into Irish law by 18 December 2013. Ireland has failed to do so and is in breach of EU law in that regard. There are already a number of domestic legislative enactments combating these issues, however modification of same is required so as to ensure that not only does Ireland comply with its obligations under EU law, but also to ensure that a proper legal system for the protection of children is put in place to tackle these issues. Child protection ought to be proactive not reactive and having regard to those who use the internet to the detriment of children this is a prime area where legislation needs to keep one step ahead of the issues as they develop.

SECTION 4: FORCED MARRIAGES

While the prominence and awareness of forced marriages in Ireland may be of relatively recent origin, the existence of this issue has been present in Ireland for some time. Anecdotal evidence exists of arranged or forced marriages in Ireland in past generations, but the influx of persons from other countries and practising different beliefs has given rise to the need for greater vigilance in recent times. Such a case came before the Irish High Court in 2013, however Irish law does not address the issue. This is an evident lacuna in our legal system that gives rise to child protection and welfare concerns in circumstances where the subject of a forced marriage is under 18 years of age. There is an urgent need to address this lacuna and consideration of the position in England and Wales, as analysed in this report, ought to form the starting point to addressing this issue with a view to publishing legislation and providing the necessary supports to combat forced marriages.

APPENDIX 1: OVERVIEW OF REPORTS INTO CHILD ABUSE

Over the past 20 years there have been a number of reports commissioned into incidences giving cause for concern in respect of child protection and welfare. At the end of 2013 Dr. Helen Buckley and Dr. Caroline O’Nolan published a report entitled *An Examination of Recommendations of Inquiries into Events in Families and their Interactions with State Services, and their Policy and Practice*. It provides an overview of a number of the reports published in previous years but, notably, suggests a new format to the manner in which reports, and in particular recommendations, are

published in the future so as to enhance the implementation of same. It is hoped this new approach will be taken into account and, on the cusp of such a departure, it is thought beneficial to review a number of the reports as published in previous years in Appendix 1 of this Report so as to highlight child protection and welfare issues and concerns. The reports considered herein include the Report of the Independent Child Death Review Group; the Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalene Laundries; The Ryan Report; The Ferns Report; The Report of the Commission of Investigation into the Catholic Archdiocese of Dublin; The Cloyne Report; The Roscommon Child Care Case Report of the Inquiry Team to the Health Service Executive; and the Kilkenny Incest Investigation.

RECOMMENDATIONS

SECTION 1: CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

1.2 General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration

Article 42A of the Constitution of Ireland and other areas of law and policy which enshrine the best interest principle should be interpreted in accordance with the rights contained within the UN Convention on the Rights of the Child (CRC).

A provision should be included in Irish law to enhance the capacity of children to access the courts to assert their interests.

Consideration should be given to the inclusion of a comprehensive ‘checklist’ of factors in the relevant legislation equivalent to that included in the Children Act 1989 in England and Wales.

The manner in which the best interest principle has been considered in all decision-making processes in legal proceedings should be explicitly outlined, as should the rights-based approach which was taken.

In every action taken by a public institution the obligation to consider and apply the best interest principle must be demonstrated. A legislative measure should be introduced for this purpose.

The government should ensure that budgetary decisions are made with the best interests of children as a primary consideration, and the manner in which this was achieved should be transparent.

Further training should be provided for the relevant professionals in both the public and private sector on the best interest principle and how to apply it. Awareness-raising with children should also be improved. A scoping exercise should be conducted at government level in order to ascertain how best to engage in such

training. A national exercise with children should be considered in which they are taught about the CRC.

1.3 General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health

Regular participatory consultations should be conducted with children in Ireland in order for their views and experiences to contribute to the design of health interventions and programmes.

The recommendations made in the report of the Office of the Minister for Children, The Child's Right to be Heard in the Healthcare Setting, should be implemented. These recommendations include an awareness-raising campaign for the general public, training for all relevant professionals and the development of relevant protocols and research into the area. The best practice guidelines in the report should be made widely available to all.

Legislation should be drafted which deals in particular with the right of children to consent to treatment as the Non-Fatal Offences Against the Person Act 1997 is unsuitable for this purpose. It should be lawful for a health care professional to provide treatment to a person under 16 years without parental consent on the condition that the child has the capacity to understand the nature and consequences of the treatment being provided.

Clear guidelines should be set out to address the matter of whether children under the age of 18 years have the right to refuse to consent to medical treatment.

Mental Health

Comprehensive, rights-based legislation should be drafted in Ireland for addressing children's health needs. Increased counselling services should be established, and children should be permitted to access counselling without parental consent. Greater resources should be ring-fenced in Ireland to provide for children's mental health services more generally.

The recommendations from the Fourth Report of the Special Rapporteur on Child Protection should be implemented. In particular, the Mental Health Act 2001 should be amended to include a section clarifying the rights of children in relation to that Act.

The recommendations from the recent report of the Children's Mental Health Coalition should be implemented. In particular, clarity should be provided around how children access mental health services and how cases are managed and prioritised. This approach is necessary to address the mental health needs of children and young people in the care of the State and in the youth justice system.

A protocol should be adopted providing for the transfer of a child from one Child and Adolescent Mental Health Services (CAMHS) area to another CAMHS area.

Obesity

Implement the recommendations of the report conducted on behalf of the Minister for Children and Youth Affairs. These include recommendations to have more height and weight measures for children, to take a holistic approach to sports policy, and to take a cross agency approach to tackling obesity in semi and unskilled social class households.

Conduct research into increasing opportunities for girls to engage in exercise, with a particular emphasis on dance as a preferred medium.

Place greater emphasis on the link between breastfeeding and lower levels of obesity in children.

Implement the recommendations of the Institute of Public Health in Ireland to adopt the Nutrient Profiling Model, introduce a 'co-regulation' approach, impose restrictions on the advertising of foods high in fat, sugar and salt between 6am and 9pm and provide for the establishment of a monitoring system.

Breastfeeding

Greater training should exist for GPs and nurses in relation to support for breastfeeding.

A greater number of lactation consultants should be appointed in Ireland.

Recommendations of the 2005 Five-Year Strategic Breastfeeding Action Plan should be implemented, in particular-

- *Establish an infant feeding Data Collection*
- *Appoint ten regional breastfeeding co-ordinators*
- *Conduct and publish a review of the implementation of the 2005 Five-Year Strategic Breastfeeding Action Plan*

Greater emphasis should be placed on health promotion strategies regarding breastfeeding. Such strategies should be targeted at the general public, and at young people before they initiate pregnancies. Young women should be made aware of the generally positive attitudes of young men to breastfeeding.

Legislation should be introduced which goes beyond EU Regulations to ban the advertising of baby formula outright.

The regulation of advertising should apply not merely to baby formula itself, but also to related products.

More stringent policing of the implementation of the Regulations should be introduced.

1.4 ‘Direct Provision’ in Ireland

There should be an immediate review of the system of direct provision. In particular, research should be conducted on the specific vulnerability of children accommodated in this system. The consequences for the best interest principle (including Constitutional consequences) should be considered.

The main recommendations of the Irish Refugee Council should be adopted, although the specifics of the overhaul of the system will, of course, be subject to the review as per the preceding recommendation. In particular recommendations regarding social welfare and child benefits, as well as limits on stays in asylum seeker centres, child protection and the right to work should be implemented as soon as possible.

Models of good practice in other jurisdictions should be researched in order to ensure that Ireland engages in support for asylum seekers which leads internationally in respecting dignity and rights.

Ireland should opt into the Recast Reception Conditions Directive of 2013 to ensure a minimum standard of provision for asylum seekers in line with other EU countries.

1.5 European Developments

The Government should integrate the Council of Europe Strategy for the Rights of the Child (2012-2015) into its work on children's rights and ensure dissemination of the document.

The Government should ensure conformity with and dissemination of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

In order to vindicate children's rights and to conform with Recommendation CM/Rec(2010)5, civil partners should be permitted to obtain parental responsibility through an agreement with other parties who have parental responsibility for the child or through an application to court.

The Gender Recognition Bill should not exclude persons under 18 years of age from applying for a Gender Recognition Certificate, but instead should provide for discretion to be exercised to determine whether the granting of such a certificate is in the best interests of the child.

SECTION 2: GENERAL TRENDS EMERGING FROM THE COURTS

2.2 Right to Privacy

The Courts and Civil Law (Miscellaneous Provisions) Act 2013 provides welcome and long overdue access to child and family law matters. The Act should be monitored in terms of its operation in practice.

2.3 Section 23 of Children Act 1997

It is recommended that clear guidelines be introduced as to the factors that should be considered when deciding whether a child in a particular case should give evidence. In the High Court, in cases dealing with the Hague Convention on Child Abduction, the practice is to employ a child psychologist to give evidence to assist the court in determining whether a child should give evidence. Judges are not psychologists and should be provided with some guidance on how to decide whether it is in the interests of the welfare of the child to appear in court to give evidence.

Section 23 of the 1997 Act needs to be reviewed in the context of care proceedings whereby the evidence of the child should be admissible, but with safeguards built in as to the weight to be attributed to it and an assessment of the particular circumstances of the disclosure.

It is recommended that section 23(2)(a) of the 1997 Act be amended so that the presumption is that the statements made by children shall be admitted, unless in the interests of justice this should not occur.

The Child Care Act 1991 should be amended so as to integrate more comprehensively the provisions contained in section 23 of the 1997 Act.

2.5 Jurisdiction, Transfer of Proceedings and Council Regulation EC 2201/2003

A protocol similar to the one that exists between Northern Ireland and the Republic should be developed between the Republic and the rest of the United Kingdom to enable the effective and efficient handling of cases where families travel from one

jurisdiction to the other, in circumstances where that family is known to the social services or there are court orders in existence in relation to the family.

2.6 Children Known to the Child and Family Agency

Where particular needs are identified by the Child and Family Agency in dealing with a family the Agency must ensure sufficient intensive and specialised supports or interventions are developed and put in place to respond to high risk families with complex needs.

2.7 Entitlement of Children to Remission

In light of the decision in Byrne & Another v. Director of Oberstown School, it is recommended that the Prisons Act 2007 be amended so that it specifically refers to Oberstown School as a place of detention for juvenile offenders as well as any other detention centres that are used as places of detention in the criminal justice context. If the Children Act 2001 is to be amended it should be altered with a view to prioritising the interests of the child.

2.8 Court Orders Affecting Children

It is recommended that the Child Care Act 1991 be amended to enable a court, when granting a supervision order, to impose such conditions as it thinks fit to ensure that the rights and welfare of the child are adequately protected. Such conditions and supports, if they were to be linked with a supervision order, can provide ‘scaffolding’ in a child care context and can potentially provide vulnerable families with the support they need, possibly obviating the need of further court orders being sought.

Section 19 of the 1991 Act requires clarification on the permissible intervention by the Child and Family Agency once a supervision order is made. At present it is unclear for example whether a social worker can inspect a dwelling, talk to the children separately, or visit the children in school without the parents’ consent.

Section 13(7) of the 1991 Act is instructive and could be extended to require parents to engage in services to help them to “parent” appropriately.

2.9 Emergency Reliefs

The operation of the powers granted by sections 12 and 13 of the Child Care Act 1991 should be examined in light of the findings of the Ombudsman for Children's investigation.

Clear guidelines for the use of Garda powers under section 12 of the Child Care Act 1991 should be produced and made available to the public. Such guidelines should stipulate that the powers granted under section 12 of the Child Care Act are to be used only as a last resort.

Members of An Garda Síochána and the Child and Family Agency staff should ensure full inter-agency co-operation and communication in matters involving the emergency protection of children as required by the Children's First Guidelines.

Consideration might be given to a prohibition on a parent or other party communicating with a child taken into care under section 13 in any manner and through any medium (Facebook etc.) except with express permission of other parties or the court.

The breach of any of these proposed conditions would have to be subject to a sanction in order for them to act as a deterrent.

It is recommended that provision be incorporated into Irish law to enable a broader spectrum of investigation and assessment to be carried out than is currently permissible under a supervision order granted under section 19 of the 1991 Act. Regard should be had to the position in other jurisdictions such as the United Kingdom and Australia. A mandated parental capacity assessment could highlight the methodology by which supports are to be provided to secure a family unit. For example, a parent with a moderate learning disability may need very specific support.

2.10 Challenges to Care Orders

There is a need for certainty in legislation, or at the very least a robust case management system, in order to set out the procedure to follow when a Judge dealing with a particular child care case finds himself/herself hearing evidence relating to a decision that has been made previously.

This is an area that should be streamlined with a more regulated functioning of the powers and role of Guardians Ad Litem (GALs).

Emergency Care Orders (ECOs) Pre-Birth

It is recommended that a statutory basis be put in place for recognition of pre-birth concerns. Once any post birth action is contemplated by the Child and Family Agency, there should be provision for (compulsory) service of proceedings or notice of intended proceedings pre-birth to allow for legal advice and representation. Legal Aid would have to be made available on a priority basis pre-birth.

The Child and Family Agency should have to substantiate why no formal pre-birth notice would be justified. For example, it might be justified in circumstances where there was no attendance at the hospital of the prospective respondent parent.

There should be an obligation on the Child and Family Agency to initiate new born baby applications when the intention is formed to seek to take the baby into care, rather than when the child might be due for release.

The Child Care Act should be amended to provide for a “Holding Order” as an alternative to an emergency care order in pre-birth cases.

2.11 Care Order Threshold and Considerations

The District Court should be empowered to make proportionate orders to underpin transition arrangements when refusing a care order, an interim care order, or an emergency care order where the child is already in the care of the Child and Family Agency.

Guidelines should be published to provide greater clarity as to the threshold to be satisfied in respect of section 18(1)(c) of the 1991 Act. Preferably such guidelines should be expounded by judgment of a court, but in the absence of same guidelines ought to be formulated so as to assist social workers in assessing whether there is a reasonable basis for pursuing an application under section 18(1)(c) of the 1991 Act.

Section 22 of the 1991 Act should be amended to provide that if there is to be an application for discharge of a care order by a respondent parent, it is to be preceded by a “leave to apply” hearing, with the onus on the respondent to satisfy the court that there is a real change of circumstances and/or real or substantial grounds for discharge of the order.

2.12 Interim Care Order Threshold and Considerations

An Order of the court granting an interim care order pursuant to section 17 of the Child Care Act 1991 must always reflect the evidence proffered to the court in support of the application, the deponent thereof, and reasons for the granting or extension of the order. Such a practice would ensure that the legal requirements as set out by O’Malley J. in K.A. v. HSE [2012] 1 I.R. 794 are met in every case, and that a judge, or other person, considering the matter on a subsequent occasion can be apprised as to the basis for the granting or extension of the order.

It is recommended that section 17 of the 1991 Act be amended to enable a court to make a supervision order in lieu of an interim care order. In a similar vein the 1991 Act should be amended to enable a court to make a less intrusive order where it deems that appropriate, e.g. in an application for a care order a court could make an order for an interim care order, or on the application for an interim care order the court could make a supervision order.

The period of extension of an interim care order should be amended to enable a court to grant an extension of an Interim Care Order (ICO) of up to 35 days to enable the Child and Family Agency to complete whatever interventions or assessments are required.

It should be a requirement for the Child and Family Agency to set out all services offered to the family to obviate the necessity to apply for an ICO (pre-proceeding work undertaken), save in emergency situations.

It is recommended that provision be made in law for the continuation of existing orders made under the 1991 Act during the hearing of an application for a new order or the extension of an existing order. For example, where an interim care order has been granted until a certain date and a hearing is taking place but has not concluded by the time the interim care order expires, the question that then arises is whether the interim care order should be extended, even if the parties contest it, so as to enable the judge to finish hearing the matter. It is recommended that a strict timeframe be put in place to allow judges in such a situation to extend an order made under the 1991 Act.

2.13 Miscellaneous Domestic Issues

It is recommended that child care law should always take place on a separate day at a separate sitting in light of the highly sensitive matters being litigated and the emotional trauma associated with being a respondent in these proceedings. At a minimum, child care matters should be heard on the same day as family law matters.

It is recommended that judges who are to be assigned to deal with child care matters should be given comprehensive training in regard to issues which are particular to child care law.

It is recommended that experts in the area of attachment, child development and the impact of abuse ranging from neglect to sexual abuse should be provided to all judges who are allocated to deal with child care matters in light of the fact that decisions made by these judges have such far reaching consequences for children and families.

Any designated specialist family courts should be staffed by specially trained judges but specialist judges should remain part of a single judicial body.

Training should be provided in advance of an assignment to child care and should be ongoing and regular.

Other practical matters that are necessary to ensure that child and family law matters proceed smoothly include: having translators within easy reach to avoid lengthy delays or adjournments when there are language problems and providing sufficient space for parties to consult with their legal representatives.

The anomaly where District Court judges do not have the power (available in the Circuit and High Courts) to order reports in relation to children pursuant to section 47 of the Family Law Act 1995 should be addressed without delay.

Where a child is joined to proceedings pursuant to section 25 of the Child Care Act 1991, provision should be made to ensure that only a solicitor with training or expertise in dealing with children is appointed to represent such a child.

Regard should be had to the family court systems that exist in other jurisdictions such as the United Kingdom, Australia and New Zealand.

Voice of the Child

The implementation of the recommendations as set out in section 4.1.4 of the Sixth Report of the Special Rapporteur on Child Protection (2013).

2.14 Appointment and Role of Guardian *ad litem*

The statutory role of Guardians Ad Litem (GALs) should be clearly defined. The present situation is that although GALs are not a party to the proceedings they are entitled to be legally represented and are permitted to take part in proceedings.

Section 26 of the 1991 Act should be amended to clearly set out the role, function, appointment and qualifications of GALs.

The qualifications of GALs should be standardised and proper vetting of persons involved in such work should be conducted.

2.15 The Right to the Provision of After-care Services

The recently publicised policy commitment of the government to provide children in care with an after-care plan should result in action in order to provide the necessary bridge for vulnerable children who are leaving the care system and beginning to live independently.

2.16 Homelessness

The difficulty with section 5 of the Child Care Act 1991 is that there is no provision for judicial scrutiny or consideration of a decision of the Child and Family Agency not to apply for a care order or supervision order with respect to a child that is homeless. It is recommended that the report to be produced by the Agency in accordance with section 5 of the 1991 Act be submitted to the District Court within 8 days of the publishing thereof for the purpose of enabling the court to consider whether the Agency has properly discharged its statutory duty towards children who will not be returning to the family unit and who are not subject to the general provisions of the 1991 Act.

2.18 The Child Care Act 1991-Miscellaneous Reforms

It is recommended that section 20 of the 1991 Act be amended so as to include any proceedings involving or relating to a child in any court.

Section 22 of the 1991 Act should be amended so as to remove any ambiguity as to whether an interim care order can be varied or discharged under the section in like manner as a care order or supervision order.

*Concurrent public law and criminal law proceedings can be problematic. Joint case management hearings have been recommended by the English Court of Appeal Criminal Division, in the case of *R v. Levy* [2007] 1 FLR 462: [2006] EWCA Crim 1902. There is no such protocol in this jurisdiction. A protocol should be adopted in Ireland to deal with the situation where a child care or family law matter might be accompanied by criminal proceedings or investigations relating to the same child or family. A procedure should be put in place that enables effective and necessary*

communication between An Garda Síochána and the family/child law court as in the United Kingdom.

Clarification is needed as to the procedure governing the privilege against self-incrimination and whether, and if so how, it applies in the child care context. A dilemma arises where a witness is asked questions regarding the welfare of the child but the answers to that question may expose a witness to criminal investigation/prosecution.

A code of practice should be developed to resolve the difficulties between confession of wrongdoing in the course of child care matters and a witness potentially exposing himself/herself to a criminal prosecution.

It is unclear whether the general privilege against self incrimination is abrogated in this jurisdiction in the context of child care or family law proceedings. This should be clarified.

2.19 Legal Support Network for Trafficked Children

The proposed establishment in Northern Ireland of a specialist legal support network to provide advice to victims of child trafficking¹ is to be welcomed and is something that the Republic should take steps to follow. The very fact that we inhabit the same island is reason enough to adopt a similar approach in this jurisdiction considering the cross border vulnerability of children who can potentially be trafficked between one country and another. Furthermore, given that the Good Friday Agreement of 1998 guarantees equivalent human rights protection north and south of the border, it is incumbent on this country to introduce similar measures.

2.20 Jurisdiction

Section 16 and section 28 of the Child Care Act 1991 should be amended to provide that a court can be seised of a matter in respect of a child “who resides or is found in its area.... or in respect of a child who was so resident or found at the date of the

¹ ‘Increase of number of children trafficked into North’ Irish Times, 6th December, 2013.

original application”. This will ensure that when a child is received into care under section 18 of the 1991 Act and then moves to reside with a foster carer or residential home in a different District Court area, the Child and Family Agency can proceed in the court originally seised for the making of the care order (or not) at their choice.

Children in need of special care should be brought into the jurisdiction of the District Court. There should, however, be provision for any social work or other reports etc. to be on affidavit and the court should be permitted to have some “inherent” powers to deal with the court’s original jurisdiction in child care matters.

The District Court should have specific powers to award costs in child care proceedings.

2.21 Appeals

Section 21 should be re-examined in light of the 31st amendment to the Constitution and its requirement that the views of the child be ascertained in certain proceedings. Any representatives acting for a parent should be obliged to formally set out a response to the social work and other reports as the proceedings progress, in a document available for the Child and Family Agency and the Court.

SECTION 3: CHILDREN AND INTERNET SAFETY

Having signed both the Convention on Cybercrime (the Budapest Convention) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) it is now imperative that Ireland ratify these Conventions forthwith without reservation.

The EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography ought to be transposed into Irish law.

The transposition of the Directive and ratification of the Conventions ought to be carried out in such a manner so as to ensure that the greatest level of protection to be afforded to children under these instruments is given effect in our domestic legislation.

In terms of the various jurisdictional rules to apply in respect of the prosecution of offences against children committed on, or with the aid of, the internet it is recommended that the most expansive approach be taken so as to ensure the prosecution of those who commit offences regardless of matters such as the location of the internet server used to perpetrate the offence or the physical presence of the child. In particular a relaxation of the dual criminality rule, as per the Convention, would assist in this regard.

The Child Trafficking and Pornography Act 1998 ought to be reviewed, clarified and amended to ensure that it keeps pace with developments in relation to the type of offences against children capable of being perpetrated on, or with the aid of, the internet. For example the concept of 'representations of children' on the internet needs to be clarified to account for more recent developments in computer generated images and 'realistic images' of children. Further the age of a child for the purpose of the 1998 Act ought to be increased from 17 to 18, and an exemption from criminal liability arising from self-created images or videos ought to be considered having regard to the international Conventions.

Irish law does not yet criminalise the viewing of child pornography. This is a significant failing in our legislation and needs to be addressed. Whilst the act of downloading child pornography is criminalised, the streaming or accessing of same through 'cloud' technology does not constitute downloading and therefore escapes criminal sanction. Such activities are as detrimental to the protection of children as downloading and therefore ought to be sanctioned in a similar manner.

The introduction of an offence of child grooming in 2007 is inadequate from the perspective of child protection. The offence under Irish law fails to comply with the international best practice promulgated in the Conventions and Directive. Those international instruments criminalise grooming itself whereas Irish law focuses on the consequences of grooming. In addition, Irish law requires that there be a minimum of two contacts between a perpetrator and a child to constitute the offence of grooming. No such minimum threshold is provided for in the international instruments, and the prescription of such a minimum threshold fails to sanction those who attempt

grooming on one occasion and are unsuccessful in further contact with that child. Irish legislation ought to be amended to address these shortcomings.

Irish legislation criminalising grooming ought to be amended to capture online activities in furtherance or as a result of grooming of a child.

SECTION 4: FORCED MARRIAGES

Introduce a coherent legislative framework aimed specifically at preventing forced marriage of children.

Ensure compliance with Ireland's international obligations in relation to the prevention of forced marriage.

A protocol should be developed identifying the role of the key State Agencies in addressing the needs of a child victim or potential victim of forced marriage.

SECTION 1:

CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

1.1 Introduction

One of the key aspects of the role of the Special Rapporteur on Child Protection is to monitor and report on international developments in respect of matters of child protection and welfare with a view to analysing same in the context of the child protection and welfare system in Ireland. Such analysis has been a constant feature of the previous Reports of the Special Rapporteur. It is intended to review such international developments over the course of the last year and to identify recommendations therefrom to be implemented in Ireland so as to ensure that the child protection and welfare system in the State is in keeping with international best practice.

1.2 General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration

General Comments are drafted by treaty monitoring bodies such as the United Nations (UN) Committee on the Rights of the Child to provide further elaboration on the substance of a right. The purpose of these official UN documents is to assist governments, and others who safeguard the rights of children, to ensure the implementation of the principles of the UN Convention on the Rights of the Child (CRC). In 2013 the UN Committee on the Rights of the Child published a general comment on a central aspect of the CRC; the best interest principle.

The best interest principle stipulates that children's interests are considered when decisions are made by adults on their behalf. The principle is enshrined in Article 3 of the CRC, which states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

legislative bodies, the best interests of the child shall be a primary consideration.

This text refers to the best interests of the child as “a primary consideration” as the rights of others may have to be considered in a given matter, however in other areas of the CRC the language used is “the paramount consideration”, i.e. the most important factor, as the child is clearly the person most affected by the issue; for example in the case of adoption proceedings.²

The best interest principle is, according to the Committee, a threefold concept. It is a substantive right, in that a child has a right to have his or her best interests taken into consideration when a decision is to be made.³ It is also a “fundamental, interpretative legal principle” in that laws should be interpreted in the manner which “most effectively serves the child’s best interests” in accordance with the CRC.⁴ Finally, it is a rule of procedure. This means that when a decision is to be made that will affect an individual child, a group of children or children in general, an evaluation must be conducted as regards the possible impact of the decision on the child or children concerned.⁵

Article 3 is a core CRC provision; the Committee has identified the best interest principle as one of the four ‘general principles’ of the CRC through which all other rights are to be interpreted, along with the right to freedom from discrimination (Article 2); the right to life, survival and development (Article 6); and the right to be heard (Article 12).⁶

The principle is, however, vulnerable to criticism. It can be argued that the best interest principle is vague and that many things can be argued to be in a child’s ‘best interest’ depending on one’s perspective. The CRC however, with its extensive list of

² CRC, Article 21.

³ UN Committee on the Rights of the Child, *General Comment No. 14 – Article 3: The Right of the Child to have his or her Best Interests taken as a Primary Consideration* (CRC/C/GC/14) (29 May 2013), at p. 4.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ UN Committee on the Rights of the Child, *General Comment No. 5 – General Measures of Implementation of the Convention on the Rights of the Child* (CRC/C/GC/2003/5) (3 October 2003).

rights, goes some way towards providing a guide to what is in a child's best interests. The principle can be criticised on the basis that it is overly paternalistic, in that decisions are made about children rather than by them, and that adult interpretations of what is 'best' for children prevail. Again the CRC can help to mitigate this. The Committee states in General Comment No. 14 that a rights-based approach must be taken to determining what constitutes the best interest of the child, and that all the rights provided for in the CRC are in the "child's best interests."⁷ The Committee reiterates that "an adult's judgement of a child's best interests cannot override the obligation to respect all the child's rights under the Convention."⁸

It is emphasised in General Comment No. 14 that states are obliged to take all necessary measures for the full implementation of the right of children to have their best interests as a primary consideration in decisions affecting them. Three types of obligations for State parties are identified:

1. In every action taken by a public institution the obligation to consider and apply the best interest principle must be applied;
2. The application of the principle must be demonstrated, that is there must be a description of how the best interests have been examined and assessed, and of the weight ascribed to them in the decision;
3. States must ensure that the interests of the child have been assessed and have been a primary consideration in the actions of those in the private sector whose decisions concern or impact on a child or children.⁹

A number of implementation measures are suggested in the general comment in order for a State to ensure compliance with Article 3. States are required to ensure that the best interests of the child are a primary consideration in all actions through the following means. States must review domestic legislation and other sources of law so as to incorporate the principle of the best interests of the child. The requirement to consider the child's best interests should be reflected and implemented in all national laws and regulations and in rules governing the operation of private or public

⁷ UN Committee on the Rights of the Child, *General Comment No. 14 – Article 3: The Right of the Child to have his or her Best Interests taken as a Primary Consideration* (CRC/C/GC/14) (29 May 2013), at p. 4.

⁸ *Ibid.*, at p. 3. This point was originally made in *General Comment No. 13* (2011) on the right to protection from all forms of violence, para. 61.

⁹ *Ibid.*, at p. 5.

institutions providing services impacting on children. It must also apply to judicial and administrative proceedings, both as a substantive right (i.e. the child should have a right to have his or her best interests to be a primary consideration) and as a rule of procedure. The Committee also states that when policies (at the national, regional and local levels) are being determined and implemented, the principle of the best interest of the child should also be upheld.¹⁰

States must establish mechanisms and procedures for complaints, remedy or redress in cases where the best interest principle has not been applied. They must also uphold the principle in the allocation of resources, and when collecting and analysing data. Training must be conducted with those whose decisions impact on children, and children themselves must be educated about the principle. Children must have opportunities to provide their views on matters regarding their best interests and to have their views taken into account as a crucial part of the best interest principle. This reflects Article 12 of the CRC, the right to be heard. The Committee also points to the negative attitudes about children which can impede the right of the child to have his or her best interests taken as a primary consideration, and states that programmes should be run which aim to have children recognised as rights holders.¹¹

The substance of the best interest principle can be a difficult matter, as ideas about what is in a child's 'best interest' will differ between contexts and even individuals. The General Comment provides a useful list of factors to consider when determining what is in a child's (or children's) best interest. These are:

- (a) The universal, indivisible, interdependent and interrelated nature of children's rights;
- (b) Recognition of children as right holders;
- (c) The global nature and reach of the Convention;
- (d) The obligation of States parties to respect, protect and fulfill all the rights in the Convention;
- (e) Short-, medium- and long-term effects of actions related to the development of the child over time.¹²

¹⁰ *Ibid.*, at p. 6.

¹¹ *Ibid.*

¹² *Ibid.*

The principle of the best interest of the child is to be found in a number of areas of Irish legislation and other sources of law. For example, the Child Care Act 1991 stipulates that a court must “regard the welfare of the child as the first and paramount consideration” in any proceedings before it under that Act in relation to the care and protection of a child.¹³ The lack of explicit reference to the best interests of the child in the Constitution of Ireland in any other context than the marital family was previously inadequate from a children’s rights perspective. I highlighted in my Submission to the Joint Committee on the Constitutional Amendment on Children¹⁴ that, before the amendment to the Constitution, the child was seldom expressly referred to in the text of the Constitution, and what few references existed were consequential or subject to others such as parents. Although children can invoke Article 40 of the Constitution which protects fundamental personal rights,¹⁵ these rights are unspecified. The Supreme Court decision in the ‘Baby Ann’ case¹⁶ demonstrated how the rights of the birth parents of a child can supersede the best interests of the child in question.¹⁷

The inclusion of an explicit reference to the rights of children, including the best interest principle, has brought Ireland much more in line with the requirements of the CRC, and consequently the requirements of General Comment No. 14. It is now stipulated in Article 42A of the Constitution that:

Provision shall be made by law that in the resolution of all proceedings—

- i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

¹³ Child Care Act 1991, section 24(a).

¹⁴ Geoffrey Shannon, *Submission to the Joint Committee on the Constitutional Amendment on Children* (2007). Available at:

http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-ConAmendChildren/Submissions/List_Of_Submissions/67Shannon.doc.

¹⁵ See *Re Article 26 and the Adoption Bill 1987* [1989] I.R. 656, at 662.

¹⁶ *N. v. Health Service Executive* [2006] 4 I.R. 374.

¹⁷ Shannon, *supra* note 14, at p. 12.

- ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.¹⁸

Article 42A also includes the provision that in such proceedings, the views of children should be ascertained and given due weight “as far as practicable”.

In accordance with the General Comment No. 14, Article 42A and other areas of law and policy which enshrine the best interest principle should be interpreted in a manner compatible with the rights contained within the CRC. A rights-based approach should be taken to the application of the principle. This should be explicitly outlined in judgments and other decision-making outcomes.

Though Ireland has enshrined the best interest principle in legislation and more recently in the Constitution, the principle has yet to be fully integrated in decision-making as regards policy. The Committee’s stipulation that in every action taken by a public institution the best interest principle must be considered and applied is not routinely observed in Ireland. Clearly the absence of the best interest principle in such decision-making has real and profound effects on children. As I outlined in my Fifth Report,¹⁹ the Ombudsman for Children, Emily Logan states that a primary feature of her work is that “the impact of civil and public administrative decision-making on the lives of children is rarely considered by the bodies concerned.”²⁰ I highlighted in the same report²¹ that the National Assembly for Wales unanimously passed a ‘measure’ in 2011 to incorporate the CRC into national law. Under the Rights of Children and Young Persons (Wales) Measure, government ministers must now consider, when drafting new laws and policies, the rights of people under 25 years of age, having “due regard” for the CRC and its protocols. The need to consider how to enact such a measure in Ireland is now even more urgent considering the publication of General

¹⁸ Bunreacht na hÉireann, Article 42(A)(4)(1). At the time of writing, the referendum result was subject to an appeal to the Supreme Court: see Part 4 of the Referendum Act 1994 and *Hanafin v. Minister for the Environment* [1996] 1 I.R. 321.

¹⁹ Geoffrey Shannon, *Fifth Report of the Rapporteur on Child Protection* (2011), at p. 64.

²⁰ Emily Logan, ‘Comment: Protecting the Rights of the Child’ *The Sunday Business Post Online*, 5 June 2011, available at www.sbpost.ie. See also Ombudsman for Children, *A Children’s Rights Analysis of Investigations* (Ombudsman for Children, 2011).

²¹ Shannon, *supra* note 19, at p. 57.

Comment No. 14,²² which requires such a provision. The measure should include the obligation on authorities to demonstrate how the best interests of children have been examined and assessed, and of the weight ascribed to them in the decision, as per the recommendations of the Committee.

In order to demonstrate implementation of this stipulation in the court context, consideration should be given to the inclusion of a comprehensive ‘checklist’ of factors in the relevant legislation equivalent to that included in the Children Act 1989 in England and Wales. Section 1(3) of that Act includes a list of factors to be considered when a decision is being made about any matter regarding the upbringing of a child; or the administration of the child’s property. In such decisions, it is stated that “the child’s welfare shall be the court’s paramount consideration.” In order to determine what exactly is in “the child’s welfare” or best interests, the court must have particular regard for the following factors:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.²³

This list permits the court to focus on various aspects of a child’s present and future well-being and accounts somewhat for the potentially vague nature of the best interest principle. It is to be noted that, although the factors are not in order of priority, the “wishes and feelings of the child” is the first factor in this checklist, reflecting Article 12 of the CRC, the right of children to be heard. A similar checklist is likely to be

²² As I have noted previously, Ireland should improve on the Wales measure by also permitting individuals to invoke the CRC in court and permit the courts to apply the CRC as a matter of Irish law. *Ibid.*, at p. 66.

²³ Children Act 1989, s. 1(3) (England & Wales).

included in the Children and Family Relationships Bill 2014. In identifying the factors to which a Court should have regard, the need to consult and accord with the provisions of the CRC should be explicitly referenced. The list of factors provided in General Comment No. 14 will also be of use (see above).

A means through which to ensure that the actions of the private sector also give due consideration to the best interests of the child must be established in Ireland in order to meet the requirements of General Comment No. 14. It is specified in the comment that:

Private social welfare institutions include private sector organisations – either for-profit or non-profit – which play a role in the provision of services that are critical to children’s enjoyment of their rights, and which act on behalf of or alongside Government services as an alternative.

Examples of such actors are those providing services for children with disabilities, or schools run by religious orders. It is the duty of the state to ensure that private actors engaged in such service provision are aware of the best interest principle and how to apply it.²⁴ This will require training for the relevant professionals in the private sector.

The existence in Ireland of the Ombudsman for Children goes some way towards meeting the requirement under General Comment No. 14 for a complaints and redress mechanism where it is claimed the best interest principle has not been applied. The Ombudsman operates as a quasi-judicial body and accepts and investigates complaints regarding State service provision and decision-making affecting children. To date, the Office has dealt with over 8,500 complaints from the public. There are other areas, however, where children may want to challenge decision-making concerning their interests where it is difficult to do so. For example it is very difficult for children to access the courts to assert their interests in their own right. When children’s interests are before the courts, it is almost always as a result of the initiation of proceedings by adults, for example parents or the State. There is no equivalent in Ireland to the provision under the Children Act 1989 for children to initiate proceedings themselves. Under section 10 of that Act, interested persons can

²⁴ General Comment No. 14, at p. 8. See section 9 of the Child and Family Agency Act 2013 (Number 40 of 2013).

make an application to the court seeking a section 8 order, an order which concerns matters regarding the child's upbringing. Section 10(8) states that:

Where the person applying for leave to make an application for a section 8 order is the child concerned, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application for the section 8 order.²⁵

Such a provision in Irish law would bring Ireland much more in line with the requirements of General Comment No. 14 in permitting children greater access to a mechanism to assert their interests, and therefore greater access to justice.

Another area in which Ireland needs to improve is considering the best interests of children when allocating resources. This would involve, for example, the explicit consideration by the government of the impact on children of budgetary measures. The Committee on the Rights of the Child has emphasised that such an exercise is necessary so that governments make clear that "budgetary decisions are made with the best interests of children as a primary consideration"²⁶ and that children, as a particularly disadvantaged group, "are protected from the adverse effects of economic policies or financial downturns."²⁷ Many States publish 'children's budgets' annually²⁸ and this should happen in Ireland. This would have the effect of making the budget process more transparent and accountable for children.²⁹

Greater levels of training and awareness-raising on the best interest principle need to be ensured in Ireland. All those involved in service provision for children, for example judges, teachers and nurses should receive training on children's rights generally and the best interest principle in particular. Sporadic training occurs in Ireland,³⁰ however a much more thorough approach needs to be taken. We need to identify how best to ensure the delivery of children's rights training for judges and key decision-makers. A scoping exercise should be conducted at government level in

²⁵ Children Act 1989, s.10(8) (England & Wales).

²⁶ Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (CRC/GC/2003/5, 27 November 2003), para. 51.

²⁷ *Ibid.*

²⁸ UNICEF, *Influencing Budgets for Children's Rights* (UNICEF, 2004).

²⁹ See further Aoife Daly, "Editorial: *Children should be a Primary Consideration in Budgets*" 14 *Irish Journal of Family Law* 1 (2011).

³⁰ See e.g. Ombudsman for Children's Office, *Young People in St. Patrick's Institution*, (2011), at p. 9.

order to ascertain this information, and arrangements should be made for training to be provided as a matter of course. As stipulated in General Comment No. 14, children in Ireland also need to be made aware of the best interest principle in order to be able to seek its application. Part of the recommended scoping exercise should be to identify how best to make children aware of the CRC and the best interest principle. In Scotland, the office of the Commissioner for Children held a national consultation of children and young people in 2009 called ‘a RIGHT blether’. As part of that consultation there was a national vote in which children and young people contributed to the Commissioner’s work plan for the following four years. Such an exercise in Ireland by, for example the Office of the Ombudsman for Children or the Office of the Minister for Children and Youth Affairs could serve the dual purpose of permitting children to influence the work of a government or semi-government body as well as making them aware of the CRC.³¹

1.2.1 Recommendations

Article 42A of the Constitution of Ireland and other areas of law and policy which enshrine the best interest principle should be interpreted in accordance with the rights contained within the UN Convention on the Rights of the Child (CRC).

A provision should be included in Irish law to enhance the capacity of children to access the courts to assert their interests.

Consideration should be given to the inclusion of a comprehensive ‘checklist’ of factors in the relevant legislation equivalent to that included in the Children Act 1989 in England and Wales.

The manner in which the best interest principle has been considered in all decision-making processes in legal proceedings should be explicitly outlined, as should the rights-based approach which was taken.

³¹ See website of the Scottish Office of the Commissioner for Children, <http://www.sccyp.org.uk/what-were-doing/what-weve-done/blether>.

In every action taken by a public institution the obligation to consider and apply the best interest principle must be demonstrated. A legislative measure should be introduced for this purpose.

The government should ensure that budgetary decisions are made with the best interests of children as a primary consideration, and the manner in which this was achieved should be transparent.

Further training should be provided for the relevant professionals in both the public and private sector on the best interest principle and how to apply it. Awareness-raising with children should also be improved. A scoping exercise should be conducted at government level in order to ascertain how best to engage in such training. A national exercise with children should be considered in which they are taught about the CRC.

1.3 General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health

The Committee on the Rights of the Child also published in 2013 General Comment No. 15 on *The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health*. General Comment No. 15 is based on Article 24 of the CRC which states that:

States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.³²

Article 24 then goes on to stipulate that States must take measures to diminish infant and child mortality, to ensure the provision of necessary health care to children, to combat disease and nutrition, to ensure pre-natal and post-natal care for mothers, to ensure appropriate access to information on healthcare, to develop preventive health care including family planning, to abolish harmful traditional practices and to encourage international co-operation in realising the right. The Committee makes the

³² CRC, Article 24.

point that “the realisation of the right to health is indispensable for the enjoyment of all the other rights in the Convention.”³³

General Comment No. 15 is based on the importance of interpreting the matter of children’s health from a children’s rights perspective. This involves the approach that all children have the right to survive, grow and develop, in a context of physical, emotional and social well-being, and every child should have the opportunity to reach his or her full potential.³⁴ It is also based on the premise of the World Health Organisation that health “is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”³⁵

General Comment No. 15 is aimed at a wide range of duty bearers, including governmental and non-governmental organisations, those in the private sector and funding organisations. It is emphasised that States are obliged to ensure that all duty bearers are sufficiently aware of their obligations and responsibilities and are capable of meeting them, and that children themselves are also empowered to be involved in decisions affecting them.³⁶

The Committee states that children’s best interests should be at the centre of decisions affecting their health, for example in relation to providing, withholding or terminating treatment. This also includes the development and implementation of relevant policies and the allocation of resources. It is specified that the best interests of the child should:

- (a) Guide treatment options, superseding economic considerations where feasible;
- (b) Aid the resolution of conflict of interest between parents and health workers; and
- (c) Influence the development of policies to regulate actions that impede the physical and social environments in which children live, grow and develop.³⁷

The Committee stipulates that States should develop procedures to guide health workers in applying the best interest principle in the area of health.³⁸

³³ Committee on the Rights of the Child, *General Comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health* (CRC/C/GC/15) (13 April 2013), at p. 5.

³⁴ *Ibid.*, at p. 3.

³⁵ Preamble to the Constitution of the World Health Organization (WHO) as adopted by the International Health Conference, New York, 22 July 1946. See General Comment No. 15 at p. 3.

³⁶ General Comment No. 15 at p. 4.

³⁷ *Ibid.*, at p. 5.

³⁸ *Ibid.*, at p. 6.

1.3.1 Participation

A clear element of the best principle is the right of children to be heard and to participate in decisions being made on their behalf. This applies in the medical arena as it does elsewhere. This is closely linked to the right of children to information, and the Committee has long emphasised that it is in the best interests of children to have access to “appropriate information on health issues.”³⁹ It is emphasised in General Comment No. 15 that the Article 12 CRC right of children to be heard provides for children to express their views on all aspects of health provision and to have those views taken into account.

Children’s views should, for example, be included in decision-making at policy level regarding what services are needed, how they are best provided, what the barriers are as regards accessing services, measuring the quality of the services and how to assist children to take responsibility for their own health and development. For this purpose, the Committee stipulates that States should conduct regular participatory consultations with children in order for children’s views and experiences to contribute to the design of health interventions and programmes.⁴⁰ In this regard, the initiative taken by the Law Reform Commission in relation to its consultation on *Children and the Law: Medical Treatment* whereby children were widely consulted is to be welcomed.

Of course participation by individual children in decision-making regarding personal medical matters is also a vital part of vindicating the right of children to the highest possible standard of health. Research conducted on behalf of the Office of the Minister for Children and Youth Affairs identified a number of obstacles in Ireland to communicating with children on medical matters.⁴¹ It was stated that, whilst children’s specialists appeared to engage in best practice regarding communicating with children, non-specialists did not appear to be as familiar with children’s rights and the need to listen to children. Moreover, it was held that the attitude of parents

³⁹ General Comment No. 4 (2003) on *adolescent health and development in the context of the Convention*, para. 10. Cited in General Comment No. 15 at p. 6.

⁴⁰ General Comment No. 15 at p. 7.

⁴¹ Office of the Minister for Children, *The Child’s Right to be Heard in the Healthcare Setting: Perspectives of Children, Parents and Health Professionals* (2006), available at: http://www.dcyh.gov.ie/documents/research/The_Childs_Right_to_be_heard_in_the_healthcare_Setting.pdf.

can determine whether children are heard in the healthcare setting. It was also found that professionals are often lacking in the time required to ensure that children are heard during the consultation and treatment process. Both the amount of appropriate physical space and the personal attitude of health professionals were found to determine whether or not children were listened to.⁴²

A number of recommendations were made in the report as regards addressing obstacles to hearing children in the healthcare setting. These recommendations are:

1. Public information campaign: A public information campaign aimed at children and adults needs to take place to raise awareness of the right of the child to be heard.
2. Training: Child development, children's rights and appropriate ways to communicate with children of all ages and stages of development should be incorporated into the training of all health professionals. This should also address the role of parents in this process.
3. Protocols and best practice: Protocols need to be developed between all health professionals, establishing best practice and shared approaches to communicating with children.
4. Research: Further research should be undertaken into the extent to which children are listened to in the healthcare setting. In particular, the experiences of teenagers and children and young people with disabilities should be taken into account.⁴³

The report also usefully outlined best practice in communicating with children regarding healthcare as involving the following factors:

- The child must be involved in treatment decisions as far as possible, bearing in mind his/her capacity to understand and willingness to be involved.
- The patient's parents or carers must be involved in treatment decisions.
- The views of children must be sought and taken into account.
- The relationship between health professional and child should be based on truthfulness, clarity and awareness of the child's age and maturity.
- Children must be listened to and their questions responded to, clearly and truthfully.
- Communication with children must be an ongoing process.

⁴² *Ibid.*, at p. 6.

⁴³ *Ibid.*, at p. 6.

- Training in communication skills with children is an essential component of appropriate professional education.⁴⁴

These factors will provide welcome guidance for professionals in order to ensure a rights-based approach to best practice is being followed as regards hearing children and taking their views into account in the area of medical treatment.

A crucial issue relating to the participation of children in healthcare decisions is that of the right to consent to medical treatment. Law and practice in Ireland does not at present provide clear guidelines on consent for professionals, and it has been reported that this results in inconsistent professional practice. It is also of concern that the existing mechanism through which children may consent to medical treatment is the Non-Fatal Offences Against the Person Act 1997, which provides a medical professional with a defence when facing prosecution for assault. This is a criminal statute unsuitable for the vindication of children's healthcare rights.⁴⁵ It does not provide a rights-based approach to children's consent and legislation should be drafted which deals in particular with this matter.

The Law Reform Commission has made a number of recommendations as regards consent to medical treatment in the report *Children and the Law: Medical Treatment*.⁴⁶ The Commission provisionally recommended that children of 14 or 15 years of age could, subject to certain requirements, be regarded as capable of giving consent to health care and medical treatment. This would be on the condition that the child had the "capacity to understand the nature and consequences of the treatment being provided."⁴⁷ The Commission also provisionally recommended that it would be lawful for a health care professional to provide treatment to a person who is 12 or 13 years of age, provided that parents or guardians of the child have been consulted and their views (as well as those of the child) considered, provided the best interests of the patient have been considered, and provided public health concerns have been considered. There is evidence, however, that children can be dissuaded from seeking

⁴⁴ *Ibid.*, at pp. 4-5.

⁴⁵ See further Law Reform Commission, *Children and the Law: Medical Treatment* (Law Reform Commission, 2009) at p. 221.

⁴⁶ *Ibid.*, at p. 219.

⁴⁷ *Ibid.*

medical advice if confidentiality is not observed.⁴⁸ Therefore it seems preferable for legislation to be introduced specifying that it be lawful for a health care professional to provide treatment to a person aged under 16 on the condition that the child has the capacity to understand the nature and consequences of the treatment.

Another vital issue is the right of children to refuse medical treatment. It was outlined in my First Report that while children of 16 years of age may consent to medical treatment in Ireland without input from their parents under the Non-Fatal Offences Against the Person Act 1997, that Act does not provide guidance on whether children of this age have a right to refuse medical treatment.⁴⁹ The issue of the right to refuse treatment in Ireland therefore remains vague as regards children aged 16 to 18 years. This issue is particularly important for children in the care of the State, who are without parents to guide them in this respect. The same issue also arises as regards persons under the age of 16. If children under 16 were to have the right to consent to medical treatment under such circumstances as recommended above, then logically they should also have the right to refuse such treatment. Clear guidelines should therefore be set out to address the matter of whether children under the age of 18 years have the right to refuse to consent to medical treatment.⁵⁰

1.3.1.1 Recommendations

Regular participatory consultations should be conducted with children in Ireland in order for their views and experiences to contribute to the design of health interventions and programmes.

The recommendations made in the report of the Office of the Minister for Children, The Child's Right to be Heard in the Healthcare Setting, should be implemented. These recommendations include an awareness-raising campaign for the general public, training for all relevant professionals and the development of relevant protocols and research into the area. The best practice guidelines in the report should be made widely available to all.

⁴⁸ Children's Rights Alliance, *Submission to the Joint Committee on Child Protection* (Children's Rights Alliance, 2006). Available at: www.childrensrights.ie.

⁴⁹ Geoffrey Shannon, *First Report of the Rapporteur on Child Protection* (2007), at p. 68.

⁵⁰ This has also been provisionally recommended by the Law Reform Commission. *Supra* note 45, at p. 220.

Legislation should be drafted which deals in particular with the right of children to consent to treatment as the Non-Fatal Offences Against the Person Act 1997 is unsuitable for this purpose. It should be lawful for a health care professional to provide treatment to a person under 16 years without parental consent on the condition that the child has the capacity to understand the nature and consequences of the treatment being provided.

Clear guidelines should be set out to address the matter of whether children under the age of 18 years have the right to refuse to consent to medical treatment.

1.3.2 Mental Health

General Comment No. 15 emphasises the serious nature of mental health problems for children and young people and the need to tackle “behavioural and social issues that undermine children’s mental health, psychosocial wellbeing and emotional development.”⁵¹ The lack of provision in this regard in the Irish context has been well documented. The Shadow Report to the Committee on the Rights of the Child, for example, highlights the absence of comprehensive, rights-based legislation in Ireland for addressing children’s health needs; the lack of counselling services for children and the fact that children cannot access counselling without parental consent, despite the fact that the problems which many children experience will derive from issues in the home.⁵² Adequate provision for children’s mental health services will require greater resources and political will in Ireland.

In my Fourth Report I engaged extensively with the issue of the right to be heard of children with mental health difficulties.⁵³ It was highlighted that the Mental Health Act 2001 operates in a context of uncertainty as regards children and medical consent and that this can lead to situations whereby parents make decisions in respect of their children that otherwise the children would make for themselves. Although the age of consent for medical treatment is 16 years under the Non-Fatal Offences Against the Person Act 1997, under the Mental Health Act 2001 the age of consent for mental health treatment is 18 years. In order to account for the vulnerable position of children

⁵¹ General Comment No. 15 at p. 7.

⁵² Children’s Rights Alliance, *From Rhetoric to Rights: Second Shadow Report to the UN Committee on the Rights of the Child* (Children’s Rights Alliance, 2006).

⁵³ Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010), section 2.

in this regard, it was recommended amongst other things that the Mental Health Act 2001 should be amended to include a separate section which clarifies the rights of children in relation to that Act. Uncertainty and inconsistency as regards consent to treatment for mental health problems persists for children in Ireland despite the serious rights issues involved.

A recent report by the Children's Mental Health Coalition highlights the urgent need for a more joined-up system to address the mental health needs of young people who have experienced care and the youth justice system.⁵⁴ The report acknowledges that, while there are some undoubtedly positive developments underway which aim to improve services for these children (for example, the establishment of the Child and Family Agency and the Assessment, Consultation and Therapy Service for the mental health needs of children in detention, special care and high support units), many problems remain which challenge the enjoyment by these children of the right to the highest attainable standard of health. The report emphasises that children, and particularly those with mental health problems, should not be involved with the youth justice system but instead be diverted towards community services that address their needs. In particular the fact that many such children require support "to address trauma, neglect or abuse they may have experienced"⁵⁵ is emphasised.

A central theme of the research is the need of children for stability and continuity in care, two factors which the report noted was clearly missing from their lives. It is stated in the report that "the overwhelming message is that if they could develop a single trusting relationship, the impact would be enormous."⁵⁶ The report identifies the need for a coherent and comprehensive national strategy which would address the mental health needs of young people in care and those in the youth justice system. This strategy should involve significant input planning, development and delivery of services by the young people themselves as they are experts by virtue of their own experiences. The report also highlights the crucial nature of inter-agency co-operation

⁵⁴ Children's Mental Health Coalition, *Someone to Care: the mental health needs of children and young people in the care and youth justice system* (2013).

⁵⁵ *Ibid.*, at p. 8.

⁵⁶ *Ibid.*

and emphasises evidence that a piecemeal approach to improving the system will not be successful.⁵⁷ The main recommendations of the report are as follows:

1. Listen to the voice of the child: Involve young people in planning service developments, education and consultation;
2. Issue a national policy statement and national strategy to address the mental health needs of children and young people in the care of the State;
3. Establish a common assessment framework and ongoing monitoring of children's and young people's mental health needs;
4. Provide stability for children and young people in the care and in youth justice systems;
5. Provide adequate, equitable access to services;
6. Establish mandatory protocols for inter-agency work;
7. Develop training programmes in identifying and understanding psychological well-being issues as an integral part of professional development for all professionals;
8. Provide legislative protection for children leaving care and detention, and homeless children.⁵⁸

An issue for the child in care is the transfer of a placement. For example, if a child is in foster care in Dublin he/she is in one Child and Adolescent Mental Health Services (CAMHS) area (having built up a therapeutic relationship). If he/she moves foster placement to Cork, the child must move to CAMHS Cork. This creates a difficulty in that there is no therapeutic relationship which is further exacerbated by the fact that the child may be placed at the end of the queue for CAMHS Cork. There is a compelling case for a protocol to be adopted for transitional "care-hand over" cases.

1.3.2.1 Recommendations

Comprehensive, rights-based legislation should be drafted in Ireland for addressing children's health needs. Increased counselling services should be established, and children should be permitted to access counselling without parental consent. Greater resources should be ring-fenced in Ireland to provide for children's mental health services more generally.

The recommendations from the recent report of the Children's Mental Health Coalition should be implemented. In particular, clarity should be provided around

⁵⁷ *Ibid.*, at p. 20.

⁵⁸ *Ibid.*, at p. 21.

how children access mental health services and how cases are managed and prioritised. This approach is necessary to address the mental health needs of children and young people in the care of the State and in the youth justice system.

A protocol should be adopted providing for the transfer of a child from one Child and Adolescent Mental Health Services (CAMHS) area to another CAMHS area.

1.3.3 Obesity

General Comment No. 15 stipulates that States must tackle obesity in children, because of the negative effects of this health condition including “hypertension, early markers of cardiovascular disease, insulin resistance, psychological effects, a higher likelihood of adult obesity, and premature death”.⁵⁹ Levels of overweight and obesity among Irish children are high compared to other Northern European countries and these levels are on the increase.⁶⁰ If this increase is not reversed it will have a significant impact on quality of life, life expectancy and healthcare costs in Ireland.⁶¹ This is a vital child protection issue and a challenge to implementation of the right of children to the highest attainable standard of health in Ireland.

Research conducted on behalf of the Minister for Children and Youth Affairs, based on the Growing Up In Ireland Longitudinal Study, indicates that 75% of nine-year-olds in the study were of healthy body mass index (BMI), 19% were overweight and 7% were obese.⁶² Girls were more likely to be overweight or obese, as were children from semi and unskilled social class households. Low levels of physical exercise were found in the research to be far more closely linked than diet to the risk of being overweight or obese. It was also found that parents underestimated the extent to which their child’s weight was a problem.⁶³

The report conducted on behalf of the Minister for Children and Youth Affairs includes a number of important recommendations. It is recommended that height and weight measures are routinely included in GP visits and school visits by public health

⁵⁹ General Comment No. 15 at p. 12.

⁶⁰ Richard Layte and Cathal McCrory, *Growing Up in Ireland: Overweight and Obesity Amongst Nine-Year-Olds* (Minister for Children and Youth Affairs, 2011).

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

nurses. It is recommended that sports policy include national standards for exercise in schools but also that a holistic approach is taken in that all those involved in sports are included. Because children from semi and unskilled social class households were found to have poorer diets and less physical exercise, it was recommended that resources for interventions should be heavily targeted at relevant schools and communities. However, it was emphasised that the structural reasons for the higher levels of overweight and obese children among semi and unskilled social class households must be tackled through a cross agency approach in a manner similar to that adopted for 'poverty proofing' in accordance with the National Anti-Poverty Strategy.⁶⁴

Low levels of exercise present a particular problem in relation to girls, and therefore greater efforts must be made to make regular exercise more accessible to this group. Dance is consistently reported by girls to be a preferred form of exercise, although it is one of the more expensive options.⁶⁵ Research is needed to establish how to make exercise more accessible to girls, in particular on how to make the medium of dance more accessible to girls.

Breastfeeding is closely correlated with lower levels of obesity.⁶⁶ Data from the Growing Up in Ireland study indicates that children who are breastfed for three to six months are 38% less likely to be obese at nine years of age compared to children who have been exclusively formula-fed.⁶⁷ However, as outlined below, levels of breastfeeding in Ireland are very low. The link between breastfeeding and lower levels of obesity further highlights the need to increase levels of breastfeeding in Ireland. One way in which this could be achieved would be to highlight this link in information campaigns on breastfeeding.

⁶⁴ *Ibid.*

⁶⁵ See e.g. National Heart Alliance, *Physical Activity, Young People and the Physical Environment: Summary of Evidence* (National Heart Alliance, 2006), at p. 13, available at: http://www.irishheart.ie/iopen24/pub/positionstatements/summary_of_evidence_physical_activity_young_people_the_physical_environment.pdf.

⁶⁶ Muiris Houston, 'Feeding the Debate', *Irish Medical Times*, 8 June 2012. Available at: <http://www.imt.ie/opinion/2012/06/feeding-the-debate.html> (last visited 8 Dec 2013).

⁶⁷ Layte and McCrory, *supra* note 60.

The Committee on the Rights of the Child makes the point that the exposure of children to sugary drinks and “fast foods” high in fat, sugar or salt contributes to obesity. Moreover, the Committee states that “the marketing of these substances – especially when such marketing is focused on children – should be regulated and their availability in schools and other places controlled.”⁶⁸ The Broadcasting Authority of Ireland has issued General and Children’s Commercial Communications Codes which include rules on commercial communications for High Fat, Salt and Sugar food directed at children, most recently updated in 2013. However, the Institute of Public Health in Ireland states that the Codes do not go far enough, and recommends:

- (i) the adoption of the Nutrient Profiling Model (a ‘simple scoring’ system used in the UK, where points are allocated based on the nutritional content in 100g of a food or drink) to limit the exposure of children to advertising of a product high in fat, sugar and salt;
- (ii) a ‘co-regulation’ approach whereby both producers and a statutory agency have joint responsibility for certifying a product as a food high in fat, sugar and salt;
- (iii) restrictions on the advertising of foods high in fat, sugar and salt between 6am and 9pm;
- (iv) a monitoring system be established in order to evaluate the effect of measures adopted.⁶⁹

There is a clear link between advertising and consumption of fast food by children.⁷⁰ Therefore standards need to be strengthened in this regard in Ireland in order to tackle rising obesity levels and in order to comply with General Comment No. 15.

1.3.3.1 Recommendations

Implement the recommendations of the report conducted on behalf of the Minister for Children and Youth Affairs. These include recommendations to have more height and weight measures for children, to take a holistic approach to sports policy, and to take

⁶⁸ General Comment No. 15 at p. 12.

⁶⁹ Institute of Public Health in Ireland, *Submission to Broadcasting Authority of Ireland Children’s Commercial Communications Code* (14 October 2011), available at <http://www.publichealth.ie/sites/default/files/FINAL%20BAI%20ChildrensCode%20HMcA14Oct%2011%20VX.pdf>.

⁷⁰ See e.g. Jason Halford *et al.*, ‘Effect of television advertisements for foods on food consumption in children’ 42 *Appetite* 221 (2004).

a cross agency approach to tackling obesity in semi and unskilled social class households.

Conduct research into increasing opportunities for girls to engage in exercise, with a particular emphasis on dance as a preferred medium.

Place greater emphasis on the link between breastfeeding and lower levels of obesity in children.

Implement the recommendations of the Institute of Public Health in Ireland to adopt the Nutrient Profiling Model, introduce a 'co-regulation' approach, impose restrictions on the advertising of foods high in fat, sugar and salt between 6am and 9pm and provide for the establishment of a monitoring system.

1.3.4 Breastfeeding

The CRC stipulates that States must “ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in...the advantages of breastfeeding...”⁷¹ The Committee emphasises in General Comment No. 15 the importance of breastfeeding for the health of children, citing the recommendation of the World Health Organisation that infants should be exclusively breastfed to six months of age and that breastfeeding “should continue alongside appropriate complementary foods preferably until two years of age, where feasible.”⁷² States have obligations in this area to “protect, promote and support” breastfeeding.⁷³ States are required, for example, to implement the International Code on Marketing of Breast-milk Substitutes, which includes a requirement to forbid the advertising of baby formula.⁷⁴

⁷¹ CRC, Article 24(2)(e).

⁷² General Comment No. 15 at p. 11, citing WHO and United Nations Children’s Fund (UNICEF), *Global Strategy for Infant and Young Child Feeding* (Geneva, 2003).

⁷³ WHO and United Nations Children’s Fund (UNICEF), *Global Strategy for Infant and Young Child Feeding* (Geneva, 2003).

⁷⁴ See <http://www.breastfeeding.ie/uploads/files/factsheet09.pdf>.

The health benefits of breastfeeding for both mother and baby are well known,⁷⁵ and breastfeeding reduces respiratory, ear and gastrointestinal infection in infants as well as ensuring health benefits which endure into adulthood.⁷⁶ It is estimated that exclusive formula feeding costs at least €12 million annually due to extra health care costs for the treatment of infections in infancy in Ireland.⁷⁷ Yet in 2010, Ireland had the lowest breastfeeding rate of 14 European countries.⁷⁸ 56% of mothers in Ireland currently initiate breastfeeding compared to 81% in the UK and over 90% in Scandinavian countries.⁷⁹ Though breastfeeding duration rate figures are not collected at a national level in Ireland research studies indicate that less than 10% of infants are still breastfed at age six months.⁸⁰ At international level a clear link has been made between breastfeeding and human rights obligations to children; therefore it is vital that significant efforts are made in Ireland to improve these figures and therefore the health of children.

Attempts have been made to implement policy in Ireland to increase breastfeeding rates; however there does not appear to have been sufficient effort to follow-up on these endeavours. Policy changes were recommended in the 2005 Five-Year Strategic Breastfeeding Action Plan in order to increase rates of breastfeeding in Ireland.⁸¹ The targets included an infant feeding Data Collection System to be developed to include demographic indicators known to influence breastfeeding, the appointment of ten regional breastfeeding co-ordinators and an increase in the national breastfeeding initiation rate of 2% per year. It was stated in the Plan that an interim report and final report would be published, however neither have been produced.⁸² Rates of

⁷⁵ American Academy of Pediatrics (2005) 'Section on breastfeeding: Breastfeeding and the use of human milk' 115 (2) *Pediatrics* 496; Chessa Lutter *et. al.*, *Quantifying the benefits of breastfeeding: A summary of the evidence* (2002).

⁷⁶ The Economic and Social Research Institute, Press Release: 'Breastfeeding in Ireland 2012: Consequences and Policy Responses' available at: https://www.esri.ie/news_events/latest_press_releases/breastfeeding_in_ireland_/index.xml (last visited 2 Dec 2013).

⁷⁷ *Ibid.*

⁷⁸ EURO-PERISTAT Project, SCPE EUROCAT, EURONEOSTAT (2013) European Perinatal Health Report.

⁷⁹ The Economic and Social Research Institute, *supra* note 76.

⁸⁰ http://www.breastfeeding.ie/support/what_help_is_available#before (last visited 8 Dec 2013).

⁸¹ Department of Health and Children, *Breastfeeding in Ireland: A five-year strategic action plan* (National Committee on Breastfeeding/ Department of Health and Children, October 2005) available at: <http://www.breastfeeding.ie/uploads/files/ACTIONplan.pdf>.

⁸² Australian Government, Department of Health, *An International Comparison Study into the implementation of the WHO Code and other breastfeeding initiatives: Republic of Ireland*, (Australian Government, Department of Health, 2012). Available at

breastfeeding in Ireland at hospital discharge had increased by almost 7% by 2010,⁸³ however an ESRI study found that existing policy initiatives had at best a limited role in the increase in breastfeeding. Most of the increase had occurred because the characteristics of mothers changed. The average age of mothers had increased and more non-Irish national mothers were giving birth in Ireland, and both factors increase the rate of breastfeeding.⁸⁴ In any case, Ireland still has an unacceptably low rate of breastfeeding compared to other countries.

Although detailed analysis of the causes of such low rates of breastfeeding in Ireland is beyond the scope of this report, there are some obvious points which can be made. An inadequate number of trained professionals exist in Ireland to assist women with breastfeeding. In one study, 54% of GPs and only 32% of practice nurses felt sufficiently skilled to provide breastfeeding support.⁸⁵ This is unfortunate as on the HSE breastfeeding website the emphasis is on accessing support from midwives and GPs who do not specialise in breastfeeding.⁸⁶ Lactation consultants, however, are professionals (usually midwives) who specialise in supporting mothers with breastfeeding. It is mentioned on the website that “A Lactation Consultant (IBCLC) may also be available.”⁸⁷ There is no guarantee that a woman who requires assistance will have access to this professional. The Association of Lactation Consultants in Ireland states that there is a shortage of lactation consultants. At Cork University Maternity Hospital, for example, there were almost 9,000 births in 2008, with only one lactation consultant employed at the hospital.⁸⁸ There is still only one lactation consultant employed at the hospital in 2013. Clearly better training for health care staff generally, as well as an increase in the number of available lactation consultants should be the first step in attempting to increase breastfeeding rates.

<http://www.health.gov.au/internet/publications/publishing.nsf/Content/int-comp-whocode-bf-init-int-comp-whocode-bf-init-ico-int-comp-whocode-bf-init-ico-ireland> (last visited 1 Dec 2013).

⁸³ ESRI, https://www.esri.ie/news_events/latest_press_releases/breastfeeding_in_ireland/index.xml (last visited 20 Dec 2013).

⁸⁴ Aoife Brick and Anne Nolan, ‘Explaining the increase in breastfeeding at hospital discharge in Ireland, 2004–2010’ *Irish Journal of Medical Science*, 2013.

⁸⁵ Barbara Whelan, *An Exploration of Health Professional Support for Breastfeeding*, Unpublished Thesis, available at <http://arrow.dit.ie/cgi/viewcontent.cgi?article=1090&context=sciendoc> (last visited 8 Dec 2013).

⁸⁶ http://www.breastfeeding.ie/policy_strategy (last visited 8 Dec 2013).

⁸⁷ *Ibid.*

⁸⁸ By Gary Culliton, ‘Ireland needs more lactation consultants’ *Irish Medical Times*, 19 March 2009. <http://www.imt.ie/news/public-health/2009/03/ireland-needs-more-lactation-consultants.html>.

The lack of a breastfeeding culture in Ireland also needs to be tackled. The National Infant Survey found in 2008 that by three to four months, only 53% of mothers who were breastfeeding had breastfed in public.⁸⁹ Increased health promotion strategies are one way in which breastfeeding should be promoted in line with State obligations. Research in Ireland has indicated that such strategies should be targeted at young people before they initiate pregnancies, and that young women should be made aware of the generally positive attitudes of young men to breastfeeding.⁹⁰ Attitudes of others have a great bearing on the likelihood of a mother to breastfeed,⁹¹ and therefore nationwide campaigns to the general public and not merely mothers will be of considerable importance in increasing breastfeeding rates.

The marketing of baby formulas is also an area which could be improved in Ireland. Formula advertisements have been found to influence mothers' feeding choices. In one study, mothers who recalled an infant formula advertisement message were found to be twice as likely to feed their babies formula.⁹² Ireland is subject to EU Regulations as regards the control of advertising of such products.⁹³ The Regulations detail, amongst other things, restrictions on the advertising of infant formulas (for those under six months) and "follow-on formulas" (for those under 12 months). However the regulations do not apply to the full range of products covered by the International Code of Marketing of Breast-milk Substitutes of the World Health Organisation. Such products include all breast-milk substitutes, bottles and teats and bottle-fed complementary foods. There are many improvements which could be made to the standards around infant formula and related products in Ireland. Given the clear effects of advertising on breastfeeding rates, advertising should be prohibited, rather than restricted. The regulation of advertising should apply not just to formula itself, but also to related products. Furthermore there is no indication that there has ever

⁸⁹ *National Infant Survey* (Health Service Executive, 2008). Available at: http://www.breastfeeding.ie/uploads/files/National_Infant_Feeding_Survey_2008.pdf.

⁹⁰ Claire Connolly, 'Attitudes of Young Men and Women to Breastfeeding', 106 *Irish Medical Journal* 9 (2013).

⁹¹ National Infant Survey, *supra* note 89.

⁹² Howard Sobel *et. al.*, 'Is Unimpeded Marketing for Breast-milk Substitutes Responsible for the Decline in Breastfeeding in the Philippines? An Exploratory Survey and Focus Group Analysis' 73 *Social Science and Medicine Journal* 1445 (2011). See also Suleiman, A, 'A study on marketing and its effects on infant feeding practices' 56 *Medical Journal Malaysia* 23 (2001).

⁹³ The most recent is Regulation (EU) No. 609/2013 of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control.

been action taken for breach of the advertising codes.⁹⁴ Therefore more stringent policing of the implementation of the Regulations is needed.

1.3.4.1 Recommendations

Greater training should exist for GPs and nurses in relation to support for breastfeeding.

A greater number of lactation consultants should be appointed in Ireland.

Recommendations of the 2005 Five-Year Strategic Breastfeeding Action Plan should be implemented, in particular-

- *Establish an infant feeding Data Collection*
- *Appoint ten regional breastfeeding co-ordinators*
- *Conduct and publish a review of the implementation of the 2005 Five-Year Strategic Breastfeeding Action Plan*

Greater emphasis should be placed on health promotion strategies regarding breastfeeding. Such strategies should be targeted at the general public, and at young people before they initiate pregnancies. Young women should be made aware of the generally positive attitudes of young men to breastfeeding.

Legislation should be introduced which goes beyond EU Regulations to ban the advertising of baby formula outright.

The regulation of advertising should apply not merely to baby formula itself, but also to related products.

More stringent policing of the implementation of the Regulations should be introduced.

⁹⁴ Australian Government, Department of Health, *supra* note 82.

1.4 ‘Direct Provision’ in Ireland

The Minister for Justice, Equality and Defence, Alan Shatter TD, made very significant progress on immigration reform in 2013. That said, further reform is needed. The system of support for asylum seekers in Ireland is known as ‘direct provision’. In my Fifth Report I noted that the system has faced criticism due to claims that it has a detrimental effect on children.⁹⁵ In December 2013, of the 34 accommodation centres in Ireland only three were built for the purpose of accommodating asylum seekers. The rest were buildings such as holiday homes which were not intended as long-term accommodation, despite the fact that the asylum process is calculated to take an average of three years.⁹⁶ Significant child protection concerns exist – single parents may be required to share with strangers, and teenage siblings of opposite genders may have to share one room.⁹⁷ Furthermore a person living in direct provision receives only €19.10 per week and €9.60 per child.⁹⁸ Over a third of residents in the system of direct provision are children,⁹⁹ and these children are growing up in “state-sanctioned poverty”¹⁰⁰ with parents unable to adequately care for them.¹⁰¹ It has been argued that the system of direct provision alienates children and is an unnatural family environment which is not conducive to their positive development.¹⁰² In my Fifth Report I recommended that research be conducted into the welfare of children in direct provision given the fact that ‘direct provision’ accommodation could not be described as creating a normal family environment.¹⁰³

1.4.1 International Standards

It is necessary to consider international standards in the area of the reception of asylum seekers in order to ensure that Ireland complies with relevant international

⁹⁵ Geoffrey Shannon, *Fifth Report of the Rapporteur on Child Protection* (2011), at pp. 31-32.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Citizens Information website, 3 July 2013, available at:

http://www.citizensinformation.ie/en/moving_country/asylum_seekers_and_refugees/services_for_asylum_seekers_in_ireland/direct_provision.html (last visited 5 December 2013).

⁹⁹ Free Legal Aid Centres, *One Size Doesn't Fit All: A legal analysis of the direct provision and dispersal system in Ireland, 10 years on* (Free Legal Aid Centres, 2009).

¹⁰⁰ Irish Refugee Council, *State sanctioned child poverty and exclusion: the case of children in state accommodation for asylum seekers* (Irish Refugee Council, September 2012).

¹⁰¹ Shannon, *supra* note 95.

¹⁰² Irish Refugee Council, *supra* note 100, at p. 4.

¹⁰³ Shannon, *supra* note 95, at p. 13.

obligations. The Executive Committee of the UN High Commissioner for Refugees published recommendations for the nature of reception systems at State level. These recommendations outlined that “[w]hile there is scope for flexibility in the choice of reception arrangements to be put in place, it is important that the various reception measures respect human dignity and applicable human rights laws and standards.” It continued:

Gender and age-sensitivity should be reflected in reception arrangements. These should address the educational, psychological, recreational and other special needs of children especially unaccompanied and separated children.¹⁰⁴

Practice in Ireland is clearly questionable in terms of the dignity afforded to asylum seekers, and there is a lack of gender and age sensitivity in the living arrangements outlined above.

A number of international human rights monitoring bodies have commented on the system of direct provision in Ireland. The UN Committee on Elimination of Racial Discrimination (CERD Committee) expressed concern in its Concluding Observations on Ireland’s report in 2011 at the negative impact that direct provision has on the welfare of asylum seekers, noting serious delays in the processing of applications, and the consequences of living in direct provision accommodation for a number of years.¹⁰⁵ The UN Independent Expert on Human Rights and Extreme Poverty¹⁰⁶ and the Council of Europe Commissioner for Human Rights¹⁰⁷ have also noted these problems. The CERD Committee further noted that the poor living conditions can result in asylum seekers in Ireland suffering psychological problems that can lead to serious mental illness. The Committee encouraged Ireland to expedite the processing

¹⁰⁴ UN High Commissioner for Refugees, ‘Conclusion 2: Conclusion on reception of asylum seekers in the context of individual asylum systems’ 14 (4) *International Journal of Refugee Law* 599 (2002).

¹⁰⁵ UN Committee on Elimination of Racial Discrimination, *Concluding Observations: Ireland*, CERD/C/IRL/CO/3-4 (10 March 2011), at pp. 4-5.

¹⁰⁶ UN Independent Expert on Human Rights and Extreme Poverty, *Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Mission to Ireland*, A/HRC/17/34/Add.2 (17th May 2011), at p. 21.

¹⁰⁷ The Commissioner “expressed his concern about the overall length of asylum procedures under the current dual system which is unique among the 27 EU member states”. Thomas Hammarberg, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Ireland from 1 to 2 June 2011*, CommDH(2011)27 (15 September 2011). See further Free Legal Aid Centres, *Recent Recommendations of United Nations & Council of Europe Monitoring Bodies Concerning Direct Provision* (Free Legal Aid Centres, 2012), available at: <http://www.flac.ie/getinvolved/campaigns/current/direct-provision-campaign/> (last visited 4 December 2013).

of asylum applications to ensure that unreasonable periods of time are not spent in asylum centres. The Committee also stipulated that Ireland improve the living conditions of asylum seekers and review the direct provision system.¹⁰⁸ The Council of Europe Commissioner for Human Rights has recommended that it would be beneficial for both asylum seekers and the State if asylum seekers were to have the right to work.¹⁰⁹

1.4.2 Recent Developments regarding Direct Provision

There have been a number of developments in the past year. One significant development is the judgment *In the Matter of an Application for Judicial Review by ALJ and A, B and C*¹¹⁰ of the High Court of Northern Ireland. Mr. Justice Stephens outlines in the judgment the inadequacy of both the asylum status determination system as well as the system of direct provision in the Republic of Ireland. The asylum seeker applicants in the case were challenging the UK Border Agency decision to return them from Northern Ireland to the Republic of Ireland where they had first sought asylum. They argued that a return to the Republic's refugee system would violate the European Charter of Fundamental Rights due to low recognition rates and the system of direct provision in this jurisdiction.¹¹¹ Stephens J did not hold that the systems constituted inhuman and degrading treatment, however he found that the direct provision system is contrary to the best interests of the child.

The UK Border Agency must “promote the welfare of children who are in the United Kingdom”¹¹² and Stephens J held that the Agency had failed in this case to consider the best interests of the children. He noted that if the applicants were returned to Ireland the mother and eldest child could not work and that the family would be forced to live in the direct provision system. However if they were permitted to remain in Northern Ireland the mother could possibly work, the family would have their own accommodation and budget and be able to cook their own meals and the

¹⁰⁸ UN Committee on Elimination of Racial Discrimination, *supra* note 105.

¹⁰⁹ Hammarberg, *supra* note 107.

¹¹⁰ [2013] NIQB 88 (14 August 2013).

¹¹¹ The applicants argued that the return would violate Article 4 of the European Charter of Fundamental Rights which protects against torture, inhuman and degrading treatment and Article 7 which protects the right to private and family life.

¹¹² Borders, Immigration and Citizenship Act 2009, section 55 (UK).

children could “develop their own sense of belonging and separate identity,”¹¹³ something which would not be possible in the Republic. This judgment is a clear legal expression of disapproval for direct provision and lends considerable weight to the argument that the direct provision system in Ireland is a disproportionate response to the need to control immigration. There may well be consequences for Ireland arising from this judgment, and Thornton suggests that “[w]ith the porous border between the Republic of Ireland and Northern Ireland, as well as a multitude of transport options to travel to Northern Ireland, it may be that others seeking asylum in this State will make such a journey.”¹¹⁴

An application has also been made to the High Court in the Republic of Ireland challenging the direct provision system.¹¹⁵ A number of asylum applicants who resided in the State challenged the direct provision system on the grounds that the system has no legal basis, that the exclusion of asylum seekers from receiving social welfare breaches the Constitution and the European Convention on Human Rights, and that the exclusion of adult asylum seekers from work is unconstitutional. Leave to proceed with the challenge was granted to the applicants by the High Court on the 21st October, 2013,¹¹⁶ however it now appears that the applicants have withdrawn the case.¹¹⁷

Another development is a report by the Irish Refugee Council which provides alternative proposals to the direct provision system.¹¹⁸ The Council provides the system of provision for asylum seekers in Portugal as a case study. The report outlines the running of purpose-built reception centres in Lisbon staffed by professionals

¹¹³ [2013] NIQB 88, para. 102.

¹¹⁴ Liam Thornton, ‘Ireland’s Asylum & Direct Provision System under the Spotlight in Northern Ireland High Court’ *Human Rights in Ireland Blog* (14 August 2013), available at: <http://humanrights.ie/children-and-the-law/irelands-asylum-direct-provision-system-under-the-spotlight-in-northern-ireland-high-court/>.

¹¹⁵ *N.M. and others v. Minister for Justice and Equality, Minister for Social Protection, Attorney General and Ireland* (Record No. 2013 553 JR). See further Liam Thornton, ‘Legal Challenge to Direct Provision in the High Court’ *Human Rights in Ireland Blog* (29 July 2013), available at: <http://humanrights.ie/children-and-the-law/legal-challenge-to-direct-provision-in-the-high-court/> and Ruadhan Mac Cormaic, ‘Asylum seeker families allowed to challenge direct provision’ *The Irish Times*, (21 October 2013).

¹¹⁶ See MacCormaic, *Ibid.*

¹¹⁷ Ruadhan MacCormaic, ‘African Family withdraws challenge to direct provision scheme’, *The Irish Times*, (10 December 2013).

¹¹⁸ Irish Refugee Council, *Direct Provision: Framing an Alternative Reception System for People Seeking International Protection* (Irish Refugee Council, 2013).

amongst whom are those with qualifications in social care, vocational support and legal support. The centres encourage interaction with the community, providing language classes and vocational support. On-site facilities such as a kindergarten, library and theatre space are used by both the residents of the centres and local Portuguese families alike. The centres are self-catering, residents are employed in the running of the centres and asylum seekers are encouraged to shop for themselves.¹¹⁹ The example from Portugal provides insight into an approach which aims to integrate asylum seekers with the local community, and ensure that this vulnerable group have autonomy over everyday matters such as food and living arrangements.

The Irish Refugee Council emphasise that the recommendations are neither definitive nor exhaustive, but aim to initiate dialogue on alternatives to the direct provision system. The Council's proposals include:

- Aim to process new asylum claims within six months.
- Increase the weekly allowance currently paid to asylum seekers in line with increases in social welfare since 2000.
- Restore universal child benefit for the children of asylum seekers.
- Limit stays in asylum seeker centres to 6 months, ensure such accommodation respects family life, and ensure independent complaints and inspection mechanisms.
- Place child protection at the heart of the system, including the employment of appropriately trained staff within the accommodation system.
- Move children from communal accommodation at the earliest possibility.
- Introduce systems to identify particularly vulnerable asylum seekers.
- Grant asylum seekers the right to work and access to the private rental market after six months in a reception centre.

These recommendations cover many of the main concerns about the direct provision system and should be considered as part of the proposed review and reform of the system.

¹¹⁹ *Ibid.*, at pp. 33-34.

1.4.3 Article 8 of the European Convention on Human Rights

One outstanding legal consideration regarding direct provision is whether it is in conformity with Article 8 of the European Convention on Human Rights (ECHR) which enshrines the right to private and family life. The Irish state has the right to determine how best to control immigration and provide for asylum seekers.¹²⁰ However Ireland has obligations to uphold human rights, including Article 8. In order to establish whether direct provision breaches Article 8, one would have to examine whether the system constitutes an ‘interference’. It can be argued that direct provision constitutes an interference with family life, not least because of the fact that children do not experience life in a family unit but instead communal living in inadequate accommodation. Under Article 8(1), the restriction of the right must be carried out “in accordance with the law”, however direct provision has not been legislated for but is instead run through ministerial circulars and administrative arrangements.

Interference with the right to family life must be necessary and proportionate.¹²¹ It has been argued that the current system is more affordable than systems which would provide asylum seekers greater autonomy in their everyday affairs.¹²² However this approach overlooks less quantifiable costs in terms of mental health, childhood development and family life.¹²³ Apart from the human cost caused by mental health and other problems arising from direct provision, there will inevitably be a cost to the State as regards referrals to mental health and social services which has yet to be estimated.¹²⁴ It therefore does not seem reasonable to claim that the direct provision system is meeting its aims, and consequently that it is a proportionate response to the services required to provide for asylum seekers. This means that Ireland may be potentially in breach of Article 8 of the ECHR in this regard.

¹²⁰ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, (1985) 7 EHRR 471.

¹²¹ Article 8(2) of the European Convention on Human Rights provides:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹²² See e.g. Reception and Integration Agency, *Value for Money & Policy Review: Asylum Seeker Accommodation Programme* (Reception and Integration Agency, May 2010).

¹²³ Irish Refugee Council, *Direct Provision: Framing an Alternative Reception System for People Seeking International Protection* (Irish Refugee Council, 2013), at p. 21.

¹²⁴ *Ibid.*

1.4.4 Other Legal Issues

Another legal consideration is the application of the principle of the best interest of the child. It has already been outlined in this report that Ireland is subject to international human rights provisions regarding this principle, in particular through Article 3 of the CRC which stipulates that in all actions concerning children, the best interests of children shall be “a primary consideration” and that institutions and services responsible for the care of children “shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff.” It cannot be said that the best interests of children is a primary consideration in the provision of services for asylum seekers in a situation where children are living for years with parents who are deprived of social welfare payments and in unsuitable communal accommodation.¹²⁵

It must also be noted that Ireland has chosen not to take part in the Reception Conditions Directive, originally passed in 2003.¹²⁶ This Directive created a framework for basic conditions for those seeking asylum, as part of a common EU asylum system. The Directive aimed to ensure that applicants would have adequate access to provision for needs such as housing, health care and employment. It contains the right to work¹²⁷ and the requirement that the best interests of the child would be a primary consideration when applying the provisions of the Directive. Ireland is not bound by the Directive and therefore is not required to transpose its provisions into national law. Ireland is the only other EU country along with Denmark in which the Directive does not apply, and has also opted out of the Recast of the Reception Conditions Directive¹²⁸ which contains higher standards as regards access to work, identification of particularly vulnerable asylum seekers, detention and a dignified standard of living.

¹²⁵ Emily O'Reilly, 'Dealing with Asylum Seekers: Why Have we Gone Wrong?' 102 *Studies Magazine* 406 (2013).

¹²⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

¹²⁷ The period after which an asylum seeker can work is to be decided by the Member State under the Directive.

¹²⁸ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. The UK has also opted out of the recast directive. See http://www.ecre.org/index.php?option=com_downloads&id=781.

Ireland's failure to opt-in to these standards has been noted at an international level. The UN Independent Expert on Human Rights and Extreme Poverty called on Ireland in her 2011 report to opt into the EU Directive.¹²⁹ It was also noted in the judgment *In the Matter of an Application for Judicial Review by ALJ and A, B and C*¹³⁰ that "Ireland has opted out of the minimum standards directive and there is considerable evidence that the provisions in Ireland do not meet the minimum standards in that directive." This factor contributed directly to the decision in that case that it would be against the best interests of the children to be sent back to Ireland from Northern Ireland to experience the inferior standards of provision for asylum seekers in Ireland. It is recommended that Ireland subject itself to these minimum standards for asylum seekers in any review and reform of the system for accommodating asylum seekers.

1.4.5 Recommendations

There should be an immediate review of the system of direct provision. In particular, research should be conducted on the specific vulnerability of children accommodated in this system. The consequences for the best interest principle (including Constitutional consequences) should be considered.

The main recommendations of the Irish Refugee Council should be adopted, although the specifics of the overhaul of the system will, of course, be subject to the review as per the preceding recommendation. In particular recommendations regarding social welfare and child benefits, as well as limits on stays in asylum seeker centres, child protection and the right to work should be implemented as soon as possible.

Models of good practice in other jurisdictions should be researched in order to ensure that Ireland engages in support for asylum seekers which leads internationally in respecting dignity and rights.

Ireland should opt into the Recast Reception Conditions Directive of 2013 to ensure a minimum standard of provision for asylum seekers in line with other EU countries.

¹²⁹ UN Independent Expert on Human Rights and Extreme Poverty, *supra* note 106, at p.21.

¹³⁰ [2013] NIQB 88 (14 August 2013) at para. 102.

1.5 European Developments

1.5.1 Council of Europe Strategy for the Rights of the Child (2012-2015)

The Council of Europe recently published a *Strategy for the Rights of the Child (2012-2015)*.¹³¹ The strategy proposes a vision for the Council of Europe's role in the field of children's rights and is the result of extensive consultation, including with governments and civil society representatives. The overall goal of the strategy is to achieve effective implementation of existing UN and Council of Europe children's rights standards through the provision of policy guidance and support to member states. There are four main objectives in the strategy:

1. promoting child-friendly services and systems;
2. eliminating all forms of violence against children;
3. guaranteeing the rights of children in vulnerable situations;
4. promoting child participation.¹³²

Since 2006 the Council of Europe has been active in the area of children's rights. The Council of Europe has contributed to mainstreaming children's rights both in its own work and amongst member states, bringing about changes in legislation and policy, for example in the area of eliminating the physical punishment of children. It has also produced child-friendly informational materials. The Council of Europe now aims to make further progress in the fields of training professionals, gathering data, preventing violence against children and meeting the needs of children for service provision.¹³³

The strategy aims to achieve this by promoting a holistic approach to children's rights amongst member states through the UN Convention on the Rights of the Child, in particular by observing the guiding principles of that instrument, i.e. non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the views of the child. Another way in which the strategy will achieve its aims is through engaging in further awareness-raising and capacity-building regarding children's rights and further work to mainstream

¹³¹ Council of Europe, *Strategy for the Rights of the Child (2012-2015)* CM (2011) 171 final (15 February 2012).

¹³² *Ibid.*, at p. 1.

¹³³ *Ibid.*, at pp. 2-3.

children's rights and to monitor implementation. The strategy should be integrated as part of activities to further children's rights by the Irish Government.

1.5.2 Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity

The Council of Europe seeks to ensure the rights of all, including those of lesbian, gay, bisexual and transgender (LGBT) persons.¹³⁴ To this end, the Committee of Ministers of the Council of Europe recently adopted Recommendation CM/Rec(2010)5 on Measures to combat discrimination on the grounds of sexual orientation and gender identity. It takes a human rights-based approach, recommending a range of measures to be taken by member states to combat discrimination facing LGBT persons based on existing human rights standards.

The substantive section of the document contains five recommendations for member states:

1. Examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;
2. Ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;
3. Ensure that victims of discrimination are aware of and have access to effective legal remedies before a national authority, and that measures to combat discrimination include, where appropriate, sanctions for infringements and the provision of adequate reparation for victims of discrimination;
4. Be guided in their legislation, policies and practices by the principles and measures contained in the appendix to this recommendation;
5. Ensure by appropriate means and action that this recommendation, including its appendix, is translated and disseminated as widely as possible.¹³⁵

¹³⁴ See Council of Europe, Combating discrimination on the grounds of sexual orientation or gender identity, <http://www.coe.int/t/dg4/lgbt/> (last visited 7 December 2013).

¹³⁵ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

An appendix in the Recommendation sets out a range of relevant “principles and measures.” These principles include a number of points highly relevant to children’s rights issues facing Ireland at present. The appendix outlines that “where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.”¹³⁶ It is also emphasised that the child’s best interests should be the primary consideration in decision-making about parental responsibility and guardianship. Consequently such decisions must be taken without discrimination based on sexual orientation or gender identity.¹³⁷

It has been outlined that one of the crucial differences between marriage and civil partnership in Ireland is that although the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 accorded legal recognition akin to marriage for gay and lesbian couples seeking to formalise their relationships regarding property, succession and maintenance; the rights, interests and needs of the children living in such families are largely ignored.¹³⁸ The Law Reform Commission recommends that civil partners should be able to obtain parental responsibility through an agreement with other parties who have parental responsibility for the child or through an application to court.¹³⁹ In order to vindicate children’s rights and to conform with this Council of Europe document, this Recommendation should be followed. The Children and Family Relationships Bill 2014 addresses this shortcoming in Irish law and will, when enacted, be the most important change in Irish family law in a generation.

Another highly relevant principle in the appendix is the obligation on member states to take appropriate measures to “guarantee the full legal recognition of a person’s gender reassignment in all areas of life.” According to the appendix, this would involve permitting change of name and gender in official and other documents.¹⁴⁰ The Gender Recognition Bill 2013 in Ireland provides for the right to apply for a Gender Recognition Certificate. Such a certificate would provide legal recognition for all

¹³⁶ Article 24.

¹³⁷ Article 26.

¹³⁸ See Aoife Daly, ‘Ignoring Reality: Children and the Civil Partnership Act in Ireland’ 14(4) *Irish Journal of Family Law* (2011).

¹³⁹ Law Reform Commission, *Legal Aspects of Family Relationships* (Law Reform Commission, 2010).

¹⁴⁰ Article 21.

purposes to the acquired gender of transgender persons. It includes the right to a new birth certificate and the right to marry or enter a civil partnership in the acquired gender. However one criticism of the Bill is that it provides that a person seeking a certificate should be over 18 years. It has been argued, for example by the Irish Human Rights Commission, that this discriminates against young transgender people, some of whom may have already made the transition, with the support of their parents or guardians, to their self-identified gender.¹⁴¹ Dunne argues that excluding such legal recognition to those under 18 in all circumstances “is a failure on the part of the State to acknowledge both the existence of transgender youth and the extremely high levels of prejudice which they encounter because of their gender identity.”¹⁴² Discretion could be used to determine whether such recognition would be in the best interests of the child. Therefore a blanket exclusion does not seem necessary. The Council of Europe Recommendation does not specify that those under 18 should be excluded from the obligation to provide legal recognition of a person’s gender reassignment. The Bill should be amended accordingly.

1.5.3 The EU and children’s rights in Ireland

There is a need to increase public awareness regarding the rights of children deriving from Ireland’s membership of the EU.¹⁴³ This should focus on EU law and policy as it relates to children, and also on the rights of the child in the EU Charter on Fundamental Rights.

The *EU Agenda on the Rights of the Child*, a document considered in my Fifth Report,¹⁴⁴ describes the *EU Youth Strategy: Investing and empowering a renewed open method of coordination to address youth challenges and opportunities*,¹⁴⁵

¹⁴¹ See e.g. *Rights commission calls for changes to draft law on gender recognition*, The Irish Times, 2 December 2013, available at: <http://www.irishtimes.com/news/crime-and-law/rights-commission-calls-for-changes-to-draft-law-on-gender-recognition-1.1610423> (last visited 11 December 2013).

¹⁴² Peter Dunne, *Where are the young people in Ireland’s proposed gender identity recognition law?* Human Rights in Ireland Blog, 10 September 2013, available at: <http://humanrights.ie/civil-liberties/guest-post-where-are-the-young-people-in-irelands-proposed-gender-identity-recognition-law/> (last visited 10 December 2013).

¹⁴³ See, for example, Children’s Rights Alliance, *Shared Values, Shared Rights – How the EU has strengthened children’s rights in Ireland* (Children’s Rights Alliance, November 2013).

¹⁴⁴ Geoffrey Shannon, *Fifth Report of the Special Rapporteur on Child Protection* (2011), at p. 43.

¹⁴⁵ Communication from the Commission: An EU Strategy for Youth – Investing and Empowering a renewed open method of coordination to address youth challenges and opportunities, COM(2009) 200 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0200:FIN:EN:PDF>.

explaining that there are two main objectives to the strategy; to increase opportunities for young people in education as well as in the labour market, and to encourage young people to be active citizens and participants in society.¹⁴⁶ The strategy is to be implemented by increased cooperation between Member States, dialogue with young people using evidenced-based policy, and providing opportunities for young people to participate in public life.¹⁴⁷ The European Commission Recommendation *Investing in Children: Breaking the Cycle of Disadvantage*¹⁴⁸ is also of importance. This recommendation seeks to guide Member States of the EU in implementing policies to address child poverty. The recommendation calls for development in the key areas of supporting parents in access to the labour market, improving access for children to education and care services and supporting children's participation in these services.¹⁴⁹

Young people can influence what happens in the EU. The Europe Direct Information Centres answer questions, supply information on the EU and provide the opportunity to send public feedback to EU institutions. Youth events such as *Structured Dialogue National Consultations for Young People* and *European Youth Event* hosted by the EU institutions offer opportunities for young people to become involved in these activities.

The Charter of Fundamental Rights of the EU is a significant development, in particular Article 24 which provides for children's rights. Article 24 states that "children shall have the right to such protection and care as is necessary for their well-being", that they have the right to express their views and have those views taken into account in accordance with their age and maturity, that the best interests of the child must be a primary consideration in decisions concerning them, and that children have the right to maintain a close personal relationship with their parents. It enables a remedy to be sought from national courts where a breach of the Charter is alleged. The Charter applies to EU institutions and to Member States when they are implementing EU law, and as regards the best interests principle, the Charter requires

¹⁴⁶ *Ibid.*, at p. 4. See Children's Rights Alliance, *supra* note 143 at p. 7.

¹⁴⁷ *Ibid.*

¹⁴⁸ Commission Recommendation: Investing in Children: Breaking the Cycle of Disadvantage, C(2013) 778 final, available at : <http://ec.europa.eu/social/main.jsp?catId=961&langId=en>.

¹⁴⁹ See Children's Rights Alliance, *supra* note 143 at p. 8.

that it is a primary consideration when EU law is being implemented.¹⁵⁰ Other EU rights are also relevant such as the right to non-discrimination and the right to freedom of movement. A number of options are available to children who feel their rights have been breached, such as making a complaint to the national courts and making a complaint to the European Commission.¹⁵¹

1.5.4 Recommendations

The Government should integrate the Council of Europe Strategy for the Rights of the Child (2012-2015) into its work on children's rights and ensure dissemination of the document.

The Government should ensure conformity with and dissemination of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

In order to vindicate children's rights and to conform with Recommendation CM/Rec(2010)5, civil partners should be permitted to obtain parental responsibility through an agreement with other parties who have parental responsibility for the child or through an application to court.

The Gender Recognition Bill should not exclude persons under 18 years of age from applying for a Gender Recognition Certificate, but instead should provide for discretion to be exercised to determine whether the granting of such a certificate is in the best interests of the child.

¹⁵⁰ *Ibid.*, at p. 12.

¹⁵¹ *Ibid.*, at p. 20.

SECTION 2:

GENERAL TRENDS EMERGING FROM THE COURTS

2.1 Introduction

The District Court has recently published some of its written decisions in the area of child law on the courts.ie website. This is a welcome development by the President of the District Court which should serve to bring transparency to an often secretive and impenetrable realm of legal proceedings. This section will identify some interesting trends that can be seen emerging from the District Court judgments published in the area of child law as well as significant cases relating to children from the Circuit and Superior Courts.

The Child Care Act 1991 is now over 20 years old and requires updating to ensure that the law keeps pace with changes in society. This section identifies some gaps in the 1991 Act and suggests recommendations in order to bring the Act in line with contemporary society and in order to meet the challenges and dangers that are facing children today.

2.2 Right to Privacy

All child and family law matters have generally been heard otherwise than in public. That has recently been changed by the Courts and Civil Law (Miscellaneous Provisions) Act 2013. It retains the pre-existing privacy provisions in respect of family and child care court proceedings, while allowing the attendance of *bona fide* representatives of the press. The courts will retain the power to exclude representatives of the press or restrict or prohibit the publication of evidence given in the proceedings in certain circumstances. The new section 40(3A)(c) of the Civil Liability and Courts Act 2004 (as inserted by the 2013 Act) sets out the factors to be considered by the court in determining whether to impose restrictions on attendance at or reporting on proceedings.

In addition, a strict prohibition will apply on reporting of material likely to identify the parties to the proceedings or any children to whom the proceedings relate. This recent change to the *in camera* rule is to be welcomed and will foster, in the language of the Act, “the desirability of promoting public confidence in the administration of justice.”¹⁵² The difficulties inherent in a system with a strict application of the *in camera* rule can be seen in the judgments of the child care courts.

*HSE and B&R*¹⁵³ was a case in which the Child and Family Agency had applied for a care order in respect of a child. The guardian *ad litem* (the “GAL”) made a request to the court for social work files pertaining to another child in the family, not a party to the proceedings, but who had previously been the subject of care proceedings. The GAL made the application pursuant to section 47 of the Child Care Act 1991 (“the 1991 Act”) which enables the court “of its own motion or on the application of any person [to] give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order.” The court made an order under section 47 to disclose certain information relating to the other child stating that the fact that interactions between the mother and the other child may have given rise to child protection and welfare concerns was *prima facie* relevant to the welfare of the child, the subject matter of the proceedings. The court noted, in coming to its decision, that the various parties to the proceedings had privacy rights under the Constitution and the European Convention on Human Rights (“ECHR”) and that any order disclosing information about the other child or his father may constitute interference with such rights.

The court held that, in exercising the jurisdiction to make an order under section 47, the courts must weigh all such rights in the balance and if the court makes any order, such an order should go no further than necessary. The court noted that it was clear from the decision of the High Court in *HSE v. McAnaspie*¹⁵⁴ that the *in camera* rule can be lifted in certain circumstances by the District Court. The court referred to the decision in *EHB v. Fitness to Practice Committee*¹⁵⁵ in which case it was held that the purpose of the *in camera* rule is to protect minors from harmful publication of

¹⁵² Courts and Civil Law (Miscellaneous Provisions) Act 2013, s.5(c).

¹⁵³ [2013] IEDC 13.

¹⁵⁴ [2012] 1 I.R. 548.

¹⁵⁵ [1998] 3 I.R. 399.

evidence in protected proceedings, but this does not imply that there is an absolute embargo on disclosure of evidence in all circumstances.

In the case of *HSE v. SC & AC*¹⁵⁶ the High Court refused an application of the Child and Family Agency to lift the *in camera* rule for the purpose of enabling the Agency to convey necessary information (reports or assessments relating to the child in question) to the United Kingdom.

In the case of *HSE v. YG*¹⁵⁷ the GAL made an application pursuant to section 47 of the 1991 Act. The application was to direct that the mother produce certain photos and videos she had of the children. Counsel for the mother argued that the mother's privilege against self-incrimination mitigated against her handing over the photos and videos, that section 47 should not be applied where it interfered with another's rights, and that it would not be in the child's best interests to interfere with the mother's constitutional or ECHR rights. The court decided that section 47 placed the interests of the child above all other rights and it was proportionate in the circumstances to order the mother to produce the material that was sought.

2.2.1 Recommendations

The Courts and Civil Law (Miscellaneous Provisions) Act 2013 provides welcome and long overdue access to child and family law matters. The Act should be monitored in terms of its operation in practice.

Clarification is needed as to the procedure governing the privilege against self-incrimination and whether, and if so how, it applies in the child care context. A dilemma arises where a witness is asked questions regarding the welfare of the child but the answers to that question may expose a witness to criminal investigation/prosecution.

¹⁵⁶ [2013] IEHC 516.

¹⁵⁷ [2012] IEDC 25.

2.3 Section 23 of Children Act 1997

Section 23 of the Children Act 1997 (“the 1997 Act”) provides for “the admission of statements made by a child as evidence of any facts therein, of which direct oral evidence would be admissible ... notwithstanding the rule of law relating to hearsay, where the court considers that a) the child is unable to give evidence by reason of age or b) the giving of oral evidence by the child ... would not be in the interest of the welfare of the child.”

In practice, applications under section 23 are usually made where the Child and Family Agency intends to rely on the evidence of a child in proceedings by way of statements made to a third party and where the Agency does not intend to call the child as a witness. Part III of the 1997 Act provides a hierarchy of devices by which a child’s direct views can be brought before a Court. These include a video link, an intermediary and hearsay statements to others. The problem with the latter is the manner in which they are recorded. For example, the child states X to a foster carer who in turn informs the fostering link worker who in turn imparts the information to an allocated social worker. The allocated social worker may then reflect the last version into a report as the statement of the child. It may have evolved or been misinterpreted along the road and the Court can admit the statement and then weigh the value in the context of a multiple chain of hearsay. The challenging question is where is the real voice of a child in this process?

In *HSE v. EL & AL*¹⁵⁸ the District Court held that it would not be in the interests of the welfare of the child to be called to give evidence. In considering whether the admission of statements would cause an injustice to the mother the court was satisfied that the interests of the welfare of the child outweighed any potential injustice to the mother. In that case the judge, in considering the weight to be attached to the admissible statements, considered that: the statements were not contemporaneously made; they did not involve multiple examples of hearsay; the motive to misrepresent or conceal appeared to be low; the statements were an edited account in collaboration with the social worker and GAL and the circumstances did not suggest an attempt to prevent a proper evaluation of the weight of the evidence.

¹⁵⁸ [2013] IEDC 4.

Although section 23 of the 1997 Act states that it is the court that ultimately decides whether or not it would be in the interests of the welfare of the child to give evidence, no guidance is provided as to how this decision is reached. In practice this is often a source of debate and difficulty in the courtroom, with judges sometimes vocalising the fact that they are not trained in child psychology and therefore might not be the most qualified people to determine the competence of a child witness.

The use of a psychologist in the High Court provides guidance to the court on the level of maturity of an individual in the context of their chronological age in order to assess a child's expressed views.

2.3.1 Recommendations

It is recommended that clear guidelines be introduced as to the factors that should be considered when deciding whether a child in a particular case should give evidence. In the High Court, in cases dealing with the Hague Convention on Child Abduction, the practice is to employ a child psychologist to give evidence to assist the court in determining whether a child should give evidence. Judges are not psychologists and should be provided with some guidance on how to decide whether it is in the interests of the welfare of the child to appear in court to give evidence.

Section 23 of the 1997 Act needs to be reviewed in the context of care proceedings whereby the evidence of the child should be admissible, but with safeguards built in as to the weight to be attributed to it and an assessment of the particular circumstances of the disclosure.

It is recommended that section 23(2)(a) of the 1997 Act be amended so that the presumption is that the statements made by children shall be admitted, unless in the interests of justice this should not occur.

The Child Care Act 1991 should be amended so as to integrate more comprehensively the provisions contained in section 23 of the 1997 Act.

2.4 Consent to Medical Treatment

In the case of *X.Y. v. HSE*¹⁵⁹ Mr. Justice Birmingham refused to declare section 25(6) of the Mental Health Act 2001 unconstitutional or incompatible with the European Convention on Human Rights (ECHR) as it relates to children. The case concerned a 16 year old girl who had been diagnosed with bipolar affective disorder. The girl had been detained in a child and adolescent mental health in-patient unit. When, at times, she refused to take medication prescribed to her she was physically restrained and it was administered by injection. The Child and Family Agency had previously applied to court and had been granted permission to take a blood sample from the girl against her wishes. The blood sample was needed to ensure that the girl was not suffering from side effects from her medication.

The concern arose when the plaintiff withdrew her consent for certain medications to be administered citing her reason as her belief that taking the medicine would reduce her capacity to formulate and execute her plan to take her own life. It was believed that the girl remained at a high risk of suicide. It was submitted by the girl's legal representatives that section 25 of the 2001 Act was unconstitutional and/or incompatible with the ECHR.

Mr. Justice Birmingham concluded that the safeguards contained in the Mental Health Act and those contained in the Child Care Act 1991 which were incorporated by section 25(14) of the 2001 Act are not only capable of working but do work in practice. The High Court noted that the initial order providing for detention for treatment was made by an independent body (the District Court) and it is subject to appeal and judicial review. The court also noted that section 47 of the Child Care Act 1991 provides a route by which any party who might wish to do so can seek to have conditions imposed in relation to treatment. The court concluded that the provisions of section 25 of the Mental Health Act were capable of being implemented in a manner that is fully constitutional and Convention compliant and that there was every reason to believe that the regime to which the girl was subjected served her best interests.

¹⁵⁹ [2013] IEHC 490.

2.5 Jurisdiction, Transfer of Proceedings and Council Regulation EC 2201/2003¹⁶⁰

The number of cases coming before our courts that have a cross-border element is ever increasing. The movement of children and families between jurisdictions becomes problematic when the children involved have come to the attention of the social services in the country they are leaving. This issue was raised in the *Sixth Report of the Special Rapporteur on Child Protection (2013)* and is an issue in which there are an ever-increasing number of cases coming before the courts.

It was noted in the *Sixth Report of the Special Rapporteur on Child Protection (2013)* that there is no protection for children who may have come to the attention of the social services in one country and are moved to another in circumstances where there is no court order in place. There is a protocol in place for the handling of cases where families move between Northern Ireland and the Republic.¹⁶¹ This is welcomed but there remains an absence of a similar protocol or procedures for cases where families move between mainland United Kingdom, or any other country and Ireland. This should be remedied and the aforementioned protocol should be extended to include mainland United Kingdom.

There are a number of recent cases in this area, often where mothers have moved from one jurisdiction to another in order to avoid the social services in the country they are leaving. One such case was *HSE v. C.R. & J.M.*¹⁶² In that case the mother had moved to Ireland from England at a very late stage in her pregnancy and the child was born in Ireland. The Child and Family Agency applied to the court to transfer the case from Ireland to the courts of England and Wales. The Gardaí had invoked section 12 of the Child Care Act 1991 to ensure that the baby was not removed from hospital. An emergency care order and interim care orders followed and the child was placed with foster carers. Article 15 of EC Council Regulation 2201/2003 provides for the transfer of a case where the court considers that a “court of another member state, with which

¹⁶⁰ Council Regulation (EC) No. 2201/2003 of 27th November, 2003 concerning jurisdiction and the recognition and enforcements of judgments in matrimonial matters and the matters of parental responsibility.

¹⁶¹ Inter-Jurisdictional Protocol for the Transfer of Child Care cases between Northern Ireland and the Republic of Ireland.

the child has a particular connection, would be better placed to hear the case, or a specific part thereof and where this is in the best interests of the child.” The court held that it was in the best interests of the child for the courts of England and Wales to determine the matter.

*HSE v. M.W. & G.L.*¹⁶³ was an appeal of a decision of the High Court requesting the courts of England and Wales to determine a child care matter pursuant to Council Regulation EC 2201/2003. The Supreme Court held that Article 15 of Council Regulation 2201/2003 “unequivocally extends to public law matters.” The court noted that the Regulation itself sets out the test that is to be applied in Article 15 applications. The child must be considered to have a particular connection to the member state, it must be in the best interests of the child for the member state to accept jurisdiction and the other court must be better placed to hear the case.

In the District Court case of *HSE v. BND & DN*,¹⁶⁴ two children were brought to Ireland in breach of a court order made in another jurisdiction. The District Court, in this case, noted that “the issue of jurisdiction of this court to make long term orders in respect of the children arises by virtue of Article 10 of Council Regulation 2201/2003 which states that in the case of wrongful removal or retention, the courts of the member state where the child was habitually resident, immediately before the wrongful removal or retention shall retain jurisdiction until the child has acquired a habitual residence in another member state and each person, institution or other body having rights of custody has acquiesced in the removal or retention.” The court noted that the courts in the other jurisdiction had stated that they would not claim jurisdiction in respect of the matter.

The court noted that the children had resided in Ireland for more than a year and a request for return had not been lodged in Ireland by the courts in the other jurisdiction. The court also observed that the court in the other jurisdiction was fully aware of the nature of the proceedings before the Irish court and therefore the Irish court was entitled to assume that it had jurisdiction to make full care orders in respect

¹⁶² [2013] IEHC 472.

¹⁶³ [2013] IESC 38.

¹⁶⁴ [2012] IEDC 10.

of the children pursuant to Article 10(b)(i) of the Regulation. The District Court in that case granted a care order pursuant to section 18 of the 1991 Act.

2.5.1 Recommendation

A protocol similar to the one that exists between Northern Ireland and the Republic should be developed between the Republic and the rest of the United Kingdom to enable the effective and efficient handling of cases where families travel from one jurisdiction to the other, in circumstances where that family is known to the social services or there are court orders in existence in relation to the family.

2.6 Children Known to the Child and Family Agency

In many child care cases before the courts, the families and children involved have been known to the Child and Family Agency for some time prior to the matter coming to court. It may be the case that supervision orders had been sought or granted, for example, or that the parents or children were linked with a particular form of assistance or support provided by the social services.

In some cases, when the matter comes before the courts various professionals are employed to carry out parenting capacity assessments or psychiatric or cognitive assessments for example. In a not insignificant number of cases the results of these tests reveal that one or both parents suffer from a cognitive disability or low level intellectual functioning. In such a situation evidence is generally given to the court by social workers or other health care professionals of supports that were put in place to assist such parents who may have been struggling to cope.

One issue that arises in these cases is the suitability of the programmes of support that are offered to such families. A judge in one case commented that the parents in a particular case had been identified as having learning disabilities and low cognitive functioning and were given a personalised parenting class over a number of weeks to help them grasp certain parenting skills. The judge went on to comment that there seemed to be no connection between the finding of the low cognitive functioning on the one hand and the parenting course that was being offered which was relatively complicated and involved the teaching of new material every week. It seems that there is sometimes a gap in understanding between the identification of problems and

needs of parents relevant to the welfare and protection of their children and the supports that are then offered to particular parents in response to those needs.

In the case of *HSE v. LW & GW*,¹⁶⁵ it was noted that social work support and interventions were put in place for the family as far back as 1998 but the court noted that “this intervention does not appear to have been sufficient to effect any change in the family dynamic.” The court noted that the children were registered under the Child Protection Register in 2004 under the category of neglect. The GAL in that case was highly critical that, despite the children being on the register, further abuse and neglect occurred of the child that remained in the home.

2.6.1 Recommendation

Where particular needs are identified by the Child and Family Agency in dealing with a family the Agency must ensure sufficient intensive and specialised supports or interventions are developed and put in place to respond to high risk families with complex needs.

2.7 Entitlement of Children to Remission

The Children Act 2001 provides a special custodial regime for young offenders and is guided by the principle that such young people, if they are given a custodial sentence, should be kept away from the general adult prison population. There is no explicit provision for a young person detained under the 2001 Act to benefit from remission of his/her sentence. *Byrne & Another v. Director of Oberstown School*¹⁶⁶ was a very significant judgment where Mr. Justice Hogan in the High Court determined that children in a detention centre are entitled to remission in the same way that adults are.

The above case was brought on behalf of a young man detained in Oberstown School on foot of a criminal conviction. The applicant claimed that the fact that remission was not available to him, as it was to other prisoners, amounted to discrimination contrary to Article 40.1 of the Constitution, which provides that all citizens shall, as human persons, be held equal before the law.

¹⁶⁵ [2102] IEDC 4.

¹⁶⁶ [2013] IEHC 562.

The statutory power to grant remission of prison sentences is contained in section 35 of the Prisons Act 2007 (“the 2007 Act”). Detailed rules are set out in Rule 59 of the Prison Rules (S.I. No. 252 of 2007) which provides that any prisoner serving a sentence of one month or more shall be eligible, by good conduct, to earn a remission of sentence. The term “prison” is expressly defined in the 2007 Act to include St. Patrick’s Institution but no reference is made to Oberstown School. Mr. Justice Hogan notes that the remission regime is fundamental to the general operation of the criminal justice system. Moreover, the judge stated that “a custodial regime which brings about such a stark difference in terms of the release dates of offenders simply because of the location of the place where they serve their period of detention as a result of the application of the remission rules to one place of detention (St. Patrick’s Institution), but not to another (Oberstown School) immediately engages the application of Article 40.1 (of the Constitution) with its fundamental command of equality before the law.” The court concluded by saying that “the failure to afford such offenders with the benefit of the remission rules amounts to a plain breach of the constitutional command contained in Article 40.1 of equality before the law.”

2.7.1 Recommendation

In light of the decision in Byrne & Another v Director of Oberstown School, it is recommended that the Prisons Act 2007 be amended so that it specifically refers to Oberstown School as a place of detention for juvenile offenders as well as any other detention centres that are used as places of detention in the criminal justice context. If the Children Act 2001 is to be amended it should be altered with a view to prioritising the interests of the child.

2.8 Court Orders Affecting Children

2.8.1 Supervision Orders

A court may grant a supervision order by virtue of section 19 of the 1991 Act. Once such an order is granted the Child and Family Agency may visit the child in question on such periodic occasions as may appear necessary to the Agency with a view to monitoring the provision of care to the child. A supervision order will be granted where the court is satisfied that there are reasonable grounds for believing that a child has been or is being assaulted, ill-treated, neglected or sexually abused or; the child’s

health, development or welfare has been or is being avoidably impaired or neglected or; the child's health, development or welfare is likely to be avoidably impaired or neglected and it is desirable that the child be visited periodically by or on behalf of the Child and Family Agency.

Section 19(2) of the 1991 Act states that a supervision order authorises the Child and Family Agency to have the child visited on such periodic occasions as the Agency may consider necessary in order to satisfy itself as to the welfare of the child and to give to his parents or to a person acting *in loco parentis* any necessary advice as to the care of the child. Under subsections 19(3) and (4) the court can give such directions as it thinks fit as to the care or visitation of the child including requiring the parents of the child or a person acting *in loco parentis* to cause him or her to attend for medical or psychiatric examination, treatment or assessment at a hospital, clinic or other place specified by the court.

The visitation rights afforded by this section have a dual purpose. The first is primarily to monitor the child and his or her carers and to ensure that the child's welfare is being promoted. The second purpose allows for a more proactive approach, permitting the Agency to give any necessary parenting advice to the child's custodians or carers, with a view ultimately to improving the child's well-being.

By its nature a supervision order has a less intrusive impact on the family and child in question than a care order for example, where the children are taken out of the care of their parents and placed in the care of the State. In some cases, indeed, it may obviate the need for further proceedings. The knowledge that the authorities are "keeping an eye" on them may prompt some errant parents to take the necessary steps to mend their ways. A court however, may feel that a supervision order on its own is not a sufficient guarantee to the court that the child's rights and welfare will be protected and the court may feel that it should impose some conditions on the supervision order. There is however no provision in law to do so. The court is permitted pursuant to subsections 19(3) and (4) of the 1991 Act to make such directions as it thinks fit when granting a supervision order but this does not extend to the imposition of conditions when granting a supervision order.

In *HSE v. YB & GB*¹⁶⁷ the District Court made section 47 directions alongside the granting of a supervision order including that the parents engage in parenting coaching and the parents engage with a family resource worker.

In the case of *F.H. & Others v. Staunton & Others*¹⁶⁸ Mr. Justice Hogan was asked to decide whether there was a proper legal basis to make directions towards the parents when granting a supervision order pursuant to section 19(1) of the 1991 Act. The judge noted that “while the HSE is plainly authorised to visit the child and to give advice to the parents of a child who is the subject of a supervision order, the subsection does not envisage that parents can be the subject of positive obligations of the kind which were actually directed by the District Judge and embodied in the supervision order.” The judge noted that it is fundamental to our legal order that something akin to medical treatment (such as, for example, psychotherapy) represents a voluntary choice on the part of the prospective client, and that very clear and express language would be required before it could be assumed that the Oireachtas had given the District Court a power to impose a condition of this kind in respect of parents otherwise subject to a supervision order.

The court held that section 19 gave no power to the District Court to direct for example a parenting capacity assessment or direct that one of the parents take part in a course of psychotherapy and held that the directions contained in the District Court order should be regarded as invalid. The court did not accept that section 47 of the 1991 Act (which gives a District Court powers to make certain directions) could provide an appropriate legislative basis for the types of directions set out above either. Mr. Justice Hogan noted that “the section 47 order must relate directly to the welfare of the child. The Oireachtas did not envisage that this jurisdiction could be used to impose *obligations* on third parties (even such as parents).” The court pointed out that the language of section 47 could not be taken to permit the imposition of positive obligations on parties other than the children themselves.

¹⁶⁷ [2012] IEDC 21.

¹⁶⁸ [2013] IEHC 533.

2.8.1.1 Recommendations

It is recommended that the Child Care Act 1991 be amended to enable a court, when granting a supervision order, to impose such conditions as it thinks fit to ensure that the rights and welfare of the child are adequately protected. Such conditions and supports, if they were to be linked with a supervision order, can provide 'scaffolding' in a child care context and can potentially provide vulnerable families with the support they need, possibly obviating the need of further court orders being sought.

Section 19 of the 1991 Act requires clarification on the permissible intervention by the Child and Family Agency once a supervision order is made. At present it is unclear for example whether a social worker can inspect a dwelling, talk to the children separately, or visit the children in school without the parents' consent.

Section 13(7) of the 1991 Act is instructive and could be extended to require parents to engage in services to help them to "parent" appropriately.

2.9 Emergency Reliefs

The use of emergency powers by An Garda Síochána to remove children from the care of their parents has come under increased scrutiny in Ireland following two incidents in 2013 whereby children were removed from their family on the basis that their ethnicity did not resemble that of their Roma parents. DNA tests later confirmed that they were the biological children of the parents in question and they were returned to their families.¹⁶⁹ The Ombudsman for Children Emily Logan is currently investigating these events and will report her findings in due course.¹⁷⁰

¹⁶⁹ Child Care Law Reporting Project, Emergency Care Order for Roma child withdrawn after DNA test, text available at: <http://www.childlawproject.ie/publications/emergency-care-order-for-roma-child-withdrawn-after-dna-test/> (last accessed 20th December 2013).

¹⁷⁰ Statement by the Ombudsman for Children on agreement reached with the Minister for Justice to investigate cases of children taken into State Care available at: <http://www.oco.ie/whats-new/media/press-releases/statement-by-the-ombudsman-for-children.html> (last accessed on 20th December 2013).

2.9.1 Irish Law

Part III of the Child Care Act 1991 seeks to secure the protection of children in emergency situations and provides An Garda Síochána and the Child and Family Agency with certain powers in emergency situations. Under section 12 of the 1991 Act a member of An Garda Síochána is given the power to remove a child to safety where there are reasonable grounds for believing that there is (a) an immediate and serious risk to the health or welfare of the child and (b) the delay necessitated in seeking an emergency protection order under section 13 of the Act or applying for a warrant under section 35 of the Act would not sufficiently protect the child.

When exercising his or her powers under section 12, a member of An Garda Síochána does not require a warrant and may, where necessary, be accompanied by such other persons as may be necessary (e.g. a social worker). Where a child is removed under section 12, he or she must be placed in the custody of the Child and Family Agency in the area as soon as is possible¹⁷¹ and where the child is not returned to his or her parents, custodians or guardians, the Child and Family Agency is obliged to make an application for an emergency care order at the next sitting of the local District Court and the court must be satisfied that the criteria in section 13 of the 1991 Act are fulfilled.¹⁷²

This power is not subject to any external oversight prior to its execution and while such extraordinary measures may be necessary at times to protect the health and welfare of vulnerable children, it should be stressed that these measures are to be used as a last resort.¹⁷³

¹⁷¹ Child Care Act 1991, s. 12(3).

¹⁷² Child Care Act 1991, s. 12(4).

¹⁷³ D. O’Riordan, “The Protection of ‘Parents’ In Emergencies,” (2001) 4(4) *Irish Journal of Family Law* 3, where O’Riordan points out that “[u]nder the Child Care Act 1991, the [Health Service Executive], An Garda Síochána and the District Courts are given great latitude and a very wide berth in carrying out their duties to protect and promote the welfare of children who are not receiving adequate care and protection.”

Section 13 provides that a judge of the District Court can make an emergency care order which provides for short-term emergency protection on the application of the Child and Family Agency where the Court is of the opinion that:

- (a) there is an immediate and serious risk to the health or welfare of the child which necessitates his being placed in the care of the Child and Family Agency; or
- (b) there is likely to be such a risk if the child is removed from the place where he is for the time being.

The threshold for granting an emergency care order is lower than that required for other orders under the 1991 Act as the Court need only form an “opinion” that there is reasonable cause to believe that either of the grounds set out in (a) or (b) are in play. It should also be noted that the temporary nature of the emergency care order (i.e. it can remain valid for up to 8 days although a court may reduce this) means that it is unlikely that it is in itself unconstitutional as it aims to strike a balance between giving the Child and Family Agency time to prepare an application for a care order while ensuring that parents are not denied custody for an extensive period of time.

Applications for emergency care orders must also be made on notice to the relevant parties and no provisions allow for a direction to be sought at shorter notice.¹⁷⁴

However, even in circumstances where there is an immediate and serious risk to the child, it may not be necessary to grant an emergency care order. An example of this is where the risk to a child can be alleviated by removing the abusive or hostile party, either by the other party applying for a barring or safety order under sections 2 or 3 of the Domestic Violence Act 1996 or by the Child and Family Agency applying on behalf of that other party under section 6 of the 1996 Act. The Supreme Court in *The State (DD) v. Groarke*¹⁷⁵ was clear that a Court must positively inquire into whether the welfare of the child requires the removal of the child from the innocent parent. Thus a Court would only be justified in removing the child where the innocent parent was unable to protect the child from the abusing parent.

¹⁷⁴ Pursuant to Rules 9(1) and (2) of the District Court (Child Care) Rules, 1995, the Child and Family Agency must give two days clear notice of the application.

¹⁷⁵ [1990] 1 I.R. 305.

2.9.1.1 Recommendations

The operation of the powers granted by sections 12 and 13 of the Child Care Act 1991 should be examined in light of the findings of the Ombudsman for Children's investigation.

Clear guidelines for the use of Garda powers under section 12 of the Child Care Act 1991 should be produced and made available to the public. Such guidelines should stipulate that the powers granted under section 12 of the Child Care Act are to be used only as a last resort.

Members of An Garda Síochána and the Child and Family Agency staff should ensure full inter-agency co-operation and communication in matters involving the emergency protection of children as required by the Children's First Guidelines.

Consideration might be given to a prohibition on a parent or other party communicating with a child taken into care under section 13 in any manner and through any medium (Facebook etc.) except with express permission of other parties or the court.

The breach of any of these proposed conditions would have to be subject to a sanction in order for them to act as a deterrent.

2.9.2 England and Wales

Under section 46 of the Children Act 1989, a police officer may take a child into police protection. This is permitted where a constable has "reasonable cause to believe" that a child is likely to suffer significant harm. Where such a power is used, there is an obligation on the police constable to place the child in suitable accommodation or to take reasonable steps to ensure that the child's removal is prevented.

Under this section a child may be taken into police protection for a maximum of 72

hours¹⁷⁶ and during this time there is no mechanism whereby the parents can challenge the exercise of this measure. If it is necessary to protect the child beyond the 72 hours, the police may apply on behalf of the local authority for an emergency protection order.¹⁷⁷ As soon as is reasonably practicable after a child is taken into police protection, the police must inform the local authority, the child and his or her parents of the steps they have taken and why.¹⁷⁸

While the police do not acquire parental responsibility for the child, they have an obligation to do what is reasonable to safeguard and promote the child's welfare.¹⁷⁹ The child's parents must also be allowed such contact as the police consider reasonable and in the child's best interests.¹⁸⁰

The Court of Appeal in *Langley v. Liverpool City Council*¹⁸¹ dealt with the relationship between police protection and "emergency protection orders" under section 44 of the 1989 Act. Dyson J. pointed out the various shortcomings of the police power afforded under section 46 of the 1989 Act, particularly in relation to the lack of parental responsibility, the inability of the court to make directions in respect of contact, examinations and assessments as well as the short time span involved. For these reasons, it was held that the statutory scheme clearly accorded primacy to section 44 of the Act as it was not only sanctioned by the court but it also involved a more elaborate, sophisticated and complete process than removal under section 46.¹⁸² For this reason, where it is at all possible to avail of the process under section 44 (i.e. the use of an emergency protection order), this should be the route followed.

Detailed guidance has been provided to the police in *The Duties and Powers of the Police under the Children Act 1989*, Home Office Circular 017/2008. Although this

¹⁷⁶ Children Act 1989, s. 46(6) (England & Wales).

¹⁷⁷ Children Act 1989, s. 46(7) (England & Wales).

¹⁷⁸ Children Act 1989, ss. 46(3)(a), 46(4)(c), 46(4) (England & Wales).

¹⁷⁹ Children Act 1989, s. 46(9) (England & Wales).

¹⁸⁰ Children Act 1989, ss. 46(3)(f) and (10) (England & Wales).

¹⁸¹ [2005] EWCA Civ 1173; [2006] 1 WLR 375.

¹⁸² *Langley v. Liverpool City Council* [2005] EWCA Civ 1173; [2006] 1 WLR 375 at para. 38.

circular is not legally binding Dyson J. referred to its predecessor in *Langley*.¹⁸³

“[P]olice protection is an emergency power and should only be used when necessary, the principle being that wherever possible the decision to remove a child/children from a parent or carer should be made by the court.”

Under section 44 of the Children Act 1989 a local authority may apply to the courts for an emergency protection order. This allows the child to be removed from home for a period of up to 8 days.¹⁸⁴

Further, under section 43 of the Children Act 1989 a child assessment order (CAO) can be made which is an intermediate step between state investigation without court involvement and with court involvement. Under the 1989 Act, an application for a child assessment order must be made on notice. It has been suggested however that there are few cases where child assessment orders are made rather than emergency protection orders¹⁸⁵. It is noted that CAOs are designed to enable social services to satisfy themselves about the welfare of children where they have suspicions of abuse or neglect but lack hard evidence.¹⁸⁶

CAOs are limited to quite specific situations in which an assessment or examination of a child is permitted in specific circumstances of non-cooperation by the parents and where there is a lack of evidence for a different type of order. A CAO can only be sought by a local authority or an authorised person *e.g.* the NSPCC. It would appear that CAOs are a useful resource for local authorities who have suspicions (but may lack hard evidence) about threats to a child’s welfare and where parents are not co-operating or permitting the social services access to the child in order to complete an assessment. The completion of any such access or assessment may obviate the need for any further interventions or applications to the court. The duration of a CAO is strictly seven days and there is no provision to extend this time period. Bainham notes that a proper diagnosis of a child’s condition may take several weeks and that the rigid time limit of a CAO may prompt the local authority to seek an interim care order.

¹⁸³ *Ibid.*, at para. 15.

¹⁸⁴ Under s. 45(5) of the Children Act 1989 this can be extended for a further period of 7 days.

¹⁸⁵ *The Child in Need: Children, the State and the Law*, David Bedingfield, 1998.

¹⁸⁶ *Children: The Modern Law*, Andrew Bainham, 3rd edition, 2005.

2.9.3 Scotland

Under the Children (Scotland) Act 1995 the police in Scotland have the power to ensure the immediate protection of children believed to be suffering from, or at risk of, significant harm. Section 61 of the 1995 Act provides that in an emergency situation where a police officer has reasonable cause to believe that the conditions for making a child protection order are satisfied, and that it is not practical in the circumstances to make such an application, the officer may remove the child to a place of safety.¹⁸⁷ However, it is also possible for a local authority or any other person to make an application to a justice of the peace seeking authorisation to remove a child to a place of safety or to prevent the child from being removed from a place where he or she is being accommodated.¹⁸⁸

The primary difference between the use of such powers in Scotland and those in operation in Ireland and in England and Wales is the length of time for which they are valid – under the 1995 Act in Scotland, the powers granted by section 61 last for a maximum of twenty-four hours.¹⁸⁹

If the officer has reasonable cause to believe that the conditions for making a child protection order are no longer satisfied and that it is no longer necessary to keep the child in order to protect him or her from significant harm, then he or she must not continue to keep the child. A child may not be kept in a place of safety under the powers conferred under section 61 if the Principal Report considers that the conditions for the exercise of that power are not satisfied or that it is no longer in the child's interest that he or she should be so kept.

The Scottish provisions contained in the 1995 Act draw substantially on the experience of England and Wales.¹⁹⁰ However, in addition to the shorter validity of the order, it is also necessary for an officer to be satisfied that it is not practicable to

¹⁸⁷ Children (Scotland) Act 1995, s. 61(5).

¹⁸⁸ Children (Scotland) Act 1995, ss. 61(1) and 61(2).

¹⁸⁹ Children (Scotland) Act 1995, s. 61(4).

¹⁹⁰ J. Masson with D. McGovern, K. Pick and M. Winn Oakley, *Protecting Powers: Emergency Intervention for Children's Protection*, (Wiley, 2007) at p. 47.

apply to a sheriff for a child protection order.¹⁹¹

2.9.4 Australia

In Australia where there is an urgent need to protect a child or young person, the community services can apply to the Children's Court for an emergency care and protection order (ECPO). The Children's Court can make an ECPO where it is satisfied that the child or young person is at risk of serious harm. The ECPO places the young person in the care responsibility of the Director General or the person specified in the order and has effect for a maximum of fourteen days and can be extended once only for another fourteen days.

2.9.5 Recommendation

It is recommended that provision be incorporated into Irish law to enable a broader spectrum of investigation and assessment to be carried out than is currently permissible under a supervision order granted under section 19 of the 1991 Act. Regard should be had to the position in other jurisdictions such as the United Kingdom and Australia. A mandated parental capacity assessment could highlight the methodology by which supports are to be provided to secure a family unit. For example, a parent with a moderate learning disability may need very specific support.

2.10 Challenges to Care Orders

2.10.1 Right to be heard

A challenge to an emergency care order granted by the District Court was recently considered by a five-judge Supreme Court, after an unsuccessful constitutional challenge in the High Court¹⁹². The issue concerned the right of a parent and child to be heard when an application for an emergency care order is being made. Mr. Justice Ryan, in the High Court, had ruled that the child's detention was lawful. It was argued by the lawyers for the parents that they had no opportunity to oppose the application for the emergency care order and could not challenge such an order until the next

¹⁹¹ Children (Scotland) Act 1995, s. 61(5).

¹⁹² A reserved judgment was given by the Chief Justice on Wednesday, February 19, 2014. [2014] IESC 8.

stage of child care proceedings, namely the hearing of the interim care order. The lawyer for the Child and Family Agency argued that, given the fact that the child had been returned to the parents, the proceedings were now moot and the Supreme Court did not need to consider the matter. The Supreme Court, in rejecting the appeal, held the general rule applied (i.e. the courts did not hear appeals on moot points) and there were no exceptional circumstances requiring the court to decide the issues raised.

2.10.2 Findings of fact in relation to previous orders

Child care cases taking place in the District Court will often involve multiple court appearances in which various orders are sought ranging from emergency care orders to interim care orders to the final care order hearing. Such a process will necessarily involve decisions being made by the judge or judges at each step of the process about whether the particular threshold for each application has been reached.

The key issue is whether a “one case one judge” approach should apply. The question is complicated by the fact that in the Dublin Metropolitan District, there are 3 dedicated judges whereas around the country the system is characterised by provincial judges (who invariably hear the cases with the result that a “one case one judge” approach is a reality although on occasion cases are dealt with by movable Judges).

2.10.3 Recommendations

There is a need for certainty in legislation, or at the very least a robust case management system, in order to set out the procedure to follow when a Judge dealing with a particular child care case finds himself/herself hearing evidence relating to a decision that has been made previously.

This is an area that should be streamlined with a more regulated functioning of the powers and role of Guardians Ad Litem (GALs).

2.10.4 Emergency Care Orders pre-birth

Unfortunately it is not unusual for the Child and Family Agency to deem it necessary to seek an emergency care order immediately after a baby has been born. Clearly when this occurs, this is an action that has often been planned pre-birth. Pre-birth conferences are held routinely. That said, there is no clear procedure governing how pre-birth concerns should be recorded or dealt with and this often results in a situation of rushed emergency applications to the court when a baby, about whom there is serious concern, is born.

It is difficult to justify an emergency care order when the mother is in hospital giving birth or having just given birth. It is also to be noted that the child and mother are in the maternity hospital with vigilant staff. Therefore there would not appear to be an immediate risk if the mother and baby remain in the maternity hospital under a “Holding Order”. The power to make such an order should be provided for in the Child Care Act. The interim care order could then be applied for 7 to 10 days after the mother is fit for discharge. The child could remain in the hospital allowing the mother to visit 24 hours per day to feed and be in the company of the baby. The primary objective of any court order must be to secure the safety of the child and to protect the child from the harmful stress of being separated from the birth mother at the earliest and important life stage. The “Holding Order” could prove to be a valuable indicator in that if the parent attends the hospital regularly to feed and nurse the child this might be a useful predictor as to future behaviour.

2.10.4.1 Recommendations

It is recommended that a statutory basis be put in place for recognition of pre-birth concerns. Once any post birth action is contemplated by the Child and Family Agency, there should be provision for (compulsory) service of proceedings or notice of intended proceedings pre-birth to allow for legal advice and representation. Legal Aid would have to be made available on a priority basis pre-birth.

The Child and Family Agency should have to substantiate why no formal pre-birth notice would be justified. For example, it might be justified in circumstances where there was no attendance at the hospital of the prospective respondent parent.

There should be an obligation on the Child and Family Agency to initiate new born baby applications when the intention is formed to seek to take the baby into care, rather than when the child might be due for release.

The Child Care Act should be amended to provide for a “Holding Order” as an alternative to an emergency care order in pre-birth cases.

2.11 Care Order Threshold and Considerations

Pursuant to section 18(1) of the 1991 Act a care order will be granted where, “on the application of the Child and Family Agency with respect to a child the court is satisfied that - a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or b) the child’s health, development or welfare has been or is being avoidably impaired or neglected, or c) the child’s health, development or welfare is likely to be avoidably impaired or neglected, and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section.” It should be stated in the context of section 18 that neglect is pernicious but not life threatening.

Section 24 of the 1991 Act states that “in any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the constitution or otherwise shall-

- a) regard the welfare of the child as the first and paramount consideration, and
- b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child.”

In practice, the District Court, when making a care order identifies which subsection of section 18 of the 1991 Act is activated and then refers to the proportionality of interfering with the rights of the parents. Section 24, however, is clear that the welfare of the child must be regarded as the first and paramount consideration.

In the case of *HSE v. CJ*¹⁹³ the court noted that in determining an application for a care order under section 18 of the 1991 Act a court must also have regard to section 24 of that Act. Section 24 mandates the court to have regard to the rights of parents under the Constitution and to have regard to the welfare of the child as the first and paramount consideration and as far as practicable to give due consideration, with regard to age and understanding, to the wishes of the child.

In the case of *HSE v. YC & HA*¹⁹⁴ the court went further and explicitly weighed the parents' right to reunification with the best interests of the children. The court stated that "the objective of restricting the right to reunification is so pressing and substantial that it is sufficiently important to justify interfering with a fundamental right." The court further stated that "the restriction is not disproportionate. The restriction, while no doubt difficult for the parents, does not impose burdens or cause harm which is excessive when compared to the importance of the objective to be achieved in the child's best interests."

Section 18(1)(c) is the most difficult threshold to establish. Cases under this subsection have proven to be the most challenging in determining the proportionality of the requested order. For example, should past behaviour be taken as a predictor of future harm in situations of drug abuse and parental incapacity.

2.11.1 Recommendations

The District Court should be empowered to make proportionate orders to underpin transition arrangements when refusing a care order, an interim care order, or an emergency care order where the child is already in the care of the Child and Family Agency.

Guidelines should be published to provide greater clarity as to the threshold to be satisfied in respect of section 18(1)(c) of the 1991 Act. Preferably such guidelines should be expounded by judgment of a court, but in the absence of same guidelines ought to be formulated so as to assist social workers in assessing whether there is a reasonable basis for pursuing an application under section 18(1)(c) of the 1991 Act.

¹⁹³ [2012] IEDC 27.

¹⁹⁴ [2012] IEDC 19.

Section 22 of the 1991 Act should be amended to provide that if there is to be an application for discharge of a care order by a respondent parent, it is to be preceded by a “leave to apply” hearing, with the onus on the respondent to satisfy the court that there is a real change of circumstances and/or real or substantial grounds for discharge of the order.

2.12 Interim Care Order Threshold and Considerations

Section 17 of the 1991 Act provides that:

“(1) Where a justice of the District Court is satisfied on the application of the Child and Family Agency that –

(a) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care order is in force), and

(b) there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of section 18(1) exists or has existed with respect to the child and that it is necessary for the protection of the child’s health or welfare that he be placed or maintained in the care of the Agency pending the determination of the application for the care order,

the justice may make an order to be known and in this Act referred to as an interim care order.”

An interim care order requires that a child named in the order be placed or maintained in the care of the Child and Family Agency for a period not exceeding 29 days or if there is consent of the parents to a period longer than 29 days. Section 17 states that “an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed twenty nine days, of the persons specified in paragraph (b)) on the application of any of the parties if the justice is satisfied that grounds for the making of an interim care order continue to exist with respect to the child.”¹⁹⁵

¹⁹⁵ This section was amended by the Child Care (Amendment) Act 2013 and substituted the period of 28 days referred to in the section for 29 days.

Therefore the interim care order can be extended where the judge is satisfied that “the grounds for the making of the interim care order continue to exist.” As per the recent decision of O’Malley J. in the High Court in *K.A. v. HSE*¹⁹⁶ on an application to extend an interim care order, the Judge must be presented with evidence to the effect that the circumstances as they then exist continue to justify the extension of the order.

This is now the current practice. The form of the order drawn is in summary form. That said, the Minute book records the witnesses, the Reports filed (which are always read by the Judge) and the full order as spoken on the Digital Audio Recording device. It also reflects the views of the child and the GAL recommendations.

2.12.1 Recommendations

An Order of the court granting an interim care order pursuant to section 17 of the Child Care Act 1991 must always reflect the evidence proffered to the court in support of the application, the deponent thereof, and reasons for the granting or extension of the order. Such a practice would ensure that the legal requirements as set out by O’Malley J. in K.A. v. HSE [2012] 1 I.R. 794 are met in every case, and that a judge, or other person, considering the matter on a subsequent occasion can be apprised as to the basis for the granting or extension of the order.

It is recommended that section 17 of the 1991 Act be amended to enable a court to make a supervision order in lieu of an interim care order. In a similar vein the 1991 Act should be amended to enable a court to make a less intrusive order where it deems that appropriate, e.g. in an application for a care order a court could make an order for an interim care order, or on the application for an interim care order the court could make a supervision order.

The period of extension of an interim care order should be amended to enable a court to grant an extension of an Interim Care Order (ICO) of up to 35 days to enable the Child and Family Agency to complete whatever interventions or assessments are required.

¹⁹⁶ [2012] 1 I.R. 794.

It should be a requirement for the Child and Family Agency to set out all services offered to the family to obviate the necessity to apply for an ICO (pre-proceeding work undertaken), save in emergency situations.

It is recommended that provision be made in law for the continuation of existing orders made under the 1991 Act during the hearing of an application for a new order or the extension of an existing order. For example, where an interim care order has been granted until a certain date and a hearing is taking place but has not concluded by the time the interim care order expires, the question that then arises is whether the interim care order should be extended, even if the parties contest it, so as to enable the judge to finish hearing the matter. It is recommended that a strict timeframe be put in place to allow judges in such a situation to extend an order made under the 1991 Act.

2.13 Miscellaneous Domestic Issues

2.13.1 Specialist family courts¹⁹⁷

Ireland does not have a specialist family or child care court system *per se*. Child care cases are primarily dealt with by the District Court with the possibility of appeal to the Circuit Court with family law cases being dealt with at the District and Circuit Court level for the most part, as always with the possibility of appeal to the higher courts. Cases dealing with judicial separation, divorce and nullity must be brought either in the Circuit Court or the High Court. Applications under the Adoptions Acts and cases of child abduction (under the Hague Convention and Brussels Regulation) must be brought in the High Court. In Dublin there are a number of judges who, at any one time, hear family and child law matters. Outside Dublin such cases are heard on particular days in the general Circuit and District courts by judges who do not specialise in family law, but instead preside in such cases as the necessity arises.

Difficulties with the courts structure, in its current form, include excessive caseloads

¹⁹⁷ The term ‘family courts’ for the purposes of this section should be understood to mean any court that hears family matters involving children or child care matters.

resulting in inadequate hearings and delays, and inconsistency in decisions.

There have been calls for some time for the establishment of specialist family courts.¹⁹⁸ The Law Reform Commission in 1996 published a Report on Family Courts. Many of the recommendations of the report of the Law Reform Commission remain relevant – reforming the court structure by unifying jurisdictions and establishing regional courts presided over by judges with appropriate expertise and experience; access to information, advice and mediation; case management; judicial studies and representation of children and their views. The Minister for Justice, Equality and Defence is currently reviewing the establishment of a separate family court as part of a comprehensive review of the Irish family law system.¹⁹⁹ This review is very much to be welcomed.

Strictly speaking all family law courts operate within the same rules as other courts and therefore it is proper that those rules of practice and procedure should be enforced in all family law hearings. Certain formal changes have been made to make family law proceedings more informal and less intimidating, e.g. in relation to the attire of judges and legal representatives. However, it cannot be disputed that family law proceedings, particularly those involving children, are inherently different to many other types of civil proceedings. In the cases involving children, the welfare of the child is the paramount consideration in formulating decisions which may affect those children. There does not appear to be a coherent view, either amongst the judiciary or legal practitioners, as to how family law proceedings should be conducted. Perhaps the starting point of this consideration should be an acknowledgment that family law proceedings are by their nature distinct from other civil proceedings.

¹⁹⁸ See 'Reforming the courts' *The Irish Times*, 19 July 2012 and 'Chief Justice wants way paved for specialist courts' *The Irish Times*, 29 June 2012. The Law Reform Commission published a Report on Family Courts in 1996 and identified a "system in crisis".

¹⁹⁹ 'Referendum on separate family court system will be held in 2014 says Minister for Justice' *The Irish Times*, 8 July 2013.

2.13.2 Voice of the child

The new constitutional requirement to hear the voice of the child in certain family law proceedings has the potential to be of transformative effect and consequentially any restructuring of the family law courts should focus on trying to integrate children into the process as much as possible where appropriate having regard to their age and degree of maturity.

There are many ways in which the voice of the child can be heard: through the child's parents or those acting *in loco parentis*, by the child giving evidence directly in court, by interview with the judge, through a third party expert report or through the guardian *ad litem* or mediation attended by the parents. In any restructuring of the family and child care court system, serious thought must be put into the manner in which the voice of the child can best be heard in line with our obligations under the Constitution. In any new courts structure, steps must be taken to ensure that the system is conducive to hearing the voice of the child. If, for example, children are to be interviewed by judges, the environment should be child friendly. If it is envisaged to establish the guardian *ad litem* service within the courts system, then it may prove cost effective to provide for the guardian *ad litem* system in family law proceedings also.

The constitutional amendment could be viewed as an opportunity for a fundamental reappraisal of how disputes concerning children are dealt with by the courts. Rather than see the obligation to hear the voice of the child as a burden or procedural hurdle which must be addressed, the focus of the courts should perhaps be to make the child the genuine centre of focus.

In private law proceedings children are not automatically heard at present. It is frequently the practice of the courts to seek assistance in terms of hearing the voice of the child by appointing an independent expert under section 47 of the Family Law Act 1995, although if there is a concern for the children that may require the intervention of the Child and Family Agency, the court can request the Agency to investigate under section 20 of the Child Care Act 1991. The section 47 report is often described as a means for hearing the voice of a child. That said, the reality of the situation is

that the independent professional is not there to represent the views and wishes of the child but is there to make a professional assessment as to the question posed by the judge in the context of the application before the court. As previously mentioned guardians *ad litem* are rarely appointed in private law disputes involving children as section 28 of the Guardianship of Infants Act 1964 has not yet been commenced.

The 2012 report of the Special Rapporteur on Child Protection made recommendations specifically relating to how the views of the child could be ascertained in public child care proceedings and private family law proceedings. The recommendations included: (i) the enactment of legislation enshrining this Constitutional right; (ii) the provision in legislation of the various methods to be employed to ascertain the views of the child; (iii) the placing of the *Guardian ad Litem* in all proceedings on a statutory footing; (iv) the implementation of the provisions of section 11 of the Children Act 1997 in their entirety.

There is provision pursuant to section 25 of the 1991 Act to join a child as a party to proceedings. This provision is rarely used in practice but with appropriate safeguards could serve to be a beneficial method of ascertaining and putting forward the views of the child.

2.13.2.1 Recommendation

The implementation of the recommendations as set out in section 4.1.4 of the Sixth Report of the Special Rapporteur on Child Protection (2013).

2.13.3 Child care courts

It is envisaged that the child care courts are to be grouped in the same pillar as family courts in any restructuring of the courts system.

While in the Dublin Metropolitan District, there are certain judges hearing child care matters on a full time basis, arrangements around the country vary, with on occasion child care matters dealt with on the family law day once per month other than emergency applications, and in other cases child care is at the conclusion of an ordinary District Court list.

The new proposed structure of the family courts may consist of a lower family court of limited jurisdiction and a higher court of unlimited jurisdiction. The current jurisdiction of the family District, Circuit and High Courts has been determined in a piecemeal fashion as various family law statutes have been introduced. What is required is an examination of matters which could be best described as complex matters which would be dealt with in the superior court and less complex matters which could be dealt with in the lower court. The higher court would have all the jurisdiction of the current family Circuit and High Court. Appeals from the lower court would be heard by the higher court or possibly by the new Court of Appeal. The Minister has expressed a desire to ensure that the specialist ethos of the family courts is maintained where cases are appealed from the higher court to the new Court of Appeal.

The new family courts are proposed to be located separately from current venues with sufficient rooms for private consultations and a welfare and assessment service to support public and private law proceedings. Mediation facilities are also to be located in the new family law courthouses. This is a sensible and necessary proposal that is welcomed. The recent success of the Dolphin House initiative shows the value of having a variety of agencies such as legal aid, mediation services and the courts and court offices under one roof.

A less adversarial approach by the lower court when dealing with guardianship, custody and access disputes, child care and protection matters is to be welcomed.

While the less adversarial system is progressive if evidence must be tested we have yet to devise a better alternative than cross examination. The dangers of an inquisitorial system must be balanced with its advantages and a litigant's right to test the evidence should not be unduly fettered.

One issue that is unresolved and requires clarification is whether the new higher family law court or the High Court would deal with constitutional issues relating to family law matters e.g. arising under Articles 41, 42 and 42A of the Constitution. It also remains to be clarified whether the High Court or the new higher family law court would deal with Article 40 habeas corpus applications in relation to children in

care. Another issue is whether an appeal from the lower family law court would be heard by the higher family law court or the soon to be established Court of Appeal.

2.13.4 The approach in England and Wales

The Family Justice Service review in the neighbouring jurisdiction provides some interesting suggestions as to reform. The report recommends the creation of a Family Justice Service and a single family court, with a single point of entry, which should replace the current three tiers of courts in England and Wales. All levels of the family judiciary (including magistrates) should sit in the family court and work is to be allocated according to case complexity which should ensure that:

- the interests of children and young people are at its heart and that it provides them, as well as adults, with an opportunity to have their voices heard in decision-making;
- children and families understand what their options are, who is involved and what is happening;
- the service is appropriately transparent and assures public confidence;
- proper safeguards are provided to protect vulnerable children and families;
- out of court resolution is enabled and encouraged, where this is appropriate;
- there is proportionate and skillfully managed court involvement; and
- resources are effectively allocated and managed across the system.²⁰⁰

Interestingly the report highlights the issue of delay within the public law system. While stating that there is no single cause for delay, the report emphasises the following issues as contributory factors:

- A culture where the need for additional assessments and the use of multiple experts is routinely expected;
- A lack of trust in the judgment of local authority social workers “driven by concerns over the poor presentation of some assessments coming from often under-pressure staff”;

²⁰⁰ The Family Justice Service Review, p. 7.

- A shortage of court capacity, delays in appointing guardians and the need to meet the various demands of both local authority and court processes.²⁰¹

The report gives a clear outline of its vision for a successful court system within the context of family justice. It states that “courts should refocus on the core issues of whether the child or children can safely remain with, or return to, the parents or, if not, to the care of family or friends” and substantially reduce their scrutiny of the detail of the care plan²⁰².

Other instructive recommendations include;

- a simplified process of case management with the judge confirmed as case manager;
- the making of the criteria against which it is considered necessary for a judge to order expert reports more explicit and strict;
- the development and extension of alternative forms of dispute resolution such as family group conferences.

In relation to private law proceedings the report praises the First Hearing Dispute Resolution Appointment (FHDRA) system, in which the judge and a Cafcass officer intervene in order to resolve issues at an early stage, and recommends that this process remain as it currently is. If further court involvement is required after the FHDRA, the report recommends the application of a ‘track’ system (either ‘simple’ or ‘complex’) which matches the level of complexity of the case. For cases allocated to the complex track, the report recommends that the same judge hear each session throughout the process.

Another recommendation of the final report of the Family Justice Review was that when determining whether a care order is in a child’s best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead the court should consider only the core or essential components of a child’s plan. These are:

²⁰¹ *Ibid.*, at p. 14.

²⁰² *Ibid.*, at p. 16.

- planned return of the child to his/her family;
- a plan to place (or explore placing) a child with family or friends;
- alternative care arrangements; and
- contact with the birth family to the extent of deciding whether that should be regular, limited or none.

In terms of case management, some of the suggestions of the final report of the Family Justice Review are that:

- the government should legislate to provide a power to set a time limit on care proceedings. The limit should be specified in secondary legislation to provide flexibility. There should be transitional provisions;
- judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales;
- the requirement to renew interim care orders after eight weeks and then every four weeks should be amended. Judges should be allowed discretion to grant interim orders for the time they see fit subject to a maximum of six months and not beyond the time limit for the case. The court's power to renew should be tied to its power to extend proceedings beyond the time limit.

Recommendations, in the context of public law proceedings and the use of expert reports include:

- primary legislation should reinforce the fact that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case;
- the court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved. Independent social workers should be employed only exceptionally;
- the Legal Services Commission should routinely collate data on experts per case, type of expert, time taken, cost and any other relevant factor;

- agreed quality standards for expert witnesses in the family courts should be developed by the Family Justice Service.

A specialist family court in Ireland could involve specialist judges dealing with cases more expeditiously. It could also enable issues in family law cases to be addressed in a more holistic manner, and could facilitate access to mediation as well as other forms of support. A number of jurisdictions have such a court structure.

The jurisdiction of England and Wales, for example, does not have a distinct family law court *per se*, but has a comprehensive linked system of family law courts (primarily ‘divisions’ of existing courts), exercising similar jurisdiction and staffed by judges with particular training in family matters.²⁰³ The system involves the hearing of family law cases in both County Courts and Magistrates’ Family Proceedings Courts, and both operate under Family Procedure Rules. There also exists a specialist division of the High Court – the Family Division – which hears family law cases.

The Family Court of Australia provides a broad system of specialist judges and staff to deal with family law disputes. Since 1976 the court has had registries in almost all Australian states and territories,²⁰⁴ and consists of a Chief Justice, a Deputy Chief Justice and other judges specialising in family law.²⁰⁵ This comprehensive system was established in order to ensure the simple and expedient resolution of family law matters.

The creation of such a structure in Ireland would certainly constitute an improvement to the current system. There is a clear need for specialist judges with expertise in family law matters, as is the norm in many other jurisdictions. In particular, there is a need for a specialist facility for child care work—an appropriate court, adequate waiting rooms for parents/social workers/guardians ad litem and a Garda to ensure everyone’s safety. There is also a need to examine the problem of delay, and how to

²⁰³ See Nigel Lowe and Gillian Douglas, *Bromley’s Family Law* (Oxford University Press, 2006).

²⁰⁴ There is no registry in Western Australia, which has its own family law court.

²⁰⁵ Chief Justice Diana Bryant, “Beyond the Horizon: State of Family Law & the Family Court of Australia 2004” (Speech delivered at the National Family Law Conference, Gold Coast, 27 September 2004).

tackle that problem, which no doubt will improve with the establishment of the new Court of Appeal.

2.13.5 Recommendations

It is recommended that child care law should always take place on a separate day at a separate sitting in light of the highly sensitive matters being litigated and the emotional trauma associated with being a respondent in these proceedings. At a minimum, child care matters should be heard on the same day as family law matters.

It is recommended that judges who are to be assigned to deal with child care matters should be given comprehensive training in regard to issues which are particular to child care law.

It is recommended that experts in the area of attachment, child development and the impact of abuse ranging from neglect to sexual abuse should be provided to all judges who are allocated to deal with child care matters in light of the fact that decisions made by these judges have such far reaching consequences for children and families.

Any designated specialist family courts should be staffed by specially trained judges but specialist judges should remain part of a single judicial body.

Training should be provided in advance of an assignment to child care and should be ongoing and regular.

Other practical matters that are necessary to ensure that child and family law matters proceed smoothly include: having translators within easy reach to avoid lengthy delays or adjournments when there are language problems and providing sufficient space for parties to consult with their legal representatives.

The anomaly where District Court judges do not have the power (available in the Circuit and High Courts) to order reports in relation to children pursuant to section 47 of the Family Law Act 1995 should be addressed without delay.

Where a child is joined to proceedings pursuant to section 25 of the Child Care Act 1991, provision should be made to ensure that only a solicitor with training or expertise in dealing with children is appointed to represent such a child.

Regard should be had to the family court systems that exist in other jurisdictions such as the United Kingdom, Australia and New Zealand.

2.14 Appointment and Role of Guardian ad Litem

Guardians *ad litem* (GALs) are appointed pursuant to section 26(1) of the Child Care Act 1991 where the court is satisfied that “it is necessary in the interests of the child and in the interests of justice to do so.” This is the only guideline as to when a GAL should be appointed. A GAL is an independent representative appointed by the court to represent the child’s personal and legal interests in legal proceedings.²⁰⁶

Whilst it is common for children to be represented by a guardian *ad litem* in child care cases it is not an automatic or mandatory entitlement. In practice it is done in an *ad hoc* manner, according to the discretion of the judge. The appointment of a GAL is only used to a limited extent in private law proceedings. Section 11 of the Children Act 1997 introduced a provision allowing for the appointment of a GAL to act as a separate representative in guardianship applications. That provision has not yet been commenced. The inconsistency with which the voice of the child is heard through the GAL process is outlined in detail in the *Sixth Report of the Special Rapporteur on Child Protection (2013)*. The *ad hoc* manner in which the child’s voice is heard through this procedure is but one of the consequences of a system where the appointment, qualification and role of GALs are not defined or regulated.

Patterns can be seen emerging from child care courts around the country. For example, the presence or absence of a GAL varies significantly. Moreover, when a GAL is appointed, the role that the guardian actually plays and the extent of involvement in court proceedings also varies significantly.

²⁰⁶ Law Society Law Reform Committee, 2006, p. 73.

At present there are no nationally agreed standards for the role, qualifications, appointment or training of GALs. The National Children's Office (NCO) in 2003 carried out a review of the GAL services in Ireland and issued a report in 2004. The report stated that Article 12 of the CRC provides that the child's "wishes and feelings are to be heard by the court." It highlighted the tension between the best interests on the one hand and the wishes and feelings of the child on the other, and the relevant weight that is to be attached to these concepts.

The Children Acts Advisory Board (CAAB), in 2009, published a document containing standards for the role, appointment, qualification and training of GALs.²⁰⁷ The CAAB stated that the GAL's role is to "independently establish the wishes, feelings and interests of the child and to present them to the court with recommendations."

This guidance, while welcome, does not have a statutory footing but is, on occasion, cited in court when parties are referring to the role of or position taken by the GAL. This is undesirable, particularly in circumstances where the CAAB was dissolved in 2011.

The President of the District Court has recently issued a comprehensive judgment on the role of the GAL in child care cases.²⁰⁸ Although the 1991 Act refers to the child's welfare being the "first and paramount consideration" (section 24) there is no clear link to what the GAL's role is in promoting this. There are no clear guidelines under the 1991 Act as to what qualifications a GAL should have, or how parties can review a GAL who has been appointed should they be dissatisfied with the appointment. GAL services in Ireland are largely unregulated with no clear definition of a GAL or clear operational standards. There is, at present, no statutory guidance as to when a GAL should be appointed and this can lead to inconsistencies as to when a GAL will be appointed by a court.

²⁰⁷ 'Giving a voice to children's wishes, feelings and interests' Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991, Children Acts Advisory Board, May, 2009.

²⁰⁸ See [2013] IEDC 19.

McWilliams and Hamilton²⁰⁹ refer to the issue of the independence of GALs and note that they are expected to conduct their work autonomously while reviewing the work undertaken by professionals employed by the Child and Family Agency, as well as being dependent on the Agency to meet their costs.

Children should have the representation of a GAL in all cases concerning their interests. The voice of the child is not adequately heard in circumstances where there is no clear and defined procedure, across all of the areas that concern children, for the appointment of a GAL. The exact purpose of the GAL, be it to represent the wishes and interests or the voice of the child, or both of these is not sufficiently clear.

2.14.1 Recommendations

The statutory role of GALs should be clearly defined. The present situation is that although GALs are not a party to the proceedings they are entitled to be legally represented and are permitted to take part in proceedings.

Section 26 of the 1991 Act should be amended to clearly set out the role, function, appointment and qualifications of GALs.

The qualifications of GALs should be standardised and proper vetting of persons involved in such work should be conducted.

2.15 The Right to the Provision of After-care Services

In some cases, where a child is placed in care, the judge directs that an after-care review take place on the child's 16th or 17th birthday to assess the after-care needs of the child and will sometimes order that a GAL be reappointed at this time. The provision of after-care plans occurs at present in an *ad hoc* manner with judges, when

²⁰⁹ Ann McWilliams and Claire Hamilton 'There Isn't Anything Like a GAL', The Guardian Ad Litem Service in Ireland, Irish Journal of Applied Social Studies: Volume 10(1), Article 5.

they deem it necessary, requesting all parties to come back to court when a child who is being placed in care, reaches the age of 18. Section 45 of the Child Care Act 1991 allows the Child and Family Agency to assist such persons until they have reached the age of 21 or until they have completed a course of education, should it be satisfied that such assistance is needed. However, this provision is discretionary only and not mandatory.

The provision of after-care services and the manner in which these are implemented should be put on a statutory footing. The Government has recently approved a policy proposal to strengthen legislative provisions for after-care. The 1991 Act will be amended to incorporate a statutory right to the preparation of an after-care plan. The development of a mandatory right to after-care is warmly welcomed and should result in better outcomes for children leaving the care system.

2.15.1 Recommendation

The recently publicised policy commitment of the government to provide children in care with an after-care plan should result in action immediately in order to provide the necessary bridge for vulnerable children who are leaving the care system and beginning to live independently.

2.16 Homelessness

The tragic reality that faces many vulnerable young people today is that, without the right supports, they can and often do end up homeless. The proposed amendment to section 5 of the 1991 Act attempts to make homelessness of a child in itself a trigger to consider care options:

Where it appears to the Health Service Executive that a child is homeless, the Executive shall enquire into the child's circumstances, and

- (a) if it is satisfied that there is no accommodation available to him which he can reasonably occupy, then, unless the child is received into the care of the Executive under the provisions of this Act, the

Executive shall take such steps as are reasonable to make available suitable accommodation for him.

(b) undertake an investigation of the child's circumstances and shall consider whether it should—

(i) apply for a care order or for a supervision order with respect to the child,

(ii) provide services or assistance for the child or his family, or

(iii) take any other action with respect to the child.

(c) Where the Health Service Executive undertakes an investigation under this section and decides not to apply for a care order or a supervision order with respect to the child concerned, it shall prepare a detailed written report setting out - (a) its reasons for so deciding, (b) any service or assistance it has provided, or it intends to provide, for the child and his family, and (c) any other action which it has taken, or proposes to take, with respect to the child.

2.16.1 Recommendation

The difficulty with section 5 of the Child Care Act 1991 is that there is no provision for judicial scrutiny or consideration of a decision of the Child and Family Agency not to apply for a care order or supervision order with respect to a child that is homeless. It is recommended that the report to be produced by the Agency in accordance with section 5 of the 1991 Act be submitted to the District Court within 8 days of the publishing thereof for the purpose of enabling the court to consider whether the Agency has properly discharged its statutory duty towards children who will not be returning to the family unit and who are not subject to the general provisions of the 1991 Act.

2.17 Alternative Dispute Resolution (ADR) and Child Care Proceedings

ADR is increasingly being utilised in an effort to reach mutually acceptable settlements of civil and commercial disputes. The Law Reform Commission (LRC) in its *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010) defines ADR as: “a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which ... involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.”

There are various types of ADR. At present in Ireland, mediation and collaborative law are often used as dispute resolution mechanisms in the family law context. Other forms of dispute resolution include conciliation and arbitration. Conciliation can be described as: “a process whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.”²¹⁰ Conciliation usually takes place under the court’s direction, whereas mediation is an independent, settlement-seeking process that provides a resource for the courts in suitable cases. The American Bar Association describes arbitration as “the reference of a dispute at issue to one to whom the parties agree to refer their claims in order to obtain an equitable decision.”

A party may choose ADR to avoid expensive and acrimonious litigation. It can be particularly useful in family law cases, where there are sometimes no clear winners or losers but parties are guided towards a mutually acceptable agreement. ADR can enable parties to proceedings to feel that they have been empowered by being involved in the decisions affecting them.

²¹⁰ The 2002 UNCITRAL Model Law on International Commercial Conciliation.

ADR can be utilised in many types of family law proceedings but would not be suited to emergency type applications such as domestic violence applications where there is little time for debate between the parties and the more neutral and structured forum of a court is required to resolve the dispute.

This brings us to the question of whether ADR is appropriate for proceedings involving children. By their nature some applications before the court such as emergency care orders require immediate decision making and are therefore not suited to ADR. Where there is an immediate threat or a concern as to the welfare of a child, decisions need to be made quickly and it is more suitable that a judge decide whether the relevant threshold is reached. The best interests of the child come first and if a court imposed outcome is necessary to protect those interests then ADR will be of very limited assistance. The final report of the Family Justice Review²¹¹ in the United Kingdom recommends that judges should retain the power to order parties to attend a mediation information session and Separated Parents Information Programmes, and may make cost orders where it is felt that one party has behaved unreasonably (in refusing to attend such a session).

In terms of other child care proceedings, such as applications for interim or full care orders, or supervision orders, the potential benefits of ADR can be identified. In child care proceedings a dynamic can often develop between the parties that reflects a sense of exclusion felt by the respondent parents. That is to say, a picture can emerge of respondent parents who have increasingly become alienated from proceedings, resulting in a sense of powerlessness or a perceived futility in resisting applications concerning their children. Often this attitude will be a culmination of months or years of interaction with the social services, often with the threat of care proceedings hanging over them. Some parents may feel that once the matter has gone to court all hope is lost and the chance of keeping their children within their care is minimal.

It is in these circumstances that ADR, in the realm of child care proceedings, may be of assistance. To give respondent parents a voice, be it through mediation or another form of ADR, may restore a sense of empowerment or control to parties who

²¹¹ *Family Justice Review: Final Report* (Justice UK, 2011), available from <http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-final-report.pdf>.

otherwise feel excluded. The threat of court proceedings can often serve to focus minds and elicit compromises and concessions that otherwise would be hard to imagine. If, for example, a supervision order was being sought by the Child and Family Agency and mediation was offered to the parties prior to any court appearance, the fact that the parents and social workers are brought together in a less formal environment could potentially result in areas of agreement being found.

Mediation is becoming increasingly embedded in the Irish justice system. Order 56A of the Rules of the Superior Courts (Mediation and Conciliation) implements Statutory Instrument 2010/502 and the EC Directive on Mediation of 2008.²¹² Moreover, the draft general scheme of the Mediation Bill 2012 will further integrate ADR into the Irish family justice system.

The Dolphin House District Court Project, which is run through the auspices of the family mediation services, operates in Dolphin House in Dublin and conducts mediations dealing with issues such as access, custody, guardianship and maintenance. The project has been a success and it is hoped that it will continue and will be extended to other locations.

The Law Reform Commission in its *Report on Alternative Dispute Resolution: Mediation and Conciliation*²¹³ reported that research had indicated that voluntary participation in information sessions on ADR is relatively low so the trend has been to make them mandatory for all parents who seek the assistance of the courts for disputes about their children, or at the very least to provide courts with the authority to order the information session. In certain, specified situations parties including the representatives of the social services and the respondent parents in child care proceedings could be compelled to attend ADR information sessions with a view to reaching a mutually agreeable solution and avoiding recourse to the courts.

²¹² EC Directive 2008/52/ of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

²¹³ LRC 98-2010, para. 6.12.

ADR, while suitable for many types of disputes particularly private law family matters, may not be entirely suitable in all child care matters.

We should however be tentative in suggesting ADR as a solution in contested child care matters. There is a significant difference between parties using mediation or any other form of ADR to settle what are in essence interpersonal disputes (along with other ancillary matters) when a marriage breaks down, and attempting to solve fundamental child protection issues by way of ADR.

2.18 The Child Care Act 1991-Miscellaneous Reforms

2.18.1 Section 20 of the 1991 Act

Section 20 of the 1991 Act permits a court, when dealing with certain proceedings under the Act or under the Guardianship of Infants Act 1964 or any case to which the Family Law Acts relate to adjourn proceedings, where it considers appropriate in order to undertake an investigation of the child's circumstances. Arguably, section 20 of the 1991 Act should be capable of being invoked in any proceedings involving or relating to a child in any court.

2.18.2 Section 22 of the 1991 Act

Section 22 of the 1991 Act permits a court of its own motion or on the application of any person to vary or discharge a care order or supervision order, or vary or discharge any condition or direction attaching to the order or, in the case of a care order, discharge the care order and make a supervision order in respect of the child. What is not clear from section 22 is whether a court can vary or discharge an interim care order in the same way that it can vary, or discharge a care order/supervision order or any direction or condition attaching thereto.

2.18.3 Connection between criminal and civil proceedings

An unfortunate corollary of certain child care cases that come before the court is that on occasion criminal proceedings or investigations are in existence relating to the same family or children or could potentially be triggered by disclosures relating to same. These could relate to domestic violence or sexual abuse for example. Under the

1991 Act there is no provision for the sharing of information between the criminal sphere of the judicial system and the civil/child care realm.

This is an issue that has been addressed in the United Kingdom²¹⁴ where a protocol was designed to set out the mechanisms for the appropriate disclosure of police information in family proceedings in a particular area to provide the court with early information to enable it to properly determine any necessary directions which need to be made in relation to the documents, records or other evidential material held by the police in relevant criminal proceedings or investigations which may inform the family court in the determination of any factual or welfare issue within the family proceedings. The protocol in the United Kingdom states that police information shall not be disclosed unless there are important considerations of public interest to depart from the general rule of confidentiality. The protocol sets out implicit undertakings on the part of the parties and their legal representatives, unless otherwise specified by a court. Such undertakings include that:

- Any material disclosed will only be used for the purposes of, and preparation for, the current proceedings unless the permission of the court is obtained;
- It will only be disclosed to professionals in the proceedings (and the parties) unless the permission of the court is obtained;
- The material will otherwise be kept confidential and copying should be kept to the minimum necessary to avoid the proliferation of copies of sensitive material.

More recently in London, the London Request Form (LRF) was introduced on the 5th August 2013, to replace the national Police/Family Disclosure Protocol within the London area. The LRF provides timely advance notice to police of the existence of family law proceedings, and the scope of police information sought. It encourages police and parties involved, including the social services, to share information at the earliest opportunity when family cases are contemplated.

²¹⁴ ACPO Police/Family Disclosure Protocol: Disclosure of Information in Family Proceedings, Related Family and Criminal Proceedings, 2007.

2.18.4 Privilege against self-incrimination

A party in any case has a general right not to answer any question if his/her answer would tend to expose him/her to a criminal charge. This presents a difficulty when a party is a witness in a case involving child protection and that witness is asked a question which may leave him or her vulnerable to a criminal prosecution at a later stage.

A code of practice should be developed and agreed among legal representatives of children in consultation with others to cover situations in which legal advice may conflict with moral guidance, in order to resolve the conflict between the right to non self-incrimination and the benefits of genuine confession and acceptance of responsibility.²¹⁵

In the United Kingdom section 98(1) of the Children Act 1989 provides that in respect of certain child care proceedings no person shall be excused from giving evidence on any matter, or answering any question put to him or her during the course of his or her evidence, on the ground that to do so might incriminate him or her or his or her spouse or civil partner in an offence. The other side of the coin is that pursuant to section 98(2) such statements or admissions “shall not be admissible in evidence against the person making it, or his spouse or civil partner in proceedings for an offence other than perjury”. This is the clearest example of an express provision abrogating the privilege against self-incrimination.

2.18.5 Recommendations

It is recommended that section 20 of the 1991 Act be amended so as to include any proceedings involving or relating to a child in any court.

Section 22 of the 1991 Act should be amended so as to remove any ambiguity as to whether an interim care order can be varied or discharged under the section in like manner as a care order or supervision order.

Concurrent public law and criminal law proceedings can be problematic. Joint case

²¹⁵ See “Rights Based Child Law: The Case for Reform-Part 1” A report by the Law Society’s Reform Committee, December, 2005.

management hearings have been recommended by the English Court of Appeal Criminal Division, in the case of R v. Levy [2007] 1 FLR 462: [2006] EWCA Crim 1902. There is no such protocol in this jurisdiction. A protocol should be adopted in Ireland to deal with the situation where a child care or family law matter might be accompanied by criminal proceedings or investigations relating to the same child or family. A procedure should be put in place that enables effective and necessary communication between An Garda Síochána and the family/child law court as in the United Kingdom.

A code of practice should be developed to resolve the difficulties between confession of wrongdoing in the course of child care matters and a witness potentially exposing himself/herself to a criminal prosecution.

It is unclear whether the general privilege against self incrimination is abrogated in this jurisdiction in the context of child care or family law proceedings. This should be clarified.

2.19 Legal Support Network for Trafficked Children

2.19.1 Recommendation

The proposed establishment in Northern Ireland of a specialist legal support network to provide advice to victims of child trafficking²¹⁶ is to be welcomed and is something that the Republic should take steps to follow. The very fact that we inhabit the same island is reason enough to adopt a similar approach in this jurisdiction considering the cross border vulnerability of children who can potentially be trafficked between one country and another. Furthermore, given that the Good Friday Agreement of 1998 guarantees equivalent human rights protection north and south of the border, it is incumbent on this country to introduce similar measures.

²¹⁶ 'Increase of number of children trafficked into North' The Irish Times, 6th December, 2013.

2.20 Jurisdiction

Section 16 of the 1991 Act states that “where it appears to the Child and Family Agency that a child requires care or protection which he is unlikely to receive unless a court makes a care order or a supervision order in respect of him, it shall be the duty of the Agency to make application for a care order or a supervision order, as it thinks fit.”

Section 28(2) states that “proceedings under Part III, IV or VI may be brought, heard and determined before and by a justice of the District Court for the time being assigned to the district court district where the child resides or is for the time being.”

2.20.1 Recommendations

Section 16 and section 28 of the Child Care Act 1991 should be amended to provide that a court can be seised of a matter in respect of a child “who resides or is found in its area.... or in respect of a child who was so resident or found at the date of the original application”. This will ensure that when a child is received into care under section 18 of the 1991 Act and then moves to reside with a foster carer or residential home in a different District Court area, the Child and Family Agency can proceed in the court originally seised for the making of the care order (or not) at their choice.

Children in need of special care should be brought into the jurisdiction of the District Court. There should, however, be provision for any social work or other reports etc. to be on affidavit and the court should be permitted to have some “inherent” powers to deal with the court’s original jurisdiction in child care matters.

The District Court should have specific powers to award costs in child care proceedings.

2.21 Appeals

Section 21 of the 1991 Act states that an appeal (from an order under Part IV of the 1991 Act) shall “stay the operation of the order on such terms (if any) as may be imposed by the court making the determination.”

2.21.1 Recommendation

Section 21 should be re-examined in light of the 31st amendment to the Constitution and its requirement that the views of the child be ascertained in certain proceedings. Any representatives acting for a parent should be obliged to formally set out a response to the social work and other reports as the proceedings progress, in a document available for the Child and Family Agency and the Court.

SECTION 3:

CHILDREN AND INTERNET SAFETY

3.1 Introduction

In recent years, the interaction between information and communications technology (ICT) and child well-being has become a cause for concern. Last year's Report highlighted a variety of issues including cyber-bullying which have begun to emerge as child protection issues.²¹⁷ This section of the Report will focus attention on the legal regulation of ICT, and the internet in particular, as it impacts on child protection. There have been significant international legal developments in this area, which will require changes to Irish legislation. Much of the discussion will focus on required changes to legislation in respect of child pornography, and the solicitation of children for sexual purposes (more commonly known as grooming). It is important to bear two things in mind when considering these issues. Child pornography and grooming present profound child protection concerns and are most likely to be perpetrated by people who are strangers to the children immediately affected. Yet the majority of child abuse is perpetrated by people close to the child, and focusing on so-called 'stranger dangers' may deflect public attention from more common forms of abuse. Secondly, Irish children's internet usage indicates that many are aware of the potential dangers inherent in the use of ICT and can often be trusted to exercise common sense and discretion over their ICT use and the ways in which their real and virtual worlds interact.

3.2 The Empirical Context

Significant data on children and young people's internet usage is provided by the EU Kids Online study.²¹⁸ This is the most comprehensive internet usage study within the EU and incorporates a significant amount of data provided by children themselves (the children surveyed were aged between 9 and 16 years) as well as their parents. A few key findings from this study should be mentioned so as to set the discussion of

²¹⁷ See Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2013), section 2.

²¹⁸ Brian O'Neill, Simon Grehan and Kjartan Ólafsson, *Risks and Safety for Children on the Internet: The Ireland Report* (EU Kids Online 2011).

the legal developments outlined below in context. Irish children tend to use the internet more than the EU average, with a growing number able to access it in a private space or through private personal devices. 59% of all nine to sixteen-year-olds in Ireland report having their own social networking profile. The majority of these (63%) keep their profile private so that only their friends can see it, while a further 22% report that their profile is partially private so that friends of friends and networks can see it. 12% report that their profile is public so that anyone can see it. The number of children keeping their profile private is above the EU average of 43%, while the figure for public profiles is less than half the EU average. However, 8% of children include an address or phone number in their profiles.

Secondly, with respect to harmful or potentially troubling internet usage, a significant majority (67%) of children are aware that material exists online which may cause them distress, yet only 11% reported being personally affected by such material. Ireland is relatively low, compared to many countries, both in terms of overall exposure to online pornography and in terms of the degree to which children are upset by what they saw when they were exposed to online sexual images. 25% of children in Ireland have seen websites containing some form of potentially harmful user-generated content. This would include a wide range of material, but in terms of sexual material, the study demonstrates that the figures are quite low. The vast majority of children say that in the last year they have not sent a photo or video of themselves (93%) or personal information (87%) to someone they have never met face-to-face. The experience of 'sexting' in Ireland is below the European average (11% as opposed to 15%) and is among the four lowest countries in Europe. Just 3% also say they have posted such messages which is the same for Europe overall. Findings in relation to Irish children maintaining online contacts and for going on to meet such contacts offline are on the lower end of European findings, indeed Ireland is the 3rd lowest of the 25 countries surveyed. 28% have made contact online with someone they did not previously know offline, although the exact context of such contact remains unclear. The older the child, the more likely he or she is to have made contact with new people online, yet just 4% of nine to sixteen-year-olds have gone to a meeting face-to-face with someone that they first met on the internet. This primarily relates to older teenagers and for fifteen to sixteen-year-olds, 10% or one in ten teenagers have met an online contact offline.

This data demonstrates that while risks certainly exist online, Irish children experience less risk than their EU counterparts. Many of the figures for risky behaviour such as meeting people first met online, or posting explicit images of themselves online are quite low. While efforts should continue to be made to reduce these even further, the empirical data is quite encouraging as it shows that children, educators, and care givers are generally aware of the potential risks that exist online and act to avoid them or reduce their impact.

3.3 International Legal Instruments Impacting on Online Safety for Children

3.3.1 Measures adopted by the United Nations

A variety of legal instruments now regulate various aspects of online safety for children. At the level of greatest generality, the UN Convention on the Rights of the Child establishes the right of children to be free from abuse and exploitation, while the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography builds on these provisions. Article 19 of the Convention obliges State parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, including exploitation, while Article 34 specifically refers to the sexual exploitation and abuse of children. However, the wording of this latter provision was generally seen as insufficient to tackle emerging sexual exploitation and abuse trends, leading to the development of the Optional Protocol.²¹⁹ This Protocol has also been subject to criticism for its restriction to commercial forms of sexual exploitation, leaving it vulnerable to the charge that it cannot realistically cope with the emergence of forms of exploitation outside the remit of trafficking, prostitution, or pornography.²²⁰ Nonetheless, the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography has highlighted the need for the introduction of legislation creating a criminal offence of internet grooming.²²¹

²¹⁹ Sarah Alexander, Stan Meuwesse and Annemieke Wolthuis, 'Policies and Developments relating to the Sexual Exploitation of Children: The Legacy of the Stockholm Conference' (2000) 8(4) *European Journal of Criminal Policy and Research* 479, at p. 482.

²²⁰ JM Petit, *Rights of the Child: Report Submitted by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* (UN Economic and Social Council 2004, E/CN.4/2005/78) at p. 7.

²²¹ *Ibid.*, at p. 23. NM Maalla, *Report Submitted by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* (UN Human Rights Council 2009, A/HRC/9/21) at p.12.

More recently, the Committee on the Rights of the Child has issued General Comment 13 on the right of children to be free from all forms of violence. The General Comment recognises that while advances have been made towards the prevention of violence against children, “existing initiatives are in general insufficient. Legal frameworks in a majority of States still fail to prohibit all forms of violence against children, and where laws are in place, their enforcement is often inadequate”.²²² In particular, the General Comment recognised that common understandings of violence are often under-inclusive, and so it attempted to provide a more comprehensive outline of the behaviours captured by the term “violence against children”. For present purposes, it is important that this includes “psychological bullying and hazing by adults or other children, including via information and communication technologies (ICTs) such as mobile phones and the Internet,”²²³ sexual abuse and exploitation outside of commercial settings,²²⁴ and specifically violence committed through the use of ICT. This final category includes various aspects of child pornography as well as bullying, harassment or stalking of children and/or coercing, tricking or persuading children into meeting strangers off-line, and being groomed for involvement in sexual activities and/or providing personal information.²²⁵ State parties must, therefore, ensure that relevant legislation provides adequate protection of children in relation to media and ICT.²²⁶

These developments recognise the various ways in which violence can be perpetrated against children through ICT. However, these statements operate at a significant level of generality. More specific instruments are found within Europe, as both the Council of Europe and the European Union have taken measures to address the problem.²²⁷ There are two Council of Europe conventions which are relevant – the Convention on Cybercrime (the Budapest Convention)²²⁸ and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote

²²² United Nations Committee on the Rights of the Child, *General Comment 13: The Right of the Child to be Free from All Forms of Violence* (2011, CRC/C/GC13) at para. 12.

²²³ *Ibid.*, at para. 21(g).

²²⁴ *Ibid.*, at para. 25.

²²⁵ *Ibid.*, at para. 31.

²²⁶ *Ibid.*, at para. 41.

²²⁷ At EU level, see generally, Verónica Donoso, *Assessment of the implementation of the Safer Social Networking Principles for the EU on 9 services: Summary Report* (European Commission, Safer Internet Programme 2011).

²²⁸ Opened for signature November 23, 2001, CETS 185, entered into force 1 July 2004.

Convention).²²⁹ Ireland has signed both Conventions, but has ratified neither. In order to ensure the highest standards of protection for children, and the highest level of international cooperation in this area, it is imperative that both Conventions are ratified without reservation.

3.3.2 The Budapest Convention

The Budapest Convention, although focused on the issue of cybercrime, provides in Article 9 for a range of offences relating to child pornography. It was felt that “specific provisions in an international legal instrument were essential to combat this new form of sexual exploitation and endangerment of children.”²³⁰ Member States must, under Article 9(1), criminalise the following offences, if committed intentionally and without right:

- (a) producing child pornography for the purpose of its distribution through a computer system;
- (b) offering or making available child pornography through a computer system;
- (c) distributing or transmitting child pornography through a computer system;
- (d) procuring child pornography through a computer system for oneself or for another person;
- (e) possessing child pornography in a computer system or on a computer-data storage medium.

In order to give child pornography the widest possible meaning, Article 9(2) stipulates that the term includes images of a minor engaged in sexually explicit conduct, images of a person appearing to be a minor engaged in sexually explicit conduct, and realistic images representing a minor engaged in sexually explicit conduct. The term “child” is understood to be a person under the age of 18, although States Parties may adopt a lower age limit which may not in any event be lower than 16 years.²³¹ The age provisions were adopted so as to provide a uniform approach to the treatment of children as sexual objects, and so may differ significantly from the age of consent

²²⁹ Opened for signature October 25, 2007, CETS 201, entered into force 1 July 2010.

²³⁰ Council of Europe, Convention on Cybercrime Explanatory Report (Council of Europe 2001) at para. 93. The Criminal Justice (Cybercrime) Bill will address this issue.

²³¹ Article 9(3).

in national laws.²³² The inclusion of the phrase “without right” is included in the Convention so that legal defences and other relevant principles can be taken into account in specific circumstances, such as the possession of material which may otherwise be considered pornographic for *bona fide* artistic, medical, scientific, or similar merit.²³³

While the Budapest Convention moves beyond the emphasis on the commercial exploitation of children to cover individual actions of production, possession, distribution and solicitation of child abuse images, the Convention’s focus on cybercrime inherently limited its ability to deal comprehensively with the broader problems of abuse and exploitation. It did not deal with the issue of grooming or soliciting a child to engage in activity that could facilitate the production of pornographic material. The language of Article 9 makes clear that the measures to be adopted at national level are effectively content related offences – they focus on the material produced from child abuse rather than the abuse itself or actions leading to that abuse.

3.3.3 The Lanzarote Convention

This latter concern was, however, the subject of the Lanzarote Convention.²³⁴ The genesis of this Convention is outlined in its Explanatory Report, which recalls the advances made by the CRC, the Optional Protocol on the sale of children and the Budapest Convention as well as a variety of other international legal instruments and political declarations.²³⁵ The resulting Convention therefore provides a comprehensive set of obligations for Member States in respect of sexual exploitation and abuse, including a variety of preventative measures such as vetting and information sharing, consciousness raising and participation measures, intervention programmes for offenders, child-friendly investigation procedures and international

²³² Council of Europe, *supra* note 230, at para. 104.

²³³ *Ibid.*, at para. 103.

²³⁴ See generally, Susan H Bitensky, ‘Introductory Note to Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse’ (2010) 49(6) *International Legal Materials* 1663.

²³⁵ *Council of Europe, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse Explanatory Report (Council of Europe 2007)* at paras. 4-24.

co-operation measures. This Report will, however, focus on Chapter VI relating to substantive criminal law.²³⁶ The measures contained within Chapter VI are designed to facilitate the harmonisation of national laws so as to in turn facilitate the enforcement of laws due to the decreased ability of perpetrators to select jurisdictions with more lenient penal codes.²³⁷

Articles 18 to 24 provide for a variety of substantive criminal law offences which Member States are obliged to enact, while the remainder of the chapter deals with jurisdictional matters, sentencing and corporate liability. Article 18 provides that Member States shall enact legislation against the sexual abuse of children, Article 19 deals with child prostitution, Articles 20 and 21 deal with child pornography while Article 22 seeks to criminalise the corruption of children. Importantly, the provisions relating to child pornography are not, unlike the Budapest Convention, limited to offences involving computer systems. In a further development of the Budapest Convention, Article 20(1)(f) stipulates that Member States must criminalise the intentional act of “knowingly obtaining access, through information and communication technologies, to child pornography.” As the Explanatory Report clarifies, this is “intended to catch those who view child images on line by accessing child pornography sites but without downloading and who cannot therefore be caught under the offence of procuring or possession in some jurisdictions,”²³⁸ while at the same time ensuring that persons who inadvertently access websites containing child pornography are not sanctioned.

Despite being a robust provision, there is an important qualification contained in Article 20(3) which permits Member States to enter a reservation where the material consists entirely of simulated representations or realistic images of a non-existent child, for example, computer generated images of children, or images involving children who have reached the age of consent, “where these images are produced and possessed by them with their consent and solely for their own private use.”

²³⁶ Bitensky, *supra* note 234.

²³⁷ *Ibid.*, and Council of Europe, *supra* note 235, at para. 112.

²³⁸ Council of Europe, *supra* note 235, at para. 140.

Reservations are also possible in respect of Article 20(1)(f). These are troubling provisions, given that the internet has considerably expanded both the supply of and demand for child pornography, and the variety of ways in which such material can now be accessed. Additionally, as Frei explains, the ready accessibility of this material coupled with the anonymity provided by the internet can lead to an increased level of curiosity about child pornography,²³⁹ prompting O'Donnell and Milner to believe that there is now a danger of "curiosity hardening into deviance".²⁴⁰ Further, the creation of images of non-existent children contributes to the sexual objectification of children. Even if a real child is not harmed in the production of this material, it legitimises the idea that children can be treated as sexual objects, and it is not inconceivable that a person who consumes images of digitally created children will also be engaged in consuming images of real children. The provisions relating to the creation of explicit images for private use is also difficult to justify. Despite the intentions of the parties at the time the material is created, it is impossible to ensure that it will not enter the public domain. Even though this material would no longer be covered by this exemption when it ceases to be for private and personal use, and any other person possessing it would be guilty of an offence, the very existence of such material can cause significant distress to the young people involved, as well as legitimising the viewing of young people in a sexual context. Similar concerns arise in relation to the possibility of reservations to the participation of young people in pornographic performances.

A novel development in the legal framework is found in Article 23. This obliges Member States to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age of consent for the purpose of engaging in sexual activities or producing child pornography where this proposal has been followed by material acts leading to such a meeting. In effect, this seeks to criminalise the online grooming of children. The Explanatory Report defines grooming as "the preparation of a child for sexual abuse,

²³⁹ Andreas Frei, Nuray Erenay, Volker Dittmann, and Marc Graf, 'Paedophilia on the Internet: A Study of 33 Convicted Offenders in the Canton of Lucerne' (2005) 135 *Swiss Medical Weekly* 488.

²⁴⁰ Ian O'Donnell and Claire Milner, *Child Pornography: Crime, Computers and Society* (Willan Publishing 2007) at p. 54.

motivated by the desire to use the child for sexual gratification”.²⁴¹ However, there are further elements which must be present in order for a criminal offence mirroring the Convention’s intentions to be established. First, there must be a proposal to meet the child, as simply sexual chatting with a child is not seen as sufficient to warrant criminal responsibility.²⁴² Secondly, the offence can only be committed through the use of ICT, meaning the phenomena of offline grooming and street-grooming are not caught by this provision. Thirdly, the offence is only complete if the proposal to meet “has been followed by material acts leading to such a meeting”, such as the perpetrator arranging a place to meet or arriving at that place. Finally, all aspects of the offence must be committed intentionally.

There are also specific clauses in the Convention relating to children’s use of ICT, and the importance of engagement with the ICT sector. Article 6 highlights the importance of education of children as a strategy for helping to prevent sexual exploitation and abuse. This is to take place within a more generalised context of information on sexuality; however, special attention is to be afforded to “situations of risk, especially those involving the use of new information and communication technologies”. Further, Article 9 states that the private sector, and the ICT sector in particular, is to be encouraged to participate in the elaboration and implementation of policies designed to prevent exploitation and to implement internal norms through self-regulation or co-regulation.

3.3.4 The Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

These provisions are augmented within the European Union by the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.²⁴³ The Directive obliges Member States to criminalise certain kinds of

²⁴¹ Council of Europe, *supra* note 235, at para. 156.

²⁴² *Ibid.*, at para. 157.

²⁴³ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography OJ L 335/1, 17

conduct and to establish minimum penalties, including offences related to the use of ICT. The transposition date for the Directive was 18 December 2013, meaning that the date for bringing the Irish law into line with the Directive has already passed.²⁴⁴

With respect to child pornography offences, the Directive defines child pornography as including realistic images of a child or the sexual organs of a child, thereby incorporating the principle established in the Lanzarote Convention that the abuse of a real child is not necessary in order for the offences relating to child pornography to be committed. The definition of the term “realistic” is not covered in the Directive and will most likely have to be the subject of elaboration in national laws and in case law. The Directive stipulates in Article 5 that the offences of acquisition of, possession of, and knowingly accessing child pornography are to be punishable by at least 1 year’s imprisonment. Sexual exploitation offences are covered in Article 4. These include causing, recruiting, coercing or forcing a child to perform in a pornographic performance and knowingly attending pornographic performances involving the participation of a child. Each of these offences may involve the use of ICT, either as a means of recruitment, or as a means of viewing such a performance. Although the phrase “attending” is not defined in the Directive, it would be possible that national legislation could include the idea of “virtual attendance”, whereby a person views a live online performance of pornographic acts. Article 8 clarifies that certain matters relating to self-generated pornographic material involving children who have reached the age of sexual consent where that material is produced and possessed with the consent of those children and only for the private use of the persons involved, in so far as the acts did not involve any abuse, shall be within the discretion of Member States.

Certain of the offences relating to sexual abuse outlined in Article 3 may also be committed using ICT, such as causing a child to witness sexual activities or sexual abuse. Under the terms of Article 25, Member States must ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and endeavour to obtain the removal of such pages hosted outside of their territory.

December 2011. This was discussed in the *Sixth Report of the Special Rapporteur on Child Protection* (2013), at pp. 77-82.

²⁴⁴ Article 27(1).

Moreover, Member States may take measures to block access to web pages containing or disseminating child pornography where Internet users are within their territory.

A range of offences relating to the grooming or solicitation of children are outlined in Article 6. First, according to Article 6(1), Member States must criminalise a proposal, made through ICT, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of engaging in sexual activity or the production of child pornography, where that proposal was followed by material acts leading to such a meeting. This is to be punishable by a maximum prison sentence of at least one year. Article 6(2) provides that any attempt made by an adult, by means of ICT, to solicit a child to provide pornographic material depicting that child, for the purpose of committing the offences of acquiring, possessing or knowingly accessing child pornography, is to be punishable, although no minimum punishment is stipulated.

Article 9 provides a list of aggravating circumstances relating to the offences described above. These include committing an offence against a child in a particularly vulnerable situation such as a child with a mental or physical disability, in a situation of dependence or in a state of physical or mental incapacity; if the offence was committed by a member of the child's family; a person cohabiting with the child or a person who has abused a recognised position of trust or authority; offences committed by several people acting in concert or within the framework of a criminal organisation; repeat offences; or offences which deliberately or recklessly endanger the life of the child or involve serious violence or cause serious harm to the child.

3.3.5 Jurisdictional rules under both the Convention and the Directive

Given the complexity of the rules relating to criminal jurisdiction outlined in both the Lanzarote Convention and Directive, these will be considered separately from the substantive criminal offences outlined in each instrument. Dealing with the Convention first, Article 25(1) established a variety of grounds on which States can base jurisdiction for trials related to the offences outlined. This states that jurisdiction is established for a State party where an offence is committed:

- (a) in its territory; or
- (b) on board a ship flying the flag of that Party; or
- (c) on board an aircraft registered under the laws of that Party; or

(d) by one of its nationals; or

(e) by a person who has his or her habitual residence in its territory.

Therefore, each State is required to punish the offences established under the Convention when they are committed on its territory. Jurisdiction is also established where an offence is committed outside the territory of a State in which an aircraft is registered or whose flag is flown on a ship. The nationality principle is included with an important caveat found in Article 25(4). This provides that the usual rule of dual criminality where acts must be criminal offences in the place where they are performed is not applicable to certain offences.²⁴⁵ The value of this provision is that a national of a State party may be prosecuted if he/she engages in activity in a foreign country, even if it is legal in that country, which is illegal in their own nation State. This is designed to ensure that jurisdiction is established in cases of sex tourism, such as where a person travels to another State to take advantage of a lower age of consent, although it is possible for States to enter reservations in respect of this clause insofar as it relates to the abuse of trust provisions outlined in the second and third indents of Article 18(1)(b).

The habitual residence basis for jurisdiction may also be the subject of reservation, as Article 25(3) allows State parties not to implement this jurisdiction or only to do it in specific cases or conditions. In an attempt to ensure that transportability of complaints from one State to another, Article 25(6) establishes that for certain offences, each State party shall ensure that, where jurisdiction is to be based on the nationality or habitual residence of a prospective defendant, the case may proceed regardless of whether the victim made a statement or complaint to the police of the state where the offence is said to have occurred.²⁴⁶

The *aut dedere aut judicare* principle is enshrined in Article 25(7), as States parties are obliged to establish jurisdiction in cases where an alleged offender is present on its territory and it does not extradite him or her to another State party, solely on the basis of his or her nationality. Finally, Article 25(8) establishes the principle of international consultation where more than one State could exercise jurisdiction. Consultation shall seek, where appropriate, to determine the most appropriate venue

²⁴⁵ The offences in question are those outlined in Articles 18, 19, 20(1)(a) and 21 of the Convention.

²⁴⁶ Again, the offences in question are those outlined in Articles 18, 19, 20(1)(a) and 21 of the Convention.

for prosecution, with the Explanatory Report indicating that this should be undertaken “in order to avoid duplication of procedures and unnecessary inconvenience for witnesses or to otherwise facilitate the efficiency or fairness of proceedings”.²⁴⁷ A novel provision is contained within Article 25(2) which states that “[e]ach Party shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory.” In effect, this seeks to move States towards a situation where jurisdiction can be exercised on the basis of the nationality or habitual residence of the victim.

The Directive also outlines jurisdictional rules. Article 17(1) states that measures must be implemented to ensure jurisdiction where the offence is committed in whole or in part within their territory or the offender is one of their nationals. Member States may also, according to Article 17(2), establish jurisdiction where the offence is committed outside their territory where the offence is committed against one of its nationals or a person who is a habitual resident in its territory (where the offence is committed for the benefit of a legal person established in its territory the offender is a habitual resident in its territory).

There are similarities between the two instruments. Each instrument provides for jurisdiction to be established on the basis of territoriality, and the nationality of the offender. Additionally, the Convention’s provisions regarding the principle of dual criminality and the place of initial complaint are mirrored in Article 17(4) and Article 17(5). Each instrument also seeks to move towards the introduction of an approach to jurisdiction centred on the nationality or residence of the victim rather than the perpetrator, although such an approach does not appear to be mandatory.

There are, however, important differences. First, the additional jurisdictional bases found in Article 17(2) (of the Directive) are optional; whereas it appears that the alternative bases for jurisdiction found in Article 25 (of the Convention) must all be incorporated into domestic legislation. However, the perpetrator’s habitual residence,

²⁴⁷ Council of Europe, *supra*. note 235, at para. 175.

and the provision relating to ships and aircraft which are found in the Convention are not found in the Directive. There are also special references to ICT found within the Directive which have no antecedent. Article 17(3) states that offences committed using ICT shall come within the jurisdiction of the State where the technology is accessed. This is important for situations where material is accessed from within the EU, but is hosted on a server located outside the European Union, or where a child induced to create pornographic material through ICT is similarly based outside the Union.

3.4 Domestic Legislation and Compatibility with International Instruments

Several pieces of Irish legislation deal with the criminal law aspects of ICT, but the most important for present purposes are the Child Trafficking and Pornography Act 1998 and the Criminal Law (Sexual Offences) (Amendment) Act 2007. Dealing with the child pornography aspects of the legislation first, the 1998 Act was drafted in a manner which allowed for a significant level of technological development. While certain amendments are necessary to comply with both the Convention and the Directive, fundamental reform is not necessary. The visual and audio representation of children engaged in, or depicted as being engaged in explicit sexual activity or witnessing sexual activity, and a video representation whose dominant characteristic is the depiction, for a sexual purpose, of the genital or anal region of a child are included within the definition of child pornography provided by section 2 of the 1998 Act.

There are however, two specific aspects of the definition which need to be considered. First, the Act includes references to representations of children. In section 2(2) of the Act, a specific provision is made for situations where an image has been generated or modified so that an image of an adult has been altered to make it seem as if it is in fact an image of a child. Therefore, imagery which conveys the “predominant impression” that it represents a child will be considered to be child pornography.²⁴⁸ However, this does not necessarily deal with the problem of computer generated

²⁴⁸ Alisdair A Gillespie, *Sexual Exploitation of Children: Law and Punishment* (Roundhall 2008) at p. 138.

images, or the “realistic images” of children discussed in the Conventions and the Directive. It is arguable, however, that the current legislation caters for this situation as section 2(1) clarifies that material will be regarded as pornographic “irrespective of how or through what medium the representation, description or information has been produced”. In this way, the demands of the international instruments described above appear to be met in this respect.

The second issue that arises in respect of the definition of child pornography is the question of age. According to section 2 of the 1998 Act, the term child is defined as a person under the age of 17 years, which mirrors the age of consent in this jurisdiction. The Act further creates a presumption that a person shall be deemed to be or have been a child, or to have been depicted as such, unless it is proven otherwise.²⁴⁹ Therefore, a presumption exists that the person depicted in the pornographic material in question is a child, but it is open to a defendant to rebut this presumption. While the presence of such a presumption complies with the standards imposed by the Conventions and the Directive, the decision to use 17 as the age at which one ceases to be a child is problematic. While the Budapest Convention permits Member States to select 16 as the age at which a person may engage in actions related to pornography, neither the Lanzarote Convention nor the Directive permit an age lower than 18 to be selected by Member States, save for the single instance of self-created imagery. Therefore, Irish law is not compliant with these international regulations. With respect to the issue of self-created images or video, the international instruments permit exemptions from criminal liability in certain circumstances. However, no such exemption is permitted in Irish law. This needs to be considered, as while the production of such material is not something to encourage, young people ought not to be criminalised for producing it.

The substantive offences provided for in the 1998 Act relating to pornography are found in section 5 and section 6. Under section 5, it is an offence to knowingly produce, distribute, print, publish, import, export, sell or show child pornography, as well as knowingly publishing or distributing any advertisement likely to be understood as conveying that the advertiser or any other person can do any of these

²⁴⁹ Child Trafficking and Pornography Act 1998, s. 2(3). See also s. 256 and Schedule 1 of the Children Act 2001.

things. Encouraging or knowingly causing or facilitating these activities is also an offence.²⁵⁰ It has been argued that the act of downloading child pornography constitutes “making” such material, and therefore a person who downloads video or still images would be guilty of this rather than a possession offence,²⁵¹ although the law is somewhat unclear on this point. It is possible that this is the correct position, as when an image is downloaded, a copy of the image is produced. However, Gillespie posits that cases involving the downloading of images have always proceeded on the basis of possession under section 6.²⁵²

The offence of possession provided for in section 6 requires that the person is knowingly in possession of the material, although a defence is created for those engaged in *bona fide* research. This defence is arguably narrower than that provided for in the Conventions and Directive which provide for possession as of right, and are designed to include law enforcement and other reasons for possession. There is a significant gap in the legislation, however, in respect of the viewing of child pornography. As outlined, the international instruments provide that the viewing of this material is to be criminalised through provisions governing the acquisition of or knowingly gaining access to pornographic material; indeed the Directive mandates that such conduct be criminalised. However, Irish law currently does not criminalise the viewing of child pornography. This creates serious problems due to the possibility of streaming video or accessing video or images stored in clouds that could be accessed without actively downloading the data in question. A further difficulty arises where the material has been downloaded but deleted and later recovered during an investigation. In such cases, the material might not be considered within the possession of the accused, as the requisite elements of control may not be present.²⁵³ If there is deemed to be no possession, or any act of making pornographic material, there may be no basis for a prosecution. These aspects of the Irish legislation should be considered in the new Criminal Law (Sexual Offences) Bill given the obligations imposed by the international instruments.

²⁵⁰ Child Trafficking and Pornography Act 1998, s. 5(1)(d).

²⁵¹ *R v. Bowden* [2000] 1 Q.B. 88.

²⁵² Gillespie, *supra* note 248, at p. 146.

²⁵³ See *DPP v. Power* [2007] IESC 31.

3.4.1 Solicitation and Grooming Offences

Offences relating to grooming using ICT are an area of major concern and require significant reform in order to comply with the requirements of the Conventions and Directive. The Irish legislation deals with two distinct scenarios – where the offender uses ICT to groom the child and seeks to meet him or her offline for sexual purposes, and where the grooming takes place offline to facilitate online sexual activities. Two new offences were created by the Criminal Law (Sexual Offences) (Amendment) Act 2007. This inserted a new section 3(2A) and section 3(2B) into the 1998 Act. The former provides that a person who intentionally meets or travels with the intention of meeting a child having met or communicated with that child on 2 or more previous occasions, and does so for the purpose of sexually exploiting that child is guilty of an offence. The meeting must take place within the State, or be intended to take place within the State. The latter provision applies where a person goes outside the State to meet or travels with the intention of so meeting a child, again for the purpose of exploitation, having met or communicated with him or her on 2 previous occasions.

Clearly, these provisions do not meet the standards outlined in the Conventions or Directive. As outlined above, the Lanzarote Convention anticipates that States criminalise the proposal to meet a child, made through ICT, if the proposal is followed by material acts leading to a meeting. A similar formulation is found within the Directive. As such, these instruments expect the criminalisation of grooming itself, and not the consequences of grooming. In Ireland, the offence is only complete when a person meets or travels to meet the child, whereas the anticipated offences are complete on the taking of preparatory actions following communication. A further difference is that there is a need for two separate contacts under Irish legislation, whereas international standards do not list such a minimum. The provisions introduced in the 2007 Act are therefore inadequate and should be amended in the forthcoming Criminal Law (Sexual Offences) Bill.

Further problems are created in so far as the sexual exploitation may take place online rather than offline. This may arise where the child in question is encouraged to engage in cybersex through text or VOIP technology, other sexual performances over webcam, or send explicit images through instant messaging or social media. The offences introduced by the 2007 Act do not deal with these problems as there is no

offline meeting. Instead, recourse will have to be had to the offences relating to child pornography. The definition of child pornography contained in the 1998 Act refers to material being pornographic, regardless of how it is produced, transmitted or conveyed, while the definition of “visual representation” includes “any photographic, film or video representation, any accompanying sound or any document ... and any ... computer disk or other thing on which the visual representation and any accompanying sound are recorded”. This would seem to include the technologies mentioned above. However, the “producer” in these cases is the victim themselves. The offence of allowing a child to be used for child pornography found in section 4 of the 1998 Act cannot be used for perpetrators unless they also have responsibilities for the custody, care and control of the child. Instead, it may be that the offences found in section 5(1)(d) of encouraging, knowingly causing or facilitating the production of pornographic images could be applied. Further, if the offender exposes themselves but does not attempt to solicit any reciprocal sexual behaviour, the 1998 Act is of limited value.

This potential gap could be remedied by legislating in line with the demands of the Directive. First, the definition of pornographic performance found in the Directive is wide enough to capture webcam or streaming based material. Secondly, in the event that the offender causes the child to witness explicit sexual behaviour even without having to participate, this would be covered by the new offence. Thirdly, legislation based on the Directive would include the offences of causing a child to participate in a pornographic performance, and the offence of attending such performances, such as where several people viewed a streamed video, but where only one interacts with the child. At present only the person who “shows” the images is guilty of an offence,²⁵⁴ whereas the other people viewing the material are not.

3.4.2 Jurisdictional Rules

The issue of jurisdiction over sexual offences is a complex problem. In Ireland, jurisdiction is regulated by the common law, by the Sexual Offences (Jurisdiction) Act 1996 and the Criminal Law (Human Trafficking) Act 2008. Generally speaking, the common law provides that in order for a State to prosecute a person, the offence

²⁵⁴ Child Trafficking and Pornography Act 1998, s. 5(1)(b).

must have been committed within the territory of that State. Additionally, an offence committed on board an Irish ship,²⁵⁵ or on board an Irish controlled aircraft will be regarded as having occurred within the jurisdiction of the Irish courts.²⁵⁶ However, statutory intervention became necessary in order to deal with the problems of sex tourism, and latterly, child trafficking. In the context of the issues under examination in this report, the jurisdictional changes effected by the 1996 and 2008 Acts have actually had relatively little impact.

The 1996 Act, as amended, provides that the State has jurisdiction over offences committed within the State, and offences committed outside the State if certain criteria are fulfilled. In order for this to happen, the behaviour must constitute an offence in the place in which it is committed, and would constitute an offence in the State if it had been committed here. Additionally, the offence must be one referred to in the Schedule of the Act. This includes reference to offences under section 3 of the 1998 Act, but not to offences committed under section 5 and section 6 of that Act. Therefore, acts relating to the production, distribution or possession of child pornography are not included. The relevance of this in the context of ICT is that if an Irish citizen or person ordinarily resident in Ireland comes into possession of child pornographic material abroad, and does not import it,²⁵⁷ or attempt to facilitate or encourage its production, he or she may not be prosecuted as the offence has not occurred in Ireland. Even if the offence were covered by the 1996 Act, the principle of dual criminality would apply.

With respect to grooming offences designed to lead to face-to-face contact with the child, section 3(2A) only applies within the State, while section 3(2B) specifically refers to offences committed outside the State.²⁵⁸ The latter brings about particular problems. In the event that an Irish resident, while based in Ireland, grooms a foreign young person who is over the age of consent in his or her own State, and travels to that State for the purpose of having sex with him or her, it appears that the Irish resident is guilty of an offence. If an Irish resident grooms an Irish child, and arranges to meet abroad, it is likely that section 3(2A) will instead apply, as under section

²⁵⁵ *O'Daly v. Gulf Oil Terminals Ltd* [1983] ILRM 163 (HC).

²⁵⁶ Air Navigation and Transport Act 1973, s. 2.

²⁵⁷ Such an action would be covered by s. 5(1)(b) of the 1998 Act.

²⁵⁸ The following discussion draws on Gillespie, *supra* note 248, at pp. 116-117.

3(2B) both the communication and the meeting must take place abroad. Under the former provision however, it seems that once the adult begins to travel with the intention of meeting the child, the offence is completed. The most significant problem arises where the meeting and communication occur in different places – if a foreign resident grooms an Irish child and arranges to meet in Ireland, it appears that no offence has been committed. Section 3(2A) cannot apply, as the communication must take place in Ireland, while section 3(2B) cannot apply as the offender is not resident in Ireland.

These problems could be circumvented by revising the current law on jurisdiction to make it compliant with the more extensive obligations of the Conventions and Directive. The Lanzarote Convention includes not only the territoriality principle but also permits the exercise of jurisdiction based on nationality or habitual residence. Irish legislation is compliant with these provisions. However, the Convention goes further than Irish law by permitting the relaxation of the dual criminality rule, which is enshrined in the 1996 Act. Moreover, the Convention introduces the principle of victim-centred jurisdiction rules which appear to be absent from Irish legislation. The Directive also introduces this as a factor establishing jurisdiction. Importantly, the Directive's clarification that the place from which ICT is accessed is to have jurisdiction would, if introduced in Irish law, clarify the legal position significantly and perhaps close some existing loopholes. These issues of jurisdiction over sexual offences should be considered in the Criminal Law (Sexual Offences) Bill.

3.5 Recommendations

Having signed both the Convention on Cybercrime (the Budapest Convention) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) it is now imperative that Ireland ratify these Conventions forthwith without reservation.

The EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography ought to be transposed into Irish law.

The transposition of the Directive and ratification of the Conventions ought to be carried out in such a manner so as to ensure that the greatest level of protection to be afforded to children under these instruments is given effect in our domestic legislation.

In terms of the various jurisdictional rules to apply in respect of the prosecution of offences against children committed on, or with the aid of, the internet it is recommended that the most expansive approach be taken so as to ensure the prosecution of those who commit offences regardless of matters such as the location of the internet server used to perpetrate the offence or the physical presence of the child. In particular a relaxation of the dual criminality rule, as per the Convention, would assist in this regard.

The Child Trafficking and Pornography Act 1998 ought to be reviewed, clarified and amended to ensure that it keeps pace with developments in relation to the type of offences against children capable of being perpetrated on, or with the aid of, the internet. For example the concept of 'representations of children' on the internet needs to be clarified to account for more recent developments in computer generated images and 'realistic images' of children. Further the age of a child for the purpose of the 1998 Act ought to be increased from 17 to 18, and an exemption from criminal liability arising from self-created images or videos ought to be considered having regard to the international Conventions.

Irish law does not yet criminalise the viewing of child pornography. This is a significant failing in our legislation and needs to be addressed. Whilst the act of downloading child pornography is criminalised, the streaming or accessing of same through 'cloud' technology does not constitute downloading and therefore escapes criminal sanction. Such activities are as detrimental to the protection of children as downloading and therefore ought to be sanctioned in a similar manner.

The introduction of an offence of child grooming in 2007 is inadequate from the perspective of child protection. The offence under Irish law fails to comply with the international best practice promulgated in the Conventions and Directive. Those international instruments criminalise grooming itself whereas Irish law focuses on the

consequences of grooming. In addition, Irish law requires that there be a minimum of two contacts between a perpetrator and a child to constitute the offence of grooming. No such minimum threshold is provided for in the international instruments, and the prescription of such a minimum threshold fails to sanction those who attempt grooming on one occasion and are unsuccessful in further contact with that child. Irish legislation ought to be amended to address these shortcomings.

Irish legislation criminalising grooming ought to be amended to capture online activities in furtherance or as a result of grooming of a child.

SECTION 4:

FORCED MARRIAGES

4.1 Introduction

A recent case before the High Court has drawn attention to a lack of coherency in the Irish law as regards forced marriages. Faced with a factual scenario whereby a 16-year-old Irish-Muslim girl of Egyptian origin had been placed in the care of the Child and Family Agency following concerns that she was forced to marry a 29-year-old man, MacMenamin J. suggested that new laws and procedures might be required to protect young people from forced marriage.²⁵⁹

At present, there is no specific offence of ‘forcing someone to marry’ in Irish law. Nor does the Irish civil law provide specific preventative or protective measures for those threatened with or seeking to leave a marriage contract under duress.

Forced marriage is a complex matter involving a broad range of cultural, societal, gender and economic issues and identifying the exact meaning of a forced marriage can often be difficult. The UK Foreign and Commonwealth Office stated the distinction between forced and arranged marriages in simple terms as follows:

“In arranged marriages, the families of both spouses take a leading role in arranging the marriage but the choice whether or not to accept the arrangement remains with the young people. In forced marriage, one or both spouses do not consent to the marriage and some element of duress is involved.”²⁶⁰

While this definition neatly sums up the two primary identifiers of forced marriage, (lack of consent and the presence of duress) it is far too simplistic in its description of arranged marriages. Arranged marriages are often seen as more acceptable as, even though the parents play an active role in finding a marriage partner, the final decision as to whether or not to enter into the marriage lies with the prospective spouses. This

²⁵⁹ *The Irish Times*, ‘Case raises issue of forced marriages; High Court judge says law doesn’t cover unions where there is no real consent’ 19 June 2013; and *The Irish Times*, ‘Vulnerable girls in need of legal protection’ 19 June 2013.

²⁶⁰ Foreign and Commonwealth Office, 2004 *Young People and Vulnerable Adults Facing Forced Marriage: Practice Guidance for Social Workers*. London. The UK Courts took a similar approach in *Re SK (Proposed Plaintiff) (An Adult By Way of Her Litigation Friend)* [2004] EWHC 3202. This was reinforced further in *NS v. MI* [2006] EWHC 1646 per Munby J at pp. 2-4.

approach fails to take account of the cultural and social pressures often placed on prospective spouses that can mean that the final decision is made by parents due to their children deferring to parental decisions.²⁶¹

This section of the Report will limit itself to the discussion of early forced marriage where one or both of the parties to the marriage are below the age of 18 years.²⁶²

4.2 Existing Irish Law and Practice

As identified by MacMenamin J., there is no Irish legislative framework that comprehensively deals with the many issues surrounding forced marriage. However, there are a number of existing civil and family law measures which can come into play to protect those threatened with, or already in, a forced marriage.

4.2.1 Child abduction laws

Child abduction arises in this context where a minor is taken abroad for the purposes of conducting a forced marriage. Although technically in place to protect the rights of parents to custody and access, such laws can arguably be used to combat forced marriage in cross-border situations. In this vein, sections 9(2) and 37 of the Child Abduction and Enforcement of Custody Orders Act 1991 permits the detention of a child who the court fears is about to be removed from the state as well as the making of injunctions preventing the removal of the child from the state. The Minister for Justice may also bring a child abduction application on an *ex parte* basis. The decision in *DGH v. Minister for Justice*²⁶³ makes it clear that while the Minister is under no obligation to bring an application under this Act, it is possible for him to do so if he sees fit.

²⁶¹ See K. Chantler, “Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse”(2012) 13(3) *Trauma, Violence and Abuse* 176 at p. 177 where Chantler refers to the “slippage” between arranged and forced marriage while also questioning the term “consent” in the field of forced and arranged marriage.

²⁶² If ordinarily resident in the Irish State, the minimum age for marriage is 18 years. In certain circumstances, it is possible to obtain a Court Exemption Order allowing marriage to proceed even if one or both parties are under 18 years. The court requires:

- That there are good reasons for the application;
- That the granting of such an exemption order is in the best interests of the parties to the intended marriage.

²⁶³ [2003] IEHC 47.

4.2.2 Child Care Act 1991

Where the Child and Family Agency believes that a child is in danger of being forced into marriage, the Agency may bring an application for an emergency care order pursuant to section 13 of the Child Care Act 1991. If there is a risk of serious or immediate harm to the child and waiting to obtain an order under section 13 would place the child at risk, An Garda Síochána may remove the child into the care of the Child and Family Agency without a warrant under section 12 of the 1991 Act. As discussed in section 2, both of these powers are effective only for a limited period of time and must be followed up by an interim care order if there is still reason to believe that the child is in danger.

4.2.3 Pre-marriage formalities

Section 2(2) of the Civil Registration Act 2004 provides that there is an impediment to marriage if one, or both parties are under 18 years of age. While an exemption from the age requirement can be granted by the Circuit or High Court under section 33 of the Family Law Act 1995, section 47 of the Civil Registration Act 2004 states that such an exemption can only be granted by a court if the applicants show that it is justified by serious reasons and is in their interests.

Section 46 of the 2004 Act also requires parties to an intended marriage to attend in person at a registrar's office and to give three months' notice of the intention to marry as well as to make a written declaration that there is no impediment to the marriage. This provision also gives the registrar authority to request evidence as to the names, addresses, marital status, age and nationality of the parties to an intended marriage. Notices of intention to marry may be published and are available for inspection at the registrar's office. Section 58 of the 2004 Act also allows an objection to be made to the marriage prior to its solemnisation.

However, much of the above relies on the assumption that the person at risk of forced marriage is participating in a civil ceremony under Irish law. This is not always the case where the parties are marrying abroad or are taking part in a purely religious

ceremony. Safeguards such as that contained in section 58 of the 2004 Act also rely on the intervention of a third party who is aware of the provisions of section 58.

4.2.4 Annulment

In Ireland, a marriage is voidable if either party to the marriage did not validly consent as a result of duress. One of the formalities for contracting a valid marriage is that both parties must give their full, free and informed consent to the union. Where consent is lacking, the marriage can be declared void and the parties can obtain a decree of nullity. In assessing whether the marriage is void, the courts will seek to ensure that consent is real and not apparent and that the parties' free will was exercised. In this regard, the court will look at the age of the parties, their maturity and whether there were outside pressures, either from third parties or from events themselves. Where a person's free will is overborne the marriage will be declared void.²⁶⁴

4.3 International Human Rights Standards and Forced Marriage

Forced marriage amounts to an infringement of a number of human rights standards and the prohibition on forced early marriage can be found in a number of international human rights instruments. These include Article 16(2) of the Universal Declaration of Human Rights, which states explicitly and without qualification that "marriage shall be entered into only with the free and full consent of the intending spouses." A similar sentiment is to be found in Article 1 of the UN Convention on consent to marriage, minimum age for marriage and registration of marriages, while Article 2 of the same Convention provides that States Parties must take legislative action to specify a minimum age for marriage.

In the context of early forced marriage, a number of articles under the UN Convention on the Rights of the Child are relevant including Article 3 (best interests of the child), Article 19 (the right to protection from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, including sexual abuse, while in the care of

²⁶⁴ See for example *S v. O'S* (Unreported, High Court, Finlay J., 11 November 1978).

parents, a guardian, or any other person), Article 24 (right to health and access to health services and to be protected from harmful traditional practices) among others.²⁶⁵

While the UN Convention on the Elimination of Discrimination against Women does not contain a definition of forced marriage, it does address the issue in Article 16(1) where it provides that State parties are under an obligation to ensure that all appropriate measures are taken to eliminate discrimination against women in matters relating to marriage and family relations, including the right to enter into marriage and the right to freely choose a spouse and to enter into marriage only with their free and full consent. Article 16(2) the Convention clearly states that “[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.” The position of the Convention was further clarified in General Recommendation No. 21 which noted that a woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being.²⁶⁶

More recently, the Istanbul Convention has clearly set out the prohibition in Article 37 which obligates parties to the Convention to take the necessary legislative or other steps to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised. Parties must also legislate or provide other measures to ensure that luring an adult or child to the territory of a party or State other than the one he or she resides in with the purpose of forcing this adult or child to enter into marriage is criminalised.²⁶⁷

²⁶⁵ See also Articles 28 and 29 (the right to education on the basis of equal opportunity), Article 34 (the right to protection from all forms of sexual exploitation and sexual abuse) and Article 36 (the right to protection from all forms of exploitation prejudicial to any aspect of the child’s welfare).

²⁶⁶ General Recommendation No. 21 (13th session, 1994) Equality in marriage and family relations at para. 16.

²⁶⁷ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, CETS No. 210. Ireland has neither signed nor ratified this Convention and it has yet to attain enough ratifications to provide for its entry into force.

4.3.1 United Kingdom

The UK's Forced Marriage (Civil Protection) Act 2007 provides for the making of "forced marriage protection orders" (FMPOs). FMPOs are modelled on non-molestation orders and the 2007 Act gives the court a wide discretion as to their content. This means that a court may, in addition to the making of the order, require the surrender of a potential victim's passport or prohibit a wedding ceremony from taking place.

The 2007 Act also provides that a "relevant third party" may apply to the court for an order on behalf of a victim or potential victim of forced marriage, even in circumstances where the victim or potential victim has not given his or her permission. In addition, the Act recognises the cultural peculiarities of forced marriage as a form of violence against women. Thus, by ensuring that orders can be made in relation to secondary as well as primary perpetrators and that orders can be enforced against those who have not been named as respondents, the Act accepts that a number of family members may be involved in forcing a woman to marry so that orders can be made in relation to secondary as well as primary perpetrators. Orders can also be made *ex parte* if it is just and convenient to do so where there is a risk of significant harm to the person the subject of the order.

In this way the 2007 Act provides that forcing another into marriage is a civil wrong rather than a crime. The sole role for the criminal law is that, once an order has been made, if it appears to the court that the respondent has used or threatened violence against the victim, it may attach a power of arrest to the order. If the order is breached, the court's powers in relation to contempt of court are applicable. There is an ongoing debate in the UK as to whether it is necessary or even effective to criminalise forced marriage, with the suggestion that the civil protection regime is inadequate to properly address this issue.

The United Kingdom also has a Forced Marriage Unit whose role is to provide information and support to the victims of forced marriage and to provide advice to professionals.

There is an interesting debate in the United Kingdom regarding the possible criminalisation of forced marriage and in June 2012, the Prime Minister announced that the Government intended to make forced marriage a criminal offence.²⁶⁸

In the recent Northern Ireland case of *G and D (Risk of Forced Marriage: Forced Marriage Protection Order)*,²⁶⁹ the courts granted an order under the 2007 Act to prevent two girls (aged 12 and 14) from travelling to Pakistan where they were to be married. The court found that a FMPO was the least intrusive means of achieving the law's purpose in preventing forced marriages and was not a disproportionate interference with the girls' rights under Article 8 of the ECHR.

4.3.2 Scotland

The Forced Marriage etc. (Protection and Jurisdiction)(Scotland) Act 2011 closely mirrors the UK's Forced Marriage (Civil Protection) Act 2007 apart from the fact that breach of the Scottish legislation is a criminal offence.

4.4 Recommendations

Introduce a coherent legislative framework aimed specifically at preventing forced marriage of children.

Ensure compliance with Ireland's international obligations in relation to the prevention of forced marriage.

A protocol should be developed identifying the role of the key State Agencies in addressing the needs of a child victim or potential victim of forced marriage.

²⁶⁸ P. Strickland, Forced Marriage, SN/HA/1003 (Home Affairs Section, September 2013).

²⁶⁹ [2010] NIFam 6 (26 March 2010).

APPENDIX 1

OVERVIEW OF REPORTS INTO CHILD ABUSE

Introduction

There have been numerous reports over the last number of years tasked with investigating different aspects of the abuse of children and fatalities involving children in this country. Some have focused on specific cases such as the Roscommon and Kilkenny investigations while others have investigated the circumstances of children who died in care such as the Report of the Independent Child Death Review Group.

Below is an overview of some of the major reports that have been conducted and relate to the abuse of children in this country. This overview is undertaken from the perspective of child protection and welfare having regard to my remit as Special Rapporteur. For a more detailed analysis readers are recommended to consult the actual reports. In addition, it would be remiss of me not to recognise and commend the extensive review and analysis of a number of these reports by Dr. Helen Buckley and Dr. Caroline Nolan published in November 2013 entitled *An Examination of Recommendations of Inquiries into Events in Families and their Interactions with State Services, and their Policy and Practice*.²⁷⁰ That report focuses on the extent to which recommendations of previous reports have in fact been implemented and provides guidance as to the form of recommendations for future reports so as to enhance the prospects of implementation.

Report of the Independent Child Death Review Group (ICDRG)

An independent group was established in response to calls for investigations into the number and circumstances of children who had died while in the care of, or known to, the HSE (now the Child and Family Agency). The Report of the ICDRG was written by Dr. Geoffrey Shannon and Norah Gibbons, both of whom co-chaired the ICDRG.

²⁷⁰ Available at www.dcy.gov.ie/documents/publications/FamilyInquiries2013.pdf.

The ICDRG received files relating to the deaths of 196 children during the period of 1st January, 2000 to 30 April, 2010.

As an initial step the Group sought to establish from the above categorisation the causes of death as being from natural causes or otherwise. The Group was also required to make itself available to interview families of the deceased and following such interviews to present the Minister with an anonymised synopsis of such interviews.

The HSE handed over relevant files to the ICDRG. Once these files were received the Group began work to compile the relevant details of each case using a standardised form. The ICDRG undertook to analyse the facts of each case and compiled a Report outlining this analysis and the requisite learning to be taken from the cases reviewed.

Below is a list of failings identified by the ICDRG. It is not an exhaustive list. For a more comprehensive list of failings and recommendations please refer to the report of the ICDRG.

- Delay in placing the child in care;
- Failure to provide a care plan;
- Lack of consistency of social workers;
- Difficulties with placements;
- Lack of critical incident reports;
- Failure to refer to appropriate services;
- Failure to utilise appropriate legal provisions;
- Poor record keeping and procedural practice;
- Lack of professional support/supervision;
- Lack of communication between agencies;
- Failure to follow up on serious issues emerging for young people;
- Failure to provide any or appropriate aftercare;
- Lack of consistency and engagement of social workers;

- Inappropriate placements;
- Lack of proper procedures;
- Lack of interagency cooperation;
- Family issues/risk indicators not sufficiently dealt with;
- Lack of resources;
- Delays in the provision of services;
- Communication gaps within the HSE and between the HSE and other bodies including the children/young people themselves and their families;
- In many cases the psychological and mental health needs of children did not appear to form part of the risk assessment, where one had been carried out.

Below is a non-exhaustive list of some of the major recommendations of the ICDRG:

- In every case where a child in care dies there should be a review of the child's death and the circumstances surrounding it by the Child and Family Agency.
- The Report recommended the establishment of a Child Death Review Unit (CDRU) based on best practice around the world.
- The Report recommended that the *in camera* rule be relaxed to enable the CDRU to carry out its functions in a proper manner. In this regard the Report notes that with the passing of the Health (Amendment) Act 2010 the Child and Family Agency is obliged to furnish information to the Minister for the performance of his or her functions or any information of public interest or concern that has been specified in writing by the Minister.
- The provision of support should not be confined to the biological family of the deceased child. Where the child has been placed with a foster family, support should be provided to those carers to ensure that their needs are addressed. The court should also be made aware of the death of a child.

- The provision of consistent care of a high standard to children in the care of the Child and Family Agency requires good interagency co-operation.
- Where concerns or referrals are made to the Child and Family Agency with regard to a child/young person it is essential that the Agency respond appropriately to such concerns immediately.
- It is essential that care plans are in place with respect to the care being provided to the child/young person by the Child and Family Agency.
- Supervision Orders should be more widely used.
- When a child/young person comes into the care of the Child and Family Agency he/she must be assigned a specific social worker.
- The risk assessment and resulting care plan must identify appropriate placements which are linked to the needs of the child/young person.
- Appropriate referrals and regular care reviews must take place.
- Critical incident reports and record keeping must take place.
- The provisions laid down in the Child Care Act 1991, Child Care Regulations and the “Children First: National Guidance for the Protection and Welfare of Children” must be adhered to.
- Drug, alcohol and mental health services must be actively integrated into the child protection system.
- It is recommended that a working group be set up to consider how the needs of vulnerable children and young people can be met.
- Social workers should receive training in mental health and child psychiatry.
- There should be an annual audit of child care and family support services.

- Communication between social workers and the family should be clearly defined.
- A permanent taskforce within the Department of Children and Youth Affairs should be set up to identify emerging issues affecting vulnerable children.
- Statutory responsibility should be placed on the Child and Family Agency to ensure that children who have been in the care of the Agency are supported.

Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalene Laundries (McAleese Report)

The Committee was established in July 2011 to establish the facts of State involvement with the Magdalene Laundries which were identified by the government as ten named institutions. The mandate of the Committee was defined in broad terms by the Government and the Committee purposely interpreted its mandate in an expansive and flexible manner.

The Report established that approximately 10,000 women are known to have entered a Magdalene Laundry from the foundation of the State in 1922 until the closure of the last Laundry in 1996. The religious orders examined by the Committee were: The Sisters of Our Lady of Charity of Refuge, The Congregation of the Sisters of Mercy, The Religious Sisters of Charity and The Sisters of the Good Shepherd.

The Committee used a wide range of archives and sources in the course of its work, including: State records comprising files and records of government departments, records of other relevant State bodies and agencies and archives of the religious congregations which operated the Laundries. The Committee also met with and received input from various people including retired civil and public servants, the religious sisters who operated the laundries and the women who were admitted to and worked in the Laundries. The Committee conducted a series of meetings with a number of women who resided for a period of time in Magdalene Laundries.

The Committee found evidence of direct State involvement in:

- i. Routes by which girls and women entered the Laundries;
- ii. Regulation of the workplace and State inspections of the Laundries;
- iii. State funding of and financial assistance to the Laundries (including contracts for laundry services);
- iv. Routes by which girls and women left the Laundries;
- v. Death registration, burials and exhumations.

As the mandate of the Committee was to establish the facts of State involvement with the Magdalene Laundries there are no conclusions or recommendations.

The Ryan Report

The Commission was established on 23 May 2000 pursuant to the Commission to Inquire into Child Abuse Act 2000, and given three primary functions:

- i. to hear evidence of abuse from persons who allege they suffered abuse in childhood institutions, during the period from 1940 or earlier to the present day;
- ii. to conduct an inquiry into abuse of children in institutions during that period and, where satisfied that abuse occurred, to determine the causes, nature, circumstances and extent of such abuse;
- iii. to prepare and publish reports on the results of the inquiry and on its recommendations in relation to dealing with the effects of such abuse.

The Commission had a mandate in relation to four types of abuse: physical abuse, sexual abuse, neglect and emotional abuse. The Commission's purpose was to conduct an inquiry into abuse of children in institutions from 1940 to the present day. A total of 493 witnesses were interviewed by members of the Investigation Committee's legal team. The Commission heard evidence through two separate committees; the Investigation Committee and the Confidential Committee.

Below is a broad outline of the most profound failings identified across the various institutions examined by the Ryan Report:

- The reformatory and industrial schools depended on rigid control by means of severe corporal punishment and the fear of such punishment. Corporal punishment was often the option of first resort and was excessive and administered by staff using a wide range of weapons. Relatively minor offences gave rise to severe punishment. A climate of fear, created by pervasive, excessive and arbitrary punishment, permeated most of the institutions and all those run for boys.
- Physical and emotional abuse and neglect were features of the institutions. Sexual abuse occurred in many of them, particularly boys' institutions to the point of being systemic. The evidence described sexual abuse perpetrated by members of the congregation and by other members of staff.
- Sexual abuse was known to religious authorities to be a persistent problem in male religious organisations throughout the relevant period. The recidivist nature of sexual abuse was known to religious authorities. When confronted with evidence of sexual abuse, the response of the religious authorities was to transfer the offender to another location where, in many instances, he was free to abuse again. Incidences of abuse were managed primarily with a view to protecting the congregation and the institution from the harm that would occur if sexual abuse by Brothers became public.
- The Department of Education neglected its regulatory and supervisory roles and failed to condemn serious abuses, including the practice of flogging. When allegations of sexual abuse were brought to the attention of the Department of Education, the Department dealt inadequately with such complaints. The Committee notes that the Department of Education assumed responsibility for the children placed by the State in its care. There was no other body to monitor the interests of one of the most vulnerable groups in the community. The system of inspection by the Department of Education was fundamentally flawed and incapable of being effective. The deferential and submissive attitude of the Department of Education towards the

congregations compromised its ability to carry out its statutory duty of inspection and monitoring of the schools. The rules and regulations governing the use of corporal punishment were disregarded with the knowledge of the Department of Education.

- The Committee notes that the inability to face up to the problem of men abusing young boys was not confined to the religious orders. Experienced gardaí and professionals were also inadequate in their response to this issue.

Below is an overall view of the recommendations put forward by the Ryan Report:

- An extra duty of care exists in relation to children and young people who are cared for *in loco parentis*. The history, patterns and risk factors in relation to the abuse of vulnerable children need to be acknowledged, understood and recorded.
- As physical abuse continues to be a commonly experienced form of child abuse, it is essential that education, training and support services are available to assist those with responsibility for the care of children. The legality of physical abuse requires review.
- In order to properly promote the safety and welfare of children and young people, services need to take considered account of the children's perspective and enable their voices and wishes to be heard.
- Civil society has a responsibility to ensure the safety of children. Many people, including extended family members, neighbours, staff in schools, hospitals and other health services, had some awareness of the abuse of children in schools and institutions in the past and failed to act to protect them.
- Procedures to facilitate access to services with a statutory responsibility for the protection of children are required.
- Comprehensive aftercare services that assist young people in the

transition to independent living are vital.

- Services where children and young people are cared for away from their families require independent inspection and oversight to ensure that their needs are not compromised.
- Child care policy should be child-centred. The needs of the child should be paramount. National child care policy should be clearly articulated and reviewed on a regular basis.
- Children in care should be able to communicate concerns without fear.
- Children who have been in State care should have access to support services.
- Children who have been in child care facilities are in a good position to identify failings and deficiencies in the system, and should be consulted.
- The full personal records of children in care must be maintained.
- The “Children First: National Guidance for the Protection and Welfare of Children” should be uniformly and consistently implemented throughout the State in dealing with allegations of abuse.

The Ferns Report

The Ferns Inquiry was tasked to: identify complaints or allegations made against clergy operating under the aegis of the Diocese of Ferns in relation to events prior to 10 April 2002; to report on the nature of the response by the Church and public to those complaints or allegations; and to consider whether the response to those complaints was adequate or appropriate and if not to consider the reasons for this.

The inquiry identified over 100 allegations of child sexual abuse made between 1962 and 2002 against 21 priests operating under the aegis of the Diocese of Ferns. The

Inquiry conducted oral hearings and interested parties were invited to communicate with the Inquiry. The Inquiry heard from members of the church authorities, the South Eastern Health Board and from An Garda Síochána. The Inquiry analysed documentation submitted to it by the various agencies referred to above.

Below are some of the major failings as identified by the Ferns Report:

- Examples are given of priests being immediately moved from their post and transferred to new positions or being allowed to continue in their position, despite the existence of allegations of child abuse. The failure in this regard, as noted by the Ferns Report was “*the failure to anticipate the likelihood that an adult having once abused a child was likely to repeat the offence.*”²⁷¹
- Some complaints of child sexual abuse were made to the gardaí on an informal basis between the 1970’s and 1980’s but there is no record of this.
- The Report notes that the interests of priests were often placed ahead of those of the community. The Report notes that a culture of secrecy and a fear of causing scandal informed at least some of the responses that have been identified by the Inquiry.

Below are some of the main conclusions and recommendations identified by the Inquiry:

- All organisations including the Catholic Church, whose operations bring their employees into unsupervised contact with children must ensure that proper systems are in place to protect children from abuse from such employees.
- The community can play a part in tackling the crime of child sexual abuse by reporting any relevant information to An Garda Síochána

²⁷¹ The Ferns Report, Chapter 8, p. 254.

and/or any other relevant authority.

- The Diocese of Ferns and every organisation exercising control over persons having unsupervised access to children must educate their priests and members to understand their personal responsibility to ensure the protection of children.
- The Department of Children and Youth Affairs should launch and repeat from time to time a nationwide publicity campaign in relation to child sexual abuse.
- Every effort should be made, by legislation and publicity, to preserve and strengthen the more open environment of reporting.
- Codes of conduct should be prepared by every organisation which employs, qualifies or appoints people to positions of unsupervised access to children.
- Every person to whom a complaint of child sexual abuse is made should immediately create a written record of the complaint.
- Every allegation of child sexual abuse should be brought to the attention of the Interagency Review Committee.
- The Minister for Children and Youth Affairs should review the desirability of introducing legislation empowering the High Court, on the application of the HSE (now the Child and Family Agency), or other suitable body, to bar or otherwise restrain a person from having unsupervised access to children where reasonable grounds exist for the belief that the person has abused or has a propensity to abuse children.
- An in-depth study should be carried out on the full remit of the HSE's (now the Child and Family Agency's) powers to intervene where child sexual abuse is suspected to have been perpetrated by a non-family member. Express statutory recognition should be given to such powers.

The Report of the Commission of Investigation into the Catholic Archdiocese of Dublin (The Murphy Report)

The Dublin Archdiocese Commission of Investigation was established to report on the handling by Church and State authorities of a representative sample of allegations and suspicions of child sexual abuse against clerics operating under the aegis of the Archdiocese of Dublin over the period 1975 to 2004. The Murphy Report makes it clear that it was not the function of the Commission to establish whether or not child sexual abuse actually took place but rather to record the manner in which complaints were dealt with by Church and State authorities. The Commission had no remit to establish whether abuse occurred although it is stated that *“it is abundantly clear, from the Commission’s investigation as revealed in the cases of 46 priests in the representative sample (see Chapters 11-57), that child sexual abuse by clerics was widespread throughout the period under review.”*²⁷²

The Dublin Archdiocese Commission of Investigation was appointed on 28 March 2006, pursuant to the Commissions of Investigation Act 2004. The Commission conducted preliminary inquiries and an advertising/information campaign to alert complainants of child sexual abuse and those with relevant information as to its existence and to invite contributions from those who wished to assist the Commission in its work. Formal oral hearings were then conducted.

Below is a sample of the major failings identified by the Murphy Report:

- The Murphy Report states that up until at least the mid 1990’s the Dublin Archdiocese, in dealing with cases of child sexual abuse, was preoccupied with the maintenance of secrecy, the avoidance of scandal, the protection of the reputation of the church and the preservation of its assets.
- The Murphy Report notes that all the archbishops of Dublin and some auxiliary bishops and Monsignors and religious orders in the period covered by the Commission were aware of some complaints.

²⁷² The Dublin Archdiocese Commission of Investigation, Chapter 1, para. 1.7.

- The Report concluded that church authorities failed to implement many of their own canon law rules on dealing with clerical child sexual abuse and states that *“it is difficult for the Commission to accept that ignorance of either the canon law or the civil law can be a defence for officials of the Church.”*²⁷³
- The Report notes the failure of successive archbishops and bishops to report complaints of child sexual abuse to the Gardaí prior to 1996.
- The priests against whom allegations were made were moved to new parishes, or appointed as chaplains, in circumstances where the new parish or organisation was not informed of suspicions or allegations of sexual abuse against those priests.
- Church authorities and Gardaí did not deal with complaints of child sexual abuse as they arose, often resulting in other children being avoidably abused.
- Until the mid to late 1990s, there was generally very poor monitoring of priests against whom allegations were made even when those allegations were admitted.
- The Murphy Report states that Catholic Church authorities, in dealing with complaints against its clerics, gave primacy to its own laws.
- The Commission notes that often the wrongdoer rather than the victim was afforded the greater protection: *“Until the problem became so great it could not be hidden, the archdiocesan procedure was to do all in its power to protect the wrongdoer, while almost completely ignoring the effect of this abuse on the victims.”*²⁷⁴

²⁷³ The Dublin Archdiocese Commission of Investigation, Chapter 1, para. 1.17.

²⁷⁴ The Dublin Archdiocese Commission of Investigation, Chapter 29 (referring to Fr. Tom Naughton), para. 29.59.

Below are some of the main conclusions and recommendations set out by the Murphy Report:

- State authorities facilitated a cover up by not fulfilling their responsibilities to ensure that the law was applied equally to all and allowing the church institutions to be beyond the reach of the normal law enforcement institutions: *“It is the responsibility of the State to ensure that no similar institutional immunity is ever allowed to occur again. This can be ensured only if all institutions are open to scrutiny and not accorded an exempted status by any organs of the State.”*²⁷⁵
- The Commission is concerned that the structures and procedures for the reporting of allegations of child abuse are heavily dependent on the commitment and effectiveness of just two people; the Archbishop and the Director of the Child Protection Service: *“The current Archbishop and Director are clearly committed and effective but institutional structures need to be sufficiently embedded to ensure that they survive uncommitted or ineffective personnel.”*²⁷⁶
- The Commission at various points in its report expresses concern that priests were allowed to continue with their functions, despite the existence of suspicions or allegations of child sexual abuse.
- The Commission considers that clear and precise rules are required to ensure that priests suspected of abusing children are not allowed to use their status to give them privileged access to children.
- The Commission considers that it would be preferable if there was a clear unambiguous listing of the statutory functions and powers of the Child and Family Agency so that there could be no doubt as to the extent of its power to intervene in child protection issues.

²⁷⁵ The Dublin Archdiocese Commission of Investigation, Chapter 1, para. 1.113.

²⁷⁶ The Dublin Archdiocese Commission of Investigation, Chapter 1, para. 1.16.

- The Commission considers that the law should be clarified in order to confer on the Child and Family Agency a duty to communicate to relevant parties, such as schools and sports clubs, concerns about a possible child abuser.

The Cloyne Report

Towards the end of the remit of the Dublin Archdiocese Commission of Investigation the Government requested the Commission to carry out a similar investigation, this time into the Catholic Diocese of Cloyne. The Commission was to select a representative sample of complaints or allegations of child sexual abuse made to the archdiocesan or other Catholic Church authorities between 1 January, 1975 and 1 May, 2004 and report on the nature of the response to those sample complaints or allegations. The Commission's main task was to consider whether the response of the church and State authorities to complaints and allegations of clerical child sexual abuse was "*adequate or appropriate*" and to establish the response to suspicions and concerns about clerical child sexual abuse. The Dublin Archdiocese Commission of Investigation was appointed by the Minister for Justice, Equality and Law Reform on 28 March 2006, pursuant to the Commissions of Investigation Act 2004.

Below is a non-exhaustive list, as set out by the Commission, of how the Archdiocese of Cloyne failed in its handling of allegations and suspicions of child sexual abuse:

- Failure to report to the gardaí;
- Failure to report to the health authorities;
- Failure to report complaints to the Diocese;
- Failure to appoint separate support people;
- The absence of an independent advisory panel. This was one of the principal recommendations in the Framework Document;
- Failure to properly record and maintain information about complaints of child sexual abuse up to 2008;

- Failure to carry out proper canonical investigations;
- Inadequate communication between senior clerics.

Below are some of the main conclusions and recommendations identified by the report:

- The Commission found that the response of the Diocese of Cloyne to complaints and allegations of clerical child sexual abuse in the period 1996 to 2008 was inadequate and inappropriate.
- The Cloyne Commission accepts that in the absence of legislation, such as exists in Northern Ireland, there will continue to be problems with the handling of so called ‘soft information’. In a number of cases, it was obvious that people had profound concern about a priest’s behaviour before any allegation of child sexual abuse was made. If these concerns were to be centrally recorded, whilst protecting the rights of the individuals concerned, they might be of considerable assistance in identifying situations which could give rise to a concern. In this regard, the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 has recently been enacted.
- The Commission stated that statutory provisions in relation to dealing with child sexual abuse should be clear and unambiguous and should not be dependent on interpretation. The law should state what the powers are and how they are to be implemented.

Roscommon Child Care Case Report of the Inquiry Team to the Health Service Executive (HSE)

On 24 January 2009 an investigation was launched into the management of the case in Roscommon of a mother of six children, who was sentenced in Roscommon Circuit Court to seven years in prison following her conviction for incest, neglect and ill-treatment of her children. The terms of reference of the inquiry were to: examine the entire management of the case from a care perspective; identify any shortcomings or

deficits to the care management process; and prepare a report on the findings and any learning arising from the investigation. At the centre of this case were six children and young people. The children had been in the care of the HSE for six years at the time of the publication of the report (October, 2010).

Below are some of the failings identified by the inquiry:

- The services put in place to support the A family, although very well intentioned, failed on many occasions to respond fully to the chaos of their daily lives, failed to recognise the risk indicators that arose and, as a consequence, failed to respond appropriately to the needs of the children.
- A particular deficit in the numerous case records is any detailed description or account of the children.
- A notable feature throughout the duration of the period under examination is the absence of any formal assessment of this case, particularly in relation to risk to the children.
- Workers were not sufficiently alert to indications of ongoing neglect.
- The views and opinions of the parents were accepted largely at face value by some staff engaged with the family. The Inquiry also found that the concerns of the relatives were not sufficiently taken on board.
- Although a plethora of services were involved with this family over the years, it is perhaps ironic that it was the wide range of services and their deployment, rather than a lack of them, which contributed to an overall failure of the services to recognise the full extent of the children's suffering.

Below are some of the main conclusions and recommendations of the Inquiry:

- The Inquiry Team concludes that the six children of the A family were neglected and emotionally abused by their parents until their removal from the home in 2003 and 2004.

- The Report notes that from accounts given by the children when they came into care, this was not a home where ‘good enough parenting’ was available. The Report concludes that the threshold as to what was considered ‘good enough parenting’ was set too low for these children.
- The recommendations of the Inquiry Team are made both in the context of the wider agenda for vulnerable children and families and in the context of the particular case that was the subject of this Inquiry.

Below is a non-exhaustive list of the concerns and recommendations put forward by the Inquiry Team:

- The Child and Family Agency is one national agency and as such needs to ensure that its child welfare and protection services are being run in a manner that is consistent across the country.
- It is recommended that the Child and Family Agency ensure that all appropriate policies and procedures are compliant with the requirements of the United Nations Convention on the Rights of the Child (UNCRC) for children to be heard in all matters that concern them.
- It is recommended that the Child and Family Agency engage with the office of the Director of Public Prosecutions (DPP) to determine how best the identities and personal information of children involved in child protection cases can be better protected, particularly where victim impact statements are supplied in relation to criminal cases.
- The Child and Family Agency should develop and implement a national policy of audit and review of neglect cases.
- A national common assessment framework should be introduced without delay for all child welfare and protection cases.
- Where there are ongoing concerns of child neglect, as in this case, the appropriate frequency of home visits by the family social worker should be agreed and carried through.

- It is further recommended that where concern is expressed, or a referral made, concerning neglect and/or emotional abuse each episode should be judged and assessed in the context of any previous concerns.
- There is no reference to emotional welfare in the definition of welfare in section 2 of the Guardianship of Infants Act 1964. An amendment such as this would help to strengthen the recognition of the importance of a positive emotional environment for the healthy development of children and strengthen the ability of the statutory services to seek the protection of the courts for children suffering emotional abuse, which is always present where children are neglected or abused.
- The Inquiry Team was concerned that adequate reporting reminders of the need to maintain the anonymity of the children in the case were not given to the *bona fide* representatives of the press.

Kilkenny Incest Investigation

An investigation was ordered into the case of a 48-year-old County Kilkenny father of two who was given a seven year jail sentence on 1st March 1993 at the Central Criminal Court, having pleaded guilty to six charges of rape, incest and assault of his daughter Mary,²⁷⁷ from a total of 56 charges covering the period 1976 to 1991.

The terms of reference of the inquiry were:

- to carry out an investigation, insofar as the health services are concerned, of the circumstances surrounding the abuse referred to in the case heard in the Central Criminal Court on 1st March 1993, and in particular to establish why action to halt the abuse was not taken earlier;
- to make recommendations for the future investigation and management by the health services of cases of suspected child abuse.

The then Minister for Health, Brendan Howlin TD, decided that the Investigation would be on an informal basis and would not be a statutory inquiry. The investigation

²⁷⁷ This is a pseudonym.

team agreed to carry out a detailed analysis of the case including a comprehensive review of the files maintained by the South Eastern Health Board of the victim's contact with its services and to interview staff and other persons principally involved in the case from 1976 to 1992. The Investigation Team also interviewed the victim and members of her family and relevant persons from other agencies.

Below is a list of the main failings as found by the Investigation Team:

- The Investigation Team notes that each aspect of the health services dealt with the individual manifestations of Mary's abuse and her various illnesses entirely separately and without interdisciplinary communication and co-operation. Even when she attributed an injury to assault there is no record of any probing or investigation being carried out as to the nature and causes of the assault.
- Although public health nurses and social workers were aware of the difficulties in the family at no stage was a full case conference held. This would have provided an opportunity to include a wider range of agencies and disciplines i.e. GP's, hospital personnel, gardaí and teachers to meet and share information and agree appropriate action.
- There was a lack of the necessary effective probing of the nature and causes of the problem which could have been achieved both from an interdisciplinary and interagency approach and a better understanding on all sides of the nature of family violence and sexual abuse.

Below are some of the main conclusions and recommendations of the Investigation Team:

- The Investigation Team recommended the implementation of the remaining sections of the Child Care Act 1991. At the time, certain parts of the Act had not yet been commenced. Those provisions came into operation by means of Statutory Instrument 258/1995 in October 1995.
- Further recommendations included an amendment of Articles 41 and

42 of the Constitution so as to include a statement of the constitutional rights of children. In this regard it is noted that on 10 November 2012 the 31st amendment to the Constitution was passed to strengthen the constitutional rights of children. As a result a new Article 42A was inserted into the Constitution.

- The Investigation Team pointed out that the “Guidelines on Procedures for the Identification, Investigation and Management of Child Abuse” which were issued in July 1998 did not have a statutory basis and recommended that these be put on a statutory footing. The Report also recommended that these procedures be revised and a regular system of evaluation of the procedures be established. The “Children First: National Guidance for the Protection and Welfare of Children” was developed in 1999 and will soon be placed on a statutory basis.
- Mandatory reporting of all forms of child abuse by designated persons is recommended. The Inquiry Team recommends that failure of designated persons to report child abuse should be an offence. In this regard, the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 and the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 have recently been enacted.
- The Report recommends that doctors should be permitted or indeed obliged to disclose information to a third party if they have reasonable grounds for believing that a child is being abused.
- The Report recommends that responsibility to ensure interagency co-operation should be assigned to the Child and Family Agency. It is recommended that all allegations of child abuse should be reported to the Gardaí and that Garda authorities should designate one or more officers at regional level as contact persons in child protection cases.
- In relation to recording of information the investigation team notes that what is essential is that records are accurate, comprehensive, dated,

signed, legible and available when necessary. All records must be contemporaneous.

Lessons to be Learned from Past Reports

What is noticeable is that there have been numerous reports over the past 20 years or so raising significant issues relating to child protection and welfare and proposing numerous recommendations in response thereto. The question must be asked as to what in fact has been learned from these reports. Has there been real progress made in terms of child protection and welfare as a result of these reports, and if so has that progress been maintained over the years by way of constant review and reform? Ultimately recommendations are meaningless unless given effect to.

Whilst each of the above mentioned reports address discrete issues there are areas of overlap on a macro scale. This is worrying as it suggests that lessons are not being learned and deficiencies are being repeated on a systemic level giving rise to widespread child protection and welfare concerns. The issues of concern raised in each of the above cited reports might be broadly categorised as relating to lack of resources, inappropriate/ineffective structures, lack of supervision/regulation, failure to accept responsibility, lack of leadership, and administrative and communications deficiencies.

Whilst one might point to the need for root and branch reform of all areas relating to child protection and welfare, the ease of making such a statement fails to reflect the practical difficulties in giving effect to it. Rather, what is suggested is that provision should be made mandating the subject body of a report to provide a direct response to the report within a defined period detailing the actions taken on foot of the report. This would provide continuity and transparency between the identification of issues and resolution of same through positive action. Further, the recommendations from the report should be embedded in the business plan and performance review processes of the relevant body.

Experience suggests that reports are commissioned by way of reaction to the revelation of serious child protection and welfare issues, and in many cases to quell public anger directed towards politicians. However, child protection and welfare ought not to be merely reactive but must also be proactive. Action needs to be taken on foot of reports. Often public anger has calmed upon the publication of a report as the heat of the issue has abated. Lessons will not be learned unless pressure is brought to bear on those who are the subject of such reports or regulate the particular area of concern. Unless positive action is taken following the publication of reports the requisite pressure to effect reform will be absent, leading to inactivity despite the identification of causes for concern. If anything is to be learned from the above cited reports and their aftermath, it is that positive action needs to be taken thereafter to ensure the implementation of the necessary reforms to guarantee the optimum level of protection for our children.

APPENDIX 2

Statistics from the Courts Service for 2012²⁷⁸

Statistics from the courts.ie website from 2012 indicate that there was a significant increase in the number of guardianship applications made by the High Court (511 in 2012 compared to 214 in 2011). 43 guardianship applications were received. Of the applications to the District Court for guardianship by unmarried fathers pursuant to section 6A of the Guardianship of Infants Act 1964, 2,219 were granted in 2012, 94 were refused and 720 were withdrawn or struck out.

The Circuit Court in 2012 made 840 orders in relation to judicial separation, 2,868 in relation to divorce and 19 applications in relation to nullity.

The District Court granted 600 applications in relation to custody and access in 2012, refused 35 and 186 were struck out or withdrawn. In relation to custody alone the District Court in 2012 granted 821 applications, refused 47 and 642 were struck out or withdrawn. The District Court granted 4,219 applications in relation to access only, refused 145 and 1,245 were struck out or withdrawn.

In terms of child care, in 2012 the District Court heard 1,346 supervision order applications, with 1,074 being granted. The District Court heard 1,677 care order applications with 1,384 being granted. The District Court heard 5,773 interim care order applications with 4,862 being granted. The District Court heard 519 emergency care order applications with 424 being granted.

²⁷⁸ These statistics were taken from the Courts Service Annual Report, 2012, available at www.courts.ie.