

**Sixth Report of the Special Rapporteur on Child  
Protection**

**A Report Submitted to the Oireachtas**

**Dr. Geoffrey Shannon**

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## **EXECUTIVE SUMMARY**

### **GENERAL INTRODUCTION**

2012 was an important year from the perspective of child protection. The adoption by the People of a new Article 42A of the Constitution concerning children and children's rights has been awaited by many for a number of years and is one for which the Minister for Children, Frances Fitzgerald TD, deserves particular credit. The vulnerable nature of children and childhood makes it appropriate that children should be the subject of discrete constitutional provision, beyond that which applies to citizens generally. In this regard, the amendment marks an expansion of the Constitution's focus on the child, sitting alongside existing provisions applying to education and replacing the earlier provision in respect of State intervention in the family for the protection of children. It is too early to attempt to definitively state what the implications of the amendment will be, in particular when one considers that it mandates the adoption of particular legislation by the Oireachtas, which will now have to be drawn up and debated.

In April, the Government announced its decision to end the practice of detaining 16 and 17 year olds in St. Patrick's Institution. This is to be welcomed, although there is also scope for further and more rapid progress to be made. 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 emphasise Minister Fitzgerald's commitment to providing a firm foundation for the continued and improved protection of children and vulnerable persons in Ireland. Looking forward, the year ahead will see the Constitutional Convention discuss whether the voting age should be reduced to 17. It is hoped that the year ahead will also provide an opportunity for reflection and/or action upon several of the issues discussed in the Report, including its Recommendations section.

## SECTION 1: CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

The standard of protection afforded to children in Ireland can only be measured as against that across the developed world. Ireland partook in the Universal Periodic Review (hereinafter referred to as the “UPR”) as conducted by the United Nations General Assembly throughout 2011. A focus of the UPR was on the improvements to be made to the implementation of children’s rights in Irish law. The Constitutional Amendment that has since taken place has gone some way towards improving Ireland’s standing in this regard. However, the extent to which Ireland will go to implement the United Nations Convention on the Rights of the Child (hereinafter referred to as the “CRC”) remains unanswered. Whilst Ireland has done much in recent times to implement and support the rights of children there are still key steps in the process that remain outstanding, most notably the implementation of the CRC into Irish law. The UPR process was beneficial in that it brought into focus the improvements made in this area by Ireland in the recent past, but also highlighted the outstanding steps to be implemented.

In terms of developments in the jurisprudence relating to Hague Convention cases on child abductions, the European Court of Human Rights (‘ECtHR’) has continued its approach in relation to the necessity to consider the best interests and welfare of a child in cases where the ‘grave risk’ defence is raised pursuant to Article 13(b) of the Hague Convention. This can be traced back to the decision in *Neulinger and Shuruk v. Switzerland* as addressed in the Fifth Report of the Special Rapporteur on Child Protection (2011), and since then two further decisions have continued in a similar vein, namely *Šneerson and Campanella v. Italy* and *X. v. Latvia*. Whilst some consideration, albeit brief, has been given by the Irish courts to the *Neulinger* decision, it is evident from the developments on the international stage that this issue will come to the fore before the Irish courts at which point significant consideration will have to be given to the manner in which the Irish courts have heretofore applied the Article 13(b) ‘grave risk’ defence.

Delay in the progression of family law cases is not a feature unique to Ireland. However, Ireland can learn from the ingenuity of other jurisdictions in their efforts to

tackle the problem of delay. Most notably the establishment of specialist court divisions - e.g. a specialist family law court structure - appears to have borne welcome results in other jurisdictions. The establishment of specialist family law courts with specialist judges sitting in the same, particularly at District and Circuit Court levels, would most likely greatly reduce the delay in the progression of family law cases in Ireland, particularly outside of Dublin. The systems established in England and Wales, and also Australia, provide good examples in this regard.

The recent ECtHR decision in *A.D. and O.D. v. United Kingdom* demonstrates the need for social workers, and those in the child care process, to be aware of their obligations under the ECHR, most notably the need to ensure that any steps taken are necessary from a child protection perspective and that all such steps, and concurrent investigations, are undertaken in an expeditious manner having regard to the rights not only of the child but also the parents. In the decision of *O'Keeffe v. Ireland* the ECtHR has permitted the Applicant in that case to proceed with her case which will call into question the responsibility, and consequent liability, of the State for abuse in religious-run schools before 1998. The decision of the ECtHR in *M.D. and others v. Malta* calls into question the provision, or lack thereof, of independent representation for children in child care cases, particularly cases in which parents seek to discharge care orders. Whilst it is common for children to be represented by a guardian *ad litem* in such cases it is not an automatic or mandatory entitlement. This is a feature of Ireland's child care legislation that needs to be revisited in light of this recent decision.

The publication by the Council of Europe of its report entitled *Child Sexual Abuse and Child Pornography in the Court's Case-Law* highlights the positive obligations imposed on states in respect of the protection of children from abuse, and also the obligations on the state *vis-a-vis* both parents and children in respect of children taken into care. This report is a useful learning tool for professionals who work in such fields and is informative as to the impact of the ECHR on such areas. In 2011, the UN published the Third Optional Protocol to the Convention on the Rights of the Child, establishing a communications procedure. That Protocol has now been signed by approximately 35 states and awaits full ratification. It is hoped that Ireland will sign this protocol in the near future as this would be in keeping with the substance and

intent behind the recent constitutional amendment on the rights of children. In 2012 the UN Committee on the Rights of the Child hosted a Discussion Day on issues concerning the migration of children. A number of Irish NGOs partook in this forum and deficiencies in the regulation of migration into Ireland were highlighted. Whilst the final report from this forum has yet to be published there are a number of matters that the State can address in the interim.

The protection of children in the context of business and industry is an enduring requirement, even in today's day and age. Whilst the abuse of children in such situations may not be readily apparent in Ireland, Irish people may nonetheless, unknowingly, be benefitting from the fruits of improper child labour. The UN has recognised the need for 'first world' countries to be vigilant in terms of those poorer nations with whom they trade. A number of recent publications stress the need to verify the source of goods imported into Ireland so as to ensure that improper child labour has not been utilised in the production process. Awareness is increasing in this regard but more positive steps need to be taken at State level so as to ensure compliance with international standards and best practice.

By December 2013 Ireland is required to transpose EU Directive 2011/93/EU dealing with child sexual abuse, exploitation and pornography. Whilst the Government has already committed to doing so a number of existing legal provisions in Ireland need to be re-examined in light of the Directive. The regulation of the internet poses a particular difficulty in this field, especially in relation to grooming. Ireland must transpose the substance of the Directive but could benefit from first examining the position in both Canada and United States in terms of how those jurisdictions have already dealt with this issue.

One of the most vulnerable groups in Irish society is that of children with disabilities. The *Fifth Report of the Special Rapporteur on Child Protection (2011)* recommended the implementation of CRC General Comment No. 13. Whilst there are no Irish studies examining the level of violence that children with disabilities are exposed to or suffer from, international studies demonstrate that this is a significant issue requiring ongoing monitoring. Indeed, whilst children in general need to be



prioritised in our society, the needs of those children with disabilities are even more pressing.

## **SECTION 2: PROTECTING CHILDREN FROM CHILDREN – BULLYING**

The impact and effect of bullying on children has been tragically thrown into the media spotlight in 2012. Whilst bullying has always been an unfortunate aspect of our society, the growth of “Cyber-bullying” has almost overnight created a readily accessible forum for bullies to target children with little or no regulation or sanction. The Irish legal system has been somewhat taken unawares as to the manner and means through which children have fallen victim to cyber-bullying. Whilst there are some legislative provisions in being that might be interpreted in such a manner as to tackle this growing problem, a focused response is required. However, in order for a system of legal recourse to be effective victims of such bullying need to be able to feel that they can come forward and express their concerns without fear of retribution. Thus, provision also needs to be made for the protection of child victims of such behaviour, e.g. the means of retaining their anonymity when making a complaint as to such bullying.

Homophobic and transphobic bullying are among the most prevalent forms of bullying amongst children in schools in Ireland. They are recognised as being among the most difficult forms of bullying to contend with, but also give rise to some of the most stark statistics in terms of effects on victims. This is an increasing problem in our schools and one that needs to be tackled head-on now in order to curb the already worrying rise in its prevalence.

The extent of a school’s liability arising from an incident of bullying between students is a topic of some considerable debate and one that has been thrown into the fore in recent months. Guidelines have been published to assist schools in tackling the problem of bullying, but in the era of online technology and cyber-bullying a new focus must be brought to bear on this issue. Lessons can be learnt from the developments in New South Wales and Massachusetts in attempting to set a legislative basis to tackle this problem in schools.

### **SECTION 3: THE LAW ON GUARDIANSHIP OF CHILDREN**

Whilst the law on guardianship in Ireland has had a statutory basis since 1964 there have been consistent and persistent calls for its reform so as to keep apace with perceived social changes. The extension of automatic guardianship to all fathers has been advocated for since the enactment of the Guardianship of Infants Act 1964, and still remains a contentious topic. In addition to that, changes in family diversification have brought to the fore the question of extending such rights, or similar rights, to step-parents and civil partners. Advances have been made in this regard in other jurisdictions, including neighbouring jurisdictions such as England and Wales, and Scotland. Many view the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 as a missed opportunity in that regard. Recommendations have been made by the Law Reform Commission, which the Government, in keeping with its programme for government, should review and implement.

### **SECTION 4: MISCELLANEOUS DOMESTIC ISSUES**

#### Right of the Child to be Heard

The recent constitutional amendment on the rights of the child provides that provision is to be made in law to enable the views of children who are the subject of child care, custody, adoption or access proceedings, to be ascertained and for the Court to give due weight to those views having regard to the age and maturity of the child. It is not apparent at present as to how the Oireachtas will give effect to this constitutional provision. There are a number of methods through which the views of a child can be ascertained, most notably by speaking with a Judge in chambers, the procurement of an expert report, or the appointment of a guardian *ad litem*. The constitutional amendment may be interpreted and given effect to in a narrow fashion by the Oireachtas. It is to be hoped that this does not occur but rather that a broad application of the provision will be put into effect so as to fully vindicate the rights of children in this regard.

#### Relocation

Where one parent seeks to relocate from Ireland to another country with a child such parent is required to obtain the consent of any guardian and/or custodian of the child.

In circumstances where the remaining guardian/custodian refuses to provide the requisite consent to the relocation of the child an application is required to be brought before a Court. In private family law litigation relocation applications are typically the most vigorously contested of all applications. However, there is no legislative guidance as to the manner in which such applications are to be determined save for the guiding principle that the welfare of the child is paramount. Ireland is not alone in that regard, yet greater clarity would be welcome in the form of legislation seeking to regulate such applications. Whilst every case is to be considered on its own merits without pre-conceived presumptions, some guidance would provide welcome clarity and consistency to this area.

#### Maintenance for the Benefit of Children: The Court Process

A parent is under a legal duty to maintain his/her child. In circumstances where the relationship between parents breaks down the issue of child maintenance can be resolved one of two ways - by mutual agreement or Court Order. There is no set formula in Irish law as to the calculation of child maintenance. Rather each case is determined on its own facts having regard to a number of statutory factors, such as income, expenditure etc. Other jurisdictions have adopted child support models that avoid court litigation and instead establish agencies whereby maintenance is calculated by way of a prescribed formula. Such a system has the advantage of transparency and consistency, but the disadvantage of being rigid and inflexible. That said, more structure to the Irish model by way of guidelines or a formula providing a clearer indication of one's child maintenance obligations would be welcome.

#### Maintenance for the Benefit of Children: Arrears of Child Maintenance

In 2011 the Enforcement of Court Orders Act 1940 was amended in respect of the collection of arrears of child maintenance. The period of time of arrears in respect of which a maintenance creditor can seek to recover in the District Court is no longer limited to 6 months. However, ambiguity remains as to the retrospective effects of this amendment and whether any such claim is limited to the monetary jurisdiction of the District Court. In the context of any such application seeking arrears of child maintenance the maintenance debtor can seek to reduce the level of maintenance owing to his/her financial circumstances. The new legislative provisions apply to such applications in the District Court and clarity remains outstanding as to the test to

be applied, and the apparent ambiguity therein as between such applications in the District Court and Circuit Court.

### School Attendance

The need to ensure that children attend school on a consistent basis throughout their primary and post-primary education is of perpetual importance. Absence from school at early stages of a child's education has been shown to have significant effects in later years in terms of literacy and numeracy levels of competence. The National Educational Welfare Board devises and implements national strategies so as to promote and ensure school attendance amongst children. It is for the Board of Management of each school to ensure that these strategies are implemented. The ultimate sanction to be brought to bear for excessive absenteeism is to bring criminal proceedings against the parent(s). This is very much a remedy of last resort and it is thought that an intermediate step of enforcement such as Education Supervision Orders as in the United Kingdom would have a positive impact in Ireland.

### The Child Care Act 1991 and Interim Care Orders – the need for clarification

In the past year an issue has arisen within the Courts as to the period of time to which interim care orders can be extended. The practice had been that an extension could be granted for a period of 28 days without the consent of the parent(s) or person(s) in *loco parentis*. However, on closer examination of the relevant statutory provision the Courts are now taking the view that an interim care order can only be extended for a period of eight days save with the consent of the parent(s) or person(s) in *loco parentis*. The effect of this is to place further unnecessary strain on an already overburdened District Court system in Ireland. The ambiguity as to the law on this issue is unhelpful and one that needs to be addressed as soon as is possible.

### Child Protection Legislation

In recent times the Government has introduced a series of welcome legislative measures in the field of child protection, most notably the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 and the National Vetting Bureau (Children and Vulnerable Persons) Act 2012. The Children First Bill 2012 continues to meander its way through the legislative process. There are a number of issues therein that require further

examination so as to ensure that the Bill will be as effective as possible when enacted. These recent legislative developments, while welcome, have potential to cause difficulties for those on the ground in fully understanding their respective obligations and responsibilities in giving effect to the statutory requirements. The application of these provisions will have to take account of the competing rights of privacy and a good name as protected under the Constitution. Whilst the enactment of these provisions is welcome the work does not stop there, and it will be necessary to ensure that all those affected by the Acts are made fully aware of their roles.

#### Disclosure of Confidential Records concerning Children

The disclosure of confidential records concerning children is a necessary element to ensure the effective reporting of incidents of child abuse. Equally, however, there is a need to ensure that such disclosure does not cause a chilling effect on the reporting of incidents by victims of child abuse. This is a very contentious area and one that was addressed in detail in the *Fourth Report of the Special Rapporteur on Child Protection (2010)*. The contest of issues remains and the increasing frequency of requests for such disclosure is constantly bringing the matter into focus. There is a need to now address this issue at statutory level so as to fill the obvious lacuna in our law that exists at present.

### **SECTION 5: NORTH/SOUTH CROSS-BORDER COOPERATION**

The Good Friday Agreement brought with it, amongst other things, a commitment on the part of the Government in Northern Ireland and the Republic to increase cross-border cooperation so as to ensure an equivalent level of protection of human rights exists in both jurisdictions. There are a number of particular areas where such cooperation is vital to the protection of children both north and south of the border. Most notably, the exchange of information on sex offenders who may move between the North and South is vital so as to ensure effective monitoring in order to properly protect children. Child trafficking remains a problem and its detection and investigation presents a joint task for North and South in light of the relative ease with which one can cross the border. The movement of children across the border in order to avoid care or adoption proceedings is a matter that has come before the courts in the Republic in the past and brings with it significant issues. Although such children

are typically returned pursuant to the Hague Convention, the need to ensure that adequate protection measures are in place for their benefit is ever present and assurances in that regard are dependent on cross-border inter-agency cooperation.

## RECOMMENDATIONS

### SECTION 1: CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

#### 1 Children and the Universal Periodic Review Process

*Establish a clear process in which it is outlined how the recommendations arising from the Universal Periodic Review process are being implemented, including as regards children's rights.*

*Fully incorporate the United Nations Convention on the Rights of the Child into domestic law, and examine the practice of Wales and Scotland. Go beyond the practice in these jurisdictions and ensure the CRC is considered in all policy-making, as well as judicial decisions.*

*Continue taking steps to ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.*

*Establish an institutional oversight mechanism in Ireland in order to take responsibility for monitoring the implementation of treaty bodies' recommendations, including those relating to the CRC.*

*Continue the encouraging steps taken towards increasing protection for children against physical punishment. Remove the reasonable chastisement defence at common law.*

*Establish a child-centred process of age assessment, appoint an independent guardian for children seeking asylum, and ensure that asylum determination and service provision in Ireland are in conformity with standards of international best practice.*

*Introduce an administrative residency scheme for the families of Irish citizen children.*

*Continue initiatives to promote pluralism in the school system, ensuring wide availability of non-denominational and multi-denominational schools.*

*Ensure sufficient resources are provided for the education of children from disadvantaged groups, such as children from the Traveller community, children with special needs, and early school leavers.*

*Increase support for human rights education as well as promoting awareness of the United Nations Convention on the Rights of the Child.*

*Raise the age of criminal responsibility to 12 for all offences, and restore the rebuttable presumption that children under the age of 14 cannot commit an offence.*

*Ireland should incorporate both the right to health as well as the right to housing into domestic law, and place special emphasis on these rights for children.*

*Increased attention should be given to implementation of CRC Article 12, the right of children to be heard, in Ireland.*

## **2 Developments relating to the European Convention on Human Rights**

*Irish judges should be kept fully informed of the developments in the ECtHR on the matter of the Hague Convention on Child Abduction.*

*Although the overriding principle in favour of return must be given due regard in Irish courts in Hague Convention cases, Judges should be advised that, where a ‘significant harm’ defence is raised under Article 13(b), sufficient consideration should be given to the situation facing the child if a return is ordered, in line with recent ECtHR judgments.*

*Conduct a scoping exercise on the benefits of establishing a specialised family courts structure in Ireland, considering models used in other jurisdictions as well as the particular needs of the Irish context.*



*Consideration should be given to the creation of a family justice review panel similar to that commissioned in England and Wales which could review the entire family justice process, and in proposed creation of a specialised family court system in Ireland.*

*In the short term, tackle the issue of delay in family law proceedings to ensure compliance with ECHR standards.*

*On foot of **A.D. and O.D. v. United Kingdom:***

- *Ensure relevant professionals are aware of the ECHR obligation to take appropriate care in order to refrain from unnecessary interference when investigating suspected abuse. Delay must be avoided when it is ascertained that children should be returned to birth families.*
- *Ensure compliance with jurisprudence of the ECtHR regarding the right of parents and children to seek damages where the ECHR Article 8 right to family life has been violated in child care cases.*
- *Ensure the appropriate balance is struck between the obligation to refrain from interference in family life and the obligation to protect children.*

*On foot of **M.D. and Others v. Malta:***

- *Ensure that children have the representation of a guardian ad litem in all cases concerning their interests.*

### **3 Council of Europe Report on Child Sexual Abuse and Child Pornography**

*Ensure relevant professionals, such as social workers, are aware of the positive obligations of states as regards the protection of children under the ECHR.*

*Raise awareness of the Council of Europe report Child Sexual Abuse and Child Pornography in the Court's Case-Law as a teaching tool for professionals in the area of child protection.*

#### **4 Developments relating to the UN Convention on the Rights of the Child**

*Ireland should sign and ratify the Third Optional Protocol to the CRC, submit itself to both the inter-State communication mechanism and the inquiry procedure thereunder, and also make widely known the existence of this Optional Protocol.*

*Ireland should address the points made by the Immigrant Council of Ireland in its submission to the Committee on the Rights of the Child as regards migrant children.*

*Ireland should use the forthcoming Report of Day of General Discussion and its accompanying Recommendations as guidance for implementing policies in conformity with the CRC as regards migrant children.*

*Ensure compliance with, and raise awareness of, the Guiding Principles on Business and Human Rights of the UN Special Representative of the Secretary-General.*

*Ireland should issue a policy response to the UN Framework and Guiding Principles on Business and Human Rights, with particular reference to child protection.*

*Implement the recommendations outlined in the report of the Irish Centre for Human Rights, Business and Human Rights in Ireland: Context, International Standards and Recommendations.*

#### **5 Directive 2011/93/EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography**

*Steps should be taken in Ireland to ensure Irish law reflects fully the provisions of the Directive.*

*In particular:*

*A specific offence of knowingly obtaining access to child pornography via information and communication technology should be introduced.*

*An explicit offence of grooming, both online and offline, should be introduced in Ireland.*

*In drafting the Criminal Justice (Victims' Rights) Bill, appropriate provisions of Directive 2011/93/EU should be included.*

## **6 Violence Against Children with Disabilities**

*All recommendations of General Comment No. 13 of the Committee on the Rights of the Child: The Right of the Child to Freedom from all Forms of Violence should be brought into effect, in particular:*

*A national coordinating framework on violence against children should be formed in Ireland to tackle adequately the matter of violence against children.*

*Physical punishment of children should be banned in Ireland, one of the reasons being that it will remove any doubt about whether violence against children with disabilities is permissible.*

*Research should be conducted in Ireland on the level of violence perpetrated on children with disabilities, in order to determine exactly what the extent of the problem is at domestic level, and in order to design appropriate policies.*

*Ireland should ratify the UN Convention on the Rights of People with Disabilities without delay.*

*The Irish government should make explicit in the next budget how the needs and rights of children were taken into account, in particular those of children with disabilities.*

## **SECTION 2: PROTECTING CHILDREN FROM CHILDREN – BULLYING**

### **1 Cyber-bullying as a Criminal Offence**

*On review of reported cases of harassment involving social networking, email and SMS, there appear to be very few criminal prosecutions taken for this type of harassment under the Non-Fatal Offences Against the Person Act, 1997 despite the suitability of that Act. When cyber-bullying is being described as an epidemic, we need to examine why this is the case. Specifically, is there reticence to investigate complaints of cyber-bullying?*

*Responding to calls for new criminal legislation to tackle cyber-bullying, the Minister for Justice identified our existing laws against harassment as being suitable. However, the Minister has directed the Law Reform Commission to examine difficulties in prosecuting for cyber-bullying and, in particular, the necessity to show persistence in the harassment.*

*Existing laws regarding harassment can be used to incorporate cyber-bullying incidents. A review of the Post Office (Amendment) Acts should be undertaken with a view to incorporating emerging means of cyber-bullying.*

### **2 Anonymity**

*The current Irish legal position would appear to suggest that an application for anonymity in the context of cyber-bullying litigation would be unsuccessful. However, it is difficult to be definitive in respect of the legal position because Mr. Justice Peart's decision in *McKeogh v. John Doe* may well have been different if the applicant had been a child or teenager seeking to rely on the right to privacy of children, and able to invoke the general social interest in protection of children from cyber-bullying. The ideal solution would be an agreement of co-operation to be entered into between ISPs (and potentially other entities such as Facebook) and the Gardaí to provide IP addresses where complaints of cyber-bullying have been received.*

### **3 Homophobic Bullying**

*It is recommended that homophobic and transphobic bullying in schools should be considered a child protection issue. As such, schools need to address homophobic and transphobic bullying through rigorous prevention and intervention measures.*

### **4 The Role & Responsibility of Schools**

*Bullying should be addressed as a public health issue rather than one confined to the sphere of education. With home access to the internet now commonplace, and social networking proliferating and becoming increasingly advanced, the danger for school-aged adolescents is real. Schools, parents and students all have a role to play in managing these foreseeable risks.*

*The most effective means of preventing bullying may be to adopt a whole-school approach. This would encompass school policies in areas such as anti-bullying initiatives, codes of behaviour and the use of social media as an educational tool, as well as the involvement of parents. Legislation should be introduced compelling schools to have a strong disciplinary code. Moreover, learning from the observations made regarding the laws of Massachusetts, disciplinary measures should be uniform nation-wide as schools currently have too much latitude to determine how to discipline each student who is engaging in bullying.*

## **SECTION 3: THE LAW ON GUARDIANSHIP OF CHILDREN**

*Replace the terms “guardianship,” “custody” and “access” with more accurate and child-centric terminology in light of the recommendations of the Law Reform Commission and other commentators.*

*The State should extend automatic guardianship rights to unmarried fathers. In doing so the State should consider implementing the procedural reforms recommended by the Law Reform Commission in order to give effect to automatic joint parental responsibility. This approach is likely to encourage responsible parenthood by*

*fathers, and sends out a signal that all fathers are equally responsible for their children.*

*The State should give further consideration to the issue of guardianship rights of parents in the context of assisted human reproduction. In this regard it is recommended that the State consider the possibility of enabling parties to opt-out of automatic registration of parental responsibility, where both parties consent, either at the time of initiating the assisted reproduction process or in any event prior to the birth of the child.*

*The State should implement the recommendations of the Law Reform Commission in relation to the extension of special guardianship rights to step-parents and civil-partners.*

*The State should consider extending certain rights and obligations to members of the child's extended family in circumstances where that person is in loco parentis in respect of that child.*

*The State should implement the provisions of s. 11 of the Children Act 1997 in their entirety.*

*The State should enact legislation to ensure that the voice of the child is heard in all guardianship proceedings.*

## **SECTION 4: MISCELLANEOUS DOMESTIC ISSUES**

### **1 Right of the Child to be Heard**

*The legislation to be enacted by the Oireachtas should not confine itself to the limitations of the constitutional amendment and should provide for the views of the child to be ascertained in any proceedings regarding the interests of the child.*

*Such legislation should provide for a variety of mechanisms to be employed to ascertain the views of the child including (i) the option to appoint a guardian ad litem*

*in both private and public proceedings and (ii) the meeting of a Judge with the child in private law proceedings.*

*The guardian ad litem system should be placed on a statutory footing.*

*Guidelines in relation to private meetings between children and Judges should be issued.*

*Legislation or Guidelines enacted to provide for the views of the child to be ascertained should also consider the general role of the child in proceedings.*

## **2 Relocation**

*Legislation should be enacted which includes the factors that the Court should consider when determining the best interests of the child. The importance of having established criteria which can be applied when determining best interests would be particularly beneficial for applications regarding relocation.*

*Specific legislation should be enacted for relocation applications. The provisions should not differentiate between internal or international relocation and should contain the key principles as set out in the Washington Declaration.*

## **3 Maintenance for the Benefit of a Dependent Child: The Court Process**

*Legislation or statutory guidelines should be introduced containing tables indicating the amount of maintenance that a parent would be expected to pay for the benefit of a dependent child.*

#### **4 Maintenance for the Benefit of a Dependent Child: Arrears of Child Maintenance**

*Clarification should be provided in relation to whether or not there is a limit on the amount of maintenance arrears that a Judge can award when making an order against a maintenance debtor in the District Court.*

*Legislation should be enacted in respect of the Circuit Court similar to that recently enacted regarding the District Court. The legislation should specifically state the power of the Judge to reduce or cancel maintenance arrears and the factors that a Judge should take into account in determining what is “fair and reasonable”.*

*Legislation should provide for a specific application process enabling a maintenance debtor to apply to have maintenance arrears reduced or cancelled. The legislation should contain factors to which the Court would have regard when determining such an application.*

#### **5 School Attendance**

*A system of Education Supervision Orders similar to the UK should be considered.*

*The powers of the National Educational Welfare Board to intervene with parents of children under six years of age should be extended so as to facilitate earlier intervention in addressing issues of school non-attendance.*

#### **6 The Child Care Act 1991 and Interim Care Orders – the need for clarification**

*Clarification should be obtained as to whether or not the amendment pursuant to section 267 of the Children Act 2001 applies to the final paragraph of section 17(2) of the Child Care Act 1991.*



*If the amendment does not apply to the last paragraph of section 17(2) of the Child Care Act 1991, legislation should be enacted to amend the last paragraph to provide for an extended time period.*

## **7 Disclosure of Confidential Records concerning Children**

*As previously detailed in the Fourth Report of the Special Rapporteur on Child Protection (2010) the lacuna in Irish law concerning the disclosure to third parties of confidential records relating to children requires immediate attention. The difficulties in this area persist. The frequency of requests for such information and the particularly sensitive issues and rights that have to be considered and balanced require careful thought. The approach taken in Canada and the experience in other jurisdictions offers a ready-made template to be adopted in Ireland.*

## **8 The Children First Bill**

*The Children First Bill is to be welcomed in that it reflects a commitment by Ireland to comply with its international child protection obligations. However, greater clarity ought to be achieved in relation to some of the proposed provisions so as to ensure that those affected by the provisions of the Bill fully understand their obligations and responsibilities.*

# **SECTION 1:**

## **CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW**

### **1.1 Introduction**

A key feature of the role of the Special Rapporteur on Child Protection is to monitor international developments in respect of child protection so as to ensure that the policies and principles applied in Ireland meet, and surpass, international best practice. The Reports of the Special Rapporteur to date have highlighted such developments across a number of fields and this Report continues in a similar vein. Any child protection strategy requires thought, planning and ingenuity. Research is key in that regard and before any policies or principles are formulated on the domestic stage an analysis of the systems employed in other jurisdictions often proves beneficial.

### **1.2 Children and the Universal Periodic Review Process**

The Universal Periodic Review (hereinafter referred to as the “UPR”) is a process through which the human rights records of all of the 192 Member States of the United Nations (hereinafter referred to as the “UN”) are reviewed once every four years. The process was created by the UN General Assembly in 2006. It is one which is driven by UN states themselves, and occurs under the auspices of the UN Human Rights Council. The UPR process provides the opportunity to outline actions which states have taken domestically to meet human rights obligations. The aim of the process is to progress human rights and to address violations in all countries. Because it takes a broad approach to the human rights examined - in that the implementation of all international instruments is under scrutiny (including the UN Convention on the Rights of the Child (hereinafter referred to as the “CRC”)) - the UPR provides a valuable opportunity to examine the implementation of important issues relating to children’s rights generally and child protection in particular.

Ireland submitted a National Report to the UN Human Rights Council in 2011 in accordance with the process.<sup>1</sup> An interdepartmental working group was established in order to prepare the report, and non-governmental organisations and other stakeholders were engaged in consultation which informed the report. The report covered issues relating to children's rights and interests in a number of areas. A number of Irish bodies and non-governmental organisations made submissions to the Human Rights Council, and, as with the National Report of Ireland, the issue of children's rights arose in those submissions. A summary of those submissions was prepared by the Office of the High Commissioner for Human Rights as an official UN document.<sup>2</sup>

A three hour interactive dialogue was held on 6 October 2011 at the UN in Geneva. Ireland was represented at the oral review by the Minister for Justice, and delegations from 49 UN member states made comments and recommendations to Ireland.<sup>3</sup> A report on this process was then compiled by the Working Group on the Universal Periodic Review and adopted by the General Assembly on 21 December 2011. Member states made 127 recommendations and Ireland accepted 62 unreservedly. Ireland undertook to examine 50 recommendations in more detail<sup>4</sup> and ultimately declined to accept 15 of those recommendations. The responses of Ireland were published as an Addendum to the Report of the Working Group on the Universal

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<sup>1</sup> *National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1*, 12<sup>th</sup> session, Human Rights Council, Working Group on the Universal Periodic Review, UN doc. A/HRC/WG.6/12/IRL/1, adopted 22 July 2011, at p. 2 (hereinafter referred to as the "National Report of Ireland").

<sup>2</sup> *Summary Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 15 (c) of the Annex to Human Rights Council Resolution 5/1*, Human Rights Council, Working Group on the Universal Periodic Review, 12<sup>th</sup> session, UN doc. A/HRC/WG.6/12/IRL/3, adopted 22 July 2011 (hereinafter referred to as the "Summary").

<sup>3</sup> The conclusions and recommendations are not necessarily a reflection of the endorsement of the Working Group as a whole, but instead reflect the position of the submitting State. See *Report of the Working Group on the Universal Periodic Review: Ireland, 19<sup>th</sup> session, Human Rights Council, Working Group on the Universal Periodic Review*, Human Rights Council, Working Group on the Universal Periodic Review, 19<sup>th</sup> session, UN doc. A/HRC/19/9, adopted 21 December 2011 (hereinafter referred to as the "Report of the Working Group"), at p.22.

<sup>4</sup> After consideration, Ireland accepted 29 recommendations of the outstanding 50, partially accepted a further 17, and did not support four. See *Report of the Working Group on the Universal Periodic Review: Ireland, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, 19<sup>th</sup> session, Human Rights Council, Working Group on the Universal Periodic Review, UN doc. A/HRC/19/9/Add.1, adopted 6 March 2012 (hereinafter referred to as the "Addendum").

Periodic Review, and were adopted by the UN General Assembly on March 15th 2012. The various children's rights themes as discussed in the various documents will be considered in this section.

### **1.2.1 Constitution of Ireland**

The issue of children and the Constitution of Ireland was one which was frequently raised in the course of the UPR process. The National Report of Ireland states that part of the review of the Constitution was to examine improvements which could be made as regards children's rights.<sup>5</sup> As well as sporadic references to children's rights throughout the National Report of Ireland, the report also contains a separate section entitled "Rights of the Child" which spans approximately two pages.<sup>6</sup> Child Protection and Education comprise much of the section, but there is also brief reference to the intention to hold a referendum on children's rights.<sup>7</sup>

The Ombudsman for Children's Office was amongst those making submissions to the Human Rights Council under the UPR process. The Office welcomed publication of the wording for the proposed amendment to include an explicit reference to children's rights in the Constitution and recommended that the referendum proceed at the earliest opportunity.<sup>8</sup>

The Report of the Working Group acknowledged the proposed action in Ireland on the Constitution noting that, "[a] referendum dealing with the rights of children will be held early in the New Year."<sup>9</sup> During the questioning process, it was clear that states were aware of the constitutional referendum and considered it to be important. In the Report of the Working Group, Australia recommended that Ireland "[i]mplement its commitment to holding a constitutional referendum on children's

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<sup>5</sup> National Report of Ireland, at p. 3.

<sup>6</sup> National Report of Ireland, at pp.16-18.

<sup>7</sup> National Report of Ireland.

<sup>8</sup> See Summary, at p. 2.

<sup>9</sup> Report of the Working Group, at p.5.

rights with a view to incorporating those rights into the Irish Constitution”.<sup>10</sup> Greece inquired about the nature of the changes that the referendum would bring for children’s rights.<sup>11</sup> It was explained by the Irish delegation that the work of the Constitutional Convention “was expected to include a review of the provisions in relation to the role of women and the family.”<sup>12</sup>

It was stated in the Report of the Working Group that Ireland agreed to Cambodia’s recommendation that Ireland:

“Ensure the comprehensive and effective incorporation of children’s rights into Ireland’s legal framework in line with the United Nations Convention on the Rights of the Child by incorporating children’s rights into the Constitution.”<sup>13</sup>

Ireland’s response was that it accepted this recommendation, referencing the intention to publish an Amendment to the Constitution Bill,<sup>14</sup> with a view to holding a referendum on explicit inclusion of children’s rights in the Constitution. The Irish delegation also pointed to the appointment of a senior cabinet Minister holding responsibility for Children and Youth Affairs as an illustration of the commitment of the Government to protection of children’s rights.<sup>15</sup>

Sweden recommended that Ireland urgently take measures to ensure that the CRC is implemented and incorporated fully at domestic level.<sup>16</sup> Ireland’s response was that it accepted this recommendation, stating that:

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<sup>10</sup> Report of the Working Group, at p.15.

<sup>11</sup> Report of the Working Group, at p.8.

<sup>12</sup> Report of the Working Group, at p.11.

<sup>13</sup> Report of the Working Group, at p.18.

<sup>14</sup> This was ultimately published in September 2012.

<sup>15</sup> Addendum, at p.3.

<sup>16</sup> Portugal and Indonesia also recommended that Ireland ensure comprehensive incorporation of children’s rights into domestic law in line with the CRC. Report of the Working Group, at p.15.

“While the CRC has not been formally incorporated into Irish law, both the spirit and aims of the Convention are significantly reflected in Irish public policy and Irish law is in conformity with the Convention. The Convention is reflected in key legislative and policy developments in recent years relating to the protection of children.”<sup>17</sup>

The Netherlands recommended that Ireland consider alternative legislative measures which would progress the rights of children in the short term, for example permitting the Ombudsman’s remit to extend to asylum-seeking children and children in prisons.<sup>18</sup> Ireland’s response was that it partially accepted this recommendation, and that “[a] number of measures are currently being implemented to enhance the position and protection of children in Irish society.”<sup>19</sup>

Peru recommended that Ireland strengthen the legal framework in place for the protection of children’s rights as well as those of other vulnerable groups such as the elderly, people with disabilities, women, and those from the travelling community.<sup>20</sup> Ireland’s stated that it *partially* accepted this recommendation, and that the Government is committed to protecting the most vulnerable groups in society. The Irish delegation also stated that Ireland has a robust framework for protection of these groups.<sup>21</sup>

### **1.2.2 Other Instruments**

The National Report of Ireland also noted that Ireland had ratified the CRC and that Ireland had an Office of the Ombudsman for Children.<sup>22</sup> The submission of the Irish Human Rights Commission recommended that Ireland ratify a number of international human rights instruments, including the Optional Protocol to the

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<sup>17</sup> Addendum, at p.3.

<sup>18</sup> Report of the Working Group, at p.18.

<sup>19</sup> Addendum, at p.3.

<sup>20</sup> Report of the Working Group, at p.18.

<sup>21</sup> Addendum, at p.4.

<sup>22</sup> National Report of Ireland, at p.9.

Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.<sup>23</sup> It was recommended in the Report of the Working Group by six different states that Ireland consider the ratification of the Optional Protocol as soon as possible.<sup>24</sup> In the Report it was stated by Ireland that legislation to enable ratification of the Optional Protocol on the Sale of Children is at “an advanced stage of preparation.”<sup>25</sup>

There were a number of general assertions regarding international instruments which relate to children’s rights as well as the rights of adults. A joint submission by various Non-Governmental Organisations (hereinafter referred to as “NGOs”) recommended that an institutional oversight mechanism should be put in place in Ireland in order to take responsibility for monitoring the implementation of treaty bodies’ recommendations.<sup>26</sup> The recommendation was made by Costa Rica in the Working Group Report that Ireland continue with ratification of pending international human rights instruments. Ireland accepted this, stating that:

“Ireland has ratified the core UN human rights treaties and is committed to continuing the process of accession to or ratification of the pending main international human rights instruments. It is important to note that Ireland does not become party to treaties until it is first in a position to comply with the obligations imposed by the treaty in question, including amending domestic law as necessary.”<sup>27</sup>

### **1.2.3 Child Protection**

Matters of child protection featured strongly in the UPR process. The Office of the Ombudsman for Children stated that the systematic abuse of children in Ireland’s residential institutions over many decades was chronicled in the report of the

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<sup>23</sup> Summary, at p.2.

<sup>24</sup> Report of the Working Group, at p.14.

<sup>25</sup> Report of the Working Group, at p.5.

<sup>26</sup> Summary, at p.4.

<sup>27</sup> Addendum, at p.2.

Commission to Inquire into Child Abuse in 2009. The Office also opined that Ireland should outline proposals regarding implementation of the Commission's recommendations, including relevant timelines. The National Report of Ireland made reference to the fact that the Government had apologised to those who had experienced childhood abuse while in state care, that an Inquiry had been established and that a redress board had been making financial awards. The Report also outlined the growing awareness of clerical sexual abuse of children and noted the Commission of Investigation established alongside legal action.<sup>28</sup>

Justice for Magdalenes (hereinafter referred to as "JFM") raised the issue of girls and women placed in Magdalene Laundries "on probation and as an alternative to a prison sentence."<sup>29</sup> JFM highlighted the fact that these institutions had not been included in the report of the Commission to Inquire into Child Abuse and made a number of recommendations. These included a recommendation that Ireland should apologise for abuses perpetrated in the Laundries and that Ireland should establish a redress scheme specifically for those who worked in the Laundries.<sup>30</sup> The National Report of Ireland also noted that a committee had been set up to establish details of the interaction between the State and the Magdalene Laundries.<sup>31</sup>

The rights of children in care were referred to in the submissions of various bodies and NGOs. The Office of the Ombudsman for Children stated that children in care should have access to appropriate supports. Edmund Rice International recommended that Ireland introduce statutory provisions to ensure young people leaving the care system have appropriate aftercare services.<sup>32</sup>

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<sup>28</sup> National Report of Ireland, at p.17.

<sup>29</sup> See *2011 Report of the Special Rapporteur on Child Protection* for extensive consideration of the rights of those who worked in Magdalene Laundries.

<sup>30</sup> Summary, at p.5.

<sup>31</sup> National Report of Ireland at p.12. The matter of Magdalene Laundries was considered in last year's Rapporteur report, *2011 Report of the Special Rapporteur on Child Protection*.

<sup>32</sup> Summary, at p.6.



The Office of the Ombudsman for Children stated that Ireland should implement the national child protection guidelines consistently.<sup>33</sup> It was outlined in the Report of the Working Group that the Government of Ireland had published a Commission of Investigation report into the Catholic Diocese of Cloyne and had decided to take various measures in line with that report. It was also noted that legislation, which would provide a statutory basis for vetting those working and seeking to work with children, was at an advanced stage.<sup>34</sup> The legislation would place a statutory obligation on organisations working with children to protect those children while in their care.<sup>35</sup>

The Irish delegation also emphasised that the Department of Children and Youth Affairs had been established and that the Minister of that Department would oversee implementation, in each government department and sector, of a framework which emphasises inspection and implementation of relevant guidelines.<sup>36</sup>

It was recommended by Thailand that Ireland institute a statutory inquiry and compensation scheme which would assist female victims, and child victims, of violence.<sup>37</sup> Ireland accepted this recommendation, stating that:

“The Government has apologised to those who had been victims of childhood abuse while in institutional care. A Commission to Inquire into Child Abuse was established to hear the accounts of those involved and to investigate the abuse of children in institutions. A redress board was established to make financial awards to assist in the recovery of those involved.”<sup>38</sup>

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<sup>33</sup> Summary, at p.5.

<sup>34</sup> The report referenced the Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill and a National Vetting Bureau Bill: Report of the Working Group, at p.5. Both Bills have now been enacted and are discussed in Section 4.7 of this Report.

<sup>35</sup> See *Fifth Report of the Special Rapporteur on Child Protection (2011)*, section 1.6.2, for extensive consideration of this issue.

<sup>36</sup> Report of the Working Group, at p.5.

<sup>37</sup> Report of the Working Group, at p.20.

<sup>38</sup> Addendum, at p.8.

### 1.2.4 Physical Punishment

Another point which arose a number of times during the UPR process was the physical punishment of children. The Office of the Ombudsman for Children emphasised in its report that all forms of corporal punishment were not yet prohibited in Ireland, and stated that the reasonable chastisement defence as regards disciplining children, which exists at common law, should be removed.<sup>39</sup>

Uruguay noted that corporal punishment is not punishable by law, though this is being reviewed.<sup>40</sup> It was stated in the Report of the Working Group that Ireland agreed to Uruguay's recommendation to:

“Promote forms of discrimination and non-violent discipline as an alternative to corporal punishment, taking into consideration general comment No. 8 (2006) of the Committee on the Rights of the Child on the protection of children from corporal punishment and other cruel or degrading forms of punishment.”<sup>41</sup>

Uruguay also recommended that Ireland explicitly prohibit all corporal punishment in the family, and continue in efforts to develop awareness-raising campaigns and education for this purpose. Ireland partially accepted this recommendation, stating:

“This matter is under continuous review. A proposal to either prohibit the defence of reasonable chastisement or to further circumscribe the definitions of what constitutes reasonable chastisement would require careful consideration. Details of any possible future significant developments in this area will be communicated to the UN CRC.”<sup>42</sup>

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<sup>39</sup> Summary, at p.5.

<sup>40</sup> Report of the Working Group, at p.10.

<sup>41</sup> Report of the Working Group, at p.20.

<sup>42</sup> Addendum, at p.8.

The Minister for Children and Youth Affairs is currently considering reform of the law. However she stated in December 2011 that it is not intended that any immediate proposals will be brought forward.<sup>43</sup> The banning of physical punishment of children was recommended in the *Fifth Report of the Rapporteur on Child Protection (2011)*.

### 1.2.5 Immigration and Children

The position of the rights and welfare of separated and unaccompanied minors seeking asylum in Ireland was raised by many of the bodies and non-governmental organisations submitting reports under the UPR. The Office of the Ombudsman for Children noted that much progress had been made in the area of care for this group of children. However the Office stated that Ireland should have a child-centred process of age assessment, that an independent guardian should always be appointed for such children, and that asylum determination and service provision in Ireland should be in conformity with standards of international best practice.<sup>44</sup> In response to a recent judgment of the Court of Justice of the EU,<sup>45</sup> the Irish Human Rights Commission recommended that Ireland introduce for the families of Irish citizen children an administrative residency scheme.<sup>46</sup>

Uruguay acknowledged the efforts made by Ireland to protect the rights of children seeking asylum, but criticised “the fact that laws do not offer protection according to the guidelines developed by UNHCR.”<sup>47</sup> The Report of the Working Group included a recommendation by Uruguay, which Ireland accepted, that laws should be enacted ensuring protection of the rights and welfare of separated and unaccompanied minors seeking asylum, in line with international law standards.<sup>48</sup> However, the

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<sup>43</sup> Paul Cullen, ‘Ban on Parents Smacking Children Considered’ *The Irish Times*, 28 December 2011.

<sup>44</sup> Summary, at p.11.

<sup>45</sup> In *Zambrano v. Office National de L’Emploi* (Case C-34/09, judgment of 8 March 2011), the CJEU established that non-EU parents of dependent EU citizen children are permitted to live and work in the EU country of which the child is a citizen. The case is covered in the *Fifth Report of the Special Rapporteur on Child Protection (2011)*, section 1.2.

<sup>46</sup> Summary, at p.6.

<sup>47</sup> Report of the Working Group, at p.10.

<sup>48</sup> Report of the Working Group, at p.15.

recommendation, again by Uruguay, that Ireland adopt immediate measures to ensure that such children have a guardian *ad litem* (a professional to represent the rights and interests of children), independently of whether an application has been submitted,<sup>49</sup> was not accepted. In the Addendum, it is reported that Ireland did not agree to this measure, stating that “[a]rrangements are in place to meet the needs of unaccompanied minor asylum seekers relating to accommodation, medical and social needs, as well as their application for refugee status.”<sup>50</sup>

### **1.2.6 Education**

As regards education, the National Report of Ireland outlined details of spending in this area, and went on to outline the prevalence of Catholic clergy as ‘patrons’ of primary schools, as well as the Forum which has been established to “ensure that the rights of parents and their children are respected” and to examine the role of religion in primary schools.<sup>51</sup> Education was a particularly strong focus of the UPR submissions of various bodies and NGOs.

The position of religion in Irish schools featured prominently in the process. A joint submission by various NGOs “stated that the provision of education in Ireland was intricately connected to the majority Christian religion, particularly the Catholic faith and that doctrinal religious instruction was taught in schools.”<sup>52</sup> It was recommended that a national network of schools should be provided in Ireland so as to guarantee equality of access to children regardless of religious background.<sup>53</sup> The Irish Human Rights Commission recommended that steps should be taken so that teachers from non-faith or minority religious backgrounds are not deterred from teaching in Ireland.<sup>54</sup>

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<sup>49</sup> Report of the Working Group, at p.19.

<sup>50</sup> Addendum, at p.5.

<sup>51</sup> At p. 15.

<sup>52</sup> Summary, at p.9.

<sup>53</sup> Summary, at p.9.

<sup>54</sup> Summary, at p.9.

There was significant attention given to this matter by the states involved in Ireland's UPR process. It was recommended by Malaysia that Ireland "[a]ccelerate efforts in establishing a national network of schools that guarantee equality of access to children irrespective of their religious, cultural or social background."<sup>55</sup> Ireland accepted this point, stating that a number of initiatives were already in place to promote pluralism in the school system and to ensure that the needs of children of all belief backgrounds are met.<sup>56</sup>

Turkey noted that the education system in Ireland was dominated by the Catholic Church,<sup>57</sup> and recommended that Ireland encourage diversity of faiths and beliefs in the education system.<sup>58</sup> It was also recommended by Egypt that Ireland "[e]liminate religious discrimination in access to education."<sup>59</sup> Ireland did not accept this point, referring to a growing school sector in Ireland which caters for pupils without denominational involvement in governance. Ireland also stated that the existing system of school admissions in Ireland is currently under review, including issues of access. Finally it was pointed out that religious groups can establish their own schools in order to cater for members of a particular faith.<sup>60</sup> The Report of the Working Group also included the recommendation by Iran and Hungary that Ireland ratify the UN Educational, Scientific and Cultural Organization Convention against Discrimination in Education (1960).<sup>61</sup> This was not accepted by Ireland, and the Addendum contained the statement that "[t]here are no immediate plans for Ireland to ratify the Convention. Ireland is fully committed to the principles of equality of educational opportunity contained in the Convention."<sup>62</sup>

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<sup>55</sup> Report of the Working Group, at p.19.

<sup>56</sup> Addendum, at p.6.

<sup>57</sup> Report of the Working Group, at p.8.

<sup>58</sup> Report of the Working Group, at p.21.

<sup>59</sup> Report of the Working Group, at p.20.

<sup>60</sup> Addendum, at p.9.

<sup>61</sup> Report of the Working Group, at p.18.

<sup>62</sup> Addendum, at p.3.

Areas in education where resources are argued to be lacking were considered in detail by submitting bodies and NGOs. Pavee Point Travellers' Centre stated that there had been draconian cuts to Traveller education services, in spite of the fact that Traveller children are disadvantaged in Ireland compared to children of the general population. The issue of access to support for children with special needs was also raised, and it was stated by the Office of the Ombudsman for Children that Ireland should outline what steps would be taken to implement the Education for Persons with Special Educational Needs Act 2004. It was also submitted that there was insufficient clarity in Ireland on how alternative educational settings for early school leavers would function, nor were there measures in place for their official regulation.<sup>63</sup>

Other issues relating to education were also raised by the states involved in Ireland's UPR process. The Report of the Working Group included the recommendation from Moldova that Ireland continue its support for human rights education in order to enhance respect for human rights, which Ireland supported.<sup>64</sup> Ireland also supported Mexico's recommendation that Ireland ensure availability of contraceptive services, including through education.<sup>65</sup>

### **1.2.7 Children in Prison and Detention**

The Office of the Ombudsman for Children stated that progress had been made to date in diverting children away from the criminal justice system, and that this progress should continue.

The Office further stated that the minimum age of criminal responsibility, which is set at 12 save for serious offences (in which case it is set at 10),<sup>66</sup> should be raised to 12 for all offences. The Office also submitted that Ireland should restore the rebuttable presumption that children under the age of 14 cannot commit an offence.<sup>67</sup> In the

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<sup>63</sup> Summary, at p.9.

<sup>64</sup> Report of the Working Group, at p.15.

<sup>65</sup> Report of the Working Group, at p.17.

<sup>66</sup> Criminal Justice Act 2006, section 129.

<sup>67</sup> Summary, at p.5.

Report of the Working Group, Timor-Leste noted that the age of criminal responsibility was 10 years for certain serious crimes,<sup>68</sup> and recommended that Ireland consider reviewing this.<sup>69</sup> Ireland did not support this recommendation.<sup>70</sup>

### **1.2.8 Other Issues**

There were a number of other issues raised during the UPR process which related to children's welfare and rights. The National Report of Ireland makes reference to the establishment of the Department of Children and Youth Affairs to lead service delivery for children.<sup>71</sup> The Report of the Working Group also reflected this and it is stated that:

“The Government's concern about the welfare of the most vulnerable in society, children, had led to a commitment to reorgani[s]e the business of Government so as to create a separate government department with sole responsibility for children and young people.”<sup>72</sup>

In the Report of the Working Group, Sweden welcomed the establishment of this separate government ministry dedicated to children and youth affairs in particular. Sweden expressed the hope that this would assist in closing reported gaps in the protection of children's rights.<sup>73</sup>

Positively the National Report of Ireland emphasises that the Department is committed to participation in line with Article 12 of the CRC. Portugal requested further information on the implementation of that CRC provision.<sup>74</sup>

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<sup>68</sup> Report of the Working Group, at p.10.

<sup>69</sup> Report of the Working Group, at p.18.

<sup>70</sup> Report of the Working Group, at p.21

<sup>71</sup> National Report of Ireland, at p.16.

<sup>72</sup> Report of the Working Group, at p.4.

<sup>73</sup> Report of the Working Group, at p.11.

<sup>74</sup> Report of the Working Group, at p.9.

It was outlined in the National Report of Ireland that the Child Trafficking and Pornography Act 1998 created the offence of trafficking children for the purpose of sexual exploitation, as well as various offences relating to possessing or involvement with child pornography.<sup>75</sup> The Criminal Law (Human Trafficking) Act 2008 created the offence of trafficking children for the purpose of labour exploitation. The Adoption Act 2010 was briefly referenced in the National Report of Ireland as strengthening the regulatory framework around adoption.<sup>76</sup> The National Report of Ireland also noted the intention to move responsibility for child protection from the Health Service Executive to a dedicated body.<sup>77</sup>

As outlined above, there were a number of general issues raised relating to the rights of adults as well as children. One of these was access to health, e.g. the fact that there is no “right to health” enshrined in Irish law as such. The Office of the Ombudsman for Children stated that the State needed to address regional disparities in health service provision.<sup>78</sup> The impact of problems relating to housing of children was also raised. The Cork Social Housing Forum submitted that a core objective of the National Social Partnership Agreement, *Towards 2016*, was to enable every household to have an affordable, good quality dwelling. The Forum outlined that there is a social housing shortfall in Ireland, and that this has implications for human rights, particularly for households with children.<sup>79</sup> The Office of the Ombudsman for Children also reported that youth homelessness and access to relevant crisis services was a significant problem in Ireland. The Office further stated that targets should be set in order to tackle this problem.<sup>80</sup>

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<sup>75</sup> National Report of Ireland, at p.11.

<sup>76</sup> National Report of Ireland, at p.14.

<sup>77</sup> National Report of Ireland, at p.16.

<sup>78</sup> Summary, at p.8.

<sup>79</sup> Summary, at p.9.

<sup>80</sup> Summary, at p.5.



Specific reference was also made to children and mental health.<sup>81</sup> A number of organisations, including Amnesty International, reported that children were still being admitted to adult psychiatric units. The Office of the Ombudsman for Children submitted that Ireland should improve efforts to provide for children's mental health needs by implementing the recommendations contained in *A Vision for Change*, a document which outlines a broad model of service provision for Ireland as regards mental health.<sup>82</sup>

Portugal recommended that Ireland consider incorporating into law the right to health as well as the right to housing.<sup>83</sup> Ireland partially accepted this recommendation, reiterating that the Government's housing policy aims to ensure all households have access to housing of good quality. As regards the right to health, Ireland stated:

“The Government is embarking on a major reform programme for the health system, the aim of which is to deliver a single-tier health service that will ensure equal access to care based on need, not income. This will be achieved through the introduction of universal health insurance.”<sup>84</sup>

### **1.2.9 Conclusions on Children and the Universal Periodic Review Process**

The UPR clearly provided a valuable opportunity for issues relating to children's rights and interests to be examined alongside general human rights issues in Ireland. This mainstreams children's rights, and arguably gives CRC standards greater legitimacy as children's rights take centre stage in the UN arena. However it also means that, as children's issues are vying for attention together with broader issues, only the surface of children's rights is skimmed in the UPR process. The obvious issues such as children in care and education receive the greatest attention. This is an

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<sup>81</sup> An issue covered in the *Fourth and Fifth Reports of the Special Rapporteur on Child Protection (2010 and 2011)*.

<sup>82</sup> Summary, at p.8.

<sup>83</sup> Report of the Working Group, at p.18.

<sup>84</sup> Addendum, p.2.

aspect of the UPR process to which the Children's Rights International Network has drawn attention.<sup>85</sup>

It is very positive that Ireland had the opportunity to demonstrate commitment to children's rights through the constitutional amendment, and the fact that there is an intention to review the law regarding physical punishment. It is also positive that Ireland has an Ombudsman for Children's Office which provided a children's rights-based approach in a broad manner while other states and organisations did not. The Ombudsman for Children's Office stated in its submission "that public bodies should carry out child impact analyses and consider Ireland's human rights obligations when framing policy or delivering services to children."<sup>86</sup> This most likely contributed to the recommendations by some states that the CRC should be fully incorporated at domestic level, a recommendation which was also made in the *Fifth Report of the Rapporteur on Child Protection (2011)*.

The nuances of the constitutional referendum were also raised by the Ombudsman. While the Office emphasised that they welcomed a referendum, the Ombudsman stated that the amendment must include the general principles of the CRC.<sup>87</sup> This was a highly important observation – the new amendment does not make express reference to many of the general principles of the CRC – for example, the right to freedom from discrimination and the right to life, survival and development. This matter needs to be pursued in Ireland, and the possibility includes the introduction of a 'measure' of the likes of that adopted in Wales and proposed in Scotland.<sup>88</sup> Furthermore, although reference was made by Ireland during the UPR process to Article 12, the right of children to be heard, including in proceedings affecting them, there is a risk of tokenism here. Although the amendment to the Constitution includes reference to the right of children to be heard in proceedings, the broader aspect of

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<sup>85</sup> Children's Rights International Network, *Universal Periodic Review: Information and Advocacy Opportunities* (Children's Rights International Network, 2008).

<sup>86</sup> Summary, at p.3.

<sup>87</sup> Ombudsman for Children's Office, *Submission for the 12th Session of the Working Group on Universal Periodic Review* (Ombudsman for Children's Office, 2011), at p. 3.

<sup>88</sup> See *Fifth Report of the Special Rapporteur on Child Protection (2011)*, section 2, which outlines the measures Wales and Scotland have taken.

children's participation in policy-making is not explicit, and it is unclear in what proceedings children will be heard and how. Furthermore, the fact that children have very little access to justice in Ireland was not made clear during the UPR process.

The response to Sweden's recommendation that Ireland take urgent measures to ensure that the CRC is fully implemented and incorporated was that "both the spirit and aims of the Convention are significantly reflected in Irish public policy and Irish law is in conformity with the Convention".<sup>89</sup> The CRC is not considered as a matter of course in either legal decision-making or policy making concerning children. Ireland has not taken steps, for example, to include a provision such as that adopted in Wales to ensure that this is done.

The response by Ireland to the Netherlands' recommendation that Ireland consider alternative legislative measures which would progress the rights of children in the short term, for example permitting the Ombudsman's remit to extend to asylum-seeking children,<sup>90</sup> was nuanced. The need to extend the Ombudsman's remit in this regard has long been recommended.

Below is a list of recommendations relating to child protection and children's rights in light of the UPR process. It is not necessarily an exhaustive list, but represents the main issues to emerge which are relevant to children. Some of these recommendations have already been made in previous reports of the Special Rapporteur on Child Protection, but it is useful to revisit them here since they arose in the course of the UPR.

#### **1.2.10 Recommendations**

*Establish a clear process in which it is outlined how the recommendations arising from the Universal Periodic Review process are being implemented, including as regards children's rights.*

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<sup>89</sup> Addendum, at p.3.

<sup>90</sup> Report of the Working Group, at p.18.

*Fully incorporate the United Nations Convention on the Rights of the Child into domestic law, and examine the practice of Wales and Scotland. Go beyond the practice in these jurisdictions and ensure the CRC is considered in all policy-making, as well as judicial decisions.*

*Continue taking steps to ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.*

*Establish an institutional oversight mechanism in Ireland in order to take responsibility for monitoring the implementation of treaty bodies' recommendations, including those relating to the CRC.*

*Continue the encouraging steps taken towards increasing protection for children against physical punishment. Remove the reasonable chastisement defence at common law.*

*Establish a child-centred process of age assessment, appoint an independent guardian for children seeking asylum, and ensure that asylum determination and service provision in Ireland are in conformity with standards of international best practice.*

*Introduce an administrative residency scheme for the families of Irish citizen children.*

*Continue initiatives to promote pluralism in the school system, ensuring wide availability of non-denominational and multi-denominational schools.*

*Ensure sufficient resources are provided for the education of children from disadvantaged groups, such as children from the Traveller community, children with special needs, and early school leavers.*

*Increase support for human rights education as well as promoting awareness of the United Nations Convention on the Rights of the Child.*

*Raise the age of criminal responsibility to 12 for all offences, and restore the rebuttable presumption that children under the age of 14 cannot commit an offence.*

*Ireland should incorporate both the right to health as well as the right to housing into domestic law, and place special emphasis on these rights for children.*

*Increased attention should be given to implementation of CRC Article 12, the right of children to be heard, in Ireland.*

### **1.3 The Court of Justice of the European Union – *Bernardi*: Child Witnesses**

The Court of Justice of the European Union (hereinafter referred to as the “CJEU”) case of *Bernardi*<sup>91</sup> concerned the procedural rules governing a special procedure – the *incidente probatorio* – which aims to account for the vulnerability of witnesses at the investigation stage of certain cases. The CJEU was requested by an Italian court to determine whether conditions imposed on access to the procedure infringed Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, which specifies *inter alia* that states must ensure that vulnerable victims benefit from “specific treatment best suited to their circumstances.”<sup>92</sup>

Mr. X was accused of sexually abusing his child Z, a minor. A preliminary investigation stage of criminal proceedings was opened before the *Giudice per le indagini preliminari* (a court of investigation). The child Z was heard on a number of occasions by expert psychologists and paediatricians during the course of the investigation. Following these measures, it was requested by the Public Prosecutor that the case be closed, and that no further action be taken. That request was opposed by the child, and the court thus ordered a hearing in the Judge’s chambers to permit the parties to give their views on the matter. The child requested, pursuant to Article

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<sup>91</sup> Case: C-507/10 *Bernardi* [2011].

<sup>92</sup> Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, Article 4(2).

394 of the Italian Code of Criminal Procedure, that she be heard as a witness under a special procedure for the taking of early evidence. Article 394 states that:

- “1. A victim may ask the Public Prosecutor to initiate an *incidente probatorio*.
2. If the Public Prosecutor refuses that request, he must issue a statement of reasons for his decision which he must notify to the victim.”

Article 398(5a) of the Italian Code of Criminal Procedure outlines that the Judge can determine where necessary the details of how evidence is heard under the *incidente probatorio*, such as the time and place. In such a case, evidence can be heard in a place outside the court, such as a special facility or at the home of the witness, where necessary.

After obtaining the agreement of the Public Prosecutor, the referring court ordered that the child be heard according to the *incidente probatorio*. The child stated at the hearing that she had experienced sexual abuse at the hands of her father. A higher court later set aside the decision of the referring court that the *incidente probatorio* should be used. The following month the Public Prosecutor requested once again that the case be closed, and again the victim opposed this. A further hearing in chambers was ordered by the referring court, and the child requested that the Public Prosecutor lodge a new request for use of the *incidente probatorio*. The Public Prosecutor did not, but again requested that the case be closed. The court engaged in preliminary investigations and questioned the compatibility of the rules of procedure applicable to minors under Article 398(5a) of the Italian Code of Criminal Procedure with Articles 2, 3 and 8 of Framework Decision 2001/220/JHA because of the fact that there is no obligation imposed by those rules on the Public Prosecutor to take any action which may be requested by a victim to permit use of the *incidente probatorio*, together with the fact that the rules do not permit the victim to appeal to court the decision of the Public Prosecutor not to make the request.

Article 2 of the Framework Decision, stipulates that states are to ensure that victims have an appropriate role in its criminal legal system and that those who are particularly vulnerable must benefit from specific treatment suited to their particular

circumstances. Article 3 of the Framework Decision provides that the possibility for victims to be heard during proceedings, as well as the possibility to supply evidence must be safeguarded. States must ensure that victims are questioned by authorities only to the extent necessary for the purpose of criminal proceedings. Article 8 of the Framework Decision provides that states must provide a level of protection for victims, including of victims' privacy if necessary. Contact between victims and offenders must be avoided and it must be ensured that victims may, "by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles."

The Judge placed a stay on proceedings and asked the CJEU for an opinion on the compatibility of the two Italian sources of law with the Framework Decision. The questions raised were:

"Must Articles 2, 3 and 8 of Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [1] be interpreted as precluding national provisions, such as Article 392(1a) of the Italian Code of Criminal Procedure, in so far as the latter does not impose an obligation on the Public Prosecutor to request an early hearing and examination of a victim who is a minor by means of the Special Inquiry procedure prior to the main proceedings, and Article 394 of the Code of Civil Procedure, which does not make it possible for that minor victim himself or herself to appeal to the courts against a negative decision by the Public Prosecutor on his or her request to be heard in accordance with the appropriate Special Inquiry procedure?"

The CJEU held in the negative for both questions. The Court stated that, though Article 2 and Article 8(4) of the Framework Decision require that states make all efforts to ensure that vulnerable victims have the benefit of a special procedure suited to their particular circumstances, it does not specify the particular means to be employed to achieve this. Therefore, the Court continued, "it must be recognised that the Framework Decision leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement the objectives

to be attained.”<sup>93</sup> While states must make provisions under the Framework Decision, victims do not have a right to the *incidente probatorio* in the investigation phase.<sup>94</sup> Because the Public Prosecutor is the body responsible for bringing prosecutions under Italian law, it is appropriate for the Public Prosecutor to decide whether to request use of the *incidente probatorio*.<sup>95</sup>

The court emphasised the need under the Framework Decision to ensure protection of fundamental rights of all involved in the case.<sup>96</sup> In the event that an accused was brought to trial, the victim has the protection of the provisions of the Italian Code of Criminal Procedure relating to special measures for vulnerable victims.<sup>97</sup> The fact that the decision of the Public Prosecutor to refuse to request use of the *incidente probatorio*<sup>98</sup> cannot be appealed to the court by the victim is not contrary to the Framework Decision<sup>99</sup> as the Framework does not guarantee to the victim the right to require that criminal proceedings be brought against the accused in order to secure a conviction. Accordingly, the judgment was as follows:

“Articles 2, 3 and 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, must be interpreted as not precluding provisions of national law, such as Articles 392(1a), 398(5a) and 394 of the Italian Code of Criminal Procedure, which, first, do not impose on the Public Prosecutor any obligation to apply to the competent court so that a victim who is particularly vulnerable may be heard and give evidence under the arrangements of the *incidente probatorio* during the investigation phase of criminal proceedings and, second, do not give to that victim the right to bring an appeal before a court against that

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<sup>93</sup> At para. 28. The court cited Case C-404/07 *Katz* [2008] ECR I-7607, paragraph 46; Case C-205/09 *Eredics and Sári* [2010] ECR I-0000, paragraphs 37 and 38; and Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-0000, paragraphs 57, 72 and 74.

<sup>94</sup> At para. 34.

<sup>95</sup> At para. 37.

<sup>96</sup> At para. 38.

<sup>97</sup> At para. 40.

<sup>98</sup> The Public Prosecutor must provide reasons as to the decision.

<sup>99</sup> At para. 41.



decision of the Public Prosecutor rejecting his or her request to be heard and to give evidence under those arrangements.”

This judgment relates to very specific issues regarding Italian law. The system whereby at the investigative stage the Public Prosecutor decides whether to request the special procedure on behalf of minors does not exist in the Irish system. The use of hearsay (i.e. indirect) evidence is provided for by the Children Act 1997, which permits its inclusion in all proceedings regarding the welfare of children, whether public or private.<sup>100</sup> It is at the discretion of the court whether to include hearsay evidence, for example video evidence.<sup>101</sup>

## **1.4 Developments relating to the European Convention on Human Rights**

### **1.4.1 The Hague Convention on Child Abduction and the Best Interests of the Child: *Šneersone and Kampanella v. Italy* and *X v. Latvia***

The aim of the Hague Convention on Civil Aspects of International Child Abduction (1980)<sup>102</sup> is to secure the prompt return of a child where that child has been wrongfully removed from one state party to the Convention to another. It is intended that the substance of the case will be heard in the state from which the child was taken. Under the Convention there exists a powerful presumption in favour of the return of the child involved, though there are a number of limited defences against this presumption, such as the argument that the child is settled in the new environment (Article 12); that the left-behind individual with custody/access has consented or has not objected to the removal (Article 13[a]); that there is a grave risk to the child (Article 13[b]); or the child objects to a return. Even if one of these defences is established, the court still has discretion to order the return of the child.

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<sup>100</sup> Section 23, Children Act 1997.

<sup>101</sup> See s.96(3) of the Children Act 1989 and the Children (Admissibility of Hearsay Evidence) Order 1993 (S.I. No. 621 of 1993); *Southern Health Board v C.H.* [1996] 1 I.R. 219; and Geoffrey Shannon, *Child Law* (Dublin: Round Hall, 2010), 2<sup>nd</sup> edn, at p.401.

<sup>102</sup> Hereinafter referred to as “the Hague Convention”.

Whilst the Hague Convention makes reference to the “interests of children” this refers to children generally and not the individual child in question; the assumption being that it is not in the interests of children to be abducted.<sup>103</sup> The merits of the best interests of an individual child are considered a matter for the courts of the state from which the child has been removed. In the *Fifth Report of the Special Rapporteur on Child Protection (2011)* it was outlined that in the case of *Neulinger and Shuruk v. Switzerland*<sup>104</sup> the Grand Chamber of the European Court of Human Rights (hereinafter referred to as the “ECtHR”) considered the matter of the best interests of the child in Hague Convention cases. The court, having considered the complex factors of the case, including the significant duration for which the child had lived in Switzerland by the time the case had reached the ECtHR, decided that to order the return of the child to Israel would be a disproportionate interference with the mother’s right to family life under Article 8 of the European Convention on Human Rights (hereinafter referred to as the “ECHR”).

The ECtHR emphasised in *Neulinger* that “an underlying principle of the Hague Convention”<sup>105</sup> was the best interests of the child, that the ECtHR has the power to review the decisions of domestic courts to ensure respect for Article 8 of the ECHR and that, when balancing competing interests, the best interests of the child is to be a primary consideration. The Court continued that under Article 8 a child’s return cannot be ordered “mechanically,”<sup>106</sup> that each child’s needs will depend on various factors, and, “[f]or that reason, those best interests must be assessed in each individual case.”<sup>107</sup>

These references to the best interest of the child in *Neulinger* were controversial, as the Hague Convention established the principle that the best interest of the child is best decided in the country from which the child has been taken. Some argued that the judgment rendered the position of the best interest decision unclear in Hague

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<sup>103</sup> See *Re M.* [2008] 1 AC 1288, at para. 42; and *A. v A. [aka Mc C.]* [2009] IEHC 460, at para. 32.

<sup>104</sup> Application no. 41615/07 2010, 6 July 2010.

<sup>105</sup> At para. 137.

<sup>106</sup> At para. 138.

<sup>107</sup> *Ibid.*

Convention cases.<sup>108</sup> In England and Wales, however, the Supreme Court held in the case of *E (Children)*<sup>109</sup> that it was not the application of the Hague Convention in *Neulinger* which would have made a forced return to Israel a breach of Article 8, but instead the length of time that the child had spent in Switzerland.<sup>110</sup> The UK Supreme Court also stated that Article 8 is already vindicated by the Hague Convention, therefore it is not necessarily the case that the ECHR ‘trumps’ the Hague Convention.

However the issue has once again arisen before the ECtHR in two separate cases. In *Šneersone and Kampanella v. Italy*<sup>111</sup> the Court applied *Neulinger* to override an Italian order to return a child abducted from Italy to Latvia. In 2006 the child’s unmarried mother had taken the child to Latvia, because, she claimed, she could not afford to live in Italy as the child’s father was failing to pay child support. Litigation was initiated in both countries, and the Latvian courts held that the child should not be returned to Italy, in accordance with the “grave risk of harm” defence.<sup>112</sup> The courts held that it was financially impossible for the mother to live in Italy and the child was suffering from psychological stress and anxiety because of the potential return to Italy, as was proven by a psychologist’s report. The Italian courts held, however, that the child should be returned. The courts held that adequate arrangements had been made for the protection of the child, including language assistance, psychological counselling for the child, and a specified house for the mother to stay during access visits from Latvia. Latvia petitioned the ECtHR on the basis that the order of the Italian courts violated the rights of the applicants to family and private life.

The ECtHR agreed with Latvia, primarily on the basis that the Italian courts had given inadequate consideration to the factors which would affect the child’s well-being. The Court, citing *Neulinger*, opined that it:

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<sup>108</sup> See e.g. Lara Walker, “The Impact of the Hague Abduction Convention on the rights of the Family in the Case-Law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of *Neulinger*” 6(3) *Journal of Private International Law* 649 (2010).

<sup>109</sup> [2011] UKSC 27.

<sup>110</sup> At para. 26.

<sup>111</sup> Application no. 14737/09, judgment of 12 July 2012.

<sup>112</sup> Article 13(b) of the Hague Convention.

“[M]ust ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin.”<sup>113</sup>

The Court stated that the child was suffering stress and anxiety because of the potential return to Italy, and that this had a significant impact on the enjoyment of family life thereby constituting an interference with family life. Although the interference was legitimate, because it was to facilitate the right to family life of father and son, it was not proportionate. The Italian courts had not considered the harm that would be caused by severing the bond between mother and child. The Latvian courts had accepted the argument of the applicant mother that she herself could not live in Italy, a country in which, she stated, she was virtually unemployable, because of the fact that she did not speak Italian. There was, therefore, a breach of Article 8 on the right to respect for private and family life.

In the case of *X v Latvia*,<sup>114</sup> the court once again had cause to hold that the approach of a domestic court in ordering the return of a child under the Hague Convention lacked detailed examination of the whole family situation, and consequently that the order in question was a disproportionate interference in breach of Article 8. The mother took the child to her native Latvia, from Australia where she and the child had lived with the child’s father, to whom she was not married. The father applied to the Australian courts to establish parental rights and to make a Hague Convention application. The Australian court held that he held shared joint parental responsibility. The mother was ordered by the Latvian courts to return the child to Australia, and when she did not the father came to Latvia and personally removed the child from her. The father was granted sole parental responsibility in Australia, and the mother

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<sup>113</sup> Para. 85.

<sup>114</sup> *X v Latvia*, Application no. 27853/09, 25 January 2012.

was granted supervised contact. The mother alleged that Latvia had breached Articles 6 and 8 by ordering the return of the child. The ECtHR held that the order had been in accordance with law and in pursuit of a legitimate aim. The approach of the Latvian court did not, however, sufficiently assess safeguards for the child's well-being, and this constituted a disproportionate interference, and consequently a breach of Article 8.

The Court cited *Neulinger* in making the point that:

“In other words – the interference cannot be regarded as having been ‘necessary’ if, *inter alia*, ... the domestic courts failed to conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin...”<sup>115</sup>

The ECtHR emphasised that it is not within the Court's remit to replace competent domestic authorities, whose task it is to examine whether the child faces a grave risk concerning exposure to psychological harm under Article 13 of the Hague Convention. However, the ECtHR asserted that it is competent to determine whether the domestic court respected Article 8 of the ECHR, when applying the Hague Convention.<sup>116</sup>

The Court noted the failure of the Latvian court to consider a psychologist's report ordered by the applicant mother after the lower court adopted its decision.<sup>117</sup> This was done in spite of the fact that the psychologist drew clear conclusions regarding the particular ties between mother and child, and stated that the risk of psychological harm for the child in the event of separation was grave. The Court noted that “[a]

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<sup>115</sup> Para. 66.

<sup>116</sup> Para. 68.

<sup>117</sup> Para. 70.

similar omission was already noted as alarming in another case recently examined by the Court”<sup>118</sup> and cited *Šneersone and Kampanella v. Italy*. The Court then outlined the link between the Hague Convention and Article 8 of the ECHR:

“Emphasising the paramount interests of the child in matters of this kind, the procedural fairness enshrined by Article 8 § 2 of the Convention provides that national courts must pay due respect to the arguable claims brought by the parties in the light of Article 13 (b) of the Hague Convention. This is to ensure that a child’s return is granted in his or her best interests and not as a purely procedural measure provided for by the Hague Convention, which is an instrument of a procedural nature and not a human rights treaty (see *Neulinger and Shuruk*, cited above, § 145, and, more recently, *Šneersone and Kampanella*, cited above, § 92).”<sup>119</sup>

The court also found fault with the fact that the assessment of the Latvian court insufficiently considered whether it would actually be possible for the mother to follow the child to Australia and maintain contact with her.<sup>120</sup> Furthermore, the ECtHR criticised the fact that the court had insufficiently considered the ability of the father to provide for the child, as well as unusual restrictions placed on the mother, for example that she not speak to the child in Latvian.<sup>121</sup> Considering these factors, the ECtHR held that there had been a violation of Article 8.

The Court, therefore, seems to be interpreting Article 8 as a provision which tempers the potentially overly-procedural nature of the Hague Convention. It appears to be placing the onus on states to carry out a deeper welfare enquiry than is usual under the grave harm defence. However, despite the criticism of some commentators that the ECtHR is riding roughshod over the overriding principle of the Hague Convention, namely the presumption in favour of return, it is clear that it is the manner in which domestic courts are approaching Article 13b which is causing problems under Article

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<sup>118</sup> Para. 71.

<sup>119</sup> Para. 72.

<sup>120</sup> Para. 73.

<sup>121</sup> Para. 77.

8 of the ECHR. The lack of regard for what the ECtHR considers important evidence as regards potential harm to the child – psychological harm, for example, and financial well-being – is resulting in violations of Article 8. Failing to examine evidence regarding such matters (as was the case in *X v Latvia*) can constitute a breach of Article 8. Therefore domestic courts are required to have regard to all the evidence regarding harm to the child in Hague Convention cases.

#### **1.4.2 Recommendations:**

*Irish judges should be kept fully informed of the developments in the ECtHR on the matter of the Hague Convention on Child Abduction.*

*Although the overriding principle in favour of return must be given due regard in Irish courts in Hague Convention cases, Judges should be advised that where a ‘significant harm’ defence is raised under Article 13(b), sufficient consideration should be given to the situation facing the child if a return is ordered, in line with recent ECtHR judgments.*

#### **1.4.3 Specialist Family Law Courts – Tackling Delay**

Ireland does not have a family courts structure *per se*. Family law cases are presently dealt with primarily by the District and Circuit Courts, with the possibility of appeal to the High Court. Outside Dublin, such cases are heard on particular days in the general Circuit and District courts. Outside Dublin, therefore, judges do not specialise in family law, but instead preside in such cases as the necessity arises. Delay is also a feature in family law, which is particularly problematic in cases concerning children, and may breach the right to a fair trial within a reasonable period of time under Article 6 of the ECHR.<sup>122</sup> This topic is discussed under the present heading of ‘Developments relating to the ECHR’ because delays faced in proceedings in Ireland

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<sup>122</sup> See e.g. Geoffrey Shannon, ‘The Internationalisation of Family Law’ 5 *Judicial Studies Institute Journal* 42, p. 88.

generally have led to a large number of decisions against Ireland by the ECtHR. There have been numerous findings against Ireland on this basis in 2012 alone.<sup>123</sup>

The Minister for Justice, Alan Shatter TD, has raised the possibility of establishing a specialised family courts structure,<sup>124</sup> as has the Chief Justice, Mrs Justice Susan Denham. Chief Justice Denham has recommended a constitutional amendment to enable the establishment of specialist superior courts, including courts which would deal with family law.<sup>125</sup> She has also noted that an appeal from the High Court is likely to take over 3 years to come before the Supreme Court at present, and pointed to the recommendation of a working group that a Court of Appeal be established to hear appeals from the High Court and thereby address this delay issue. The Court of Appeal would deal with both criminal and civil matters and leave the Supreme Court to hear constitutional matters as well as issues of exceptional importance.<sup>126</sup>

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.<sup>127</sup> 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.<sup>128</sup> 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. There are 18 judges in

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<sup>123</sup> Michael Farrell, *Justice Delayed: Decisions against Ireland at the European Court of Human Rights* (Public Interest Law Alliance, 2012).

<sup>124</sup> ‘Reforming the courts’ *The Irish Times*, 19 July 2012.

<sup>125</sup> Carol Coulter, ‘Chief Justice wants Way Paved for Specialist Courts’ *The Irish Times*, 29 June 2012.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> See further Nigel Lowe and Gillian Douglas, *Bromley’s Family Law* (Oxford University Press, 2006).



the Family Division, drawn primarily from the specialist family law Bar, who spend a large part of their judicial time hearing family law cases. They are, therefore, highly experienced in dealing with disputes in the area of family law.

The majority of private family law cases are heard by the County Courts, though the Magistrates' Courts hear a significant minority of cases involving children. There are special divisions of the County Courts which are staffed by specially trained judges. There are, for example, divorce county courts, family hearing centres (for private law cases), care centres (for public law cases concerning children), and, more recently, an adoption centre. All public law cases involving children must commence at the level of the Magistrates' Courts, where unpaid lay persons (known as 'Magistrates') sit, advised by a trained lawyer. There are special 'family proceedings' courts within this system which are staffed by Magistrates who are drawn from a 'family panel'. Those on the panel receive an induction and a basic course of training for this purpose. The High Court handles a small number of difficult or significant cases across all family law matters.

Lowe and Douglas state of the system in England and Wales that "[t]here are differences in the courts' powers due to the piecemeal accretions of jurisdiction" and that "[t]his has presented problems in efficiency and efficacy of the courts to handle family problems." Therefore, despite the benefits for family law of a linked system of family law courts, a more holistic approach would be best in Ireland.

In a report published in England and Wales in July 2012 entitled "Judicial proposals for the modernisation of family justice" one of the key recommendations made by Mr. Justice Ryder is the creation of a single Family Court. The single Family Court will be the vehicle for a significant change of culture characterised by strong judicial leadership and management and evidence-based good practice.<sup>129</sup>

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<sup>129</sup> Mr. Justice Ryder "Judicial proposals for the modernisation of family justice" Judiciary of England and Wales, July 2012. Mr. Justice Ryder was appointed to carry out this report following the final report issued by the Family Justice Review panel in November 2011. The final report had amongst other key recommendations recommended the creation of a single family court. This panel had been appointed to review the family justice system in England and Wales and was commissioned by the Ministry of Justice, the Department for Education, and the Welsh Government. The final report can be accessed from <http://www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-final-report.pdf> >. Mr. Justice Ryder's report can be accessed from [http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj\\_recommendations\\_final.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj_recommendations_final.pdf).

The single Family Court will be a network of local Family Court centres organised around care centres which will be judicially led and managed. Judges at all levels will be members of the same court, which will be lead by the President of the Family Division. The Family Court centres will provide specialist judges, magistrates and legal advisors who are able to undertake work in the full range of family matters. In addition to the creation of the single Family Court there are proposals for an effective framework for leadership and management. The effective management of judicial resources will help to reduce delay by better deployment practices which improve judicial continuity and listing.

The recommendations in the report are to resolve the current difficulties facing the family courts, in particular delays and the significant increase in the number of litigants who are self represented.

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,<sup>130</sup> and consists of a Chief Justice, a Deputy Chief Justice and other judges specialising in family law.<sup>131</sup> This comprehensive system was established in order to ensure the simple and expedient resolution of family law matters. The Federal Magistrates Court, which has a broad general jurisdiction, including administrative law and consumer protection, was given responsibility for some aspects of family law. The reason for this was the perception of a creeping formalism in the Family Court of Australia, as well as the mounting costs of litigation.<sup>132</sup> The Federal Magistrates Court generally hears less complex family law cases than those heard in the other Federal Courts.

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<sup>130</sup> There is no registry in Western Australia, which has its own family law court.

<sup>131</sup> 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).

<sup>132</sup> See e.g. Nicholson CJ, 'Review of the Family Court' 64 *LMV Institute Journal* 628 (1990) at 628-629; and Alastair Nicholson, 'Setting the Scene: Australian Family Law and the Family Court— A Perspective From the Bench' 40 (3) *Family Court Review* 279 (2002).

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. There is also a need to examine ways in which this issue is related to the problem of delay, and how to tackle that problem.

#### **1.4.4 Recommendations:**

*Conduct a scoping exercise on the benefits of establishing a specialised family courts structure in Ireland, considering models used in other jurisdictions as well as the particular needs of the Irish context.*

*Consideration should be given to the creation of a family justice review panel similar to that commissioned in England and Wales which could review the entire family justice process, and in proposed creation of a specialised family court system in Ireland.*

*In the short term, tackle the issue of delay in family law proceedings to ensure compliance with ECHR standards.*

#### **1.4.5 A.D. and O.D. v United Kingdom**

The case of *A.D. and O.D. v United Kingdom* concerned the right to private and family life and child protection issues.<sup>133</sup> The ECtHR held that the UK was in violation of Article 8 of the ECHR due to errors by a local child protection authority which involved the removal of a child from his family for an unnecessarily prolonged period of time. A breach of Article 13, the right to an effective remedy, was also found, because there was no domestic remedy available to the child's mother at the time of the incident.

The second applicant, the child, suffered fractured ribs as a baby, which injury, on investigation by authorities, was held to be sustained non-accidentally. Doctors and

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<sup>133</sup> *A.D. and O.D. v United Kingdom* [2010] ECHR 340 (16 March 2010).

other experts ruled out the possibility of brittle bone disease. An interim care order was issued, and the family was obliged to live in a “resource centre”<sup>134</sup> 150 miles from their home while investigations were conducted. The family stayed at the centre for 12 weeks, and the required risk assessment was not carried out because of a communication error. The risk assessment was carried out on the return of the family to their home, and after this the second applicant was placed in foster care. Whilst in foster care, he sustained another fracture and tests conducted after this showed indications of brittle bone disease which had not been evident previously. When it was then recommended that the applicant child be returned to his birth family, this did not happen for six weeks. The first applicant (the child’s mother) made a complaint to the local authority, and an investigation was undertaken. The applicant mother was unhappy with the outcome of the investigation and took legal proceedings alleging negligence. The case was dismissed on the basis that the child had not suffered recognisable harm and that the local authority did not owe the mother a duty of care.

The applicants argued before the ECtHR that the treatment they had received violated both Article 8 (the right to private and family life) of the ECHR, and that the fact that their domestic legal action was unsuccessful violated Article 13 (the right to an effective remedy). There was agreement between the parties that there had been an interference with family life within the meaning of Article 8, therefore it was for the ECtHR to determine whether such interference was justified. The Court held that the intervention was in conformity with UK law and had the legitimate aim of protection of a child. It went on to consider whether there were “relevant and sufficient”<sup>135</sup> reasons given to justify the intervention.

The Court emphasised that mistaken judgments by professionals and local authorities do not themselves render child care decisions incompatible with Article 8, and the reliance on the initial evidence (and the subsequent decision to investigate) did not mean that the local authorities breached ECHR rights, as the reasons for the initial interference were indeed relevant and sufficient. However subsequent failings were unnecessary and therefore breached Article 8. These failings included obliging the

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<sup>134</sup> At para. 22.

<sup>135</sup> At para. 82.

family to move far from home, failing to conduct the proposed risk assessment and the subsequent removal of the child from the birth family (which, the Court held, would most likely have been avoided had the assessment been conducted), as well as the delay in returning the child to his family when advised to do so.

The Court also found a breach of Article 13, on the basis that the applicant mother could not claim for damages as she was not owed a duty of care by the local authority. Because the local authority did have a duty of care to the second applicant and he consequently had access to legal redress, his Article 13 right was held not to have been breached.

In Ireland, the application for a care order is to be a measure of last resort and all alternative measures have to be considered before a child is removed from his or her family.<sup>136</sup> However, *AD and OD v United Kingdom* is a reminder that, although errors by the relevant authorities concerning child protection measures may not necessarily constitute a breach of Article 8, a degree of care has to be taken in order to refrain from unnecessary interference when investigating suspected abuse, and delay must be avoided when it is ascertained that children should be returned to birth families. It should also be permissible for parents to seek and obtain damages where errors have been made by the authorities.<sup>137</sup> On the other hand, the authorities must not be lax regarding their obligation to protect children. Thus, in the case of *Z and others v UK*, the UK was held to have breached Article 13 because there was no remedy for children to seek damages where the relevant authorities knew or ought to have known that the children were suffering significant harm yet did not take appropriate steps.<sup>138</sup>

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<sup>136</sup> Child Care Act 1991, s.3(3). See further Geoffrey Shannon, *Child Law* (Round Hall: Dublin, 2010, 2<sup>nd</sup> ed.), at p. 230.

<sup>137</sup> It is not clear whether the Irish courts would take the same approach as the British court did in *A.D. and O.D.* as to the existence of a duty of care. It may be noted that section 3(1) of the European Convention on Human Rights Act 2003 imposes a duty on organs of the State (as defined) in the Act to perform their functions in a manner compatible with the ECHR, although this is subject to any contrary statutory provision or rule of law. Where there has been a breach of section 3(1), section 3(2) provides that a court may award such damages as it considers appropriate “if no other remedy in damages is available”.

<sup>138</sup> Application no. 29392/95, judgment 10 May 2001.

Therefore the duty to protect children has to be weighed against the obligation to refrain from disproportionate or unnecessary interference with family life.

#### **1.4.6 Recommendations:**

*Ensure relevant professionals are aware of the ECHR obligation to ensure a degree of care has to be taken in order to refrain from unnecessary interference when investigating suspected abuse, and delay must be avoided when it is ascertained that children should be returned to birth families.*

*Ensure compliance with jurisprudence of the ECtHR regarding the right of parents and children to seek damages where the ECHR Article 8 right to family life has been violated in child care cases.*

*Ensure the appropriate balance is struck between the obligation to refrain from interference in family life and the obligation to protect children.*

#### **1.4.7 O’Keeffe v Ireland**

A case concerning child protection which is of particular importance to Ireland is that of *O’Keeffe v Ireland*,<sup>139</sup> an admissibility case concerning the responsibility of the Irish state for child sexual abuse suffered in a state school. The applicant, Louise O’Keeffe, had claimed damages for personal injuries from the Department of Education over sexual abuse by a teacher at her school in Cork in the 1970s when she was aged eight years. Her claim against the State was threefold:

“(a) negligence by the State arising out of the failure of the State Defendants in relation to the recognition, examination and supervision of the school and in failing to put in place appropriate measures and procedures to protect from, and to cease, the systematic abuse by LH since 1962; (b) vicarious liability of the State Defendants for the acts of LH since, *inter alia*, the true relationship between them and the State was one of employment; and (c) liability given the

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<sup>139</sup> Application no. 35810/09, judgment 26 June 2012.

constitutional responsibility of the State Defendants in the provision of primary education pursuant to Article 42 of the Constitution and the measures put in place to discharge that responsibility.”<sup>140</sup>

The Supreme Court ruled in 2009, however, that the State was not liable for the abuse on the basis that it was the Catholic Church which was responsible for the appointment of teachers, not the State. The applicant argued before the ECtHR that the State failed to protect her from abuse by her teacher and that there was no remedy in place whereby the State could be held accountable. She argued this violated Article 3, the right to be free from torture and inhuman and degrading treatment (alone and taken together with Article 13, the right to a remedy), Article 8, the right to family life, and Article 2 of Protocol No. 1, the right to education. She also argued that there had been a violation of the right to freedom from discrimination taken together with Article 8 and Article 2 of Protocol No. 1. She further argued that Article 6, the right to a fair trial and Article 13, the right to a remedy, had been violated, due to the length of time which the civil proceedings took.<sup>141</sup>

The Government argued that the applicant had failed to exhaust fully all domestic remedies against the State and other bodies, in particular because she should have, it argued, sued the relevant bishop. The Government further argued that she was no longer a victim of a violation of her ECHR rights because damages were awarded in her favour against the teacher and by the Criminal Injuries Compensation Tribunal. However the applicant argued that the ECHR requires a remedy in order to establish the responsibility of the State under which damages can be awarded.

The ECtHR noted “that the applicant’s essential grievances concerned the State’s responsibility for the abuse suffered by her as well as the availability of a civil remedy against the State in that respect.”<sup>142</sup> It ruled that the applicant had decided to sue the State, that this was a reasonable route to have taken, and she was therefore not required to sue the relevant bishop. It was not the case, therefore, that the applicant

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<sup>140</sup> At para. 10.

<sup>141</sup> At para. 55.

<sup>142</sup> At para. 86.

had failed to exhaust domestic remedies, and the petition could not be said to be “manifestly ill-founded”, i.e. the petition could not be said not to be arguable. The ECtHR did consider, however, that the settling of the civil proceedings was conducted properly and that the Article 13 complaint was not admissible.

The case will therefore proceed and the applicant’s argument that the delay violated Article 6 will be heard on the merits and the outcome will be significant for Ireland. If successful, the applicant would establish that the State is vicariously responsible for abuse in religious-run schools before 1998. After that year the responsibility of the State for such schools was more clearly established.<sup>143</sup>

#### **1.4.8 *M.D. and Others v Malta***

The case of *M.D. and Others v Malta*<sup>144</sup> involved the ability to challenge a care order, and the automatic removal of parental rights after a criminal conviction for child cruelty. The children were taken into the care of the state due to neglect by the mother, and the mother was convicted of child cruelty. When her “circumstances...changed”,<sup>145</sup> she requested that the court revoke the care order. Under the relevant legislation, however, when a care order is issued the parent loses the right to represent relevant children. Also, after 21 days, the parent loses the right to access court to challenge the care order. Had the mother been affected only by a care order and not the conviction for cruelty, the situation would have been different.

The mother claimed that her Article 6 right to fair trial, Article 8 right to family life and Article 13 right to an effective remedy had been breached. This, she argued, was because there was no remedy available to her at domestic level whereby an impartial tribunal could re-examine the issuing of a care order. Instead a revision depended on the discretion of the Minister issuing the order.

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<sup>143</sup> By virtue of the Education Act 1998. See *O’Keeffe v Ireland*, para. 22.

<sup>144</sup> Application no. 64791/10, judgment 17 July 2012.

<sup>145</sup> At para. 15. It is not outlined in what manner her circumstances changed.



The ECtHR emphasised that “in order for the right of access to court to be effective, an individual must have a clear and practical opportunity to challenge an act interfering with his civil rights.”<sup>146</sup> The Court noted that the Government of Malta did not submit that a judicial remedy existed at domestic level which would permit a parent to challenge a care order while it was in force (i.e. until the relevant children reached eighteen years). Though it was possible for the Minister to revoke a care order, this did not meet the requirements of Article 6, as the Minister did not constitute an independent and impartial tribunal. Whilst children could theoretically have access to court, their mother was not permitted to represent them (due to the conviction and care order). They were reliant on third parties to assist them, and they were not provided with impartial representatives. These factors, the Court emphasised, meant that none of the three applicants had access to court to challenge the care order, and therefore there had been a violation of Article 6.

As regards the Article 8 claim, concerning the automatic removal of the parental rights on conviction for neglect of children under the age of 12, the Court considered “that the automatic application of the measure to the applicant without any weighing of the interests of justice and those of the children whose interests are paramount, is of itself problematic.”<sup>147</sup> The fact that there was no means through which to challenge this decision meant that it did not strike a fair balance between the interests of the children, the mother, and society at large and was not “necessary in a democratic society”<sup>148</sup> and therefore violated Article 8. The Court did not consider it necessary to examine whether there had been a violation of Article 13.

The Court also held under Article 46 (regarding implementation of judgments) that Malta had to ensure that a procedure was in place which allowed the mother the opportunity to request an independent tribunal to examine whether removal of her parental rights was justified. It also recommended that general measures be taken by Malta to ensure that effective access to court was possible for persons affected by a care order.

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<sup>146</sup> At para. 53.

<sup>147</sup> At para. 77.

<sup>148</sup> At para. 79.

The judgment emphasises the obligation to ensure that parents can challenge care orders, and the importance of avoiding blanket removals of parental rights under particular circumstances without the possibility of considering the principle of the best interests of the child for individual children. It also points to the importance of providing children with independent representation in such cases, a point made in previous reports, for example the *Fifth Report of the Rapporteur on Child Protection (2011)*. Whilst it is possible for a parent to challenge the continuation of a care order before a Court in Ireland, the provision of independent representation for children in such cases is not mandatory. This practice is thus called into question in light of the decision in *M.D. and Others v. Malta*.

#### **1.4.9 Recommendations:**

*Ensure that children have the representation of a guardian ad litem in all cases concerning their interests.*

### **1.5 Council of Europe Report on Child Sexual Abuse and Child Pornography**

The Council of Europe recently produced a report entitled *Child Sexual Abuse and Child Pornography in the Court's Case-Law*.<sup>149</sup> The preparation of the report was at the request of the Children's Rights Policies Division of the Council of Europe, which is conducting a programme of work on the elimination of sexual violence against children. The report provides a valuable examination of the case law of the ECtHR concerning sexual abuse of children, with regard to the relevant articles of the ECHR. The report focuses in particular on principles relating to the positive obligations states have in this area, including the obligation to take preventive measures to protect children from abuse.<sup>150</sup>

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<sup>149</sup> Council of Europe, *Research Report: Child Sexual Abuse and Child Pornography in the Court's Case-Law* (Council of Europe, 2011) (hereinafter referred to as the "Research Report").

<sup>150</sup> *Ibid*, at p. 3.

The report points to the need for applicants to claim under Article 3, the right to freedom from torture, cruel, degrading, or inhumane treatment or punishment, that the abuse that was suffered reaches the standard of that provision<sup>151</sup> and that the authorities knew or should have known of the serious risk of abuse and yet failed to take sufficient measures to prevent abuse. Applicants may also argue that the state failed to provide sufficient preventative measures, such as criminal sanctions.<sup>152</sup> The report emphasises that the minor status of a child can be a factor which leads to a finding that certain treatment reaches the threshold of Article 3,<sup>153</sup> and so too can the fact that the abuse was perpetrated directly by authorities of the state.<sup>154</sup>

The report also covers positive obligations in other specific areas. As regards the obligations of the state to parents when children are removed from their care, it is noted that the Court frequently emphasises that sufficient efforts as regards family reunification must be made by states in respect of families where there are child protection issues.<sup>155</sup> The Court has also found violations as regards certain state procedures, such as the failure to provide access to courts or an adequate remedy for victims of abuse. For example, it has found that the absence of access to court for those with learning disability is a violation of ECHR rights,<sup>156</sup> as are overly-restrictive defamation laws which prevent victims coming forward to allege abuse.<sup>157</sup>

The report also refers to cases concerning child pornography, a notably under-explored area by the ECtHR.<sup>158</sup> It seems that states have a wide margin of appreciation in order to limit freedom of expression on the internet to protect

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<sup>151</sup> *A v. the United Kingdom*, no. 95599/94, 23 September 1998.

<sup>152</sup> Council of Europe, *Research Report*, at p. 5.

<sup>153</sup> *A v. the United Kingdom*, no. 95599/94, 23 September 1998.

<sup>154</sup> *Aydin v. Turkey*, no. 23178/94, 25 September 1997; *Salmanoglu and Polttas v. Turkey*, no. 15828/03, 17 March 2009; *Ahmet Özkanet and Others v. Turkey*, no. 21689/93, 6 April 2004. Council of Europe, *Research Report*, at p. 6.

<sup>155</sup> *K.A. v. Finland*, no. 27751/95, 14 January 2003. Council of Europe, *Research Report*, at p. 7.

<sup>156</sup> *X and Y v. the Netherlands*, no. 8978/80, 26 March 1985. Council of Europe, *Research Report*, at p. 8.

<sup>157</sup> *Juppala v. Finland*, no.18620/03, 2 December 2008. Council of Europe, *Research Report*, at p. 9.

<sup>158</sup> Council of Europe, *Research Report*, at p. 9.

children.<sup>159</sup> As regards the detention of perpetrators of sexual abuse, the duty of the state under Article 3 to protect the public from a potential rapist must be weighed against the right to liberty of that individual. The Court has elaborated on this balancing test as follows:

“[T]he Convention obliges State authorities to take reasonable steps within the scope of their powers to prevent ill-treatment of which they had or ought to have had knowledge, but it does not permit a State to protect individuals from criminal acts of a person by measures which are in breach of that person’s Convention rights, in particular the right to liberty as guaranteed by Article 5 § 1”.<sup>160</sup>

Therefore the circumstances under which a state may use preventative detention to protect the public from potential abusers are strict, and the lawfulness of the detention, the location of detention, the extent to which a consequence can be foreseen, and proof of the mentality of the potential abuser will all be relevant.<sup>161</sup>

The report is a useful resource for identifying the positive obligations of states as regards the protection of children and could prove a valuable teaching tool for professionals in the area of child protection, such as social workers, on the requirements of the ECHR.

### **1.5.1 Recommendations:**

*Ensure relevant professionals, such as social workers, are aware of the positive obligations of states as regards the protection of children under the ECHR.*

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<sup>159</sup> *Perrin v. the United Kingdom* (dec.), no. 5446/03, 18 October 2005. Council of Europe, *Research Report*, at p. 9.

<sup>160</sup> *Jendrowiak v. Germany*, no. 30060/04, 14 April 2011, at para. 37. Council of Europe, *Research Report*, at p. 10.

<sup>161</sup> See e.g. *Haidn v. Germany*, no. 6587/04, 13 January 2011 and *Frank v. Germany* (dec.), no. 32705/06, 28 September 2010. Council of Europe, *Research Report*, at p. 10.

*Raise awareness of the Council of Europe report Child Sexual Abuse and Child Pornography in the Court's Case-Law as a teaching tool for professionals in the area of child protection.*

## **1.6 Developments relating to the UN Convention on the Rights of the Child**

### **1.6.1 CRC Individual Complaints Mechanism - Developments**

As outlined in last year's report, the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure was drafted in 2010 in order to permit children or their representatives to petition the Committee on the Rights of the Child on the basis of violations of children's CRC rights. The Optional Protocol was adopted in December 2011 and opened for signature in February 2012. It currently has 35 signatures and two ratifications,<sup>162</sup> and will enter into force once it has been ratified by 10 states.

Momentum has been gathering at civil society level in support of this Optional Protocol. The Irish Human Rights Commission was part of a joint submission by national human rights institutions to indicate strong support for the communications procedure, on the basis that other instruments only provide fragmented opportunities for children, whereas an optional protocol to the CRC enables "differentiated approaches in consideration of the specific characteristics of the Convention [which] will have an added value in further strengthening child rights protection."<sup>163</sup> In May 2012, the Irish Centre for Human Rights held a conference entitled "Complaints to the UN Committee on the Rights of the Child: Opportunities for Ireland" with Dr. Maria Herczog, a member of the UN Committee on the Rights of the Child as the keynote speaker. A number of individuals and entities including Amnesty International, the Children's Rights Alliance and the Irish Centre for Human Rights signed a petition requesting that Ireland sign and ratify the Third Optional Protocol.

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<sup>162</sup> As of October 2012.

<sup>163</sup> *Joint NHRI statement on the Rights of the Child*, Submitted 13th Regular Session of the Human Rights Council, Item 3: Report of the Working Group on the Optional Protocol to the Convention on the Rights of the Child (2010), at p.1.

Signing and ratifying the Third Optional Protocol would position Ireland as a leading state in the area of children's rights, and would be commensurate with the substance of the recent constitutional amendment on the rights of the child.

### **1.6.2 Recommendation:**

*Ireland should sign and ratify the Third Optional Protocol to the CRC, submit itself to both the inter-State communication mechanism and the inquiry procedure thereunder, and make widely known the existence of the Third Optional Protocol*

### **1.6.3 Day of General Discussion - Migration**

'Days of General Discussion' are utilised by the Committee on the Rights of the Child to provide focus to important areas within the sphere of children's rights. Held on an annual basis, they involve the drafting of a paper, the submission of reports by interested parties (e.g. relevant NGOs), a day during which various meetings are held in order to elaborate on the right under discussion (attended by, e.g. UN representatives, government officials and relevant NGOs), and the drafting of a final report with recommendations. This year the Day of Discussion focused on migration. The overall objective of the day was to promote the rights of children in the context of international migration, at both international and national level. The Committee explains the reason for the focus on migration in the background paper:

"The situation of all children in the context of migration is of major concern, given their greater vulnerability to human rights violations. This is a diverse group including both children with regular and irregular migration status ... Even with regular status, migrant families often do not have equal access to social protection measures, and are at risk of poverty, marginalization, and social exclusion."<sup>164</sup>

It is pointed out in the background paper that there are two major gaps regarding the protection of the rights of children affected by migration, whether their status is

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<sup>164</sup> Committee on the Rights of the Child, *2012 Day of General Discussion: The Rights of all Children in the Context of International Migration, Background Paper* (August 2012), at p.3 (hereinafter referred to as the "Day of General Discussion").

regular or irregular. The first gap is the lack of particular provisions for children in laws, policies and programmes relating to migration. Secondly, there is a lack of public policies which aim to protect the particular rights of children in accordance with the UN CRC.<sup>165</sup>

The background paper states that countries from which children originate, countries through which children travel, and destination countries need to cooperate and coordinate, in order to ensure that CRC rights are upheld. It refers to evidence indicating that child migrants whose immigration status is irregular or unclear are a high-risk group for rights violations. It points out that detention of migrant children is a human rights violation under international human rights law and should be prohibited. Regardless of the migration status of parents, children should be treated as children first and foremost in order for a state to comply with the CRC. The CRC principle of the best interests of the child should, therefore, be the primary guiding principle for policy-makers and others when it comes to decisions concerning migrant children. The report recommends that states should conduct a “Best Interests Determination”, because:

“Not putting the best interests of the child as a first and foremost consideration when deciding State actions regarding migrant children means not only that their rights will be at risk, but also that the country of destination is squandering an irredeemable opportunity to invest in the well-being and social cohesion of its population.”<sup>166</sup>

The poverty which migrant children are likely to face is raised in the report. Many of these points are highly relevant to the Irish context.

A submission was made to the Committee by the Immigrant Council of Ireland, an independent non-governmental organisation advocating for the rights of migrants and

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<sup>165</sup> 2012 Day of General Discussion, at p.3.

<sup>166</sup> At p.37.

their families.<sup>167</sup> The submission outlines the main challenges faced by migrant children in Ireland. It calls for legislative reform to deal with the current *ad hoc* system which, it claims, lacks immigration rules that are comprehensive, clear and fair. The Immigration, Residence and Protection Bill (2010) aims to deal with this and is currently in the process of being redrafted. However, the Minister retains a broad discretion in determining immigration decisions, which has the potential to lead to inconsistent decisions. There is a lack of an independent appeals tribunal outside the asylum application process, and there are significant delays. It is also argued in the report that there is distinct uncertainty around the access to third-level education for migrant children, who may find that, contrary to the situation for Irish children, they must pay international student fees in order to attend a third level institution, even where they have been educated in Irish schools. Some children are being forced out of education altogether, it is argued.

The report states that racism and xenophobia are on the rise and that these phenomena should be tackled as a matter of national importance through education and awareness-raising initiatives. It calls for legislative reform to permit the judiciary, when determining appropriate sentencing, to consider racist motivation to be an aggravating factor. The report also recommends national monitoring of racist incidents. It points to the young age of initiation of migrant children into prostitution, and recommends harsher penalising of men who engage in payment for sex, as well as better resourcing of supports for children who have been engaged in prostitution, including legal representation to ensure they can navigate the range of legal proceedings in which they may be involved.

The *Report of Day of General Discussion* and accompanying Recommendations are expected to be drafted by February 2013. In order to address the shortcomings in Ireland as regards children and migration, guidance from the report should be followed to ensure international best practice. It is intended that outcomes from the

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<sup>167</sup> Immigrant Council of Ireland, *Submission to the United Nations High Commissioner for Human Rights Committee on the Rights of the Child 2012 Day of General Discussion: "The Rights of All Children in the Context of International Migration"* (Immigrant Council of Ireland, 2012).



2012 Day of General Discussion will recommend practical measures that states can take to implement policies which respect CRC rights when it comes to migration.<sup>168</sup>

#### **1.6.4 Recommendations**

*Ireland should address the points made by the Immigrant Council of Ireland in its submission to the Committee on the Rights of the Child as regards migrant children.*

*Ireland should use the forthcoming Report of Day of General Discussion and Recommendations as guidance for implementing policies in conformity with the CRC as regards migrant children.*

#### **1.6.5 Business and Child Protection**

The impact of business practices on child protection is increasingly recognised. The UN Global Compact report *Children's Rights and Business* states that:

“The effects that business has on children can be long-lasting and even irreversible. Childhood is a unique period of rapid physical and psychological development during which young people’s physical, mental and emotional health and well-being can be permanently affected for better or worse. Adequate food, clean water, and care and affection during a child’s developing years are essential to his or her survival and health.”<sup>169</sup>

A large number of children – 215 million – are engaged in child labour. Intrinsically linked to this is the fact that 101 million children are not attending primary school. Demand in the Global North fuels the use of children by businesses in the Global South, and it is therefore partly the responsibility of states in the Global North (including Ireland) to ensure that businesses which are operating from their jurisdiction do not engage or become complicit in human rights abuses, particularly of children. Other jurisdictions have demonstrated varying degrees of awareness of, and reaction to, this responsibility. For example, in California, the Transparency in Supply

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<sup>168</sup> At p. 38.

<sup>169</sup> UN Global Compact, *Children's Rights and Business* (UN Global Compact, 2011).

Chains Act came into force on 1 January 2012 which obliges retailers with a certain turnover who are doing business in California to report on their efforts to eliminate slavery and human trafficking from their (international) supply chains.

The UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises released a document entitled *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* in 2011.<sup>170</sup> The report summarises the work of the Special Rapporteur from 2005 to 2011, and presents the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.” An early UN initiative sought to impose on companies the same range of human rights duties under international law that pertain to States once they ratify treaties. The proposal was unsuccessful and instead the office of the Special Representative of the Secretary-General “on the issue of human rights and transnational corporations and other business enterprises” was established in 2005 in order to undertake a new process in the area of business and human rights. The Guiding Principles are the outcome of that process.

The Guiding Principles do not set new standards, but are to be seen as the start of a process whereby the implications of existing standards and practices for states and businesses are clarified. The standards are integrated within a single, comprehensive and coherent template.<sup>171</sup> It is stipulated in the Guiding Principles that states have a duty to protect people against human rights abuse within their territory by third parties, including businesses. States must therefore take appropriate steps to prevent and punish abuse through effective policies, regulations, laws and procedures. States should give a clear message regarding the expectation that businesses in their territory must respect human rights. This will include provision of guidance to businesses on how they must respect human rights. Additional steps should be taken to prevent human rights abuses by businesses associated with the state (e.g. owned by the State,

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<sup>170</sup> *Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 17<sup>th</sup> session, Human Rights Council, UN doc. A/HRC/17/31, adopted 21 March 2011. (Hereinafter referred to as the “Report of the Special Representative”).

<sup>171</sup> Report of the Special Representative, at para. 14.

or receiving support from State agencies etc). States should assist in ensuring that businesses operating in conflict-affected areas are not involved with human rights abuses, possibly by denying access to public support for a business associated with gross human rights abuses which refuses to cooperate in rectifying the situation. The responsibility of businesses to respect human rights can be derived from international human rights instruments such as the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. The Guiding Principles also provide that:

“In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”<sup>172</sup>

It is important that the Guiding Principles become an accepted part of practice of Irish businesses, and well known by relevant state officials and bodies. This way Ireland can claim to be engaging in best practice as regards international human rights law, particularly as regards the treatment of children by Irish businesses and those associated with them. As an aside, there is also a possibility that this could have economic or reputational benefits for Ireland, for example from 'ethical investors'.

In 2012, the Irish Centre for Human Rights released a report entitled *Business and Human Rights in Ireland: Context, International Standards and Recommendations*.<sup>173</sup>

It makes the point that state representatives do assert Ireland's commitment to human rights, but the Irish Government has not yet drafted a comprehensive policy on business and human rights.<sup>174</sup> Also, whilst Ireland provides for an amount of

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<sup>172</sup> Principle 17.

<sup>173</sup> Irish Centre for Human Rights released a report entitled *Business and Human Rights in Ireland: Context, International Standards and Recommendations* (Irish Centre for Human Rights, 2012).

<sup>174</sup> Irish Centre for Human Rights, *Business and Human Rights in Ireland: Context, International Standards and Recommendations* (Irish Centre for Human Rights, 2012), at p.3.

oversight of extraterritorial activities of Irish businesses, the report states that it is under-utilised.<sup>175</sup>

The report makes a number of recommendations specific to the Irish context, including the need to ensure better remedies in Ireland for those alleging breaches of their human rights as regards the practice of businesses operating out of Ireland. It is stated that:

“Certain barriers exist in Ireland in relation to the effective accessing of remedies, including the costs of litigation, availability of legal representation, and the absences of multi-party claims.”<sup>176</sup>

The OECD has drafted *Guidelines on Multinational Enterprises*, and in accordance with this Ireland has a “National Contact Point” established under the OECD Guidelines (the Bilateral Trade Promotion Unit of the Department of Enterprise, Jobs and Innovation has been assigned the role) to progress implementation of the OECD Guidelines. The role of the National Contact Point has, however, been of limited effectiveness to date and the report recommends strengthening and greater awareness-raising of both the Guidelines and the National Contact Point.<sup>177</sup>

Further recommendations of the report include the proposal that that the Irish Government should issue a policy response to the UN Framework and Guiding Principles on Business and Human Rights, and include information on business and human rights when submitting reports to UN human rights monitoring bodies. A review of existing legislation is also recommended in order to assess Irish compliance in the area considering relevant international standards. It is also recommended that businesses in Ireland should receive guidance on the requirements of human rights due diligence, and businesses should make a policy commitment to the international human rights standards enshrined in the UN Framework and Guiding Principles.

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<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*, at p.5.

<sup>177</sup> *Ibid.*, at p.39.

### **1.6.6 Recommendations**

*Ensure compliance with, and raise awareness of, the Guiding Principles on Business and Human Rights of the UN Special Representative of the Secretary General.*

*Ireland should issue a policy response to the UN Framework and Guiding Principles on Business and Human Rights, with particular reference to child protection.*

*Implement the recommendations outlined in the report of the Irish Centre for Human Rights, Business and Human Rights in Ireland: Context, International Standards and Recommendations.*

## **1.7 Directive 2011/93/EU<sup>178</sup> on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography**

In 2011, the European Parliament and Council adopted Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography.<sup>179</sup> The Directive recognises that “sexual exploitation of children and child pornography require a comprehensive approach covering the prosecution of offenders, the protection of child victims and prevention of the phenomenon.”<sup>180</sup>

Minimum rules are set by the Directive regarding how criminal offences are defined in the area of sexual abuse and exploitation of children (i.e. anyone under 18), as well as child pornography and solicitation of children for sexual purposes. Provisions are also introduced by the Directive strengthening measures to prevent such crimes and to protect victims. The Directive stipulates, for example, that causing (for sexual purposes) those under the age of sexual consent to witness a sexual act should attract a maximum sentence of at least a year in prison, and where the sexual act is an

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<sup>178</sup> This was originally mis-numbered as Directive 2011/92/EU but corrected on 21 December 2011: see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:018:0007:0007:EN:PDF>.

<sup>179</sup> 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, and replacing Council Framework Decision 2004/68/JHA.

<sup>180</sup> Article 3(2).

abusive one, a maximum sentence of at least two years in prison. It also sets the standard that engaging in sexual acts with a child under the age of sexual consent will attract a maximum prison term of at least five years.

Where sexual activities with a child under the age of sexual consent involves abuse of a position of trust, this must be punishable by a maximum term of at least eight years in prison. The juxtaposition in the Directive of the terms “maximum” and “at least” is apt to confuse, but appears to mean that States must set or have in place a maximum term of sentence, and that term cannot be less than 8 years. If the child is over the age of consent, sexual activity involving a breach of trust must be punishable by a maximum term of at least three years in prison. Sexual activities with a particularly vulnerable child under the age of sexual consent, for example a child with a disability, will attract a maximum term of at least eight years in prison, or three years if the child is over the age of consent. The Directive also establishes maximum sentences for use of children to make pornography, attending pornographic performances involving children, profiting from such pornography, and using a child for prostitution. It further stipulates that Member States must bring the provisions into force by 18 December 2013. Ireland has adopted the Directive and indicated that it will meet the deadline for bringing it into force.<sup>181</sup>

Missing Children Europe is the operating title of the *European Federation for Missing and Sexually Exploited Children* organisation. It is an umbrella organisation representing 28 grassroots NGOs from 19 Member States of the EU as well as Switzerland which actively work on cases relating to missing and/or sexually exploited children, including work on prevention and support for those affected by the phenomenon. Missing Children Europe is currently conducting research to determine the extent to which the policy and practice of Member States, including Ireland, is in line with the Directive. Outlined below are some areas where changes arguably should be made to Irish legislation in order to comply with the Directive.

In Ireland, a range of sexual offences are prohibited by law and the specific charge which is brought will depend on all the circumstances of a particular case, as well as

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<sup>181</sup> See [http://www.justice.ie/en/JELR/Pages/EU\\_directives](http://www.justice.ie/en/JELR/Pages/EU_directives).

on the age of the victim and the available evidence. There does not exist at present an offence of knowingly obtaining access to child pornography via information and communication technology in Ireland,<sup>182</sup> however under the Child Pornography and Trafficking Act 1998<sup>183</sup> any person who knowingly possesses child pornography will be found guilty of an offence. It is possible, though not guaranteed, that it could be held that it is an offence to knowingly access child pornography via information and communication technology, even if the material is not downloaded or stored in such a way that possession could be established. In order to comply with Directive 2011/93/EU, a specific offence of knowingly obtaining access to child pornography via information and communication technology should be introduced.

“Grooming” is defined by the UK Home Office as “a course of conduct enacted by a suspected paedophile, which would give a reasonable person cause for concern that any meeting with a child arising from the conduct would be for unlawful purposes”.<sup>184</sup> The Directive notes that online grooming poses particular problems as the internet “provides unprecedented anonymity to users because they are able to conceal their real identity and personal characteristics, such as their age.”<sup>185</sup> Although “grooming” of children for sexual purposes is not referred to in the Articles of the Directive, it does make reference to “solicitation of a child to meet the offender for sexual purposes”<sup>186</sup> and stipulates that states should prosecute perpetrators. Offline grooming, however, is also a significant problem. There is, at present, no specific offence of grooming of children for sexual purposes in Ireland, either online or offline. There are, however, offences which relate to relevant activities, such as convincing a child to send an indecent photograph,<sup>187</sup> and sexually exploiting a child, which can include inviting or coercing a child to engage in a sexual act.<sup>188</sup> However,

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<sup>182</sup> This is required by Article 5(3) of Directive 2011/93/EU.

<sup>183</sup> Section 6(1).

<sup>184</sup> Home Office (2002a) *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences*. London, Home Office.

<sup>185</sup> *Ibid.*

<sup>186</sup> At para. 19.

<sup>187</sup> Child Pornography and Trafficking Act 1998, section 5(1)(d).

<sup>188</sup> Child Pornography and Trafficking Act 1998, section 3(2).

these provisions deal with the effects of grooming but not the grooming itself.<sup>189</sup> Therefore the legislation arguably does not deal in the necessary manner with the initial stage of communication between a suspected paedophile and child at the earliest stage.

Courts of EU Member States are obliged to interpret national legislation so as to achieve an interpretation which conforms to the State's obligations under EU Directives. The *Pupino*<sup>190</sup> judgment of the CJEU clarifies that this obligation applies in respect of the entirety of national law, not just legislation adopted to give effect to EU requirements. However, national courts are not obliged to interpret national law *contra legem*.<sup>191</sup> Furthermore, the interaction between the requirement for a conforming interpretation and the strict construction of criminal statutes in Irish law<sup>192</sup> is unclear, particularly when one considers that legal certainty is itself a general principle of EU law.<sup>193</sup> For these reasons, it cannot be assumed that Irish law will be judicially interpreted to conform to the requirements of Directive 2011/93/EU and appropriate action by the Oireachtas is likely to be required.

Canada has created the offence of online "grooming". Canadian Criminal Code section 172.1, entitled "Luring a child", creates the offence of communicating with a child via a computer system for the purpose of committing a sexual offence against the child. Title 18 of the US Code, which is the criminal and penal code of the federal government of the US, creates the offences of both online and offline 'grooming' stipulating that "Whoever, using the mail or any facility or means of interstate or foreign commerce ... knowingly persuades any individual who has not attained the age of 18 years, to engage in .... sexual activity ..." commits a criminal offence.<sup>194</sup>

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<sup>189</sup> Response to Missing Children Europe Project questionnaire.

<sup>190</sup> Case C-105/03 *Criminal Proceedings Against Pupino* [2005] ECR I-5285.

<sup>191</sup> Case C-106/89 *Marleasing* [1990] 1 ECR 4135.

<sup>192</sup> See e.g. *Mullins v Harnett* [1998] 2 ILRM 304.

<sup>193</sup> Thus, in C-268/06 *IMPACT* [2008] the CJEU held (in a non-criminal context) that Irish law's interpretative presumption against the retroactive application of laws would apply, even though transposition of a Directive was at issue, because of the principle of legal certainty in EU law.

<sup>194</sup> 18 USC § 2422(b).



An explicit offence of grooming, both online and offline, should be introduced in Ireland.

The Directive contains a number of provisions for the support of victims of child sexual abuse. It stipulates, for example, that states must provide assistance and support to victims “before, during and for an appropriate period of time after the conclusion of criminal proceedings.”<sup>195</sup> The *Fifth Report of the Rapporteur on Child Protection (2011)* outlined the results of the *Crime Victims Helpline Annual Report 2010* which highlighted specific difficulties that victims experience within the Irish criminal justice system. Unfortunately the majority of callers to the helpline reported feeling victimised a second time by the criminal justice system, feeling limited to a ‘witness’ role, reported difficulties contacting the relevant Garda, and generally reported feeling that the system had let them down. The Irish Government has stated that it proposes to publish a Criminal Justice (Victims’ Rights) Bill in order to strengthen victims’ rights,<sup>196</sup> although the date at which the Bill will be published is not known. In drafting the Bill, it would be advisable to include provisions of Directive 2011/93/EU, such as provision for assistance for victims at appropriate stages, access to legal counselling and “a special representative for the child victim”<sup>197</sup> where there is a conflict of interest with those with parental responsibility. Access to legal representation must be made available in some circumstances, for example for the purpose of claiming compensation, and it should be free of charge for victims who lack sufficient financial resources.<sup>198</sup>

### 1.7.1 Recommendations

*Steps should be taken in Ireland to ensure Irish law reflects fully the provisions of the Directive.*

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<sup>195</sup> Article 19(1).

<sup>196</sup> See Rape Crisis Network Ireland, *RCNI Submission on Proposed Heads of Forthcoming Victims’ Rights Bill 2011* (RCNI, 2011), available at: <http://www.rcni.ie/uploads/RCNISubmissiononProposedHeadsOfVictimsRightsBill2011June11.pdf>.

<sup>197</sup> Article 20.

<sup>198</sup> *Ibid.*

*In particular:*

*A specific offence of knowingly obtaining access to child pornography via information and communication technology should be introduced.*

*An explicit offence of grooming, both online and offline, should be introduced in Ireland.*

*In drafting the Criminal Justice (Victim's Rights) Bill, appropriate provisions of Directive 2011/93/EU should be included.*

## **1.8 Violence Against Children with Disabilities**

The World Health Organisation Department of Violence and Injury Prevention and Disability recently funded research into violence against children with disabilities. The research, conducted by Jones *et. al.*, examined the results of 17 studies conducted primarily in “high-income” countries.<sup>199</sup> The results were startling – indicating that violence will be experienced by up to a quarter of children with disabilities during their lifetimes.<sup>200</sup> This is far higher than the rate of violence experienced by children generally, and, depending on the type of violence involved, children with disabilities are three to four times more likely to experience violence than children without disabilities. Children with disabilities were found to be 3.6 times more likely to be victims of physical violence and 2.9 times more likely to be victims of sexual violence. The conclusion of the authors was that “children with disabilities in all settings should be viewed as a high-risk group in whom it is important to identify violence.”<sup>201</sup>

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<sup>199</sup> Lisa Jones *et. al.*, “Prevalence and Risk of Violence against Children with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies” 380 (9845) *The Lancet* 899 (2012), at p. 906.

<sup>200</sup> *Ibid.*, at p. 907.

<sup>201</sup> *Ibid.*

One of the most significant findings was that children with “mental or intellectual disabilities” appear to experience more violence and be at more risk of violence,<sup>202</sup> and are 4.6 times more likely to experience such violence than children without a disability. This group was found to be particularly at risk of sexual abuse, and some theorists claim that this is because those with a learning disability are seen by some predators as particularly helpless and compliant.<sup>203</sup> The World Health Organisation states that factors which cause this phenomenon include stigma and discrimination regarding people with disabilities, ignorance regarding disability, and a lack of social support for those who care for people with disabilities. The fact that children with disabilities are more likely than those without to be situated in institutions also raises the risk of abuse, as does the fact that communication problems make it difficult for many children with disabilities to disclose experiences of abuse.<sup>204</sup>

The study highlights the shocking level of violence perpetrated on a large percentage of the population of children with disabilities, and it is vital that policy-makers in Ireland take heed of this study. Ireland has various international obligations in terms of protecting children with disabilities from violence. The UN Convention on the Rights of the Child stipulates in Article 19, for example, that “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence.” The *Fifth Report of the Rapporteur on Child Protection (2011)* considered the relevance for Ireland of *General Comment No. 13 of the Committee on the Rights of the Child: The Right of the Child to Freedom from all Forms of Violence*. The General Comment lists measures which states should take to prevent violence against children, to assist such children, and to hold perpetrators accountable. One measure is the identification of groups most at risk, and the General Comment refers to “marginalised groups such as children with disabilities” as one such group.<sup>205</sup>

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<sup>202</sup> *Ibid.*, at p. 906.

<sup>203</sup> See e.g. Emily Lund and Jessica Vaughn-Jensen, “Comment: Victimisation of Children with Disabilities” 380 (9845) *The Lancet* 867 (2012), at p. 867.

<sup>204</sup> World Health Organisation, *Children with Disabilities More Likely to Experience Violence: Note for the Media*, 12 July 2012. Available at: [http://www.who.int/mediacentre/news/notes/2012/child\\_disabilities\\_violence\\_20120712/en/index.html](http://www.who.int/mediacentre/news/notes/2012/child_disabilities_violence_20120712/en/index.html)

<sup>205</sup> Committee on the Rights of the Child, *General Comment No. 13 – Article 19: The Right of the Child to Freedom from all Forms of Violence* (CRC/C/GC/13) (17 February 2011), at p. 19.

The General Comment also refers to ways in which states must deal adequately with such violence where it has occurred. Such measures include safe and accessible ways for children to report violence, rigorous child rights-based investigations, and a full range of services for supporting and treating children who report violence. The need for appropriate follow-up (e.g. interventions, review etc.) as well as respect for due process is also highlighted.<sup>206</sup>

The General Comment also places particular emphasis on the obligation to prevent violence against children, and the prioritisation of a preventative approach. Such an approach should begin with the explicit prohibition of all such forms of violence, including banning of physical punishment of children. In the context of the current discussion on violence against children with disabilities, the benefits of such a legislative change are clear – any doubts would be removed regarding whether violence against children with disabilities is permissible. As noted above, however, the Minister for Children stated in December 2011 that it is not intended that any immediate proposals will be brought forward in Ireland regarding banning physical punishment.<sup>207</sup>

Another measure which the Committee on the Rights of the Child stipulated must be in place is the promotion of positive parenting which could entail appropriate education of children, perpetrators and the broader community.

In line with General Comment No. 13, the *Fifth Report of the Rapporteur on Child Protection (2011)* recommended that a national coordinating framework on violence against children should be formed in Ireland to tackle adequately the matter of violence against children. There are a number of other steps which also need to be taken in light of the results of the World Health Organisation-funded study of Jones *et. al.*<sup>208</sup>.

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<sup>206</sup> *Ibid*, at p. 21.

<sup>207</sup> Paul Cullen, 'Ban on Parents Smacking Children Considered' *The Irish Times*, 28 December 2011.

<sup>208</sup> Lisa Jones *et. al.*, "Prevalence and Risk of Violence against Children with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies" 380 (9845) *The Lancet* 899 (2012), at p. 906.

The latter study highlighted the problems which currently exist with available research in the area. The studies which the authors analysed, for example, did not contain a break-down of types of disability other than a divide between physical and learning disability. This means that the difference in the levels and types of violence experienced by discrete types of disability could be obscured. There also exists an unanswered question about how much of the disability experienced by children in the relevant studies was actually *caused* initially by the violence experienced, and how much was *because* of the disability. Such information would be highly relevant to how the issue is dealt with in policy making.

There is, it seems, no research on the extent to which children with disabilities experience violence in Ireland. A literature review undertaken for the National Disability Association in Ireland indicates that there are few national studies on the issue of abuse of people with disabilities generally.<sup>209</sup> Research should be conducted in Ireland on the level of violence perpetrated on children with disabilities, in order to determine the exact extent of the problem at domestic level, and in order to design appropriate policies.

Though Ireland was amongst the first to sign the UN Convention on the Rights of People with Disabilities, it has yet to ratify it. The Convention includes Article 16, which relates to the rights of people with disabilities to “freedom from exploitation, violence and abuse”. Article 16 stipulates that states must take all appropriate measures, including “legislative, administrative, social [and] educational” measures, to protect persons with disabilities from all forms of violence and abuse. It states that preventative measures should be “age-sensitive” and should include information and education for people with disabilities and care-givers.<sup>210</sup> Article 16 also specifies that states must have effective legislation and policies to deal with prevention and provision for the aftermath of abuse, including child-focused legislation and

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<sup>209</sup> Brown, *A Review of the Literature on Abuse of People with Disabilities* (NDA, 2006, unpublished). See: [http://www.nda.ie/website/nda/cntmgmtnew.nsf/0/CE957ED7DA23464B802576CB005B809A/\\$File/SexualAbuse2008\\_03.htm](http://www.nda.ie/website/nda/cntmgmtnew.nsf/0/CE957ED7DA23464B802576CB005B809A/$File/SexualAbuse2008_03.htm).

<sup>210</sup> Article 16(2).

policies.<sup>211</sup> The need to report regularly to the monitoring body of the UN Convention on the Rights of People with Disabilities would require a particular focus on the issue of the treatment of people with disabilities, and would require the gathering of data and the examination of relevant laws and policies. This would undoubtedly advance the situation of children with disabilities, and give greater consideration to the issue of violence against this group. It is therefore advisable that Ireland ratify this Convention without delay.

To ensure that children do not suffer disproportionately from budget cuts, the government should guarantee that children are explicitly considered in the next budget, as required by the CRC. The Committee on the Rights of the Child stipulates that this should be done so that governments demonstrate that “budgetary decisions are made with the best interests of children as a primary consideration”<sup>214</sup> and that children are protected to the greatest extent possible from financial downturns, particularly vulnerable groups of children.<sup>215</sup> There are a number of states which publish ‘children’s budgets’ annually, and such an exercise provides accountability and transparency.<sup>216</sup>

### **1.8.1 Recommendations**

*All recommendations of General Comment No. 13 of the Committee on the Rights of the Child: The Right of the Child to Freedom from all Forms of Violence should be brought into effect, in particular:*

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<sup>211</sup> Article 16(5).

<sup>214</sup> 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.

<sup>215</sup> *Ibid.*

<sup>216</sup> See UNICEF, *Influencing Budgets for Children’s Rights* (UNICEF, 2004).

*A national coordinating framework on violence against children should be formed in Ireland to tackle adequately the matter of violence against children.*

*Physical punishment of children should be banned in Ireland, one of the reasons being that it will remove any doubt about whether violence against children with disabilities is permissible.*

*Research should be conducted in Ireland on the level of violence perpetrated on children with disabilities, in order to determine exactly what the extent of the problem is at domestic level, and in order to design appropriate policies.*

*Ireland should ratify the UN Convention on the Rights of People with Disabilities without delay.*

*The Irish government should make explicit in the next budget how the needs and rights of children were taken into account, in particular those of children with disabilities.*

## **SECTION 2:**

# **PROTECTING CHILDREN FROM CHILDREN - BULLYING**

### **2.1 Introduction**

The recent tragic suicides of three Irish teenagers, who were allegedly victims of cyber-bullying has prompted calls for urgent legislation to address this apparent epidemic confronting today's young people. Recent studies and published reports highlight the prevalence of this growing phenomenon. In November 2012, a report was published by the Ombudsman for Children's office on the issue of bullying in schools. The report presents the views of three hundred children aged from 10 to 17 from across the country who participated in the consultation. The report, entitled "Dealing with Bullying in Schools: A Consultation with Children and Young People", revealed that cyber-bullying and homophobic bullying were two of the most prevalent forms of bullying raised by those who took part in the report.

Media reports have revealed that in one Dublin primary school almost 100 of its 450 pupils have Facebook accounts. Another south-side Dublin school confirmed that a number of its students using Facebook were as young as 8.<sup>217</sup> At a time when schools and their students are embracing the opportunities for collaborative learning that online tools allow, the misuse of the internet amongst pupils and the difficulties facing schools are rapidly emerging. A recent incident in Cork led to 28,000 people logging on to social media sites to watch two 13-year-old schoolgirls embroiled in a physical fight. Thirty other students who were onlookers to the fight were also filmed on the clip which went viral. Thousands of tweets were made regarding the incident. The two girls involved were identified and suspended from the school. Another recent newspaper article reported that a small number of schools have expelled students for

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<sup>217</sup> "Study: Cyberbullying begins with friends", *Irish Examiner*, 7 November 2012. This is despite the fact that the minimum age at which Facebook permits users to open a page is 13. See <http://www.facebook.com/help/210644045634222/>.



persistent cyber-bullying, which continued after warnings, but noted that these were exceptional cases.<sup>218</sup>

This section discusses the risks posed by cyber-bullying and considers the legal consequences. Proposals to address cyber-bullying have included the introduction of legislation compelling schools to have strong anti-bullying codes, blocking access to the website at the centre of the recent controversy and specific criminal legislation. A review of these proposed strategies will be conducted as will the role of schools in cyber-bullying. This section will also review legislation that has been introduced in America, Canada and Australia to address this issue. Each sub-section concludes by suggesting a recommendation for action.

## **2.2 Social Networking & Concepts of Cyber-bullying**

Social networking sites or individual blogs allow people, including young people, without the need for web programming skills, to publish online effortlessly. This public space allows them to exchange information, often of a very candid nature, interactively with their peers on a wide range of issues. Social networking sites are being used as online, collaborative diaries where the amount of information and its type is limited only by the teenager's self-restraint or by reason of parental intervention. It is common for teenagers to:

- disclose large amounts of personal and intimate information about themselves online in personal profiles;
- post pictures of themselves and their friends;
- disclose contact details (including email and instant messenger user names), geographical location (school and personal) as well as other biographical information; and
- post comments and provide opportunities for others to comment and provide feedback in response.

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<sup>218</sup> “Why home and school must join forces to beat the cyber-bully”, *Irish Independent*, 10 November 2012.

Cyber-bullying is a term first used by Canadian Bill Belsey to describe “the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group that is intended to harm others”.<sup>219</sup> Researchers and practitioners differ on a conclusive definition of bullying, though most agree that bullying is a subset of aggression and there are three attributes that underpin bullying conduct. These are the intent to harm (physical, emotional and psychological), an imbalance of power and that the behaviour is repeated. Cyber-bullying has similar attributes. In cyber-bullying, the perpetrator’s anonymity<sup>220</sup> and their unrestricted access to the victim represent the power imbalance.<sup>221</sup>

### **2.2.1 Mediums used to Cyber-bully**

Cyber-bullying may be described under seven categories: text, picture or video clip, phone calls, emails, websites, chat-rooms and instant messaging.

#### Social Networking or Blogging

Cyber-bullying in a social networking or blogging context can include:

- posting harsh messages or threats on a social network profile or blog that belongs either to the victim or the perpetrator;
- uploading manipulated images or other images taken without the victim's knowledge or consent;
- using the personal information disclosed by the victim against them in a different and damaging context;
- using the public forum to damage the victim’s reputation;
- setting up a profile page or blog posing as the victim and posting provocative messages or humiliating posts.

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<sup>219</sup> Bill Belsey ‘Always on? Always aware!’ [www.cyberbullying.org](http://www.cyberbullying.org) 7 September 2009.

<sup>220</sup> Though the perpetrator need not always be anonymous. Arguably, the physical distance provided by social media helps make cyber-bullying easy to perpetrate.

<sup>221</sup> “Cyber-bullying in social networking sites & blogs: Issues for young people and schools”, Sally Kift, Marilyn Campbell and Des Butler, 20 *J.L. Inf. & Sci.* 63 (2009-2010).

### Short Message Service (SMS)

SMS text messaging is another common medium used to cyber-bully. The report of an NUI Maynooth study<sup>222</sup> published in the wake of these high-profile suicides demonstrates the extent and nature of cyber-bullying in Irish schools by SMS. The research covered four categories of cyber-bullying: text, picture or video clip, phone calls and emails. It found that the most common form was phone calls and text messages. The study also found that 17 per cent of children had been victims of bullying, while 9 per cent admitted being perpetrators. A quarter of victims did not confide in anyone. The study among Irish second-level students aged 12 to 18 found cyber-bullying has a typical duration of one to two weeks, but can last for several years. Proportionately, more younger (30 per cent) than older (10 per cent) participants were likely to become the victims of bullying.

### Instant Messaging & Emailing

Instant Messaging or 'IM'ing' refers to real-time communication via the Internet with those persons included on a contact list. IM services are used to cyber-bully by perpetrators which can entail establishing fake user names for IM accounts to anonymously send damaging messages to the victim or setting up a fake account in the victim's name to send such messages to others.

In the same way that false accounts are used for IM'ing, such email accounts can be established allowing the perpetrators to send abusive messages anonymously.

### Other

Chat rooms are another common medium used to cyber-bully, permitting users to post or send harmful messages to others.

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<sup>222</sup> ""Living in an "Electronic Age": Cyberbullying amongst Irish adolescents", P. Cotter and S. McGilloway, *The Irish Journal of Education*, 2011, xxxix, pp. 44-56.

### 2.2.2 Cyber-bullying as a Criminal Offence in Ireland

In 2008, the *Irish Independent* reported the District Court prosecution of a man for posting offensive and obscene messages on social networking site Bebo<sup>223</sup>. This case is believed to be the first case involving social networking to come before the Irish courts. The posts by a man on a teenage girl's site were described by the judge hearing the case as "outrageous". The perpetrator agreed to pay the victim €3,000 as opposed to a jail sentence being imposed. The case was prosecuted under Section 13(1) of the Post Office (Amendment) Act, 1951, as amended, for sending offensive or indecent material by means of telecommunication.

### 2.2.3 The Post Office Amendment Act 1951

Section 13 of the Post Office Amendment Act 1951 has been significantly amended<sup>224</sup> since it was enacted. The most recent change was brought about by the Communications Regulation (Amendment) Act 2007, which substituted the following for section 13:

Offences in connection with telephones.

13.—(1) Any person who—

- (a) sends by telephone any message that is grossly offensive, or is indecent, obscene or menacing, or
- (b) for the purpose of causing annoyance, inconvenience, or needless anxiety to another person—
  - (i) sends by telephone any message that the sender knows to be false, or
  - (ii) persistently makes telephone calls to another person without reasonable cause,

commits an offence.

(2) A person found guilty of an offence under subsection (1) is liable on conviction—

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<sup>223</sup> "Man (27) prosecuted over obscene Bebo messages", *Irish Independent*, 6 June 2008.

<sup>224</sup> Fourth Schedule of the Postal and Telecommunication Services Act 1983; section 7 of the Postal and Telecommunications Services Amendment Act 1999; and Regulation 4(8) of SI 306/2003.

- (a) if tried on indictment, to a fine not exceeding €75,000 or to imprisonment for a term not exceeding 5 years, or to both, or
- (b) if tried summarily, to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 12 months, or to both.

(3) A contravention of this section is an offence under the Post Office Act 1908.

(4) On convicting a person for an offence under subsection (1), the court may, in addition to any other penalty imposed for the offence, order any apparatus, equipment or other thing used in the course of committing the offence to be forfeited to the State.

(5) In this section, 'message' includes a text message sent by means of a short message service (SMS) facility.

This section is quite restrictive as it addresses messages sent by "telephone" only. Whilst it specifically includes text messages, it does not include any reference to email or other internet messages. It has been suggested by Kelleher & Murray<sup>225</sup> and TJ McIntyre<sup>226</sup> that the section would not include those other types of message. Moreover, parliamentary debates on this issue (although not cognisable by the courts in interpreting statutes<sup>227</sup>) suggest that "cyber-bullying" was intentionally not included. The Minister for State at that time rejected an amendment extending the section to include cyber-bullying, stating:

"The purpose of amending the Post Office (Amendment) Act 1951 was to increase fines to deter nuisance calls to the emergency call answering service, ECAS. The change proposed by the Senators is a wider offence and I understand from the debate on Tuesday that they are particularly concerned about tackling cyber-bullying. The issues were raised again today by the Senators. This type of regulation falls outside the remit of the Bill. The sole intention of this provision is to address nuisance calls to the emergency services. To respond to Senator Terry, it is an offence under section 10 of the Non-Fatal Offences against the Person Act 1997 to harass a person by use of

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<sup>225</sup> D. Kelleher and K. Murray, *Information Technology Law in Ireland*, (2nd ed., 2007) at p.690.

<sup>226</sup> [www.tjmcintyre.com](http://www.tjmcintyre.com), 28 July, 2008.

<sup>227</sup> *Crilly v Farrington* [2001] 3 IR 251.

any means, including by use of a telephone. Therefore, the issue is already dealt with to a certain extent.”

As the only report available on the case referred to in the section above was a newspaper article published, it is difficult to be sure of the precise legislation referred to in court. However, it has been suggested by TJ McIntyre,<sup>228</sup> that the prosecution may have had in mind the previous section 13(1) which prohibited the sending of any grossly offensive etc. message by means of the telecommunications system operated by “any authorised undertaking” which may have been wide enough to include internet connections.

#### **2.2.4 Harassment**

Bullying is a form of harassment and, as such, falls within the provisions of the Non-Fatal Offences Against the Person Act, 1997. Section 10 of the Act prohibits the harassment of a person “by any means” by “persistently following, watching, pestering, besetting or communicating with him or her”. The section provides for punishment of up to seven years imprisonment, and allows for a court to order, either in addition to, or as an alternative to a conviction, that a person shall not, for such period as the court may specify, communicate by any means, or come within a specified distance of a person’s home or workplace. The explicit reference to communication with a victim “by any means” and the alternative to a prison sentence may mean that this section is well suited to the kind of circumstances which arise in cyber-bullying cases. This legislation has been used in the past in cases where the harassment was via email only, and featured no physical element.

#### **2.2.5 Convictions for Harassment by Email and SMS**

In 2011, it was reported<sup>229</sup> that a man was convicted before Dublin District Court of harassing his son over an eight month period by continually sending him unwanted “inappropriate” e-mails to his workplace. The perpetrator was ordered to have no

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<sup>228</sup> *Ibid.*

<sup>229</sup> *The Herald*, 20 Sept 2011.

contact with his son except through solicitors for a year. Dublin District Court heard that the man's son, who had broken off contact with him, had been "stressed and in fear" over the emails, which continued after Gardaí advised his father to stop. A total of 37 unwanted emails were involved. The man was convicted of harassing his son on dates between April and November 2010. Judge William Early fined him €120 and ordered him not to contact the victim again for 12 months.

In 2011, it was also reported<sup>230</sup> that a man who harassed his ex-girlfriend through emails, threatening letters and texts, during a three year period, pleaded guilty to charges under section 10(1) and (6) of the Non-Fatal Offences Against the Person Act before Galway District Court. The evidence before the court outlined how the communications ceased when the Gardaí became involved and that contact with the victim was not continuous throughout the three years. It was further explained to the court that the perpetrator had sent a letter to the woman's workplace and that a colleague had also received a letter. The letter was described as one which would put someone in fear.

Judge Fahy convicted the accused and imposed a four month sentence, suspended for a duration of 12 months, on condition that he be of good behaviour, have no contact, by any means, with the injured party and stay away from her residence and place of work.

In another recent case, it was reported in the media<sup>231</sup> that a man who sent approximately one hundred unsolicited texts on July 27, 2010 to a woman because of his "infatuation" with her was handed down a suspended prison sentence and fined under Section 10 of the Non-Fatal Offences against the Person Act 1997 at Arklow District Court. The man was charged with harassing the victim after she had made numerous complaints to Gardaí about receiving text messages from an unknown person.

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<sup>230</sup> *Galway Advertiser*, 14 July 2011.

<sup>231</sup> *Wicklow People*, 5 December 2012.

The court heard that the texts had been sent by the perpetrator at various times of the day and night and a number of the texts made reference to where the victim had been socialising.

Judge Kennedy imposed a six-month prison sentence which he suspended for two years with the perpetrator's own bond in the amount of €500. The judge also fined the perpetrator €1,500 and ordered him to have no contact with the victim.<sup>232</sup>

#### **2.2.6 Recommendations**

*On review of reported cases of harassment involving social networking, email and SMS, there appear to be very few criminal prosecutions taken of this type of harassment under the Non-Fatal Offences Against the Person Act, 1997 despite the suitability of that Act. When cyber-bullying is being described as an epidemic, we need to examine why this is the case. Specifically, is there reticence to investigate complaints of cyber-bullying?*

*Responding to calls for new criminal legislation to tackle cyber-bullying, the Minister for Justice identified our existing laws against harassment as being suitable. However, the Minister has directed the Law Reform Commission to examine difficulties in prosecuting for cyber-bullying and, in particular, the necessity to show persistence in the harassment.*

*Existing laws regarding harassment can be used to incorporate cyber-bullying incidents. A review of the Post Office (Amendment) Acts should be undertaken with a view to incorporating emerging means of cyber-bullying.*

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<sup>232</sup> A further example is provided by <http://www.irishtimes.com/newspaper/ireland/2012/0726/1224320828156.html> - it appears, though it is not absolutely clear, that s.10 of the 1997 Act was invoked here.



## 2.3 Anonymity

Anonymity is often the greatest obstacle in bringing perpetrators of cyber-bullying to justice. It represents an obstacle not only for those seeking to identify perpetrators but may also prevent victims from pursuing justice. Proposals to address cyber-bullying have included calls for legislation to be enacted to promote co-operation between law enforcement and telecommunication providers to reveal the identity of perpetrators hiding behind the veil of anonymity.

A recent decision of Mr. Justice Roderick Murphy of the High Court could mark an important development for victims seeking to gain access to identities of persons who post comments on-line. In November 2012, it was reported<sup>233</sup> that the High Court granted court orders to an Irish-based oil exploration company allowing it to seek the identity of people who allegedly posted defamatory material on internet message boards, including Boards.ie, causing the oil company to lose stg£132m of market value.

US Oil Gas plc (USOP) claimed that untrue defamatory postings on a number of online message boards between 8 November and 22 November 2012 regarding its drilling project in Nevada led to a price-drop and damaged the company's reputation. After being granted the court orders, USOP stated its intention to take legal action against the authors of the posts. The company has been in the oil and gas sector for more than six years and had a good reputation as a well-managed business. The chief executive of USOP Brian McDonnell stated in an affidavit to the court that statements made alleging that the company was engaged in fraudulent activities and serious wrongdoings had "a catastrophic effect" on its market value.

The person or individuals behind the postings called Mr. McDonnell a 'liar' in public and alleged he was running a 'ponzi scheme'. In the affidavit, McDonnell stated it would be difficult for USOP to generate further capital investment because of the false allegations that are now in the public domain.

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<sup>233</sup> <http://www.siliconrepublic.com/comms/item/30501-high-court-grants-orders-to/> .

This decision to allow USOP to gain access to the identities of the person or people who posted the commentary on the message boards may represent a significant development in terms of the ability of online perpetrators to hide behind anonymous profiles on social networking sites. This High Court decision demonstrates a willingness on the part of the Irish legal system to take necessary measures where the law itself does not provide such avenues.

### **2.3.1 Anonymity of the Victim**

If a victim of cyber-bullying seeks to pursue a legal claim for defamation against the perpetrator, they will require certain information beforehand. First, the victim will require the perpetrator's IP address. If the IP address is obtained, the victim will be in position to identify the relevant Internet Service Provider (ISP). However, if the victim's request to the ISP to reveal the names of the users associated with the IP is refused, the victim will be required to seek a court order directing the ISP to disclose that information. The need for such an application to the courts will undeniably deter potential litigants due to the requirement for justice to be administered in public. For the purposes of a victim's court application, they will be required to disclose their identity and the details surrounding the cyber-bullying incident(s).

The likelihood of a court agreeing to allow an applicant to bring such a claim anonymously is unclear and a recent High Court decision would suggest that such a request may not be granted. In *Mc Keogh v John Doe*<sup>234</sup> Mr. Justice Peart had previously made *ex parte* interim orders prohibiting publication of or concerning a YouTube video clip and accompanying text. The video clip showed a passenger running from a taxi without paying his fare. Comments posted with the clip incorrectly identified the plaintiff as the passenger. In a further application to the court, Mr. McKeogh requested similar orders against a number of newspapers who had reported on the earlier proceedings prohibiting publication. Mr. McKeogh's application against the newspapers was unsuccessful. It was held that that a litigant does not have any right to anonymity in relation to court proceedings due to the constitutional requirement for the administration of justice in public. This was held to apply in cases where a party, such as Mr. McKeogh, genuinely believes that his or her

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<sup>234</sup> [2012] IEHC 95.

right to privacy and a good name would be breached if his or her involvement as a party to the proceedings became public information. The newspapers' reports of the interim orders were a consequence of the administration of justice in public and, therefore, Mr. Justice Peart refused the plaintiff's application.

### **2.3.2 A Review of the Canadian Position**

In the Canadian case of *AB v Bragg Communications Inc.*,<sup>235</sup> a bullied teenager sought an order against the defendant ISP to disclose the identity of the owner of the IP address, so that she could take a defamation action against the cyber-bully. This request was granted at first instance - however, the teenager's request to pursue the proceedings anonymously or to restrict publication of the contents of the fake profile was refused. The teenager appealed to the Nova Scotia Court of Appeal but the previous court decision was upheld.

A further appeal was made to the Supreme Court of Canada in which the request was finally granted.<sup>236</sup> The critical importance of the principle of open justice was recognised by the court, but it was held to be outweighed in this case by the need to protect children's privacy and to protect them from cyber-bullying. Accordingly, the teenager could proceed anonymously in her application for an order requiring the ISP to disclose the identity of the relevant IP users.

Judge Abella described the principle of open justice as a hallmark of a democratic society and as being inextricably linked to freedom of expression and freedom of the press but held that the question before the court was whether the request for anonymity was necessary to protect an important legal interest and with a minimal impact on freedom of expression. The relevant legal interests in this instance were the teenager's privacy interests and the protection of children from cyber-bullying.

The teenager's privacy interests in this instance were underscored by her young age and the type of victimization from which she requested to be defended. Judge Abella stated, "It is not merely a question of her privacy, but of her privacy from the

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<sup>235</sup> [2010] NSSC 215.

<sup>236</sup> [2012] SCC 46.

relentlessly intrusive humiliation of sexualized online bullying”.<sup>237</sup> She further held that, as the recognition of the inherent vulnerability of children was fully recognised in Canadian law, there was no requirement for a particular child to demonstrate that she was personally inherently vulnerable.

Judge Abella acknowledged that it is reasonable to infer that children may suffer harm through cyber-bullying and recognised the “resulting inevitable harm to children – and the administration of justice – if they decline to take steps to protect themselves because of the risk of further harm from public disclosure”<sup>238</sup>. She stated that, “the likelihood of a child protecting himself or herself from bullying will be greatly enhanced if the protection can be sought anonymously”. The learned judge therefore concluded:

“If we value the right of children to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing A.B.’s anonymous legal pursuit of the identity of her cyber-bully”.

### **2.3.3 Recommendation**

*The current Irish legal position would appear to suggest that an application for anonymity would be unsuccessful. However, it is difficult to be definitive in respect of the legal position because Mr. Justice Peart’s decision in *McKeogh v John Doe* may well have been different if the applicant was a child or teenager seeking to rely on the right to privacy of children, and able to invoke the general social interest in protection of children from cyber-bullying. The ideal solution would be an agreement of co-operation to be entered into between ISPs (and potentially other entities such as Facebook) and the Gardaí to provide IP addresses where complaints of cyber-bullying have been received.*

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<sup>237</sup> *Ibid*, at para 14.

<sup>238</sup> *Ibid*, at para 23.

## 2.4 Homophobic Bullying

On 14<sup>th</sup> December 2011, UN Secretary General, Ban Ki-moon declared that homophobic bullying was a “moral outrage, a grave violation of human rights and a public health crisis.” In May 2012, in Paris, UNESCO launched their manual of good policy and practice for tackling homophobic bullying in education.<sup>239</sup>

In Ireland, the Programme for Government in 2011 committed to “encourage schools to develop anti-bullying policies and in particular, strategies to combat homophobic bullying to support students.” In May 2011, the Minister for Education and Skills, announced the establishment of a “working group comprising all the relevant sections of [his] Department, along with the NGOs involved in this area and the education partners, to help draft a roadmap towards the elimination of homophobic bullying in our schools.”

### 2.4.1 Why focus on homophobic bullying?

Homophobic and transphobic bullying have been found to be a problem in Ireland. TCD’s Anti-Bullying Centre found that 16% of Irish second-level students overall were the targets of bullying.<sup>240</sup> *Supporting LGBT Lives*, a major study funded by the HSE’s National Office for Suicide Prevention, found that the rate of bullying was much higher among lesbian, gay, bisexual and transgender (LGBT) people, and specifically that:

- 50% experienced verbal homophobic or transphobic bullying;
- 40% were verbally threatened by fellow students;
- 25% were physically threatened by their peers;
- 34% heard homophobic comments from their teachers.<sup>241</sup>

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<sup>239</sup> UNESCO (2012), “Education sector responds to homophobic bullying”, <http://unesdoc.unesco.org/images/0021/002164/216493e.pdf>.

<sup>240</sup> M.O’Moore (1997): <http://abc.tcd.ie/school.html>.

<sup>241</sup> P. Maycock *et. al.*, (2009) “Supporting LGBT Lives: A Study of the Mental Health and Well-Being of Lesbian, Gay, Bisexual and Transgender People” [www.belongto.org](http://www.belongto.org).

Minton, Dahl, O'Moore and Tuck, (2008)<sup>242</sup> also reported high rates of homophobic bullying and harassment amongst the sample of LGBT youth that they surveyed. According to the authors, 50% of respondents reported experiencing incidents of bullying within the preceding 3 months, while over one-third said that they had encountered regular (daily/weekly) verbal harassment relating to their sexual orientation. One in five had been physically attacked owing to their sexuality and a similar proportion of respondents related feeling unsafe travelling between home and school.

Research funded by the Department of Education and Skills (DES) and carried out by Dublin City University found that 79% of teachers were aware of homophobic bullying in their schools.<sup>243</sup> The same study found that 41% of teachers found it more difficult to deal with homophobic bullying than other forms of bullying.<sup>244</sup> Some teachers have reported their reluctance to discuss matters of sexual orientation in an affirming light for fear of being seen to 'undermine' the religious values of the school. Section 37 of the Employment Equality Act 1998 (which grants schools an exemption from the discrimination provisions of the 1998 Act where action is reasonably necessary to preserve the school's religious ethos) may, indeed, discourage teachers in denominational schools from addressing LGBT concerns in a positive manner. This point is underlined by a 2008 study carried out by Lodge, Gowran and O'Shea: *Valuing Visibility: An Exploration of how Sexual Orientation Issues Arise and are Addressed in Post-Primary Schools* (2008),<sup>245</sup> a study funded by the Department of Education and carried out by NUI Maynooth and the Gay and Lesbian Equality Network. Some teachers in that study noted that their school's religious ethos often served to inhibit classroom discussion by teachers of issues of sexual orientation. This in turn weakened, in their view, attempts to address homophobic bullying in such schools:

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<sup>242</sup> "An Exploratory Survey of the Experiences of Homophobic Bullying among Lesbian, Gay, Bisexual and Transgendered Young People in Ireland" *Irish educational studies*: 27 (2) 177-191.

<sup>243</sup> Norman, J. & Galvin, M. (2006) "*Straight Talk: An Investigation of Attitudes and Experiences of Homophobic Bullying in Second-Level Schools*" (Gender Equality Unit, Department of Education & Science, DCU).

<sup>244</sup> This may be due to ethos concerns, underlining the impact of s.37 of the Employment Equality Act (EEA) 1998.

<sup>245</sup> <http://www.glen.ie/attachments/1fa441c7-8607-4de5-a833-d2fb9bc93528.PDF>.

“...some school personnel were concerned about being inclusive of those who are gay, lesbian or bisexual for fear of acting contrary to some religious views or teachings.” (2008:15)

Homophobic and transphobic bullying have serious impacts on the mental health of LGBT young people. *Supporting LGBT Lives* found that:

- 27% of LGBT people have self-harmed;
- 50% of LGBT people under 25 have seriously thought of ending their lives;
- 20% of LGBT people under 25 have attempted suicide.<sup>246</sup>

The research also shows that most LGBT young people know their identity at 12 years of age but do not tell anyone until they are 17. This five year period corresponds to the time spent in secondary school. The research found a direct correlation between homophobic/transphobic bullying and attempted suicide.

“BeLonG To,” Ireland’s national youth service for LGBT young people, has undertaken awareness-raising work in relation to bullying, such as the annual campaign, “Stand Up! Don’t Stand for Homophobic Bullying”, which takes place each March in schools and youth services across Ireland. “BeLonG To” addresses homophobic bullying in partnership with school principals, teachers’ unions and other education partners. The organisation has long been engaged in policy development with key institutions and government departments, and the Minister for Education appointed it as a member of the DES Working Group on Bullying in Schools.

As part of its contribution to the DES Working Group, “BeLonG To” held a consultation on bullying in schools with LGBT young people at its youth leadership training residential event in Waterford in August 2012. The young people were from Carlow, Cork, Dublin, Kilkenny and Waterford; there were 17 girls and 14 boys, ranging in age from 13 to 21, with an average age of 18 years. Of the 31 young people, 23 had experienced homophobic or transphobic bullying in school. Only 8

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<sup>246</sup> P. Maycock *et. al.* (2009) “Supporting LGBT Lives; A Study of the Mental Health and Well-Being of Lesbian, Gay, Bisexual and Transgender People” [www.belongto.org](http://www.belongto.org).

had reported the bullying to staff at the school, and of these, only 3 reported that the bullying was addressed by someone in the school. Of the 15 young people who had experienced bullying but did not report it, 9 said that this was because they were afraid to speak up, and 4 did not think it would help to report it. The findings of this consultation demonstrate that high levels of homophobic bullying continue to take place in Irish schools.<sup>247</sup>

Former President Mrs. Mary McAleese has also alluded to the worrying prevalence of homophobic bullying and the impact it has on already vulnerable young people coming to terms with their emerging sexuality:

“Although Ireland is making considerable progress in developing a culture of genuine equality, recognition and acceptance of gay men and women, there is still an undercurrent of both bias and hostility which young gay people must find deeply hurtful and inhibiting. For them, homosexuality is a discovery, not a decision and for many it is a discovery which is made against a backdrop where, within their immediate circle of family and friends as well as the wider society, they have long encountered anti-gay attitudes which will do little to help them deal openly and healthily with their own sexuality. ...we could and should decommission attitudes that encourage bullying of all sorts and in particular attitudes that are deeply hurtful to those who are homosexual”.<sup>248</sup>

#### **2.4.2 Recommendation**

*It is recommended that homophobic and transphobic bullying in schools should be considered a child protection issue. As such, schools need to address homophobic and transphobic bullying through rigorous prevention and intervention measures.*

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<sup>247</sup> These studies primarily address the experience of LGBT students. As such, it is possible that they may not reflect and capture the experience of heterosexual students who are bullied because they are perceived to be lesbian or gay. As such, the problem of homophobic bullying may be even more pronounced, when one includes the experience of heterosexual students who are bullied based on perception.

<sup>248</sup> President of Ireland, Mary McAleese, International Association of Suicide Prevention, 14<sup>th</sup> Biennial Conference, Irish National Events Centre, Killarney, Co Kerry, 31 August 2007.



## 2.5 The Role & Responsibility of Schools<sup>249</sup>

At a time when schools and their students are engaging in the latest forms of collaborative learning that online tools such as portfolios and blogs allow, the rising popularity of the latter carries with it the potential for such tools to be misused as yet another method of internet harassment and cyber-bullying, particularly by and against young school students. Because technology permits an inescapable platform for cyber-bullying for the ‘always connected’ world, temporal distinctions between instances of bullying which occur at school and at home risk becoming eradicated. The liability for schools in this novel environment is far from clear, particularly as regards the extent of the school's duty of care beyond school hours and the school's virtual and physical gates.

In a recent statement to the media,<sup>250</sup> the Association of Community and Comprehensive Schools (ACCS) General Secretary, Ciarán Flynn confirmed that that association has had to deal with a number of issues including separate incidents where students set up hoax Facebook pages in the names of a principal and another student. Principals have had to deal with situations where pictures taken in the classroom, or elsewhere in the school, have been posted online. In light of calls made for the introduction of legislation compelling schools to have strong anti-bullying codes, a review of the role of schools in addressing cyber-bullying and the extent of their responsibility in such instances is timely and significant. Whilst cyber-bullying in school communities is found to exist mainly among students, there are increasing reports of student-to-staff cyber-bullying. This section will also include a review of the position in other jurisdictions, specifically Massachusetts and New South Wales in Australia.

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<sup>249</sup> There is some evidence that in relation to homophobic bullying, teachers may be reluctant to address issues of sexual orientation because of fears relating to the religious ethos of a school. See the Valuing Visibility report (2008) – above.

<sup>250</sup> “Schools ban photos to stamp out cyber bullies”, *Irish Independent*, 4 December 2012.

### 2.5.1 Code of Behaviour and Discipline

School management authorities are responsible for dealing with bullying in a school. Each school is required to have in place a policy which includes specific measures to deal with bullying behaviour, within the framework of an overall school Code of Behaviour and Discipline.

Guidelines on Countering Bullying Behaviour in Schools<sup>251</sup> (hereinafter referred to as “the Guidelines”) were issued by the Department of Education and Skills (DES) to assist schools in developing their anti-bullying policy. The Guidelines also outlined a strategy to prevent bullying behaviour. In addition a template was provided to develop an anti-bullying policy based on the guidelines. The template makes specific reference to cyber-bullying and homophobic bullying.

The Guidelines specify that an anti-bullying policy “should be an integral part of a written Code of Behaviour and Discipline in all primary and post-primary schools”. The Guidelines go on to observe that “[i]nternational research clearly indicates the crucial importance of the existence of a School Policy, which includes specific measures to deal with bullying behaviour within the framework of an overall school Code of Behaviour and Discipline” and that “such a code, properly devised and implemented, can be the most influential measure in countering bullying behaviour in schools.”

Under Section 23 of the Education (Welfare) Act 2000 the management authority of a school is obliged to draw up a Code of Behaviour for students at the school. The Act provides that the Code of Behaviour must be prepared by the board of management after consultation with the principal, teachers, parents and the local Education Welfare Officer.

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<sup>251</sup> “Guidelines on Countering Bullying Behaviour in Schools, 1993” [www.education.ie](http://www.education.ie). A suite of guides for second level schools, developed by GLEN, the Gay and Lesbian Equality Network, and the Department of Education are available at [www.glen.ie/education](http://www.glen.ie/education) or on the Department’s website. The main resource is *Lesbian, Gay and Bisexual Students in Post-Primary Schools: Guidance for Principals and School Leaders* and the accompanying *10 things you should know: 5 things you can do*, both of which have been endorsed by all the education partners – all the national school management bodies, the teachers unions, the NAPD and the National Parents Council Post-Primary.

Schools also have obligations in relation to harassment and sexual harassment under the Equal Status Acts, 2000 to 2011. The DES template states that harassment should be addressed within the framework of an overall school Code of Behaviour. The template further states “[t]he prevention of harassment should be an integral part of a written Code of Behaviour and of an anti-bullying code or charter”.

An information booklet<sup>252</sup> was published jointly by the Department of Education and Science and the Equality Authority and was issued to all primary and post-primary schools in 2005. In this publication, it was recommended that a school’s Code of Behaviour should explicitly name the nine grounds under which discrimination is prohibited under (what were then) the Equal Status Acts, 2000 to 2004.<sup>253</sup> The template also referred to recommendations that the Code should set out in the school’s policy and procedures to deal with harassment, including the identification of preventative actions and measures that will be taken to address it, if it should occur.

### **2.5.2 Liability of a school**

A victim of cyber-bullying seeking reparation for damage to his or her reputation or for injuries that he or she has suffered may, where that damage or injury has been suffered in a school context, view the school itself as an appropriate defendant. A school authority may be perceived as the “deeper pocket” compared with the perpetrator for the purposes of meeting any compensation award in a defamation and/or negligence claim, whether by virtue of the school’s insurance cover or its support from public finances.

#### **Defamation**

It is possible that a claim may be made against a school when it or its employee is responsible for placing defamatory material on a social networking site or blog. It also

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<sup>252</sup> Department Education & Science and The Equality Authority, *Schools and the Equal Status Acts* (2<sup>nd</sup> Ed.).

<sup>253</sup> It is submitted that it should also explicitly name transgender status as a further ground. Transgender status is not explicitly addressed in equality legislation but, in the case of those who have undergone, are undergoing or wish to undergo gender reassignment, is covered implicitly by the sex discrimination provisions of the EEA 1998 and Equal Status Act (ESA) 2000.

cannot be excluded that a school could be held responsible for defamatory material placed on a social networking site or blog hosted by third parties such as other students, for example if it knew or ought to have known that this was occurring.

### Negligence

A plaintiff seeking to establish an action for negligence is required to show that the defendant owed the plaintiff a duty of care, and the defendant breached that duty with the result that the plaintiff suffered damage. If such a case is successfully made out the defendant may seek to rely on a defence, which, in the case of cyber-bullying in a school context, is likely to be limited to contributory negligence. Whilst claims against schools for alleged breach of duty in failing to prevent face-to-face bullying may raise difficulties, cyber-bullying, including bullying involving a social networking site or blog, would inevitably pose even more considerable challenges.

#### **2.5.3 The Response by Department of Education & Skills and Schools**

School management bodies are currently engaged in updating existing policies and launching new initiatives to tackle cyber-bullying in schools. The Joint Managerial Body (“JMB”) has directed schools to ban all students from taking photographs of other pupils or members of staff under new guidelines to combat cyber-bullying. These guidelines state that students should not be allowed to take pictures of staff or other students unless specifically required for a school project. ACCS recently advised its ninety-three schools to strengthen their codes of behaviour to cover breaches of discipline arising from the misuse of online data or social media, and to include as possible punishment student suspension or expulsion.

The Irish Vocational Education Association, which represents 258 schools, expects to have a set of procedures for dealing with cyber-bullying ready soon. Education Minister Ruairí Quinn TD also has an expert group working on new rules for schools around all forms of bullying, including cyber-bullying.

A key focus of the updated JMB guidelines is on social media sites, such as Facebook or Twitter, which many teachers now use as effective educational tools. The challenge for schools is to ensure that the use of such sites does not facilitate cyber-bullying or

breaches of privacy and, to this end, the guidelines provide practical suggestions on how to safeguard those involved. Teachers are advised not to use their personal Twitter or Facebook accounts for any school-related projects, but to set up separate accounts. Teachers are also instructed to avoid connecting directly with students by using Facebook pages and to protect their tweets on Twitter, whether for personal or school-related purposes, so that they are only viewable by approved users.

#### **2.5.4 The Position in Other Jurisdictions: A Review of Criminal Legislation in New South Wales and of Massachusetts Laws**

##### New South Wales

New South Wales is the only Australian jurisdiction to enact legislation specifically directed at bullying in schools (which would in its terms include cyber-bullying).<sup>254</sup> Nevertheless, cyber-bullying may easily be conceived of in terms of well known criminal offences such as assault, threats, extortion, stalking, harassment and indecent conduct. In addition, an increasing array of new offences, such as torture, voyeurism, cyber-stalking, and telecommunications offences may be relevant. The New South Wales provisions, and some of these other offences as they apply to cyber-bullying, merit examination.

The Commonwealth Criminal Code Act 1995 contains a number of offences which may be effective against a cyber-bully who misuses telecommunication services to menace or threaten other persons. Section 474.17 makes it an offence to use telecommunication services to menace, harass or cause offence (punishable by 3 years imprisonment). It is irrelevant as to whether the menace or threat is caused by the type of use (such as multiple postings on a website), by the content of the communication or by both, provided reasonable persons would regard the use as being menacing, harassing or offensive in all the circumstances.

Where the threat goes further and contains a threat to kill or cause harm, an offence under s.474.15 may be committed. This section provides that it is an offence for a

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<sup>254</sup> Crimes Act 1900 (NSW), Div 8B.

person to use telecommunication services, including the internet, to threaten to kill (punishable by 10 years imprisonment) or to cause serious harm (punishable by 7 years) to another person (such as the target) or to a third person, if the bully intends the target to fear that the threat will be carried out. ‘Fear’ is defined broadly in the Act to include apprehension, while ‘threat’ is defined as including “a threat made by any conduct, whether express or implied and whether conditional or unconditional.” It is not necessary for the target to *actually* fear that the threat will be carried out, just that it be *intended* to put the target in such fear.<sup>255</sup> This is an important point since most bullies intend that their targets are fearful, and there have been numerous reported cases of death threats and threats of serious harm being made in the cyber-bullying context (most commonly by email or text message).

Additional offences in the Criminal Code Act 1995 (Cth) that may be relevant to cyber-bullying include s.474.22, which prohibits using a carriage service for child abuse material. The latter section may encompass posting a video of a sexual assault and other abuse such as ‘happy slapping’, in which an unsuspecting victim is assaulted while an on-looker films the attack, often with a mobile phone, and distributes the video via a website.

### Massachusetts

As a result of bullying in schools in Massachusetts, Governor Deval Patrick signed an anti-bullying Bill into law on May 3, 2010 making Massachusetts the 42<sup>nd</sup> state to pass such a law. Both the State Senate and House of Representatives unanimously passed the Bill, and it is considered one of the strictest anti-bullying laws in the US. The law applies to school districts, charter schools, non-public schools, approved private day or residential schools and collaborative schools.

The law defines bullying as unwelcome and repeated “written, verbal, or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that (1) causes physical or emotional harm to the victim or damage to the victim’s property; (2) places the victim in reasonable fear of harm to himself or of damage to

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<sup>255</sup> See s 474.15(3).

his property; (3) creates a hostile environment at school for the victim; (4) infringes on the rights of the victim at school; or (5) materially and substantially disrupts the education process or the orderly operation of a school.”

In addition, bullying includes cyber-bullying, which is defined as “bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.”

All school districts in Massachusetts were required to adopt and implement a bullying prevention and intervention plan in their schools by December 31, 2010. Shortly after the law was passed, the Department of Elementary and Secondary Education provided a model plan for school districts state-wide to use as a guideline and serve as a resource to schools. School districts, with input from teachers, school staff, professional support personnel, volunteers, administrators, students, parents, guardians, law enforcement, and community representatives, must create a plan to be implemented in each respective school.

The law places considerable emphasis on the schools’ role in responding to bullying by requiring all school districts to formulate and implement a prevention plan. At a minimum, every plan must include: (i) definitions of bullying, cyber-bullying and retaliation and statements prohibiting each; (ii) clear reporting procedures for students, staff, parents, guardians and others; (iii) a provision that allows anonymous reports as long as no disciplinary action is taken solely on the anonymous report; (iv) prompt investigation of all reports of bullying or retaliation; (v) possible disciplinary actions for the perpetrator as long as the disciplinary actions “balance the need for accountability with the need to teach appropriate behaviour”; (vi) clear procedures to

restore the victim's safety and need for protection; (vii) ways to protect a person who reports bullying, provides information for an investigation or provides reliable information about an act of bullying; (viii) procedures for promptly notifying (1) the parents or guardians of a victim of the act as well as the action taken to prevent further acts, as long as the notification is consistent with state and federal law, and (2) the law enforcement agency if criminal charges may be pursued against the perpetrator; (ix) a provision that a student who intentionally makes a false allegation of bullying or retaliation shall be subject to disciplinary action; and (x) a strategy that provides counselling or appropriate services for perpetrators, victims, and their family members. In order to ensure the prevention plan is successfully implemented in each school, a school official must be designated by the superintendent and school principal to oversee the plan.

#### **2.5.5 Recommendations**

*Bullying should be addressed as a public health issue rather than one confined to the sphere of education. With home access to the internet now commonplace, and social networking proliferating and becoming increasingly advanced, the danger for school-aged adolescents is real. Schools, parents and students all have a role to play in managing these foreseeable risks.*

*The most effective means of preventing bullying may be to adopt a whole-school approach. This would encompass school policies in areas such as anti-bullying initiatives, codes of behaviour and the use of social media as an educational tool, as well as the involvement of parents. Legislation should be introduced compelling schools to have a strong disciplinary code. Moreover, learning from the observations made regarding the laws of Massachusetts, disciplinary measures should be uniform nation-wide as schools currently have too much latitude to determine how to discipline each student who is engaging in bullying.*



## 2.6 Irish and British initiatives regarding children's online safety

When considering how to protect children online, it is important that a child-centred perspective is taken. In the UK's major internet safety review headed by Dr. Tanya Byron, children's perspectives were central to the review, ensuring that it accurately reflected how children and young people use the internet and other media (hereinafter referred to as the "Byron Review").<sup>256</sup> Special attention needs to be paid to the idea of user-generated content. It is also crucial to remember that all of these problems can be offset in many cases by the educational, developmental and social benefits for young people that accrue from positive online experiences.

With respect to internet safety generally, the Office for Internet Safety was established under the auspices of the Department of Justice in 2008. It has primary oversight responsibility over the Industry Code of Practice and Ethics for Internet Service Providers in Ireland, and has established hotline.ie, a mechanism by which suspected illegal material can be reported and removed or access to it blocked. The emphasis of hotline.ie is on online child abuse imagery. It also provides guides to internet safety for parents and children.

The establishment of the Working Group on Bullying alongside the holding of a National Anti-Bullying Forum in May 2012 - an initiative between the Department of Education and Skills and the Department of Children and Youth Affairs - is a welcome development, as is the consultation with young people undertaken by the Office of the Ombudsman for Children. However, there has been no comprehensive review of internet safety comparable to the Byron Review to date in Ireland. The Byron Review highlighted the importance of a three part strategy to improving children's online experiences - reduce the availability of material that threatens the well-being of children, restrict access to such material through the effective use of filtering and parental control software as well as at ISP level, and build children's

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<sup>256</sup> Tanya Byron, *Safer Children in a Digital World: The Report of the Byron Review* (Department of Education, 2008). See also the literature review conducted for the review - David Buckingham, *The Impact of the Media on Children and Young People with a particular focus on computer games and the internet*: Prepared for the Byron Review on Children and New Technology (Department of Children, Schools and Families, 2008) - as well as the Byron Review Action Plan (Department of Education, Department of Culture, Media and Sport and the Home Office, 2008) and the two-year assessment of the Review, Tanya Byron, *Do we have safer children in a digital world: A review of progress since the 2008 Byron Review* (Department of Education, 2010).

resilience when they encounter problematic material, allowing them to cope better with unwelcome experiences.<sup>257</sup> These objectives have much to commend them; however, more detailed research needs to be conducted on this issue in Ireland before the three part strategy can be unreservedly accepted as the basis for policy formation.

It is also important that children's online safety is mainstreamed within child welfare discourse and policy. This is due to the importance of online interaction for many young people. It is therefore essential that the adults upon whom children rely – especially in families and in school – are equipped with a sufficient understanding of internet safety issues so that they can offer appropriate support to young people. Initiatives such as the ISPCC's Safe Click Code provide clear guidance for both parents and young people, yet more work needs to be done both in terms of public awareness raising and education for parents and young people as well as mainstreaming the issue within schools. To that end, consideration should be given to extending the mandate of the Office for Internet Safety and the allocation of resources to ensure that the appropriate research can be conducted and subsequent policies implemented effectively.

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<sup>257</sup> The Byron Review, at 62-65.

# SECTION 3:

## THE LAW ON GUARDIANSHIP OF CHILDREN

### 3.1 Introduction

The law relating to the guardianship of children<sup>258</sup> in Ireland is contained in the Guardianship of Infants Act 1964<sup>259</sup> (hereinafter referred to as “the Act”), as amended by the Status of Children Act 1987, the Judicial Separation and Family Law Reform Act 1989, the Family Law (Divorce) Act 1996 and the Children Act 1997.

Guardianship, a legal relationship that encompasses both rights and duties, is “the duty to maintain and properly care for a child and the right to make decisions about a child’s religious and secular education, health requirements and general welfare.”<sup>260</sup> A guardian is empowered to make decisions on any matter relating to the child’s education, religious upbringing, health or general welfare. In addition, a guardian has the right to be consulted on matters relating to the child such as his or her place of residence; passport and visa applications; legal representation; consent to medical treatment; and adoption or care of the child in the event of the death of another parent or guardian. These parental rights and duties flow from the constitutional protection of the family set out in Article 41 and Article 42 of the Irish Constitution, *Bunreacht na hÉireann*. Section 10(2)(a) of the Act outlines the role of the guardian as follows:

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<sup>258</sup> A “child” is defined in s. 2 of the Act, as amended by the Age of Majority Act 1985, as a person under the age of 18 years.

<sup>259</sup> The Guardianship of Infants Act 1964 reformed and consolidated the pre-existing laws relating to custody, guardianship and testamentary guardianship and expressly repealed all residual English Statutes.

<sup>260</sup> Alan Shatter, *Family Law* (4<sup>th</sup> ed. Butterworths 1997) at p. 532. This description was approved by Finlay Geoghegan J. in *R.C. v I.S.* [2003] IEHC 86; [2003] 4 IR 431. *See also* Geoffrey Shannon, *Family Law Practitioner* (Thomson Roundhall, 2003) at I-034.

[A]s guardian of the person [the guardian] shall, as against every person not being, jointly with him, a guardian of the person, be entitled to the custody of the infant and shall be entitled to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the infant and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant.

Custody, on the other hand, refers to the day-to-day care and control of the child,<sup>261</sup> while access enables a party to have contact with the child and can include the imposition of conditions or supervision.<sup>262</sup> Generally speaking, only guardians of the child can apply for custody.<sup>263</sup>

The Law Reform Commission favours replacing the current terms “guardianship,” “custody” and “access” with the terms “parental responsibility,” “day-to-day care” and “contact.” These terms are considered to more accurately describe the relationship between the child and those caring for him or her. It has been suggested that a more accurate description of guardianship is in fact “parental rights and responsibility.”<sup>264</sup>

### **3.1.1 Recommendation:**

*Replace the terms “guardianship,” “custody” and “access” with more accurate and child-centric terminology in light of the recommendations of the Law Reform Commission and other commentators.*

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<sup>261</sup> *J v C* [1970] AC 668; [1969] 1 All ER 788 cited with approval in *W O’R v EH* [1996] 2 IR 248.

<sup>262</sup> Increasingly, access is considered the right of the child to maintain contact with a parent or other person.

<sup>263</sup> An exception is the unmarried father who can apply to court for custody or access to the child without being appointed guardian first. See s. 11(4) of the Act.

<sup>264</sup> Anne Egan and Richard McNamara, “Grandparents and the Law in Ireland” (2010) 13(2) *IJFL* 27.

### 3.2 Parental Guardianship

Legal guardianship rights and obligations adhere automatically to a child's birth mother and, where the couple are married at the time of birth, to her husband.<sup>265</sup> Where the biological father subsequently marries the child's mother, he automatically obtains joint guardianship. This status is not affected by any subsequent breakdown in the marriage.<sup>266</sup>

The constitutional protection afforded to married parents does not extend to the non-marital father, whether that family is based on cohabitation, civil partnership or is a lone parent family.<sup>267</sup> Where a child is born outside marriage, the unmarried mother is the sole guardian of her child<sup>268</sup> unless she consents to the father's appointment as guardian.<sup>269</sup> Where the unmarried mother does not consent to the father being appointed guardian, then the father must apply to the District Court to be so appointed.<sup>270</sup> While the non-marital father has a right to apply for guardianship, there is no correlating right for such an application to be granted.<sup>271</sup> However, even where a non-marital father acquires such rights and both parents become joint guardians, the father can still be removed as a guardian by court order.<sup>272</sup>

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<sup>265</sup> Section 6(1) of the Act.

<sup>266</sup> Section 10(2) of the Family Law (Divorce) Act 1996 which states that the granting of a decree of divorce does not in itself affect the right of either parent to act as a joint guardian.

<sup>267</sup> See *State (Nicolaou) v An Bord Uchtála* [1966] IR 567; *G v An Bord Uchtála* [1980] IR 32; and *JK v VW* [1990] 2 IR 437.

<sup>268</sup> Section 6(4) of the Act. This is because the relationship between mother and child has been held to be protected under Article 40.3 of the Constitution in *G v An Bord Uchtála* [1980] IR 32. While this is generally considered to be a weaker form of constitutional protection, it is nonetheless significant.

<sup>269</sup> Section 2(4) of the Act as amended by s. 4 of the Children Act 1997. For the procedures required to make such a statutory declaration see the Guardianship of Children (Statutory Declarations) Regulations 1998. Prior to making such a declaration the parties must have made arrangements in relation to the custody of and access to the child. Where there is more than one child of the relationship, a separate agreement must be made in respect of each child.

<sup>270</sup> Section 6A(1) of the Act as inserted by s. 2 of the Status of Children Act 1987.

<sup>271</sup> Though it is now very common for fathers to be appointed guardians, when they apply. See *J.K. v J.W.* [1990] 2 IR 437.

<sup>272</sup> Section 8(4) of the Act as inserted by s. 7 of the Children Act 1997.

The weak constitutional position of the father and child relationship where the father is not married to the child's mother was established by Supreme Court in *State (Nicolaou) v An Bord Uchtála*.<sup>273</sup> Mr. Justice Walsh noted therein that “[i]t has not been shown to the satisfaction of this court that the father of an illegitimate child has any natural right as distinct from legal rights, to either the custody or society of that child and the court has not been satisfied that any such right has ever been recognised as part of natural law.”<sup>274</sup>

A similar case was brought before the European Court of Human Rights (hereinafter referred to as the “ECtHR”), *Keegan v Ireland*,<sup>275</sup> where the applicant lived with the child's mother for two years before the relationship ended and the child was born. He applied to the Circuit Court under the Act to be appointed as the child's guardian, which would have enabled him to challenge a proposed adoption. The ECtHR found that the period of cohabitation was one of a number of considerations that went towards establishing the family ties necessary to bring the case within Article 8, which guarantees the right to private and family life under the European Convention on Human Rights (hereinafter referred to as the “ECHR”). Article 14 of the ECHR also prohibits discrimination, for example on grounds of birth, when ECHR rights are engaged.

In the relatively recent case of *Zaunegger v Germany*<sup>276</sup> the ECtHR considered a situation where, under German law, an unmarried father was excluded from the outset from seeking a judicial examination as to whether the attribution of joint parental authority served the child's best interest. Joint custody for parents of children born outside marriage could only be obtained by a joint declaration, so where a mother refused to grant her approval, an unmarried father was unable to seek the aid of the court. The ECtHR observed that a child born into a *de facto* family relationship is “*ipso jure* part of that ‘family’ unit from the moment and by the very fact of his

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<sup>273</sup> *State (Nicolaou) v An Bord Uchtála* [1966] IR 567.

<sup>274</sup> *Ibid.*, at p. 643.

<sup>275</sup> *Keegan v Ireland* (1994) 18 EHRR 342. See also *Johnston v Ireland* (1986) 9 EHRR 203.

<sup>276</sup> *Zaunegger v Germany* Application No. 22028/04.

birth.”<sup>277</sup> A great deal of importance was placed on the fact that the relationship between the applicant and his partner had lasted five years until their separation in August 1998 and that the child had lived with the applicant until January 2001 when she moved to his former partner’s apartment. The Court held that “family life” had existed between the applicant and his partner for the purposes of the Article 8 of the ECHR and observed:

“...although there exists no European consensus as to whether fathers of children born out of wedlock have a right to request joint custody even without the consent of the mother, the common point of departure in the majority of Member States appears to be that decisions regarding the attribution of custody are to be based on the child’s best interest and that in the event of a conflict between the parents such attribution should be subject to scrutiny by the national courts.”<sup>278</sup>

Although States have a wide margin of appreciation in such cases, the difference in treatment here was viewed as discriminatory as it had no reasonable justification. The ECtHR held that substantial grounds for justification will be required in instances of a gender bias or bias on the grounds of birth or other status. It concluded that there must be a “reasonable relationship of proportionality between the general exclusion of judicial review of the initial attribution of sole custody to the mother and to the aim pursued, namely the protection of the best interests of the child born out of wedlock.”<sup>279</sup>

In *McD v L* Mr. Justice Fennelly, at paragraph 76 of his judgment, summarised the legal position in Ireland as follows:<sup>280</sup>

“... the natural or non-marital father:

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<sup>277</sup> *Ibid* at para. 37.

<sup>278</sup> *Ibid* at para. 60.

<sup>279</sup> *Ibid* at para. 63.

<sup>280</sup> *McD v L* [2009] IESC 81.

1. has no constitutional right to the guardianship or custody of or access to a child of which he is the natural father;
2. has a statutory right to apply for guardianship or other orders relating to a child; this entails only a right to have his application considered;
3. the strength of the father's case, [...] consisting of 'rights and concerns' will depend on an assessment of the entirety of the circumstances, of which the blood link is one element, whose importance will also vary with the circumstances; in some situations it will be of '*small weight*;'
4. both Hamilton C.J. and Denham J. spoke of *de facto* families in the context of an application for guardianship pursuant to the Act of 1964 and only in the sense of a natural father living with his child and unmarried partner in an ostensible family unit; a *de facto* family does not exist in law independent of the statutory context of an application for guardianship;
5. the father's rights, i.e. rights to apply, if any, are in all cases subordinate to the best interests of the child."

The High Court in *J.McB. v L.E.*<sup>281</sup> had regard to the jurisprudence from the ECtHR, including *Zaunegger v Germany*, as well as the dicta in *McD v L*. Mr. Justice MacMenamin concluded that he was constrained to follow the decision in *McD v L* in rejecting any recognition in Irish law of the *de facto* family, or any direct application of Article 8 of the ECHR (i.e. its application other than through the avenues provided for under the European Convention on Human Rights Act, 2003).

In its Consultation Paper, the Law Reform Commission referred to Australia as one of the few jurisdictions to enact legislation that provides for automatic parental

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<sup>281</sup> *J. McB. v L.E.* [2010] IEHC 123.



responsibility for all parents, but acknowledged that there had been significant practical difficulties in the implementation of the legislation.<sup>282</sup>

The Commission had regard to the rights and “best interests” of the child as provided for in the UN Convention on the Rights of the Child as well as the Constitution and the principle of equality between parents regardless of gender or marital status. It concluded that automatic joint parental responsibility (guardianship) be extended to both the mother and father of any child.<sup>283</sup> The Commission felt that given the significant responsibilities and rights associated with parental responsibility it considered it necessary for the State, and others dealing with the child and his or her parents, to have a clear record of those persons who have parental responsibility for a child. For this reason the Commission also recommended that automatic parental responsibility be linked to compulsory joint registration of the birth of a child. This would be an appropriate trigger mechanism to activate parental responsibility, as there could be situations where a non-marital father may not become aware that he is the father of a child until sometime after the birth of the child.<sup>284</sup>

Murray has noted that roughly one third of births in Ireland now occur outside of marriage and, therefore, the failure of the current legislative framework to provide automatic guardianship rights for non-marital fathers impacts on a significant portion of the population.<sup>285</sup> In this way, it is possible that the failure of the legislature to provide (beyond the facility to make an application) for recognition of the guardianship rights of natural fathers could constitute a disproportionate means of achieving its stated objective, namely the protection of the institution of marriage.

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<sup>282</sup> Law Reform Commission Consultation Paper, *Legal Aspects of Family Relationship*, (LRC CP 55 – 2009) at p. 64. The Commission referred to Rhodes, Graycar and Harrison, *The Family Law Reform Act: the first three years* (University of Sydney and the Family Court of Australia 2000) at p. 2.

<sup>283</sup> Law Reform Commission Report, *Legal Aspects of Family Relationships*, (LRC 101 – 2010) at p. 18. The ambit of the Commission’s Report did not extend to the issue of guardianship of children conceived by means of assisted human reproduction such as sperm donation or surrogacy.

<sup>284</sup> The Commission also recommended the amendment of s. 22(2) of the Civil Registration Act 2004 which governs the registration of the birth of a child by both parents who are not married.

<sup>285</sup> Claire Murray, “Recognising the Modern Family: Extending Legislative Guardianship Rights in Ireland” (2012) 15(2) *Irish Journal of Family Law* 39. For data see *Central Statistics Office Second Quarter 2011 Report* (Dublin 2012).

### 3.2.1 Concerns about the extension of rights to natural fathers

The Law Reform Commission stated that one of the reasons put forward for not extending automatic guardianship rights to non-marital fathers in Ireland is the concern that this would guarantee rights to genetic fathers who play no role in the child's life following conception.<sup>286</sup> The existence of these automatic rights would arguably enable a genetic father to have an effective veto over decisions that the mother might wish to make with regard to the child in the future.

For this reason the Commission felt that it was important to distinguish between the roles played by non-marital fathers who have no connection with a child from conception or birth and who play no role in the child's upbringing, and fathers who, although not married to the mother are in a committed relationship with the mother of the child and play a significant role in raising the child.<sup>287</sup> The Commission also placed a degree of emphasis on the best interests of the child and felt that while it would be in the child's best interests for their father to have significant rights in circumstances where the child is born into a stable family unit, that might not necessarily be the case where the biological father was in effect a sperm donor. It is difficult to see how legislation could provide for such a distinction, particularly where there is no presumption of paternity in cases where the couple are not married at the time of birth. The Commission acknowledged these difficulties and it was recommended that a father be allowed to make an application to the relevant Registrar of Births who would then record the application and inform the mother of the child that the application had been made. The mother would then have 28 days to object to the name of the man being entered on the birth certificate as the father of the child. Where no objection is made, the father's name would be entered on the birth certificate. Where an objection is made thereafter by the mother, the Registrar of Births would refer the matter to the District Court whose only power would be to delete the entry if it was established by the mother that the man was not the father of the child.

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<sup>286</sup> Law Reform Commission Consultation Paper, *supra* n.282 at p. 65.

<sup>287</sup> Law Reform Commission Consultation Paper, *supra* n.282 at p. 65.

### **3.2.2 Recommendations:**

*The State should extend automatic guardianship rights to unmarried fathers. In doing so the State should consider implementing the procedural reforms recommended by the Law Reform Commission in order to give effect to automatic joint parental responsibility. This approach is likely to encourage responsible parenthood by fathers, and sends out a signal that all fathers are equally responsible for their children.*

*The State should give further consideration to the issue of guardianship rights of parents in the context of assisted human reproduction. In this regard it is recommended that the State consider the possibility of enabling parties to opt-out of automatic registration of parental responsibility, where both parties consent, either at the time of initiating the assisted reproduction process or in any event prior to the birth of the child.*

## **3.3 Step-parents and Civil Partners**

One of the largest gaps in the Irish guardianship legislation is the failure to provide a mechanism whereby step-parents or civil partners who are not the biological parent can seek guardianship. Even in circumstances where biological parents or guardians are in favour of conferring guardianship on a step-parent or a civil partner, there is no provision for the appointment or recognition of such rights and obligations.

### **3.3.1 Step-parents**

A step-parent does not automatically gain parental responsibilities and rights towards a child when they marry that child's parents, regardless of the duration of the relationship.<sup>288</sup> It would appear that the only way in which a step-parent can obtain rights in respect of their partner's child (at least during the life of their partner) is for

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<sup>288</sup> Though the step-parent may be obliged to maintain the child if, knowing the child is not his or her child, he or she treats the child as a child of the family.

the couple to jointly adopt the child. This requires the biological parent of the child to adopt his or her own child and severs all legal connection between the other biological parent and the child. This procedure cannot be used where the child is a marital child.<sup>289</sup> Undoubtedly this is a significant step to take and may be unsuitable, for example where the biological parents share custody of the child and maintain a good relationship. It is unlikely to be in the best interests of the child or children in question.

### England and Wales

Section 4A of the Children Act 1989<sup>290</sup> does not provide step-parents or civil partners with a special status but instead requires them to apply for a parental responsibility order to secure parental responsibility for their partner's child. This can be obtained either by way of a parental responsibility agreement to this effect, or by way of application to court for a parental responsibility order. The section draws a distinction between cases where only one birth parent has parental responsibility (e.g. where the mother of a child born outside marriage marries a man who is not the child's father) and cases where both parents have parental responsibility. In the first case, an agreement can be entered into between the step-parent and his or her spouse. In the second scenario an agreement can only be made if both parents agree. The section doesn't require a minimum period of care on the part of the step-parent and there is no external welfare check.<sup>291</sup> A court order will usually be sought where consent of one of the birth parents cannot be obtained. In such cases the welfare of the child will be the court's paramount consideration,<sup>292</sup> with the wishes and feelings of the child a relevant factor.

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<sup>289</sup> This may change in line with the recent constitutional amendment.

<sup>290</sup> Section 4A of the Children Act 1989 was inserted by s. 112 of the Adoption and Children Act 2002.

<sup>291</sup> Section 4A(2) does however provide for the government to make regulations concerning the format of these agreements and their recording.

<sup>292</sup> Section 1 of the Children Act 1989.

A step-parent may also obtain parental responsibility by applying for a residence order.<sup>293</sup> Where a court makes such an order in favour of any person who is not the parent or guardian of the child, that person shall have parental responsibility for the child while the residence order remains in force. Section 115 of the Adoption and Children Act 2002 provides for the introduction of special guardianship orders which are intended to provide for children in respect of whom adoption is not appropriate.<sup>294</sup> Neither special guardianship nor residence orders remove all legal rights of other holders of parental responsibility.

### Scotland

The Scottish Law Commission has placed an emphasis on the fact that parents remain parents even if they no longer live together or live with their child. The Commission therefore suggested that any order granting parental rights to a third party should deprive any other person of a parental right only in the circumstances expressly provided for in the order and to the minimum extent necessary to give effect to the order. The Commission did, however, accept that:

“[The] availability of a non-exclusive package of parental responsibilities and rights, conferred in a way which is as non-threatening to the absent parent as possible, could be particularly useful for step-parents.”<sup>295</sup>

The Irish Law Reform Commission in its Report did not recommend that parental responsibility be removed from the biological parents of the child, but instead suggested a mechanism extending parental responsibility to other persons in a parental role. The Commission believed that this statutory framework should reflect the reality that in some circumstances a child may have more than two adults

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<sup>293</sup> Section 12 of the Children Act 1989. Parents or others with parental responsibility have a right to apply for the revocation of a residence order.

<sup>294</sup> Section 14A of the Children Act 1989 was inserted by s. 115 of the Adoption and Children Act 2002.

<sup>295</sup> Scottish Law Commission *Report on Family Law* (Scot Law Com No. 135) at 58, para 5.39.

fulfilling parental roles.<sup>296</sup> This will be discussed more fully in conjunction with the Commission's recommendations on civil partners.

### 3.3.2 Civil Partners

Despite the fact that a sizeable number of children in Ireland are brought up in families that are headed by same-sex couples,<sup>297</sup> the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (hereinafter referred to as the "2010 Act") made no attempt to amend the Guardianship of Infants Act to provide recognition for the relationship between civil partners and their non-biological child.<sup>298</sup> Thus, while both biological parents are still living the non-biological parent in the civil partnership remains a legal stranger to the child. This is very similar to the situation of step-parents - apart from the fact that civil partners cannot be appointed joint guardians of their child<sup>299</sup> or jointly adopt their partner's child. The provisions relating to testamentary guardianship remain unchanged also, in that while a civil partner can be appointed testamentary guardian of their deceased partner's biological child in his or her will, problems may arise where the testamentary guardian must act jointly with the surviving parent or guardian. The surviving parent has a right to object to the appointment of the surviving partner as a joint guardian and in such cases the surviving partner must apply to the court to determine the matter.

The Ombudsman for Children has commented on this omission and noted that the rights of children remained largely unaddressed by the 2010 Act.<sup>300</sup> The Ombudsman

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<sup>296</sup> Law Reform Commission Report, *supra* n.283 at p. 37.

<sup>297</sup> The 2011 Census enumerated 230 same-sex couples raising children.

<sup>298</sup> There are a number of circumstances in which a child can come to reside with civil partners. For example, where one of the partners has a child from a previous relationship, or as a result of planning between the couple. Alternatively, while civil partners cannot jointly adopt, one partner can as an individual adopt a child. See Aoife Daly, "Ignoring Reality: Children and the Civil Partnership in Ireland" (2011) 14(4) *Irish Journal of Family Law* 82 at p. 82.

<sup>299</sup> Nor can step-parents, except through joint adoption.

<sup>300</sup> Advice of the Ombudsman for Children on the Civil Partnership Bill 2009, (Dublin, July 2010) available at [http://www.oco.ie/assets/files/publications/advice\\_to\\_government/Advice%20of%20Ombudsman%20for%20Children%20on%20Civil%20Partnership%20Bill%202009.pdf](http://www.oco.ie/assets/files/publications/advice_to_government/Advice%20of%20Ombudsman%20for%20Children%20on%20Civil%20Partnership%20Bill%202009.pdf).

noted that the issue had already been considered in detail by the Working Group on Domestic Partnerships (“the Colley Report”)<sup>301</sup> which had considered in detail the very real difficulties that can emerge when a primary caregiver cannot become the legal guardian of a child for whom he or she is caring. The Ombudsman pointed out that the inclusion of special guardianship orders could be beneficial to children in a range of circumstances beyond those immediately relevant to civil partnership, such as step-families or the children of a widow/er and ultimately recommended that provision be made in law for special guardianship orders, either in the civil partnership legislation or in other appropriate legislation.<sup>302</sup>

Indeed, in its passage through the Oireachtas, an amendment was proposed in the Seanad that would have included a section in the 2010 Act to deal with same-sex couples and their children by providing for “special guardians.” The proposed amendment would have inserted a new s. 8A into the Guardianship of Infants Act 1964 and was similar in many ways to the provisions of the UK Children’s Act 1989. However, this provision was not adopted and the Bill passed without any reference to guardianship.

In answer to a number of Parliamentary Questions in early 2012, Minister for Justice and Equality, Alan Shatter TD, stated that where a child’s parent is in a relationship with another person, whether of the same sex or of the opposite sex, that other person has no parental responsibility for the child under the law as it stands. He further referred to an earlier answer provided in which he stated:

“The Programme for Government includes a commitment to amend the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 to address any anomalies or omissions, including those relating to children. In this regard, the Law Reform Commission has made detailed recommendations in its Report on the Legal Aspects of Family Relationships. In particular, the

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<sup>301</sup> Working Group on Domestic Partnerships, Options Paper, (Department of Justice, Equality and Law Reform: 2006).

<sup>302</sup> *Supra* n.300, at pp. 4-5. It is arguable that any provision for civil partners would also have to address step-parents, as more favourable provision could not be made for civil partners than for married couples.

Commission recommends that legislative provisions be introduced to facilitate the extension of guardianship (parental responsibility) to civil partners and step-parents either by agreement with the other parties who have parental responsibility for the child or by application to court. The Commission's recommendations are under consideration in my Department with a view to preparing legislative proposals.”<sup>303</sup>

The Minister has subsequently expressed his intention to address the legislative gaps relating to parenting by same-sex couples.<sup>304</sup>

The current situation gives rise to practical and legal problems and ignores the reality of shared parental responsibilities between civil partners. It leaves both parents and children in an insecure position. This became apparent in the case of *McD v L*<sup>305</sup> where a lesbian couple conceived a child with the help of a male friend who acted as sperm donor. The three entered into a written agreement whereby it was established that the couple would be parents of the child and the plaintiff, Mr. McD, would remain a “favourite uncle.” Significantly, although contact would be facilitated at mutually convenient times, Mr. McD would not be under any obligation to have contact with the child and any contact he was to have would be at the discretion of the child's parents. However, following the birth of the child, Mr. McD failed to have regard to the terms of the contract and began to seek a more involved parental role in the child's life. The relationship between the parties disintegrated and when the child reached the age of two, the respondents decided to move to Australia for a year. Mr. McD sought, and was granted, an *ex parte* injunction preventing the respondents from travelling and then applied for guardianship of and access to the child.

Mr. Justice Hedigan in the High Court rejected both of the plaintiff's applications on the basis that the relationship or “personal ties” between the same-sex couple and the

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<sup>303</sup> Minister for Justice and Equality Deputy Alan Shatter, Written Answers – Parental Rights, Tuesday, 14 February 2012.

<sup>304</sup> See the Minister's speech at the Annual Conference of the European Gay Police Association, 28 June, 2012, See <http://www.justice.ie/en/JELR/Pages/SP12000196>, and a subsequent presentation to Fine Gael LGBT on 19 November 2012, available at <http://www.justice.ie/en/JELR/Pages/SP12000321>.

<sup>305</sup> *McD v L* [2008] IEHC 96; [2009] IESC 81 (SC).



child of one of the partners constituted a *de facto* family within the meaning of Article 8 of the ECHR. However, the decision of the High Court was overturned by the Supreme Court, which held that the primary issue for consideration in the context of an application for guardianship and access was the best interests of the child. For this reason, the Supreme Court upheld the decision to refuse guardianship but remitted the matter to the High Court to make provisions relating to access.

The Supreme Court squarely rejected the recognition afforded by the High Court to *de facto* families. In so doing, the Court observed that the High Court had not identified any statute or rule of law which fell to be interpreted in a manner consistent with the ECHR, and that this was required, pursuant to section 2 of the European Convention on Human Rights Act 2003, in order for the Convention to be engaged at all in the case.<sup>306</sup> Interestingly, no argument appears to have been advanced before the Supreme Court that the Guardianship of Infants Act itself (pursuant to which the plaintiff's application was brought), or the statutory test therein, were required to be interpreted in such a manner as would allow weight to be attached to the *de facto* family life of the defendants when deciding on the plaintiff's application for access. However, it is not clear whether any such argument would have had success, for example because section 2 of the 2003 Act limits the scope for interpretative creativity on the part of the courts by providing that a Convention-compatible interpretation can only be achieved "*subject to the rules of law relating to [the] interpretation and application [of statutes]*."<sup>307</sup> It may also be noted that the Supreme Court stated that there was no legal recognition of same-sex couples in Ireland. This position has, of course, since altered with the coming into force of the 2010 Act, which will itself now have to be interpreted in a manner compatible with the Convention. Again, however, section 2's caveat as regards the rules of statutory interpretation, as well as the separation of

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<sup>306</sup> It may be noted that another jurisdictional 'trigger' for the Convention under section 3 of that Act is the performance by an organ of the State of its functions. This was not at play in *McD v L*, which was a case between private parties, involving no public entity other than the courts. Section 1 of the 2003 Act expressly excludes the courts from the definition of organs of the State.

<sup>307</sup> As illustrated by *GT v. KAO* [2008] 3 I.R. 567.

powers,<sup>308</sup> are likely to prevent the courts from interpreting the 2010 Act in such a manner as to make provision for children, when the Oireachtas has omitted to do so.

### **3.3.3 Recommendations of the Law Reform Commission in relation to civil partners and step-parents**

It may be open to a step-parent or a same-sex couple to challenge the relevant provisions of the Act dealing with guardianship rights using provisions of the European Convention on Human Rights Act 2003, as being incompatible with the State's obligations under Article 8 of the ECHR.<sup>309</sup> However, it is uncertain whether an application by a same-sex couple would be successful in this regard given the wide margin of appreciation afforded to States on this issue. It is possible that there may be a stronger case in respect of opposite-sex step-parents or members of the extended family given that the ECtHR has recognised that these relationships amount to *de facto* families.<sup>310</sup>

In its Report, the Law Reform Commission recommended that legislation be enacted to facilitate the extension of parental responsibility to civil partners as well as step-parents. It recommended that civil partners and step-parents could obtain responsibility by way of an agreement with other parties already having parental responsibility for the child, or by way of application to the court. The Commission was of the view that where parental responsibility was extended by agreement all parties should obtain legal advice prior to finalising the agreement. It also recommended that where a court was tasked with making an order extending parental responsibility it must have regard to, among other factors, the wishes and best interests of the child and the views of other parties with parental responsibility.

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<sup>308</sup> Specifically, the prohibition on courts from legislating: see e.g. *Private Residential Tenancies Board v Judge Linnane* [2010] IEHC 476.

<sup>309</sup> See Claire Murray, "Recognising the Modern Family: Extending Legislative Guardianship Rights in Ireland" (2012) 15(2) *Irish Journal of Family law* 39.

<sup>310</sup> In *Gas and Dubois v. France* (2010), while ruling that a same-sex couple were not entitled to demand second-parent adoption, the ECtHR nonetheless ruled that a same-sex couple with a child came within the scope of family life for the purpose of the Convention.

The Commission did not recommend extending this provision to those persons not in a civil partnership with, or married to, a biological parent, but who were in *loco parentis* in respect of a child. This would therefore exclude those who are cohabiting. The Commission felt that in such circumstances it was sufficient for the biological parent to appoint that person testamentary guardian to care for the child in the event of their death.<sup>311</sup>

#### **3.3.4 Recommendation**

*The State should implement the recommendations of the Law Reform Commission in relation to the extension of special guardianship rights to step-parents and civil-partners.*

### **3.4 Rights and Duties of the Extended Family**

People other than the parents of the child can be appointed guardian of a child. This usually occurs when a person is appointed a testamentary guardian or is made a guardian of a child by order of the court.<sup>312</sup> A parent may appoint a person to act as testamentary guardian in the event of that parent's death. Alternatively, under s. 8(1) of the Act where a child has no guardian, the court, on the application of any person, may appoint a guardian to the child. In such circumstances, the court has discretion to appoint a guardian. The rights of extended family members, including grandparents, are superseded by the constitutional guarantee to respect and protect the family based on marriage.

The introduction of procedures to facilitate contact between a child and members of the extended family would be in compliance with the UN Convention on the Rights of the Child (hereinafter referred to as the "UNCRC")<sup>313</sup> and the ECHR.<sup>314</sup> This child

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<sup>311</sup> Law Reform Commission Report, *supra* n.283, at p. 42.

<sup>312</sup> Sections 7, 8 and 9 of the Act set out the rules in relation to the appointment of testamentary guardians and court appointed guardians.

<sup>313</sup> Article 9(3) of the UNCRC recognises "the right of the child who is separated from one or both parents to maintain public relations and direct contact with both parents on a regular basis unless it is contrary to the child's best interests."

centric approach was also adopted by the High Court in *M.D. v G.D.*<sup>315</sup> where Ms. Justice Carroll stated that the court was concerned with access as a right of the child rather than of the adult.

However, in *A and B v Eastern Health Board*,<sup>316</sup> Mr. Justice Geoghegan clearly stated that grandparents have no constitutional rights in respect of their grandchildren. Similarly in *L.P. v M.N.P.* McGuinness J. noted that:

“...under the Constitution of Ireland the parents have inalienable and imprescriptable rights and the child has a concomitant right to be brought up in the family of a parent. Under the Guardianship of Infants Act, 1964 the grandparents would have no locus standi to apply for custody, although in certain situations under the Child Care Act, 1991 the child could be placed by the Court in the grandparents’ care, but only if both parents were found to be totally unfit to care for the child.”<sup>317</sup>

In *F.N. and E.B. v C.O. (Guardianship)*<sup>318</sup> the maternal grandparents sought sole custody of two teenage children and were opposed by the children’s father. The children’s parents separated and following the death of their mother they lived with their grandparents. The children wished this arrangement to continue into the future but also wanted to maintain access to their father. Finlay Geoghegan J. endorsed the view that the welfare of the child is the paramount consideration and that it required that the applicants be appointed guardians to act jointly with the first respondent. However, here the court also considered the fact that if the father’s application were granted it would have resulted in the removal of the two children from Ireland to England. The court expressly recognised that where the mother of the children is deceased, there is a presumption that the welfare of the children is best served by

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<sup>314</sup> Article 8 of the ECHR has been found to extend outside the traditional nuclear family. See for example *Marckx v Belgium* (1979-1980) 2 EHRR 330 at para. 45.

<sup>315</sup> *M.D. v G.D.*, (Unreported, High Court, Carroll J., 30<sup>th</sup> July, 1992).

<sup>316</sup> *A and B v Eastern Health Board* [1998] 1 I.R. 464, at 478.

<sup>317</sup> *L.P. v M.N.P.* (Unreported, High Court, McGuinness J., October 14, 1998), at p. 6.

<sup>318</sup> *F.N. and E.B. v C.O.* [2004] 4 I.R. 311.

keeping the children with the marital father. However, in this case that presumption was rebutted.

There have been some relatively recent developments regarding the constitutional position of grandparents in the immigration context. In *X v Minister for Justice, Equality and Law Reform*,<sup>319</sup> Mr. Justice Hogan stated:

“It is true that Article 41.3.1 commits the State to the protection of the institution of marriage ‘upon which the family is founded’. But that does not mean that the grandparents and siblings cannot, at least, for certain limited purposes and in certain special situations, come within the ambit of the protection of the family for the purposes of Article 41 ...

For such persons to come within the scope of the constitutional protection, it is, however, necessary to demonstrate that they have such ties of dependence and inter-action with other family members that they would come within the rubric of that family and that the family itself is based on marriage. This normally pre-supposes that a person such as a grandparent would share the same house as the other family members in question and that they would have an active role in the comings and goings of the family in question. A grandparent could not, for example, be regarded as a family member simply by reason of ordinary social courtesies or even by reason of regular visits to the grandchildren's family home. While each case must turn on its own facts, something further than the ordinary inter-action between a grandparent and a grandchild or other family member would generally be required. This, as it happens, is also the position of the European Court of Human Rights with regard to Article 8 ECHR: see, e.g., *Marckx v. Belgium* (1979) 2 EHRR 330, *Boughanemi v. France* (1996) 22 E.H.R.R. 228.”

The Law Reform Commission’s Consultation Paper considered that the law relating to testamentary guardians and court appointed guardians was satisfactory.<sup>320</sup>

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<sup>319</sup> *X v Minister for Justice, Equality and Law Reform* [2010] IEHC 446 at paras. 39 and 46.

<sup>320</sup> Law Reform Commission Consultation Paper, *supra* n.282, at p. 5.

However, the Commission observed that where grandparents or other relatives are in the position of *de facto* guardians of a child during the lifetime of the child's parent, and are exercising all the responsibilities of raising a child, such persons are not entitled to any of the rights associated with guardianship while the child's parents are still alive.<sup>321</sup> It was acknowledged that this can lead to difficulties on a practical level such as in relation to consent to medical treatment or in applications for passports where the grandparents or other extended family are *de facto* guardians of the child during the lifetime of the child's parents.<sup>322</sup>

The Law Reform Commission's Report did not recommend the extension of guardianship rights to grandparents or other extended family members. Instead it was recommended that grandparents would not be required to go through the two-step process necessitated under s. 11B of the Act in order to seek access to their grandchild. It also recommended that the entitlement to apply for custody be extended to persons other than parents or guardians of the child, where the parents are unwilling or unable to exercise their responsibilities.

### **3.4.1 Recommendation**

*The State should consider extending certain rights and obligations to members of the child's extended family in circumstances where that person is in loco parentis in respect of that child.*

## **3.5 The Voice of the Child in Guardianship Applications**

Section 25 of the Guardianship of Infants Act 1964<sup>323</sup> provides:

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<sup>321</sup> *Ibid.*

<sup>322</sup> Under the Act it is possible for third parties – which could include step-parents, civil partners, grandparents or other members of the extended family – to apply for access to the child under s. 11B of the Act (as inserted by s. 9 of the Children Act 1997). This process is not limited to parents but involves a two step process whereby the party making the application must first apply to the court for leave to apply for access. It is only once a party is granted leave that a substantive hearing will take place in relation to access.

<sup>323</sup> Section 25 of the Act was inserted by s. 11 of the Children Act 1997. While the remainder of s. 11 is not yet commenced, this particular section is in force.

“In any proceedings to which section 3 applies, the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child’s wishes in the matter.”

This section, along with s. 11 of the Children Act 1997 - which inserted a new Part IV into the Act - were meant to extend the regard that a court must have to the views of the child. Section 11 introduced a provision allowing for the appointment of a guardian *ad litem* to act as separate legal representation in guardianship applications by the natural father where the court is satisfied that “special circumstances” exist. Unfortunately, s. 11 of the 1997 Act was never commenced. It remains the case that the appointment of guardians *ad litem* for children in private law proceedings is not facilitated by the legislation and is therefore only used in a limited manner in such proceedings. Therefore, it is unsurprising, as Durcan points out, that the effect of guardians *ad litem* has been greater in public law litigation under the Child Care Act 1991 or under the inherent jurisdiction of the High Court than in private litigation between parents or third parties under the provisions of the Act.<sup>324</sup> He cites the costs required to represent the child which are borne by the parties to private legislation, but borne by the HSE in public litigation, as the reason for this difference. This is problematic because in private law proceedings, such as guardianship, there is no explicit provision allowing for the addition of a child as a party and the child has no automatic right to be heard. However, it appears that the courts possess a residual jurisdiction to so permit and furthermore, to appoint a solicitor to act on the child’s behalf.<sup>325</sup>

This position would appear to be in contravention of Article 12 of the UNCRC, which recognises and promotes the importance of children’s participation in decision-making that affects their individual and collective lives. It states:

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child,

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<sup>324</sup> Gerard Durcan, “Hearing the Voice of the Child” (2012) 18(1) *Medico-Legal Journal of Ireland* 21.

<sup>325</sup> See Shannon (2003) *supra* n.260.

the views of the child being given due weight in accordance with the age and maturity of the child.

The Committee on the Rights of the Child in its Concluding Observations on Ireland's second periodic report recommended that Ireland:

“... strengthen its efforts to ensure, including through constitutional provisions, that children have the right to express their views in all matters affecting them and to have those views given due weight in particular in families, schools and other educational institutions, the health sector and in communities.”<sup>326</sup>

In addition to the UNCRC there is a growing international literature and best practice guidance on the right of children and young people under the age of 18 to a voice in decision-making that affects their lives. Empowering children and young people to participate in decision-making on issues that affect their lives must be balanced against the duty to ensure their continuing safety and protection.

In *F.N. and E.B. v C.O. (Guardianship)*<sup>327</sup> Ms. Justice Finlay Geoghegan considered the question of whether the provisions of the Constitution required that the views of a child be taken into account in determining an application pursuant to s. 3 of the Act. She accepted that it is well established that a child in respect of whom a decision is being taken by the courts under s. 3 of the Act has a personal right within the meaning of Article 40.3 of the Constitution to have that decision taken in accordance with the principles of constitutional justice. She stated:

“Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964

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<sup>326</sup> Concluding Comments of the Committee on the Rights of the Child on Ireland's 2<sup>nd</sup> Periodic Report, 2006, CRC/C/IRL/CO/2, para. 25.

<sup>327</sup> *F.N. and E.B. v C.O.* [2004] 4 I.R. 311.



applies. Hence s. 25 should be construed as enacted for the purpose of *inter alia* giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child.”<sup>328</sup>

### **3.5.1 The 31<sup>st</sup> Amendment of the Constitution**

The text of the 31<sup>st</sup> Amendment of the Constitution incorporates a provision expressly providing for the procedural right of the child to express his or her views in accordance with the child’s capacity. Although this will not give constitutional status to the voice of the child - as the phrase “provision may be made by law” is used - it represents a constitutional commitment to enact legislation to ensure that children are heard in specific family law cases. Article 42A does not extend this procedural right to all areas impacting on children’s rights, however it does include guardianship matters.

The new Article 42A.4.2° will extend this right to all children with the capacity of *forming* views, not just those capable of expressing them. This would require a functional approach to be applied by those tasked with assessing a child’s decision-making ability. One could also foresee that this Article could require the provision of supports to a child where necessary to enable him or her to form a view, for example, in the form of child friendly information or a trusted representative who is capable of explaining matters to the child.

It remains unclear as to how the legislature will implement this provision in practice. Noteworthy in this regard is the fact that s. 11 of the 1997 Act is still not in force. Questions remain as to the weight that will be attached to the views of the child and whether the constitutional rights and duties of the parents will ultimately trump the voice of the child where there is a disagreement between the two. The reference to “due weight having regard to the age and maturity of the child” might suggest that the

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<sup>328</sup> *Ibid* at para. 29.

rights and duties of the parents will more easily trump the views of a younger child,<sup>329</sup> but it is not clear at what age or level of maturity (if any) the voice of the child would assume a decisive weight over the rights of the parents. It is also unclear who will be responsible for assessing whether a child is capable of forming views or whether there will be a presumption of decision-making ability. Who will assess whether a child is capable of forming views – will there be a presumption of decision-making ability?

### **3.5.2 Recommendation**

*The State should implement the provisions of s. 11 of the Children Act 1997 in its entirety.*

*The State should enact legislation to ensure that the voice of the child is heard in all guardianship proceedings.*

## **3.6 “Best interests” under the Constitutional Amendment**

Article 42A.4.1° states:

“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 purposes of preventing the safety and welfare of any child from being prejudicially affected, or
- ii. concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.”

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<sup>329</sup> C.f. *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 concerning the admittedly very different issue of provision of contraception to under 16s, where Lord Scarman stated:

“As a matter of Law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment *terminates* if and when the child achieves sufficient understanding and intelligence to understand fully what is proposed” (emphasis added).

While Article 42A.4.1° can be criticised for its limited remit, in that it only extends this provision to family matters,<sup>330</sup> it is to be welcomed with respect to its provisions on guardianship. This Article requires the introduction of legislation to ensure that the best interests of the child are paramount in judicial proceedings concerning guardianship, custody or access. The adoption of the “best interests” test instead of the language of “welfare”, reflects the provisions of the UNCRC<sup>331</sup> as well as a move away from the paternalistic approach associated with the narrower concept of “welfare.”

The adoption of Article 42A.4.1° does not, however, make the “best interests” principle directly applicable in proceedings but instead requires that the Oireachtas enact legislation to implement the provision, i.e. provision must be made by law. It is unclear as yet, how this new provision will interact with protections already provided for in legislation. Specifically, section 3 of the Guardianship of Infants Act has, up to now, required that in any proceedings regarding “the custody, guardianship or upbringing of an infant,” the welfare of the child will be the paramount consideration.<sup>332</sup> The meaning of “welfare” has been quite broadly defined including, the religious, moral, intellectual, physical and social welfare of the child<sup>333</sup> and in *G v An Bord Uchtála*<sup>334</sup> was referred to as the “best interests” test which is in line with Ireland’s obligations under the UNCRC. Section 3 also provides that the child’s welfare must be “the paramount consideration” which echoes the provisions under Article 42A.4.1°.

In the past the “best interests” test has given rise to a conflict between the constitutionally protected rights of the parent and the rights of the child. At present where a dispute relating to the custody of a child takes place between two parents, the

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<sup>330</sup> Article 12 of the UNCRC extends the right to be heard to any judicial and administrative proceedings affecting the child.

<sup>331</sup> Article 3 of the UNCRC requires that the “best interests” of the child are a “primary” consideration.

<sup>332</sup> Ursula Kilkelly, Legal Analysis of the Children’s Referendum: Article 42A.4.1, Human Rights in Ireland, October 23, 2012 available at <http://www.humanrights.ie/index.php/2012/10/23/legal-analysis-of-the-childrens-referendum-article-42a-4-1/>.

<sup>333</sup> Section 2 of the Act.

<sup>334</sup> *G v An Bord Uchtála* [1980] IR 32.

court will apply the provisions of the Act. However, where a third party (such as a grandparent or foster carer) is in dispute with a parent or parents, considerable confusion has arisen. In such cases - at least up to now - the primacy of the welfare of the child has not been accepted by the courts and unless there were compelling reasons or a failure for physical or moral reasons as per the former Article 42.5 of the Constitution, a child was returned to the married parents.<sup>335</sup> One of the main criticisms leveled at the new constitutional amendment has been that Article 41 of the Constitution has remained untouched, making it difficult to ascertain just how child-centric the amendment will prove to be when weighed against the constitutional rights of the parents.

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<sup>335</sup> See *N & Anor v Health Service Executive & Ors* [2006] IESC 60 (“the Baby Ann case”); *Re J.H. (An Infant)* [1985] IR 390; *In Re J.* [1996] 2 IR 295; *H.W. v North Western Health Board & C.W.* [2001] 3 IR 622.

## SECTION 4:

# MISCELLANEOUS DOMESTIC ISSUES

### 4.1 The Right of the Child to be Heard: The Need for Legislation

Following the recent passing of the 31<sup>st</sup> Constitutional Amendment, Article 42A.4.2 provides that, as far as practicable, in child care, custody, adoption and access proceedings, the views of a child, who is capable of forming his or her own views, will be ascertained, and the Court will give due weight to those views having regard to the age and maturity of the child.<sup>336</sup>

As this Article states “that provision shall be made by law” the Oireachtas is under an obligation to pass legislation to give effect to the Constitutional right. Previous case law suggests that the Oireachtas can exercise its “discretion as to the details of the legislation.”<sup>337</sup>

The amendment reflects provisions already contained in International and European instruments.<sup>338</sup> For example, Article 12 of the United Nations Convention on the Rights of the Child (hereinafter referred to as the “UNCRC”) places an obligation on State parties to ensure that the views of the child are given due weight and, in particular, that the child is to be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.<sup>339</sup>

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<sup>336</sup> Article 42A.4.2:

Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

<sup>337</sup> Finlay P. in *The State (Walsh) v Murphy* [1981] 1 IR 285, as referred to by O’Toole, M “The Voice of the Child and the Role of the Guardian ad Litem” Conference Paper presented to the “*Family Lawyers Association of Ireland Conference*” Lismore Castle, 3rd December 2012.

<sup>338</sup> See Article 12 of the United Nations Convention on the Rights of the Child; Article 24 of the European Union Charter of Fundamental Rights and Article 11(2) of Regulation 2201/2003 which provides that in child abduction proceedings under the Hague Convention a child must be given the opportunity to be heard unless it is inappropriate having regard to the child’s age or maturity.

<sup>339</sup> UNCRC Article 12:

The constitutional amendment is narrower in its scope than Article 12 of the UNCRC. First, the right to have the child's views ascertained, as provided for in the amendment, does not extend to all proceedings which impact upon the interests of the child, for example, administrative proceedings and other proceedings including *inter alia* immigration and asylum proceedings.<sup>340</sup>

In addition, the constitutional amendment does not specify how this right is to be achieved in practice and it is not clear whether or not the right to have one's views ascertained equates with the right guaranteed under Article 12 of the UNCRC to be provided the opportunity to be heard. Importantly, the constitutional amendment, unlike Article 12 of the UNCRC is qualified by the phrase "as far as practicable".

However, the Oireachtas is in a position to give wider expression to the constitutional right in any legislation that it enacts for the purposes of giving effect to the amendment.

#### **4.1.1 Existing provisions**

##### The Constitution

It was established in *F.N. v C.O.*<sup>341</sup> by Ms. Justice Finlay Geoghegan that the Constitution provides a right for the child's wishes to be taken into account in proceedings determining the guardianship, custody or upbringing of a child provided the child is of sufficient age and maturity.

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1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

<sup>340</sup> However, in *Nwole v Minister for Justice, Equality and Law Reform* [2003] IEHC 72, at pp.12-13 Finlay Geoghegan J. stated that a child subject to a deportation order had the right to be heard: "... the provisions of [the Refugee Act 1996] must be construed... in accordance with the Convention on the Rights of the Child which has been ratified by Ireland."

<sup>341</sup> [2004] 4 I.R. 311.

## Legislation

In relation to public child care proceedings, section 24 of the Child Care Act 1991 states that the Court must regard the welfare of the child as the first and paramount consideration and “in so far as is practicable, to give consideration having regard to his age and understanding, to the wishes of the child.” In practice, this provision has been given effect by the appointment of a guardian *ad litem* (hereinafter referred to as “GAL”) to represent the child in care proceedings.<sup>342</sup> Also, under section 25, the Court can join a child as a party to the proceedings, who would then be represented by a solicitor. The Court will only do so provided the child is of sufficient age and understanding and that it is in the interests of the child and justice. The power of the Court under this section is rarely used as the appointment of a GAL appears to be the preferred approach.

In relation to private child care proceedings, section 25 of the Guardianship of Infants Act 1964 states that in any proceedings determining the welfare of the child “the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child’s wishes in the matter.” Under section 28 a GAL can be appointed to represent the child, however, this provision has never been commenced.<sup>343</sup> Section 28(5) states that the costs of the GAL shall be paid by the parties to the proceedings, which in practice would most likely be the parents of the child. Therefore, in many private law proceedings, the appointment of a GAL might be impossible as the costs would be prohibitive for the majority of parents going before the Courts.

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<sup>342</sup> See section 26 of the Child Care Act 1991. However, it is important to note that this section states that the Court “*may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian ad litem for the child.*” The Act does not state what is in the interests of the child and in the interests of justice. Moreover, in practice a GAL is not always appointed.

<sup>343</sup> Guardianship of Infants Act 1964, section 28, as inserted by section 11 Children Act 1997.

#### 4.1.2 The current methods used to ascertain the wishes of the child in practice

Obtaining the child's view or wishes is not a modern phenomenon. As far back as the eighteenth century, in the case of *R v Gynghall* the court stated that the obvious action to take in determining the welfare of a child, would be to see and speak to a child:

“...that the Court of Chancery had to determine... what was really for the welfare of the child, whose interests were being discussed, it is obvious that, if the child were of any reasonable age, the Court would hardly desire to determine that question without seeing or speaking to the child and ascertaining its own view on the matter...”<sup>344</sup>

In the Irish Courts today the following methods are used:

1. Speaking to the Judge privately in Chambers:

This is the traditional method in private law proceedings and is preferred to the child giving evidence in Court. As Chief Justice Keane stated in *R.B. v A.S.*<sup>345</sup> “... to invite them [children] to give evidence in court in the presence of the parties or their legal representatives would involve them in an unacceptable manner in the marital disputes of their parents.”

However, in the UK, Lord Justice Wall took the view that “the discretion to see children should be exercised cautiously;...there must be good reason... The ascertainment of a child's wishes and feelings is, where relevant, normally the province of the Court Welfare Officer, or a Guardian Ad Litem, who can... then be cross examined in the normal way.”<sup>346</sup>

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<sup>344</sup> *R v Argyll* [1893] 2 Q.B. 232 at p. 251, as referred to by Durcan, G. “Hearing the voice of the child” *Medico-Legal Journal of Ireland* 18(1) (2012), 21-28.

<sup>345</sup> [2002] 2 I.R. 428.

<sup>346</sup> *B v B* [1994] 2 FLR 489 at p. 496.



In *O'D v O'D*,<sup>347</sup> Mr. Justice Abbott provides guidelines including the importance of observing the principles of a fair trial and natural justice and importantly, not guaranteeing confidentiality to a child, unless the parents in the case do not object. In this case, he was able to guarantee confidentiality and the children spoke to the Judge in the presence of a stenographer and registrar.

2. Through an independent report:

In private law proceedings the Court may order the procurement of a section 47 report<sup>348</sup> on any question affecting the welfare of a party to the proceedings or their children. The report is carried out by an independent expert, who will interview the parents, the children and any other relevant persons, and will usually conclude with a list of recommendations, for example, in cases of separation or divorce, as to with whom the children should reside. This is also a method by which the views of children are ascertained and provided to the Court. The Court is to give due consideration to the independent report, but it does not supplant the duty of the Judge to make the final determination.<sup>349</sup> Similarly, in public care proceedings, the Court has the same power to make an Order for an independent report.<sup>350</sup>

3. The appointment of a guardian *ad litem*:

As previously stated above there is provision in legislation for a GAL to be appointed in both public and private law proceedings. In addition to the above mentioned drawbacks, the legislative provisions do not specify the requisite qualifications that an expert must possess in order to be qualified to carry out a report pursuant to section 47. The National Children's Office Annual Report 2004 highlights the deficiencies in the guardian *ad litem* system, for example

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<sup>347</sup> [2008] IEHC 468.

<sup>348</sup> Pursuant to section 47 of the Family Law Act 1995.

<sup>349</sup> *McD v L* [2009] IESC 81.

<sup>350</sup> Child Care Act 1991, section 27.

the inadequate statutory regulation and lack of guidance as to how a GAL should be appointed. It compares the Irish model with international models and makes recommendations.<sup>351</sup> Guidelines were also issued by the Children Acts Advisory Board in 2009 to standardise the role, qualifications, appointment and training of a GAL.<sup>352</sup> The Report also considered a model that would provide for the appointment of a GAL in complex cases or, in simpler cases, the appointment of an Advocate, who would not need to be as well qualified.

#### **4.1.3 Methods in other jurisdictions**

The same three methods of ascertaining the views of the children are used in the following jurisdictions. However, there are important differences that should be considered.

##### New Zealand

In New Zealand the legislation states that a court must appoint a lawyer for a child in proceedings involving access to, or custody of, a child “unless it is satisfied the appointment would serve no useful purpose.”<sup>353</sup> The child is not considered a witness and does not have to give evidence nor will he/she be subject to cross examination.<sup>354</sup> The legislation details the role and purpose of the lawyer and states that the child’s views should be given directly or through their representative.<sup>355</sup> The lawyer must

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<sup>351</sup> This Report can be downloaded at [http://www.dcy.gov.ie/documents/publications/NCO-Annual\\_Report\\_2004-4.pdf](http://www.dcy.gov.ie/documents/publications/NCO-Annual_Report_2004-4.pdf).

<sup>352</sup> 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. Published by Children’s Act Advisory Board May 2009 <http://www.srsb.ie/Publications/PDFs---Publications/Giving-a-Voice-to-Childrens-Wishes,-Feelings-and-I.aspx>.

<sup>353</sup> Care of Children Act 2004, s.7(2).

<sup>354</sup> Care of Children Act 2004, s.134(5).

<sup>355</sup> Care of Children Act 2004, s.6.

also put to the Court what he or she considers to be in the child's best interests and therefore has a dual role of acting both for the child and the court.<sup>356</sup>

The Family Court Rules also state that the Court may directly ascertain the wishes of a child.<sup>357</sup> It appears that “judicial meetings with children in family law matters in New Zealand occur frequently” using a team approach i.e. using a combination of at least two of the above mentioned methods.<sup>358</sup> The preference for using either judicial meetings or ascertaining the views of the child through their representative was referred to in *K. v. K.* where it was also held that the procurement of a report by an expert should not be ordered by the court for the sole purpose of ascertaining the child's views.<sup>359</sup> Moreover, there are Judicial Guidelines which “outline the procedure and establish recommended standards of Judicial practice to assist the Court ... to enable children to be given reasonable opportunities to express any views on any matters affecting them.”<sup>360</sup>

The Judicial Guidelines state *inter alia* that the meeting should take place in the presence of a lawyer and that the Judge can consider a request by the child for confidentiality and may not make the record or part of it available to the parties.<sup>361</sup>

The legislation states that an expert report may be carried out by a person “whom the court considers qualified for the purpose to prepare a written cultural, medical, psychiatric, or psychological report on the child who is the subject of the application.”<sup>362</sup> However, due to the provisions in relation to judicial meetings with

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<sup>356</sup> Fernando M., “Judicial Meetings with Children in Family Law Proceedings: Hearing Children's Voices”, Thesis submitted for Degree of Doctor of Philosophy, University of Tasmania, July 2011 [http://eprints.utas.edu.au/11749/2/Thesis\\_Final\\_Submission\\_Fernando.pdf](http://eprints.utas.edu.au/11749/2/Thesis_Final_Submission_Fernando.pdf).

<sup>357</sup> Family Court Rules 2002 (NZ), r.54.

<sup>358</sup> *Supra n.*356, at p. 213.

<sup>359</sup> *K. v. K.* [2005] NZFLR 28, at para.92.

<sup>360</sup> Judges Guidelines - Decisions with Children (2007) at para. 1 <http://www.justice.govt.nz/courts/family-court/practice-and-procedure/guidelines/judges-guidelines-decisions-with-children>.

<sup>361</sup> *Ibid.*, at paras.9 and 13.

<sup>362</sup> Care of Children Act 2004, s.133(2)(a).

children and the compulsory appointment of a lawyer for the child, this method would appear to be infrequently used to ascertain the child's views.

### England and Wales

In England and Wales, the child's views can be ascertained by the court appointing a CAFCASS<sup>363</sup> Officer who will compile a 'welfare' report. The CAFCASS Officer has a duty to ascertain the views of the child and to explain the report to the child with regard to the child's age and understanding.<sup>364</sup> There is also provision for a GAL to be appointed, which is rarely exercised in private law matters. However, the appointment of a GAL is automatic in public child care proceedings.<sup>365</sup>

In relation to Judges talking to children privately, there appears to have been a sea-change in England and Wales and there is now growing acceptance and recognition of the role that Judges can play in talking to children.<sup>366</sup> Judicial Guidelines have been established "to encourage judges to enable children to feel more involved and connected with proceedings."<sup>367</sup> The Guidelines are similar to the Guidelines in New Zealand with subtle differences. They set out *inter alia* that a Judge should never see a child alone and that what the child says will be communicated to their parents other than in exceptional circumstances.<sup>368</sup>

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<sup>363</sup> Children and Family Court Advisory and Support Service.

<sup>364</sup> Sir M. Potter, "The Voice of the Child: Children's 'Rights' in Family Proceedings" [2008] *International Family Law* at p. 140.

<sup>365</sup> The Children Act 1989, s.41.

<sup>366</sup> *Supra* n.356, at p. 237.

<sup>367</sup> The Family Justice Council published Guidelines for Judges meeting children who are subject to Family Proceedings (2010) which are approved by the President of the Family Division and can be downloaded at [http://www.familylaw.co.uk/system/uploads/attachments/0000/3356/Guidelines\\_for\\_Judges\\_Meeting\\_Children.pdf](http://www.familylaw.co.uk/system/uploads/attachments/0000/3356/Guidelines_for_Judges_Meeting_Children.pdf).

<sup>368</sup> *Ibid.*, at paras.5(vi) and 6(i).

The report of Mr. Justice Ryder published in July 2012<sup>369</sup> referred to the fact that consideration should always be given to how the voice of the child is to be heard in family proceedings. The report states that in particular, the respect that ought to be accorded to the CRC should be demonstrated by:

- An engagement with children to facilitate their understanding of the process of proceedings where that is coincident with their welfare;
- The ascertainment of a child's wishes and feelings and an opportunity to be heard, where the child wishes it; and
- An explanation for every child of the decision of the court.

This recommendation emphasises the need for the child to be assisted in understanding the process, in being able to participate in the process and most importantly being assisted in understanding the outcome of the process. These three aspects are essential and should all be considered by the Irish Courts when determining how the voice of the child is to be heard pursuant to the recent Constitutional amendment.

### Scotland

The Scottish legislation provides children with a right to be heard in certain family decision making.<sup>370</sup> The most common method of the child's views being expressed to the court is by the appointment of a 'curator ad litem.' The curator ad litem is usually a lawyer and can use his or her discretion as to how to present the child's views to the court. The court in addition may appoint an expert similar to a CAFCASS Officer to compile a welfare report. It is to be noted that a child over 12 years may instruct his or her own lawyer.<sup>371</sup>

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<sup>369</sup> See *supra* note 129 Mr. Justice Ryder, "Judicial proposals for the modernisation of family justice", Judiciary of England and Wales, July 2012, at p. 15. The report can be accessed from [http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj\\_recommendations\\_final.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/ryderj_recommendations_final.pdf).

<sup>370</sup> Children (Scotland) Act 1995, s.6.

<sup>371</sup> Age of Legal Capacity Act 1991, ss.4 and 5.

Scottish case law has given express approval to judicial meetings. Fernando quotes Raitt and states “that many Judges speak with children often, and have said they are happy to do so.”<sup>372</sup> However, it appears that there is no legislation or guidelines governing the procedure for judicial meetings. The meetings are not recorded and the Judge appears to provide a brief oral report about the meeting to the parties.

The lack of guidelines has been criticised as it has been recognised that guidelines provide a model of best practice in that they provide clarity and certainty.<sup>373</sup> Moreover, concerns are routinely raised in relation to the conflict between due process and the private interviewing of children by Judges and the lack of transparency in the Scottish system would appear to heighten rather than alleviate such concerns.<sup>374</sup>

In relation to public law proceedings, Scotland operates a different model to the models in Ireland and England and Wales. In the Scottish “Children’s Hearing System”, the child has the right to attend all proceedings regarding them and the parties may be excluded from part of the hearing to enable the panel to ascertain the child’s views.<sup>375</sup>

#### **4.1.4 Recommendation**

*Legislation to be enacted by the Oireachtas should not confine itself to the limitations of the constitutional amendment and should provide for the views of the child to be ascertained in any proceedings regarding the interests of the child.*

*Such legislation should provide for a variety of mechanisms to be employed to ascertain the views of the child including (i) the option to appoint a guardian ad litem*

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<sup>372</sup> Raitt “Hearing Children in Family Law Proceedings”, as referred to by Fernando, M., *supra* n.356, at p.248.

<sup>373</sup> *Ibid*, at p.275.

<sup>374</sup> *Ibid*, at p.251.

<sup>375</sup> Children (Scotland) Act 1995, ss.43-45.

*in both private and public proceedings and (ii) the meeting of a Judge with the child in private law proceedings.*

*The guardian ad litem system should be placed on a statutory footing.*

*Guidelines in relation to private meetings between children and Judges should be issued.*

*Legislation or Guidelines enacted to provide for the views of the child to be ascertained should also consider the general role of the child in proceedings.*

## **4.2 Relocation: The Need for Legislation**

### **4.2.1 The legal position in Ireland**

Our increasingly mobile and multicultural society has resulted in a considerable increase in applications for relocation coming before the Courts. This is not unique to Ireland and over the past decade the international legal community and individual countries have been trying to address the issue of relocation.<sup>376</sup>

Relocation cases involve an application by a parent to remove their child from the child's normal residence to reside either (a) in another country or (b) in another part of the same country, usually on a permanent basis,<sup>377</sup> with an objection from the other parent.

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<sup>376</sup> For example, international developments included The Hague Conference on Private International Law which co-organised the International Judicial Conference on Cross-border Family Relocation in Washington on 23-25 March 2010 where the participants (50 Judges representing different Countries) drafted the Washington Declaration which contains principles relevant to relocation and child abduction. The draft Declaration can be downloaded at [http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_X1&PageId=424](http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&PageId=424). Also, in Australia, the Family Law Council, a statutory authority which advises the Attorney General addressed the issue of relocation in its 2006 report <http://www.ag.gov.au/FamilyLawCouncil/Publications/ReportstotheAttorneyGeneral/Documents/Discussion%20paper%20on%20Relocation%20-%20February%202006%20-%20PDF.PDF>.

<sup>377</sup> Applications for temporary relocation may also come before the Courts: See *McD v L* [2007] IESC 28 (19 July 2007) where the Supreme Court dismissed the mother's appeal from the High Court, which had refused her application to relocate to Australia for a period of one year.

At present in Ireland, an application for relocation is brought in the Courts pursuant to section 11 of the Guardianship of Infants Act 1964 (“the 1964 Act”), which is a general provision and allows for any application to be made “affecting the welfare of the child” and for the court to give directions in relation to custody and access.<sup>378</sup>

Section 2 of the 1964 Act defines “welfare” as comprising the religious and moral, intellectual, physical and social welfare of the infant and section 3 states that the Court must regard the welfare of the child as the first and paramount consideration.<sup>379</sup> This is the only legislative provision which states what the Court must consider when determining an application for relocation.

For further guidance and legal principles as to how the Courts determine applications for relocation it is necessary to consider the case law on relocation.

First, in the case of *E.M. v A.M.*<sup>380</sup> Mr. Justice Flood stated that the Court must have regard to the following six factors:

1. Which of the two [hypothetical outcomes] will provide the greater stability of lifestyle for [the child];

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<sup>378</sup> Section 11 (Applications to the Court):

- (1) Any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper.
- (2) The court may by an order under this section—
  - (a) give such directions as it thinks proper regarding the custody of the infant and the right of access to the infant of his father or mother;
  - (b) order the father or mother to pay towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the father or mother, the court considers reasonable.

<sup>379</sup> Section 3 of the Guardianship of Infants Act 1964 (Welfare of the infant to be paramount):

Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

<sup>380</sup> *E.M. v A.M.* [1990] (Unreported, High Court, Flood J, 16<sup>th</sup> June 1992).



2. The contribution to such stability that will be provided by the environment in which [the child] will reside, with particular regard to the influence of his extended family;
3. The professional advice tendered by [the expert witness];
4. The capacity for and frequency of, access by the non-custodial parent;
5. The past record of each parent in their relationship with [the child], in so far as it impinges upon the child's welfare;
6. The respect, in terms of the future, by the parties to orders and directions of the Court.

In the case of *K.B. v L.O'R.*,<sup>381</sup> Mr. Justice Murphy J reiterated some of the factors as devised by Mr. Justice Flood above:

1. Child's welfare is of paramount importance;
2. Proposals for relocation and the arguments against relocation should be weighed against the child's best interests;
3. A parent does not have to show 'compelling reasons' for or against relocation;
4. Where relocation is allowed the court should devise an access regime which adequately fulfilled the child's right to regular contact with the remaining parent.<sup>382</sup>

Mr. Justice Murphy, in granting the mother's application to relocate, appears to apply the test as defined by Lord Justice Thorpe in the English case of *Payne v Payne* which was at that time the leading authority in international relocation cases.<sup>383</sup>

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<sup>381</sup> [2009] IEHC 247 (Unreported, High Court, Murphy J., 15<sup>th</sup> May 2009).

<sup>382</sup> See Section 3 of the judgment on legal precedent

This is in contrast to Mr. Justice MacMenamin who in the most recent Irish High Court case on international relocation in *U.V. v V.U.* affirmed the criteria as advanced, not by Lord Justice Thorpe, but by President (of the Family Division) Butler-Sloss in *Payne v Payne*:<sup>384</sup>

- “(a) The welfare of the child is always paramount;
- (b) There is no presumption...in favour of the applicant parent;
- (c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight;
- (d) Consequently, the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end;
- (e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important;
- (f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important;
- (g) The opportunity for continuing contact between the child and the parent left behind may be very significant.”

Mr. Justice MacMenamin stated that in balancing the rights of the parents the Court must have regard to the constitutional rights of children to have issues of custody or upbringing taken in the interests of their welfare. He affirmed a non-presumptive approach, and referred to *H (A Child)*<sup>385</sup> which makes reference to the Washington

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<sup>383</sup> [2001] FAM 473, at paragraph 26:

- “(a) the welfare of the child is of paramount consideration; and
- (b) refusing the primary carers reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.”

<sup>384</sup> *U.V. v V.U.* [2011] IEHC 519, at para.38.

<sup>385</sup> [2010] EWCA Civ. 915.

Declaration which holds that relocation cases should be determined without any presumptions. The principles contained in the Declaration reflect the approach adopted by President Butler Sloss above and the approach adopted in other jurisdictions.<sup>386</sup>

Mr. Justice MacMenamin also referred to recent case law from the Court of Justice of the EU, which emphasises the rights contained in Articles 7 and 24(3) of the Charter of Fundamental Rights to respect for family and private life and the right of the child to “maintain on a regular basis personal relationships and direct contact with both of his or her parents.”<sup>387</sup>

Mr. Justice MacMenamin stated that where the welfare of the child requires it, the Judge must not be precluded from hearing the child.<sup>388</sup>

#### **4.2.2 The International position**

The Washington Declaration gives 13 recommendations, primarily aimed at international relocation applications.<sup>389</sup> It notes the importance of states ensuring that there are legal procedures available for a parent to make an application<sup>390</sup> and to encourage parents to use such a procedure and not to act unilaterally, which may constitute a child abduction.

Paragraph 2 states that the parent who wishes to relocate should give a reasonable period of notice to the other parent before any proceedings are commenced or

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<sup>386</sup> In *Re AR (A Child: Relocation)* [2010] EWCA Civ 1346 at para. 11 Mostyn J. states that the Washington Declaration offers “a more balanced and neutral approach... as is the norm in many other jurisdictions. It specifically ordains a non-presumptive approach.”

<sup>387</sup> (Case C-400/10 PPU), *J.McB. v. L.E.*, *supra* n.281.

<sup>388</sup> In the English case of *Re G (Children)* [2010] EWCA Civ 1232 Thorpe LJ referred to the fact that the subcommittee of the Family Justice forcefully expressed the view that judges in that jurisdiction should be meeting children and hearing their voice in carefully arranged conditions.

<sup>389</sup> Paragraph 5 of the Declaration: The text can be downloaded: < [http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_X1&PageId=4240](http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&PageId=4240)>.

<sup>390</sup> *Ibid*, at para. 1.

relocation takes place. Paragraph 3 provides that the best interests of the child should be the primary consideration in all applications concerning international relocation. A list of guiding factors follows in paragraph 4:

“4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:

- i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child’s development, except if the contact is contrary to the child’s best interest;
- ii) the views of the child having regard to the child’s age and maturity;
- iii) the parties’ proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
- iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
- v) any history of family violence or abuse, whether physical or psychological;
- vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
- vii) pre-existing custody and access determinations;
- viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
- ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
- x) whether the parties’ proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;
- xi) the enforceability of contact provisions ordered as a condition of

- relocation in the State of destination;
  - xii) issues of mobility for family members; and
  - xiii) any other circumstances deemed to be relevant by the judge.
5. While these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law.”

The legal principles applied by Mr. Justice MacMenamin in the High Court reflect to a large extent the non-binding principles contained in the Declaration.

Other American organisations have attempted to develop non-binding relocation standards to facilitate a more uniform approach to relocation cases<sup>391</sup> and the Commission on European Family Law has drafted a set of Principles that address national and international relocation.<sup>392</sup> The Permanent Bureau of the Hague Conference on Private International Law has also recommended that the Special Commission consider recommending that further research be carried out in the area of international family relocation and that an expert committee be set up to assist the Permanent Bureau in developing a soft law tool as a guide to good practice or to develop a binding instrument addressing international family relocation.<sup>393</sup>

These are all attempts to encourage the enactment of binding legislation which sets out clear principles on the law on relocation and allows for a consistent approach to be applied by Judges in this growing area.

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<sup>391</sup> The American Academy of Matrimonial Lawyers proposed the Model Relocation Act. The American Law Institute included relocation in their Principles of the Law in Family Dissolutions. The Uniform Law Commission drafted the Relocation of Children Act. See Berenos, Y.M., “Time to Move On? The International State of Affairs with Respect to Child Relocation Law” *Utrecht Law Review* Vol. 8, Issue 1, January 2012 at p. 12 para. 3.2 (hereinafter referred to as “Berenos”).

<sup>392</sup> *Ibid*, at p. 17, para. 3.4.

<sup>393</sup> This was recommended by the Permanent Bureau in its “Preliminary Note on International Family Relocation” at p. 27, para. 83. This conclusion was reached after research was carried out to establish the feasibility of a Protocol to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

### 4.2.3 The legal position in other jurisdictions

#### The United States of America

The majority of States have provisions in their statutes that refer to the issue of relocation. The extent of the detail varies considerably, from one section merely stating that an application for relocation should be made under this provision, to a series of detailed provisions. Some States do not have specific relocation provisions and use general provisions to address relocation.

All statutes state that the best interests of the child is the paramount consideration and some define in detail what is meant by this.<sup>394</sup> Statutes may contain provisions on one or all of the following:

1. Definition of relocation- it may be that a relocation within a certain distance or for a specific time period may not be considered subject to the relocation provisions.<sup>395</sup> Indeed, definitions provided in other jurisdictions can vary considerably, for example it may be defined as a ‘change of place of residence’ in Canada or as ‘leaving the country’ as in Denmark.<sup>396</sup>
2. Statutes will usually provide for a minimum notice period that the parent planning to relocate should give to the other parent. This time period ranges from 30 to 90 days.<sup>397</sup>

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<sup>394</sup> For example in Connecticut the statute (Conn. Gen. Stats. § 46b-56(c) 2011) provides a very detailed series of factors that the court must consider when determining the best interests of the child. The Statute can be downloaded at <<http://www.cga.ct.gov/2011/pub/chap815j.htm#Sec46b-56.htm>>.

<sup>395</sup> For example, in California the Statute does not apply to relocations for a period not exceeding 30 days: Californian Family Code s.3024. In Florida, a relocation is subject to relocation law if the relocation is more than 50 miles from the current residence: 2012 Florida Statutes: Title VI Chapter 61: 13001(e). Also, see Berenos at p. 4.

<sup>396</sup> Canadian legislation does not define relocation but it has been understood to mean “a change in residence” whereas Denmark allows relocation within a country and therefore defines it “as leaving the country.” See Berenos at p.5, para.2.1.2 and p.9, para.2.4.6.

<sup>397</sup> The State of Indiana requires 30 days: Indiana Code Title 31- Art.17-2.2(b). The State of New Jersey requires 90 days: New Jersey Statute Annotated Title.9:2-2.

3. States apply different presumptions and burden of proofs. However, the Washington Declaration states that a non presumptive approach should be adopted and it appears that a non-presumptive approach is the most child centred approach.
4. Some States have a list of codified factors that the Court must consider in determining a relocation application.<sup>398</sup> The factors are similar to those contained in the Washington Declaration.

### The United Kingdom

If a party wishes to relocate with a child to another country the party must apply under section 13(1) of the Children Act 1989 which states that where a residence order is in force in respect of a child, the child cannot be removed from the United Kingdom for a period of more than one month without either the consent of all those with parental responsibility or the consent of the court.

As is the position in Ireland, the legal principles and/or tests to be applied to relocation decisions are contained in case law and not legislation.

Prior to the most recent English Court of Appeal case of *K v K*<sup>399</sup> the leading authorities were *Poel v Poel* and *Payne v Payne*. However, there was much criticism of the manner in which the principles were applied in practice.<sup>400</sup>

In *K v K*, the Court of Appeal confirmed that the only legal principle contained in *Poel* and *Payne* is that the welfare of the child is of paramount importance, and held that the rest is guidance. Lord Justice Thorpe stated that where the parents look after the child in a shared care arrangement, the courts should apply the Welfare

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<sup>398</sup> Berenos at p. 5 states that “it is striking that most state law does not include any factors in written law; case law is leading.”

<sup>399</sup> (*Children: Permanent Removal from Jurisdiction*) [2011] EWCA Civ 793.

<sup>400</sup> Eaton and Reardon “*K v K*: The end of the Road for *Payne*?” November [2011] *IFL* at p. 308.

Checklist.<sup>401</sup> This Welfare Checklist contains the factors that the court must consider in determining the best interests of the child. Lord Justice Black appears to state that the welfare checklist approach may also be applied in cases where there is not a shared care arrangement.<sup>402</sup>

Internal relocation applications are made pursuant to the general provision relating to residence, contact and other Orders.<sup>403</sup> A different test is applied when determining internal relocation cases and this is also contained in case law.<sup>404</sup> There are no statutory provisions detailing the relevant principles to be applied.

In *Re F.*,<sup>405</sup> Lord Justice Wilson questioned why there was a complete dichotomy to the principles apt to each of the two determinations and stated:

“It is too late for it to be permissible for this court to rule that, in internal relocation cases, the analysis of the child’s welfare, informed by consideration of the matters specified in section 1(3) of the Act, should not be conducted through the prism of whether the circumstances are exceptional.... But, for the reasons given, I believe that, had I not felt bound by authority, I might have wished to suggest that a test of exceptionality was an impermissible gloss on the enquiry mandated by section 1(1) and (3) of the Act.”<sup>406</sup>

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<sup>401</sup> The Welfare Checklist is contained in the Children Act 1989 [section 3(1)] which states that when a court is making an order in relation to access or custody it must have particular regard to (a) the wishes and feelings of the child concerned (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.

<sup>402</sup> *K v K* [2011] EWCA Civ 793 at para. 144-145.

<sup>403</sup> An applicant applies for a “Specific Issue Order” allowing her to relocate pursuant to section 8 (entitled “Residence, contact and other orders with respect to children”), Children Act 1989.

<sup>404</sup> The test known as the test of exceptionality and was outlined in *Re E* (Residence: Imposition of Conditions) [1997] 2 FLR 638.

<sup>405</sup> *Re F* [2011] 1 FLR 1382 (CA).

<sup>406</sup> *Ibid.*, at para.26.



## Australia

A party wishing to apply to relocate with their child must apply under the provision which relates to the Court's power to make a parenting order. A parenting order sets out where the child will live and the contact the child is to have with the non-resident parent. Therefore, this provision is not specific to relocation applications.<sup>407</sup> Australia does not distinguish between internal or international relocation so all relocation applications are made pursuant to this general provision.

In determining parental order applications the Court is under a statutory duty to consider the best interests of the child as paramount.<sup>408</sup> The Act does not contain a definition of 'best interests of a child' but it contains a very detailed list of factors that the Court must consider when determining what is in the child's best interest. The Act differentiates between primary considerations and additional considerations. The primary considerations are (a) the benefit of the child to have a meaningful relationship with both parents and (b) the need to protect the child from harm, abuse or family violence. The secondary considerations include a very detailed list of factors, for example, considering the child's wishes, the capacity of each parent to parent, any history of family violence and any other relevant factor.<sup>409</sup> These considerations are similar to the factors set out in the Welfare Checklist in English legislation.

The Australian case law on relocation states that the court must apply the relevant best interest considerations and make findings of fact. It has been held that the legislation does not mandate any particular order of the considerations.<sup>410</sup> Case law has also recognised the fact that although the best interests of the children are

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<sup>407</sup> Section 65D of the Family Law Act 1975 (as amended by the Family Law Amendment (Shared Parental Responsibility) Act 2006: The text can be downloaded at [http://www.comlaw.gov.au/Details/C2012C00711/Html/Text#\\_Toc337813705](http://www.comlaw.gov.au/Details/C2012C00711/Html/Text#_Toc337813705).

<sup>408</sup> Section 65E.

<sup>409</sup> Section 60CC: This section contains a very detailed list of factors and can be downloaded at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/s60cc.html](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s60cc.html).

<sup>410</sup> *Cowley & Mendoza* (2010) 43 Fam LR 436; [2010] Fam CA 597.

paramount they are not the only consideration and due respect must be given to other factors, such as a parent's right to free movement.<sup>411</sup>

#### **4.2.4 Recommendation**

*Legislation should be enacted which includes the factors that the Court should consider when determining the best interests of the child. The importance of having established criteria which can be applied when determining the best interests would be particularly beneficial for applications regarding relocation.*

*Specific legislation should be enacted for relocation applications. The provisions should not differentiate between internal or international relocation and should contain the key principles as set out in the Washington Declaration.*

### **4.3 Maintenance for the Benefit of a Dependent Child: The Court Process**

In Ireland, the child maintenance system operates through the three different tiers of the Courts; the District, Circuit and High Court. This means that a parent of a dependent child who requires maintenance from the other parent for the benefit of that dependent child, and who does not, for whatever reason, enter into a private arrangement with the other parent of that child for the provision of maintenance must apply through the Courts. This is the most common family law application brought before a Judge of the District Court.

#### **4.3.1 International child support models**

In other jurisdictions, the responsibility for the formal determination of maintenance for the benefit of a child may lie with an agency<sup>412</sup> rather than the courts<sup>413</sup> or in some cases both an agency and court system are used.<sup>414</sup>

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<sup>411</sup> *Hepburn v Noble* (2010) Fam CAFC 111.

<sup>412</sup> For example, Australia, Denmark, New Zealand, Norway and the United Kingdom.

<sup>413</sup> For example, Austria, Belgium, Canada, France and Germany.

The court-based system that exists in Ireland was similar to that which existed in the United Kingdom prior to the enactment of legislation in 1991 which created the Child Support Agency.<sup>415</sup> This Act replicated to a large degree the regimes which operated in other agency-based countries.<sup>416</sup> The change to an agency-based system occurred because of the view of the then government that the courts-based regime was “fragmented, uncertain and ineffective” and that “levels of non-payment were high.”<sup>417</sup> The introduction of an agency-based system “marked a shift from discretionary decision making to a rigid rules based scheme.”<sup>418</sup>

In 2012 the UK Government announced that it was winding up the Child Support Agency and replacing it with another agency-based system, the Child Maintenance Service. The underlying principle of the new system is to encourage separated parents to come to private agreements between themselves. A telephone service is being provided to parents to assist them in entering into private maintenance agreements, referred to as a “Family Based Arrangement.” There will be aids and services available, such as a maintenance calculator to assist parents to come to an agreement and a new formula, based on the gross weekly income of the parent, will be used to calculate the amount of child maintenance that a non resident parent is to pay.

The approach being adopted in the UK to child maintenance services aims to reduce the adversarial nature of child maintenance disputes and to provide greater certainty and transparency through the use of a defined formula. A similar formula is used in other jurisdictions.<sup>419</sup>

An identical formula is not adopted by each jurisdiction, but the advantage of a formula-based approach is that there is predictability and consistency as to the amount

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<sup>414</sup> For example, Finland.

<sup>415</sup> Child Support Act 1991.

<sup>416</sup> For example, Australia, New Zealand and some States in the USA.

<sup>417</sup> “European Approaches to child maintenance payments” Joseph Rowntree Foundation June 1999 <http://www.jrf.org.uk/sites/files/jrf/F619.pdf>.

<sup>418</sup> *Ibid.*

<sup>419</sup> For example, Australia and New Zealand.

determined to be paid. A disadvantage is that the formula can be complex and therefore it is not as readily transparent or understandable as it ought to be. In addition, the formula-based approach is rigid and inflexible in that it does not allow for each and every individual circumstance to be considered.<sup>420</sup>

A presumed advantage of a court-based system is that the judge can take account of all individual circumstances. This advantage must be weighed against the cost and detrimental effect which adversarial proceedings can have on the parties.

Some jurisdictions which use a court-based system, have introduced guidelines<sup>421</sup> or tables<sup>422</sup> that are used by the judges to assist them in calculating maintenance awards. The parties also use the tables and guidelines to assist them to coming to an agreement. In Canada, the Federal Support Guidelines state that their objectives are:<sup>423</sup>

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

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<sup>420</sup> Skinner, Bradshaw, Davidson “Child support policy: An international perspective.” Department for Work and Pensions Research Report No. 405 <http://research.dwp.gov.uk/asd/asd5/rports2007-2008/rrep405.pdf>.

<sup>421</sup> Canada uses Guidelines, namely the Federal Child Support Guidelines SOR/97-175.

<sup>422</sup> Germany uses Tables known as The Düsseldorfer Tables. The 2013 tables can be downloaded at <http://www.treffpunktaltern.de/familienrecht/Unterhaltstabellen/duesseldorfer-tabelle.php>.

<sup>423</sup> Federal Child Support Guidelines SOR/97-175 <http://laws.justice.gc.ca/eng/regulations/SOR-97-175/page-1.html#h-1>.

The guidelines make clear that their principal objectives are to enhance fairness, reduce conflict by making child support calculation objective, improve court efficiency by giving parents the tools to calculate maintenance and to ensure consistent treatment.

The guidelines are updated annually and state the amount of child maintenance to be paid which is based on the annual income of the paying parent.<sup>424</sup> The amounts in the tables are based on economic studies of average spending on children in families at different income levels and are calculated using a mathematical formula.<sup>425</sup>

The guidelines contain provisions that state the factors to be considered where a parent earns over \$150,000 per annum<sup>426</sup> and enable additional sums to be provided by way for maintenance to cover medical, dental, special or extraordinary expenses.<sup>427</sup> An important concept contained in the guidelines is that parents contribute towards the children in proportion to their respective incomes:

“Sharing of expense

7(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.”<sup>428</sup>

The guidelines also enable judges to exercise discretion and account for personal circumstances. They also enable parents to carry out the exercise of calculating and determining child support maintenance with the confidence that the court would be applying the same formula and set of factors.

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<sup>424</sup> Sample table updated 2011 can be downloaded at <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/legis/fcsg-lfpae/2011/pdf/aba.pdf>.

<sup>425</sup> See Federal Child Support Guidelines Notes 1-6.

<sup>426</sup> Section 4 of the Federal Child Support Guidelines SOR/97-175.

<sup>427</sup> Sections 6 and 7 of the Federal Child Support Guidelines SOR/97-175.

<sup>428</sup> Section 7(2) of the Federal Child Support Guidelines SOR/97-175.

In Germany – which uses a court-based system - similar tables have also been produced which are used by the courts to determine the amount of child maintenance payable. Although, courts are not under an obligation to use the tables, it appears that they are widely used as the *de facto* standard.<sup>429</sup>

In the United States, each State is required by federal law to establish guidelines that are used to calculate child support due from parents. Such guidelines may be established by law or by judicial or administrative action. All earnings and income of the non-custodial parent must be considered. The guidelines must be based on specific descriptive and numeric criteria, and result in a computation of the support obligation.<sup>430</sup> The guidelines are reviewed and, if necessary, revised at least every four years and the review must consider economic data on the cost of raising children.<sup>431</sup>

Although, the courts are under a general requirement to use the percentage standard, a court may use its discretion and award a different amount if after considering a number of factors specified in the statute, it considers that it would be unfair to award the percentage amount. The factors that a court may consider include *inter alia*, the financial resources of the child, the financial resources of both parents, the needs of any person (other than the child) whom either party is legally obligated to support, the cost of day care, the child's medical and educational needs, the best interests of the child, and any other relevant factor.<sup>432</sup>

Therefore, in Canada and the USA, where the maintenance regime is operated through a courts system, parents can refer to tables contained in statutory guidelines that will indicate the amount of maintenance to be paid in respect of a dependent child

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<sup>429</sup> Skinner, Bradshaw, Davidson "Child support policy: An international perspective." Department for Work and Pensions Research Report No. 405 at. p.43.

<sup>430</sup> Wisconsin Legislative Council 'Child Support Law in Wisconsin' published 22 January 2004 [http://libcd.law.wisc.edu/~wilc/lca/lca\\_2004\\_01.pdf](http://libcd.law.wisc.edu/~wilc/lca/lca_2004_01.pdf).

<sup>431</sup> See: 45 C.F.R. s. 302.56 - Guidelines for setting child support awards <http://www.law.cornell.edu/cfr/text/45/302.56>.

<sup>432</sup> Wisconsin Legislature s. 767.25 (1m), Stats. Child Support. <https://docs.legis.wisconsin.gov/2003/statutes/statutes/767/25/1m>.

by a non resident parent. In countries where there is an agency-based regime, a strict formula is applied. A system which provides a universal formula or which provides guidelines as to the amount of maintenance to be paid, with a certain amount of legislative discretion, fulfils exactly the objectives as stated in the Canadian guidelines, namely to: (i) enhance fairness (ii) reduce conflict by objective calculations (iii) improve court efficiency by providing tools for self calculation and (iv) ensure consistent treatment.

#### **4.3.2 Applications for maintenance for the dependent child in the Irish Courts**

An application by a parent of a child for maintenance for the benefit of the child can be made to the Court under the Family Law (Maintenance of Spouses and Children) Act 1976 (hereinafter referred to as “the 1976 Act”). If the application is made in the District Court, there are monetary restrictions in relation to maintenance awards and the maximum amount of maintenance that can be ordered is €150 per week per child.<sup>433</sup> If the application is made in the Circuit Court there is no monetary restriction in relation to the periodical payment of maintenance.

Pursuant to the 1976 Act the Court, in deciding whether to make a maintenance order, has to have regard to all the circumstances of the case and, in particular the following factors as set out in s.5(4):

- (a) the income, earning capacity (if any), property and other financial resources of—
  - (i) the spouses and any dependent children of the family, and
  - (ii) any other dependent children of which either spouse is a parent, including income or benefits to which either spouse or any such children are entitled by or under statute, with the exception of a benefit or allowance or any increase in such benefit or allowance in respect of any dependent children granted to either parent of such children,

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<sup>433</sup> Family Law (Maintenance of Spouses and Children) Act 1976, section 23 as amended by section 20 of the Court and Court Officers Act 2002.

- (b) the financial and other responsibilities of—
  - (i) the spouses towards each other and towards any dependent children of the family, and
  - (ii) each spouse as a parent towards any other dependent children, and the needs of any such children, including the need for care and attention, and
- (c) the conduct of each of the spouses, if that conduct is such that in the opinion of the Court it would in all the circumstances be repugnant to justice to disregard it.

There are no further statutory guidelines or tables which detail any further the factors to be taken into account by judges, or which more specifically state the amount of maintenance that should be paid by a parent for the benefit of a child. In practice, the Courts will usually apply a variety of relevant factors such as those contained in the Wisconsin statute. However, as there is only the above mentioned legislative provision contained in the 1976 Act for guidance, judges do not have statutory guidance or other instruments to ensure that they adopt a uniform and consistent approach. A system that provides guidance, whether on a statutory footing or not, would produce a child maintenance model that has at its core the aims of fairness, consistency and court efficiency, and would mark a departure from the adversarial based model of child maintenance that presently exists.

#### **4.3.3 Recommendation**

*That legislation or statutory guidelines are introduced which would contain tables indicating the amount of maintenance that a parent would be expected to pay for the benefit of the dependent child.*<sup>434</sup>

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<sup>434</sup> As stated the introduction of such guidelines would remove the unlimited legislative discretion in which the courts operate under. The advantage of guidelines in comparison to introducing an agency based system is that there is room for individual circumstances to be considered before a final determination as to the amount of maintenance to be paid is made. Also, the guidelines could be used by prospective parents to encourage a private settlement.



#### **4.4 Maintenance for the Benefit of a Dependent Child: Arrears of Child Maintenance**

Section 63 of the Civil Law (Miscellaneous Provisions) Act 2011 (hereinafter referred to as “the 2011 Act”) amended section 8 of the Enforcement of Court Orders Act 1940 (hereinafter referred to as “the 1940 Act”) by substituting for it a new section 8. The former section 8 set out the procedure whereby a maintenance creditor could apply to the District Court for the enforcement of an Order against a maintenance debtor for non-payment of debts. This section empowered the Judge to impose a maximum sentence of three months imprisonment on the defaulter. Moreover, section 8(7) stated that no debt was recoverable which was due and owing more than six months prior to the institution of the enforcement proceedings.

Therefore, in practice, in the District Court, a maintenance creditor was limited to recovering a maximum of six months arrears of maintenance prior to the date of the creditor’s application to the Court.

In the case of *McCann v Judge of Monaghan District Court*,<sup>435</sup> Ms. Justice Laffoy ruled (outside of the maintenance context) that the procedure as outlined in section 8 was unconstitutional as it failed *inter alia* to provide the requisite procedural safeguards for a debtor subject to a custodial sentence. As a consequence of this decision certain amendments were made to section 8 of the 1940 Act by the Enforcement of Court Orders (Amendment) Act 2009,<sup>436</sup> but no amendments were made at that stage to section 8(7) and therefore, the six month time limit appeared to remain in place.

It may be noted that in December 2011, in *H v Governor of Wheatfield Prison*,<sup>437</sup> Mr. Justice Hogan held that the relevant District Court judge had erred in law in sentencing the applicant to seven days imprisonment for non-payment of

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<sup>435</sup> [2009] IEHC 276.

<sup>436</sup> Section 2(2) of the Enforcement of Court Orders (Amendment) Act 2009 amended sections 8(1), 8(2)(d) and 8(3)(d) of the Enforcement of Court Orders Act 1940.

<sup>437</sup> *H v Governor of Wheatfield Prison* [2011] IEHC 492 (approved 6 January 2012).

maintenance. The error in question was that the applicant – to whom the former section 8(7) applied - had been given no notice of the prospect of imprisonment in the summons.

As stated, section 63 of the 2011 Act amended the former section 8 “by the substitution of the following section 8.” Although, the word “substitution” is sometimes compared with, for example, the word ‘repeal’ it can be stated that ‘substitution’ has the same effect as a ‘repeal’ and that the former section 8 along with the amendments made to it by the 2009 Act have been replaced in their entirety by the new section 8 as set out in section 63 of the 2011 Act. The fact that the 6 month time-bar on recouping arrears of maintenance has been swept away raises the question as to whether arrears which were previously so time-barred can now be recouped.

The applicability of section 27 of the Interpretation Act, 2005 is something which litigants will have to consider in this context. It concerns repeal of “an enactment” - which is defined in s.2(1) as also including a “portion of an Act”. “Repeal” expressly encompasses a situation similar to section 63 of the 2011 Act where one provision is substituted for another.<sup>438</sup> Section 27(1)(c) provides that repeal of an enactment does not affect “any right, privilege, obligation or liability acquired, accrued or incurred under the enactment”. Prior to the coming into force of the 2011 Act, the former section 8(7) seems clearly to have given maintenance debtors a “right” or “privilege” not to be pursued for any arrears of maintenance which were due and owing six months before the institution of enforcement proceedings. There is thus an argument that this remains the case in respect of all arrears accrued six months before the coming into force of the 2011 Act, notwithstanding that the former six month limitation has since been removed from the statute book.

However, that is not necessarily the end of the matter. Section 4 of the Interpretation Act provides that the provisions of that Act (including section 27) apply “except in so far as the contrary intention appears in ... the enactment [being interpreted].” It is not possible to be definitive in this respect vis-à-vis section 63 of the 2011 Act. However,

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<sup>438</sup> This is because section 2(2) of the Interpretation Act provides that ‘repeal’ includes a situation where a provision is replaced.

it is difficult to discern an intention that the default operability of section 27(1)(c) of the 2005 Act was to be displaced. Indeed, section 63's reference to where a maintenance order "is not duly paid" arguably looks to the present and future and could be taken to suggest that it was not intended to upset the previous legal position. Litigants and judges will therefore have to come to a view on whether this is the case. Some guidance on the applicable legal principles could be obtained from the recent Supreme Court judgment in *Minister for Justice v Tobin*<sup>439</sup> where the judges gave detailed consideration (and reached differing conclusions) on whether the operation of section 27 of the Interpretation Act was displaced by a contrary intention in the statute therein at issue.

The new section 8 sets out the procedure for issuing a District Court summons and the powers of the judge in making any orders for outstanding amounts where a monetary amount payable by virtue of an antecedent order within the meaning of the Family Law (Maintenance of Spouses and Children) Act 1976 is not duly paid. However, the new section does not cap the amount of arrears to be claimed by inserting a time limit, such as the six month limit that was contained in the former section 8. The new section states:

"8(1) Where a monetary amount payable by virtue of an antecedent order within the meaning of the Family Law (Maintenance of Spouses and Children) Act 1976 is not duly paid, the person entitled to the payments (in this section referred to as the applicant) may apply to the relevant District Court clerk for the issue of a summons directed to the person by whom such amounts are payable (in this section referred to as the defaulter) requiring the defaulter to attend before the District Court at a time and date specified in the summons for the purpose of giving evidence to the court as to his or her means and assets and on the hearing of such summons such person may be examined on oath by or on behalf of the applicant.

(2) Having heard evidence as to the amount outstanding on foot of such order and having heard evidence as to the means and assets of the defaulter, the

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<sup>439</sup> *Minister for Justice v Tobin* [2012] IESC 37.

District Court Judge may make such order as to the payment, collection or recovery of the amounts outstanding under such order as to the Judge seems fair and reasonable including one or more than one of the following:

(a) where the Judge is satisfied that there are monies due and owing by any other person to the defaulter, an order directing such other person to pay the monies concerned to the relevant District Court clerk to the extent of the amount outstanding to the applicant on foot of the order referred to in subsection (1) and which is specified in the order together with the costs of the application under this section,

(b) where the Judge is satisfied that there are monies which will become due or may become due by any other person to the defaulter, an order directing such other person to pay any such monies to the relevant District Court clerk to the extent of the amount outstanding to the applicant on foot of the order referred to in subsection (1) and which is specified in the order together with the costs of the application under this section,

(c) where the Judge is satisfied that it would be effective to do so, an order that the amounts outstanding to the applicant referred to in subsection (1) be levied by distress against the goods of the defaulter and the sale of such goods and for the transmission to the relevant District Court clerk of the proceeds of sale after payment of all costs and expenses properly arising in connection with the levying of distress and the sale of the goods.

(3) Every distress and sale made in pursuance of an order of the District Court Judge under this section shall be carried out by the appropriate under-sheriff.

(4) All moneys received by the relevant District Court clerk shall be paid as soon as practicable after receipt to the applicant.

(5) In this section “relevant District Court clerk” means the District Court clerk for the District Court area in which the defaulter resides or carries on any profession, business or occupation, unless by virtue of any other enactment

relating to the antecedent order concerned any other District Court clerk is the relevant District Court clerk as respects that antecedent order.”.

The Minister for Justice and Equality stated that pursuant to the new section 8 “the District Judge may make such order as to the payment, collection or recovery of all amounts outstanding as the judge deems fair and reasonable”<sup>440</sup> (underline added). Therefore, it appears to have been intended by the Government that all outstanding amounts under the maintenance Order would be subject to payment by the maintenance debtor and that there would be no time limit restricting the arrears that can be sought by the maintenance creditor. Such comments would not be admissible as evidence of the intention of the Oireachtas in any court proceedings, but are noteworthy in their own right. The wording “*fair and reasonable*” is taken directly from the Act and indicates that the Judge is able to use his discretion and make an order for payment in the amount that is considered “*fair and reasonable*.”<sup>441</sup>

In addition to the above substitution, section 31 of the 2011 Act inserted a new “section 9A” into the Family Law (Maintenance of Spouses and Children) Act 1976 (hereinafter referred to as “the 1976 Act”) and applies only to maintenance orders made by the District Court.

The new section states that it shall be a contempt of court for a maintenance debtor to fail to make a payment due under an antecedent order.<sup>442</sup> It outlines the procedural requirements in this regard, including the requirement of notice of the prospect of imprisonment,<sup>443</sup> and provides the right to legal aid for the maintenance debtor. If the District Court Judge is satisfied that the failure to make payment is due to a change in the financial circumstances of the maintenance debtor since the making of the

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<sup>440</sup> Dáil Eireann Debates, 16 February 2012: <http://debates.oireachtas.ie/dail/2012/02/16/00140>.

<sup>441</sup> Section 8(2) of the Enforcement of Court Orders Act 1940, as amended by section 63 of the Civil (Miscellaneous Provisions) Act 2011.

<sup>442</sup> Section 9(A)(1).

<sup>443</sup> Although section 9A was not in force when the events which were the subject of *H v Governor of Wheatfield Prison* [2011] IEHC 492 occurred, it was in force when the judgment was handed down, and Hogan J. commented with approval as regards the provision at para 20 of his judgment, noting that it was necessary after the Ms. Justice Laffoy’s *McCann* judgment.

previous order, the Judge may treat the hearing as an application to vary the antecedent order, and on hearing evidence from both the maintenance creditor and debtor in relation to their financial circumstances, may make an order varying an antecedent order. A Judge has the jurisdiction to make an order varying the antecedent order, as of the date of the application by the maintenance creditor, but the legislation does not state whether or not the Judge has discretion to reduce the amount of arrears outstanding as per the antecedent order.

The Judge can adjourn proceedings to enable a maintenance debtor to make payment of the monies owed or to allow an application for an attachment of earnings to be made.<sup>444</sup> If the Judge is satisfied that the reason for inability to make payment is not due either to the financial circumstances of the maintenance debtor, or some other valid reason, then it is treated as a contempt of court.<sup>445</sup> This section states that “financial circumstances” relate to the annual income of the person, the value of any property, any liabilities and other financial circumstances that the court considers appropriate.<sup>446</sup> It does not refer to any statutory time limit in seeking arrears of maintenance.

Therefore, by virtue of the new provisions contained in the 2011 Act it would appear that the District Court is not restricted by any legislative time limit in making a monetary award in relation to maintenance arrears (subject to the possible application of section 27 of the Interpretation Act, 2005). The general practice since the enactment of the 2011 Act in the District Court appears to have been not to place a six month limit on the amount of maintenance arrears that can be claimed, but some District Court Judges have applied a time limit of six years. This period appears to have been adopted by Judges simply because under the Statute of Limitations Act, 1957 as amended, the limitation period within which someone can bring an action in tort or contract is six years from the date upon which the cause of action accrued.<sup>447</sup> There is no basis in law for the application of this time period to applications for

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<sup>444</sup> Section 9(A)(b).

<sup>445</sup> Section 9(A)(10).

<sup>446</sup> Section 9(A)(12).

<sup>447</sup> Section 11 of the Statute of Limitations Act, 1957.

maintenance arrears.<sup>448</sup> An order providing for maintenance is a periodical payments order and is not a final judgment capable of being recovered by legal action.<sup>449</sup> In contrast, other District Court Judges are applying no limit at all, which means that District Court Judges are not applying a uniform approach.

In the Circuit Court an application for maintenance arrears is made by a maintenance creditor by way of a motion for attachment and committal pursuant to Order 37 of the Circuit Court Rules. There is no statutory time limit on the maintenance creditor bringing an application and the legislation does not provide a monetary limit on the amount of arrears that can be sought. In practice the Judge will consider the reasons why the maintenance debtor has failed to pay the maintenance as per the antecedent Order and may not make an Order for the full amount of the arrears outstanding. The Judge may also treat the application for maintenance arrears as if it were an application to vary the antecedent order and a new order may be made providing for a reduced maintenance sum to be paid.<sup>450</sup> The legislation states that an application to vary an existing maintenance Order can be made by either party,<sup>451</sup> although, the legislation does not state the factors that the Judge should take into account when deciding whether or not to vary an Order.

Therefore, District Court Judges when determining applications for maintenance arrears can make orders for outstanding amounts that are “fair and reasonable”<sup>452</sup> and can treat an application for maintenance arrears by a maintenance creditor as an application to vary maintenance by the maintenance debtor pursuant to the recent

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<sup>448</sup> In addition, if Judges are applying the time limit of six years that is relevant to actions in tort or contract, then should they also be applying the civil jurisdiction of the District Court which in claims for breach of contract or claims in tort, the claim or award does not exceed €6,348.69? The District Court has the power to make a lump sum maintenance order in addition to or instead of an order for periodical maintenance payments, and the maximum amount or the aggregate of a lump sum payment cannot exceed €6,348.69 i.e. the civil jurisdiction of the District Court.

<sup>449</sup> *Keys v Keys* [1919] 2 IR 160.

<sup>450</sup> In effect applying the same process as stated in s.9A of the Family Law (Maintenance of Spouses and Children) Act 1976, as inserted by section 31 of the Civil (Miscellaneous Provisions) Act 2011 which applies to the District Court only.

<sup>451</sup> Section 6 of the Family Law (Maintenance of Spouses and Children) Act 1976.

<sup>452</sup> Section 8 of the Family Law (Maintenance of Spouses and Children) Act 1976, as inserted by the Civil (Miscellaneous Provisions) Act 2011.

changes made to the legislation.<sup>453</sup> However, there is no similar legislation in place for Circuit Court Judges.

The legislation applicable to the District Court does not specifically state that maintenance arrears can be reduced or cancelled and does not elaborate on which factors the Judge should consider when determining whether or not to reduce or cancel the maintenance arrears outstanding.

If legislation does not provide a limit on maintenance arrears, and this is not considered to be breach of the constitutional rights of the maintenance debtor nor a breach of the “local and limited” jurisdiction of the District and Circuit Courts,<sup>454</sup> then legislation must be clear as to whether or not the Judge has the power to reduce or cancel any maintenance arrears outstanding and the factors that the Court would consider relevant in making this determination. Moreover, if there is to be no limit on the arrears of maintenance that can be claimed then a question arises as to what the position is to be where a maintenance creditor has failed to bring an application for maintenance arrears for a substantial period of time, thereby arguably acquiescing in the non-payment. Safeguards should be contained in the legislation for the maintenance debtor. For example, provision could be made in legislation to enable a maintenance debtor to apply to the court to have his maintenance arrears reduced or cancelled.

In the Canadian province of British Columbia, the Family Relations Act, 1996<sup>455</sup> specifically refers to the issue of maintenance arrears and states that a maintenance debtor can apply to Court to have his arrears reduced or cancelled. It lists the factors that the Court will consider when determining the application. Although, only parents who were never married to each other can apply under this Act, the same test is in

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<sup>453</sup> Section 8 of the Enforcement of Court Orders Act 1940 as inserted by section 63 of the Civil (Miscellaneous Provisions) Act 2011, and s.9A of the Family Law (Maintenance of Spouses and Children) Act 1976 as inserted by section 31 of the Civil (Miscellaneous Provisions) Act 2011.

<sup>454</sup> See Article 34.3.4 of the Constitution. Under Article 34.3.1 only the High Court has full original jurisdiction.

<sup>455</sup> Family Relations Act 1996 Chapter 128  
[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_96128\\_01#section96](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96128_01#section96).



practice applied in cases where parents who were married to each other have applied under the Divorce Act.<sup>456</sup> Section 96(2) of the Family Relations Act 1996 provides:

(2) If an application is made to reduce or cancel arrears under a maintenance order, the court may reduce or cancel the arrears but only if it is satisfied that it would be grossly unfair not to do so.

(3) For the purpose of subsection (2), the court may take into consideration:

- (a) the efforts the applicant has made to comply with the maintenance order,
- (b) the applicant's explanation for any delay in applying for variation of the maintenance order, and
- (c) any special circumstances that the court considers relevant.

(3.1) If the court reduces arrears under a maintenance order, the court may order that interest does not accrue on the reduced amount of arrears but only if, taking into consideration the factors listed in subsection (3), the court is satisfied it would be grossly unfair not to make that order.

(3.2) If the court cancels arrears under a maintenance order, the court may cancel interest that has accrued on the arrears under section 11.1 of the *Family Maintenance Enforcement Act* but only if, taking into consideration the factors listed in subsection (3), the court is satisfied it would be grossly unfair not to make that order.

#### **4.4.1 Recommendations**

*Clarification should be provided in relation to whether or not there is a limit on the amount of maintenance arrears that a Judge can award when making an order against a maintenance debtor in the District Court.*

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<sup>456</sup> Under s.17 of the Federal Divorce Act 1985 the maintenance debtor must make an application to vary the antecedent order as there is no provision specifically stating the right to apply to reduce or cancel maintenance arrears.

*Legislation should be enacted in respect of the Circuit Court similar to that recently enacted regarding the District Court.<sup>457</sup> The legislation should specifically state the power of the Judge to reduce or cancel maintenance arrears and the factors that a Judge should take into account in determining what is “fair and reasonable”.<sup>458</sup>*

*Legislation should provide for a specific application process enabling a maintenance debtor to apply to have maintenance arrears reduced or cancelled. The legislation should contain factors to which the Court would have regard when determining such an application.*

## **4.5 School Attendance**

On 7 June 2012, Minister for Children and Youth Affairs, Frances Fitzgerald TD, launched the National Educational Welfare Board’s (NEWB) Analysis of School Attendance Data for 2009/2010. According to the data collected annually from schools by the NEWB and analysed by the Educational Research Centre, the figures for General Non-Attendance are lower for 2009/10. The percentage of school days missed through absence stands at just over 6% (or 11 school days per year) in primary schools and approximately 8% (or 13 school days per year) in post-primary schools. In Delivering Equality of Opportunity in Schools (DEIS) schools, rates of non-attendance are significantly higher than in non-DEIS schools with student absences over 20 days running at 30%, compared with 15.3% in non-DEIS schools. This latest report of the Analysis of School Attendance Data provides evidence of the highest ever levels of schools reporting on absenteeism with 97.1% of primary schools and 95.8% of post-primary now providing information on attendances.

Commenting on the data, Minister Fitzgerald stated:

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<sup>457</sup> Section 8 of the Enforcement of Court Orders Act 1940 as inserted by section 63 of the Civil (Miscellaneous Provisions) Act 2011, and s.9A of the Family Law (Maintenance of Spouses and Children) Act 1976 as inserted by section 31 of the Civil (Miscellaneous Provisions) Act 2011.

<sup>458</sup> Section 8 of the Enforcement of Court Orders Act 1940 as inserted by section 63 of the Civil (Miscellaneous Provisions) Act 2011.

“While absenteeism reduced in 2009/2010, over 56,000 students still missed school each day, consisting of approximately 31,400 primary and 24,700 post-primary students. This must remain a significant cause for concern and demonstrates the need for a sustained and focussed approach to supporting student attendance, participation and retention.”

Under existing laws, parents of children aged between 6 and 16 may be prosecuted for not doing enough to make sure their children go to school. As a result of this threshold age of six, the vast majority of the estimated 67,000 children who start primary school each year are not covered by school attendance laws. The current legislation will be reviewed in this section along with the role of the NEWB, schools and parents. This section will also review the proposed extension to the age rule as proposed by the Government in early 2012.

#### **4.5.1 Legislation**

The legislation governing school attendance in Ireland is the Education (Welfare) Act 2000. Under the Act the minimum school leaving age is 16 years or the completion of three years of post-primary education, whichever is the later. Parents are required to ensure that their children from the age of 6 to the age of 16 attend a recognised school or receive a certain minimum education. There is no absolute legal obligation on children to attend school, nor on their parents to send them to school.

#### **4.5.2 Constitutional Provision**

Article 42 of the Constitution acknowledges that the primary and natural educator of the child is the family and guarantees to respect the right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

#### **4.5.3 The National Educational Welfare Board**

The National Educational Welfare Board (NEWB) is the national agency established to ensure that every child attends school regularly, or otherwise receives an appropriate minimum education. It also advises the Government on school attendance and education provision. The Board’s emphasis is on helping schools, families and

children, as opposed to imposing penalties for non-attendance at school. It employs educational welfare officers at local level on a nationwide basis to provide support and advice to parents and schools and to follow up on absences from school. The NEWB's remit includes responsibility for the Home School Community Liaison Scheme, the School Completion Programme and the Educational Welfare Service (EWS).

The NEWB also undertakes the following:

- Monitors school attendance, and takes a range of measures where children do not attend school;
- Maintains a register of children who are not attending a recognised school;
- Maintains a register of young persons of 16 and 17 years of age who leave school early to take up employment and makes arrangements for their continuing education and training in consultation with providers and employers;
- Collects data on school attendance and non-attendance, suspensions and expulsions;
- Intervenes in relation to proposed school expulsions.

#### **4.5.4 Responsibilities of schools**

Schools are obliged to keep a register of their students attending the school. They must also maintain attendance records for all students and notify the NEWB if a child is absent for more than 20 days in a school year. The principal must also inform the NEWB if, in his/her opinion, a student has a difficulty with attendance.

The Board of Management in each school is obliged to prepare a school attendance strategy and submit it to the NEWB.

The aim of the policy is to promote regular school attendance and an appreciation of learning within the school. The policy provides for:

- The rewarding of students who have good attendance records,
- The identification of students who are at risk of dropping out at an early stage,

- The establishment of closer contacts between the school and the families concerned,
- The co-ordination with other schools of programmes aimed at promoting good behaviour and encouraging attendance,
- The identification of aspects of the operation and management of the school and of the curriculum that may contribute to truancy and the removal of those aspects in so far as they are not necessary for the proper running of the school.

#### **4.5.5 Enforcement**

With the consent of the parents, the NEWB may arrange for an examination of the intellectual, emotional or physical development of a child. If the parent refuses consent, the NEWB may apply to the Circuit Court for an order that the examination be enforced. The Circuit Court may grant the order if it is satisfied that the child's behaviour, lack of educational progress or regular absence from school without a reasonable excuse warrants an examination.

Criminal prosecutions for failure to ensure children attend school have increased significantly in recent years. The NEWB's stated position is that it will only issue criminal proceedings against parents as a measure of last resort and that this forms a "very small percentage" of the board's work. In 2010, it was reported that a mother-of-five was jailed for a month for failing to ensure her son attended school.<sup>459</sup>

The mother was sentenced at Tallaght District Court to 30 days in prison, forcing her children into care, after it was heard her 15-year-old son had missed almost 70% of his school days from November 2008 to April 2010. Judge James McDonnell stated that the woman's failings in relation to her son's education were so severe that a jail sentence was warranted.

At the same court sitting, the father of a secondary school girl who had also been repeatedly absent from classes, was sentenced to 15 days in jail for failing to appear after the case was adjourned from a previous date for a probation and welfare report. When a serious problem arises regarding attendance, the NEWB's first step in dealing

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<sup>459</sup> "Mother jailed for failing to make son attend school", *The Examiner*, 8 May 2010.

with it is to issue a school attendance notice (SAN) which is a legally binding order directing the parent to ensure their child attends school as required. When a SAN is issued, the situation is monitored and the parent is given every opportunity to address the underlying issues. Where there is no change and the child remains out of school, the Educational Welfare Officer will consider taking a prosecution but this will be in exceptional cases only.

#### **4.5.6 Responsibilities and duties of parents**

Under the Education Welfare Act, 2000 parents must inform the school if their children will be absent from school on a school day and the reason for the absence.

Parents and guardians have a legal obligation to ensure that their child attends a school or otherwise receives an education. If the NEWB considers that a parent is failing in his or her obligation, it must send the parent a School Attendance Notice warning that legal action will follow if the child does not attend school regularly. Before doing this, it must make reasonable efforts to consult with the parents and the child. If the parent fails to comply, he or she may be prosecuted. If convicted, the parent may be fined €634.87 and/or imprisoned for a month and fined €253.95 for each subsequent day that he or she fails to send the child to school. If the parent claims that suitable alternative education is being provided, he or she must prove this. It will be a defence for the parents to show that they have made all reasonable efforts to send the child to school and, in such cases, the Health Service Executive must be notified.

#### **4.5.7 Analysis of School Attendance Data for 2009/2010**

- The percentage of student days lost through absence is running at just over 6% in primary schools and around 8% in post-primary schools. The figures for 2009/10 are lower than for 2008/09 and are at the lower end for the five year period 2005/06 – 2009/10.
- Over 56,000 students miss school each day, consisting of approximately 31,400 primary and 24,700 post-primary students. This equates to a loss of 11

school days per student per year in primary school and 13 days per year in post-primary school.

#### Figures for Twenty-Day Absences are stable

- The figures for twenty-day absence have remained relatively stable over the past five years, although the year-to-year variability in twenty-day absences is greater than for general non-attendance.
- About 12% of primary school students and 18% of post-primary students were absent for 20 days or more during the school year. Based on population numbers this is approximately 58,000 primary school students, and 53,000 post-primary students.

#### Non-Attendance is higher in special schools

In the primary school sector non-attendance is substantially higher in special schools and in ordinary schools with special classes.

#### Non-Attendance in Primary School is higher in urban areas

Rates of non-attendance in primary schools are higher in towns and cities than they are in rural areas. This is particularly apparent in terms of the percentage of pupils absent for twenty days or more where rates of 20-day absences are almost double the rural rate. This pattern is stable year-on-year.

#### Non-Attendance is higher in disadvantaged schools

- In primary schools non-attendance is generally higher in schools involved in the School Support Programme (SSP). However, there is an important urban/rural dimension in non-attendance. General non-attendance and twenty-day absences are higher in non-disadvantaged urban schools than they are in disadvantaged rural schools. This pattern is stable year-on-year.
- In post-primary schools all forms of non-attendance were higher in disadvantaged schools. Just under 30% of students in disadvantaged schools

were absent for twenty days or more in 2009/10. This figure is down just over 2% on 2008/09. In non-disadvantaged schools the figure for 20-day absences was 15.3% for 2009/10, comparable to 2008/09.

#### Higher Non-Attendance in Vocational and Community/Comprehensive Schools

Rates of non-attendance are higher in vocational and community/comprehensive schools than in secondary schools.

#### Comparisons with other countries

Non-attendance in Irish primary schools was 5.6% of student days in 2009/10 compared to between 5.1% and 6.9% for Northern Ireland, England, Scotland and Wales. Non-attendance for post-primary schools was 7.9% of student days, compared to between 6.8% and 8.9% for Northern Ireland, England, Scotland and Wales.

#### **4.5.8 Proposed Extension to age rule**

In May 2012, it was reported that the Government planned to examine proposals to legally oblige parents of children under the age of six to ensure their children attend school regularly.<sup>460</sup> At present, the vast majority of the estimated 67,000 children who start primary school each year are not covered by school attendance laws. Extending these powers to intervene with parents of those under six would help ensure there was earlier intervention in addressing issues of school non-attendance.

At the time of the report, Labour TD and former school principal Aodhán Ó Riordáin stated:

“A problem which I experienced as a principal, and which has been repeated to me by colleagues, is the difficulty [in] intervening before these problems become entrenched. By giving the NEWB greater legal muscle to intervene with those under-six, we can begin to change that.”

Research shows that long absences from school in the early years can be particularly damaging and have long-term negative consequences for literacy and numeracy skills.

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<sup>460</sup> “School attendance Bill extends age rule” *The Irish Times*, May 21, 2012.



In a statement, the board said such a move towards earlier intervention may require constitutional and legislative changes, and may also impact on its resources.

#### **4.5.9 Initiatives and Strategies**

A group of 10 schools in Dublin are involved in the Dublin 8 initiative which demonstrated considerable success in the NEWB Data Report released in 2012. Each of the schools involved agreed a common School Attendance Policy in collaboration with the NEWB. This included the integration of the Educational Welfare Service, School Completion Programme and Home School Community Liaison Scheme, all working in unison to address the absenteeism of pupils in the Liberties area. Persistent levels of chronic absenteeism amongst a core group of 100 pupils were systematically targeted. On average, each of these 100 pupils missed 42 days prior to this integrated approach and this was reduced to 24 school days absence.

Overall the approach resulted in the targeted area missing 9,768 less school days - an improvement of 25%.

Initiatives such as the Dublin 8 Initiative, demonstrate that an integrated approach to tackling attendance works. The NEWB intends to implement a new integrated service involving the Home/School/Community/Liaison Scheme and the School Completion Programme to support children, families and schools in the 2012-2013 school year.

The Guidelines for schools on the Development of Attendance Strategies as outlined in Section 22 of the Education (Welfare) Act, 2000 are currently being developed. Formal guidance is required so that schools may be provided with information regarding responsibilities under the Act. These Guidelines are due to be made available to schools in the next academic year.

#### **4.5.10 Education Supervision Orders: The Position in the UK**

In the UK, the Education Welfare Service (the equivalent of the NEWB) can apply for an Education Supervision Order (ESO). This can be in addition to or instead of a prosecution. An application for an ESO is heard in the Family Proceedings Court. ESOs enable Education Welfare Officers to direct parents and the child to co-operate with plans to make sure the child is appropriately educated.

Before an order is applied for, the Education Welfare Service must consult the parents, the children and the County Council's Social and Community Care Department. The Court must agree that an ESO is in the best interests of the child. The first Order is for one year. Extensions can be requested which may be for up to three years at a time. These extensions are possible up until the time the child leaves school.

It is the experience of the Education Welfare Service in the UK that ESOs encourage parents and children to work in partnership with the Education Welfare Officers.

In the event that parents do not, they can be taken back to court and fined.

#### **4.5.11 Recommendations**

*A system of Education Supervision Orders similar to the UK should be considered.*

*The powers of the NEWB to intervene with parents of those under six years of age should be extended to facilitate earlier intervention in addressing issues of school non-attendance.*

#### **4.6 The Child Care Act 1991 and Interim Care Orders: the need for clarification**

Section 17 (2) of the Child Care Act 1991, before it was amended by Section 267 of the Children Act 2001, read as follows:

“An interim care order shall require that the child named in the order be placed or maintained in the care of the health board –

- (a) for a period not exceeding eight days, or
- (b) where the health board and the parent having custody rights or person acting in *loco parentis* consent, for a period exceeding eight days,

and an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed eight 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.”

In practice this meant that when the HSE applied for an interim care order, the Court could only grant an initial interim care order for a maximum period of eight days. If the parent who had custody of the child or a party acting in *loco parentis* consented to the interim care order being made, then the Court could grant an interim care order for a period longer than eight days.

As stated above, the final paragraph of section 17(2) enabled the HSE to apply for one or more extensions to the interim care order. An extension would be granted for a period exceeding eight days in cases where there was consent; where there was no consent the extension would be granted for a period not exceeding eight days.

Sections 17(2)(a) and (b) were then amended by section 267 of the Children Act 2001 which extended the period of time for which a Court could grant an interim care order

without the consent of the parent(s) or person(s) in *loco parentis* to a period of 28 days, or where there is consent to such an Order for a longer period.

This meant that the matter was not being brought before the Court with the same frequency, as the period of time for which the interim care order could last had been extended by twenty days in cases where there was no consent, and in cases where there was consent, for periods in excess of twenty-eight days.

In practice, the result of this amendment was that the time period for granting an extension to an interim care order was also extended from a period not exceeding eight days to a period not exceeding twenty-eight days, where there was no consent. In cases where there was consent an extension could be granted for a period exceeding twenty-eight days.

However, an issue has now arisen as to whether or not the amendment which was adopted encompassed an amendment to the time period in relation to the extension of interim care orders.

The time period in relation to an extension of an interim care order, is contained in the last paragraph of section 17(2). Therefore, if the last paragraph of section 17(2) is considered to be a separate paragraph, which does not form part of paragraph (b), then the amendment pursuant to section 267 of the Children Act 2001 does not apply to an extension of an interim care order and therefore, an extension cannot be granted for a period exceeding eight days where there is no consent.

As a result of this ambiguity the District Courts are no longer granting extensions of interim care orders for periods exceeding eight days where there is not the requisite consent.

In the case of *K.A. v Health Service Executive & Ors*<sup>461</sup> Ms. Justice O'Malley had to determine the lawfulness of children detained under emergency care orders. She quoted section 17(2) as follows at pages 2-3:

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<sup>461</sup> [2012] IEHC 288.

“(2) An interim care order shall require that the child named in the order be placed or maintained in the care of the Health Service Executive -

(a) for a period not exceeding twenty-eight days, or

(b) where the Health Service Executive and the parent having custody of the child or person acting *in loco parentis* consent, for a period exceeding twenty-eight days,

and an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed twenty-eight 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 order continue to exist with respect to the child.” (Underline added)

It is not quite clear why the Court quoted a reference to the twenty-eight day period in the second paragraph of s.17(2). The issue regarding the application of the amendment does not appear to have been raised in this case and Ms. Justice O’Malley may have interpreted section 17(2) in the way that the Courts had been doing until the concern was raised earlier last year. Thus, the judgment cannot be taken as clarification from the Superior Courts that the legislature had intended when enacting the section 267 amendment pursuant to the Children Act 2001 to extend the time period regarding extensions to interim care orders.

As a result of this issue, cases are coming before the District Court with increasing frequency which places considerable pressure on that Court’s time and resources.

In many cases the relevant parties consent to an extension, so the issue does not arise. However, in cases where the parents do not consent to an extension of the interim care order, or where a party has abandoned the child and the consent of that party cannot be obtained, the Court would appear to be restricted to granting an extension to an interim care order for a period not exceeding eight days.

#### **4.6.1 Recommendations**

*Clarification should be obtained as to whether or not the amendment pursuant to section 267 of the Children Act 2001 applies to the final paragraph of section 17(2) of the Child Care Act 1991.*

*If the amendment does not apply to the last paragraph of section 17(2) of the Child Care Act 1991, legislation should be enacted to amend the last paragraph to provide for an extended time period.<sup>462</sup>*

### **4.7 Child Protection Legislation**

The Government has introduced a series of legislative measures in the past year to strengthen the methods of protection of children and vulnerable persons. This was in response to the recently published reports which highlighted the failure by the State in the past to ensure that children and young people were adequately protected. Efforts can be seen in this regard through the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 and the National Vetting Bureau (Children and Vulnerable Persons) Act 2012, together with the Children First Bill 2012.

The enhanced protection provided by these measures emphasise the Government's commitment to providing a firm foundation for the continued and improved protection of children and vulnerable persons in Ireland. However, in examining the protection guaranteed under the above mentioned legislation and the obligations it places on certain persons, it is important to consider the provisions in conjunction with existing legislation, in particular the rights guaranteed to persons under the Data Protection Acts 1988 and 2003.<sup>463</sup> Moreover, it is necessary to consider any relevant

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<sup>462</sup> In England and Wales pursuant to section 38(4) of the Children Act 1989 an initial interim care order will expire after a period eight weeks and thereafter extensions can be applied for. An extension to an interim care order will expire after four weeks. The Act does not distinguish between cases where there is consent and where there is not consent.

<sup>463</sup> Provisions of the Data Protection Acts provide that the rights thereunder can be displaced by a countervailing enactment (see for example section 8(e)). However, because the Acts transpose an EU

Constitutional rights of persons, including the right to privacy which is also guaranteed by the European Convention on Human Rights, the right to fair procedures and due process, and the right to a good name.

#### **4.7.1 Children First Bill 2012**

The Children First Bill 2012 essentially places obligations on all those working with children to provide a safe place for children and to report suspected concerns of child abuse. The Bill is intended to complement and not to replace any other legal obligation a person has to disclose information to the Garda Síochána<sup>464</sup> and, when commenced, will operate alongside three guidance documents, namely the *2011 Children First: National Guidance for Protection and Welfare of Children*,<sup>465</sup> *Safeguarding Guidance for Organisations*<sup>466</sup> and *Guidance for the Reporting of Abuse*.<sup>467</sup>

The Bill reflects a commitment by Ireland to comply with its obligations under the UN Convention on the Rights of the Child 1989 (hereinafter referred to as the “UNCRC”), in particular with Article 3 of the UNCRC which sets out the duty on States to “ensure that the institutions, services and facilities responsible for the care and protection 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, as well as competent supervision”.

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Directive, the State may not have an absolute entitlement in terms of the exceptions it can create by enactment, if such would whittle away the core of right to data protection, which is recognised in the EU Charter as a separate right from privacy.

<sup>464</sup> There are also obligations to report contained in the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012.

<sup>465</sup> *Children First* was first published by the precursor to the Department of Children and Youth Affairs in 1999 and was updated by the Department in July 2011. It details what steps organisations are obliged to take to secure the safety of children and deals, in particular, with inter-agency co-operation between the HSE and An Garda Síochána.

<sup>466</sup> Yet to be published.

<sup>467</sup> Yet to be published.

The primary objective of the Bill is to ensure that where children are participating in or being provided with services of an organisation that they are in a safe environment. The Bill requires organisations which are providing a service where a child is present without a parent or a guardian to: (i) Appoint a Designated Officer who will receive concerns or allegations of child abuse and who is to be responsible for the *Keeping Children Safe Plan*; (ii) Compile a *Keeping Children Safe Plan*; (iii) Vet and train staff; and (iv) Create a culture where both the employee and volunteer promote best practice in child welfare and protection.

#### Relevant Provisions of the Children First Bill:

The Department of Children and Youth Affairs sought submissions and comments on the Heads of Bill from organisations affected by the Bill. A number of concerns were raised which are set out below.

Under Head 2 there is concern that the definition of sexual abuse in its present form may prevent persons under 18 years who are engaging in consensual sexual activity to access medical advice or treatment in relation to the same. The Bill states “it is presumed that consensual sexual activity permitted by law is not sexual abuse, however this presumption may be rebutted.” In this regard, it may be noted that in 2012 the Supreme Court in *MD v Ireland*<sup>468</sup> rejected a constitutional challenge (on equality grounds) to section 5 of the Criminal Law (Sexual Offences) Act 2006. That section provides: “A female child under the age of the 17 years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse”. Essentially the Court found that: “The danger of pregnancy for the teenage girl [is] an objective which the Oireachtas was entitled to regard as relating to ‘differences of capacity, physical and moral and of social function’ as provided for in Article 40.1 of the Constitution.”<sup>469</sup>

It has been recommended that the Bill contain a defence for designated persons who fail to report due to a ‘reasonable excuse’ as is provided for under the Criminal Justice

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<sup>468</sup> *MD v Ireland* [2012] IESC 10.

<sup>469</sup> At para 56.



(Withholding Information on Crimes against Children and Vulnerable Persons) Act 2012.

The term emotional abuse is not included in the categories of abuse defined in Head 2. It is recognised that the identification of emotional abuse is complicated by the diversity of signs and symptoms that a child may display and that this may place an excessive burden on designated reporters in determining whether or not the concern or abuse should be reported. Safeguards could be inserted into the proposed Bill, such as an obligation to report but a provision that no penalty applies for failure to report emotional abuse.

The definition of employment differs from the definition provided under the National Vetting Bureau (Children and Vulnerable Persons) Act 2012. It is recommended that there be consistency between these definitions.

Under Head 6, the draft Bill states that it applies to organisations that provide services to children without a parent or guardian present and where an employee or volunteer has direct contact with a child. Specific types of services are referred to namely “recreational, educational, cultural, religious, spiritual or charitable pursuits, health care, therapeutic or disability services” and it is expressly stated that a service can fall under the draft Bill regardless of whether or not it is provided by the State. Types of services which are not included are also identified. It is recommended that these categories be clearly identified and easily distinguishable, so that organisations can identify which category they fall into. It is not clear, for example, whether swimming pools would fall under the meaning of “recreational....services” (included under the Bill) or “leisure facilities which cater for adults but allow children to use their facilities” (not included). It is recommended that consideration be given to the approach set out in the National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

Head 7 sets out the duties of organisations that fall within the scope of the draft Bill. Under Head 7(8) it states that a vetting application must be made for volunteers. The explanatory note to this section indicates that a vetting application is to be made for each employee or volunteer. This will require clarification and consideration of the

new provisions of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012.

Head 8 provides for mandatory notification to the HSE of the existence of an organisation which falls within the terms of the proposed legislation. At present, the definition of which organisations require notification to the HSE and when requires further clarification.

Head 9 imposes a requirement upon organisations to appoint a Designated Officer to report in accordance with the *Guidance for the Reporting of Abuse* (yet to be published) and decisions as to whether or not a report should be made are to be taken in accordance with this guidance. If the Designated Officer decides not to report a concern or allegation, he/she must record the reasons for not reporting it along with the action (if any) taken as a result of the concern or allegation.

It is recommended that the legislation itself provide further detail in this respect even if further guidelines on the reporting procedure are ultimately included in the Guidance. For example, the legislation could provide an indication of a time frame - for example “as soon as practical/possible”<sup>470</sup> or “promptly/immediately/forthwith/without delay.”<sup>471</sup> It is also recommended that the initial report should be made by telephone which should be followed up in writing within a certain time frame, such as 48 hours. This is the approach taken in other jurisdictions, such as New York.

Head 10 of the draft Bill places an obligation on all employees and volunteers in an organisation to report to their Designated Officer concerns or allegations of child abuse that come to their attention during employment (i.e. while engaged in the activities of the organisation)”. It is therefore recommended that the relevant legislation provides protection to employees from retaliation in the form of dismissal, suspension, demotion, discipline, harassment or any other type of interference, as is

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<sup>470</sup> As contained in legislation in Australia.

<sup>471</sup> As contained in the legislation in Canada.

provided for in legislation in other jurisdictions.<sup>472</sup> It may be that the protection of whistleblowers in the Government's Protected Disclosure in the Public Interest Bill 2012, when enacted, will make adequate provision in this regard.

Head 11 states that in addition to the obligation of employees or volunteers to report concerns or allegations, any person who holds a supervisory post and is responsible for the supervision of employees or volunteers who work directly with the children is also obliged to report his/her concerns. Furthermore, sole practitioners or self-employed persons who work with an organisation (as defined) are obliged to report concerns.

If a person contravenes the requirement to report allegations and concerns of child sexual abuse without a reasonable excuse, they will be guilty of an offence liable on summary conviction to a 'Class A fine' or imprisonment for a term not exceeding 12 months or both, or on conviction on indictment, to an unlimited fine or imprisonment for a term not exceeding 5 years (see Head 20).

The following observations and recommendations should be considered:

- (ii) The challenge is to ensure that the threat of a criminal conviction will not lead to over-reporting by Designated Officers.
- (iii) Defences should be expressly included (in addition to general criminal law defences) because the Designated Officer will be subject to penalties for failure to carry out his obligations under the draft Bill.
- (iv) Organisations should be placed under an obligation to provide their designated officer with a statement to be signed, which states the role of the Designated Officer, his/her obligations under the Bill and any penalties that they may be subject to in the event of non-compliance. This statement should also set out the obligations of the organisation towards the Designated Officer under the Bill, for example to provide training.
- (v) Where the organisation fails to carry out its obligations in relation to the appointment of, and duties towards, the designated officer, the question arises as to whether it should also be held liable and guilty of an offence.

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<sup>472</sup> For example, the Provinces of Ontario and Manitoba in Canada.

An option would be to import a similar provision as contained in section 80(1) of the Safety, Health and Welfare at Work Act 2005 into this legislation.

- (vi) The legislation should provide for protection from liability in respect of designated officers who have acted reasonably and in good faith. A provision similar to that included in the *Protection for Persons Reporting Child Abuse Act 1998* could be inserted in this Bill. This would also reflect the position taken by the legislatures in a number of other jurisdictions.
- (vii) It is not clear exactly of what offences a person would be guilty under Head 11(3) if he/she contravenes Head 11. It is recommended that the possible offences are identified and clearly stated. Offences could include: (1) failure to report, and (2) knowingly making a false or misleading report. Such offences are included in the legislation in the majority of provinces in Canada and Australia and States in the United States. In addition, while the penalties presently provided for should be reduced, it is recommended that the criminal penalty for a failure to report should be maintained. For example, the Australian Capital Territory allows for the imposition of a term of imprisonment of 6 months.

Head 12 states that the explicit responsibility for the provision of information, advice and awareness to the public, organisations and professionals rests with the HSE. It is imperative that the *Safeguarding Guidance for Organisations* is published prior to the commencement of the legislation to ensure that organisations can begin to put in place the necessary structures before the Bill comes into force. In this regard, it may be noted that Mr. Justice Clarke in *Omega Leisure Ltd. v Superintendent Barry*<sup>473</sup> stated: “...although it is well known that ignorance of the law excuses nobody (*ignorantia juris neminem excusat*) it is less well known that a corollary of this maxim is that an individual should have access to and be able to determine the laws by which he is governed, so as to be able lawfully to order his life in society.”

Head 16 contains the reporting criteria. It does not include a requirement to advise or inform those against whom an allegation or complaint of abuse has been made, which

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<sup>473</sup> *Omega Leisure Ltd. v Superintendent Barry* [2012] IEHC 23, at para. 7.2.

can be contrasted, for example, with section 15 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 which provides that submissions shall be invited from the person affected by disclosure, and that these shall be taken into account by the Chief Bureau Officer before a determination is made. In the interests of justice and to ensure fair and due process it is recommended that a person should have a legal entitlement to be informed of a complaint against them and that provision for this should be made in the Children First legislation.<sup>474</sup>

Head 18 of the draft Bill specifically provides that the Data Protection Acts, 1988 and 2003 are to apply in relation to data collected, processed, kept and used in accordance with the legislation, but that the Data Protection Acts are not to prevent the exchange of information for the purpose of protecting a child. An issue may arise for Designated Officers who are obliged to maintain all relevant records under Head 9 of the draft Bill. Therefore, organisations will need to take care in the manner in which they store and handle personal information.

#### **4.7.2 Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012**

The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 (hereinafter referred to as the “Withholding Information Act”) makes it an offence for a person, who knows or believes that an offence under Schedule 1 of that Act has been committed against a child to withhold information without reasonable excuse in relation to the commission of that offence. One of the various stipulated offences under Schedule 1 is the offence of cruelty to children under section 246 of the Children Act 2001. Thus, to the extent that employees of local authorities (for example, in the performance of any of their functions, such as under the Housing Acts) come to know or believe that a child is being neglected or ill-treated within the meaning of that section by the person having

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<sup>474</sup> See *MQ v Gleeson* [1998] 4 IR 85 in which Barr J. held that the Health Board was under a duty to accord fair procedures to a person before it disclosed information about allegations of sexual abuse against that person to the local VEC.

care or custody of the child, those employees may be under an obligation to report this to the Gardaí or risk committing an offence themselves.

The Withholding Information Act creates an obligation on a person to report information to the Garda Síochána. This is in addition to, and not in substitution for, any other statutory obligation that a person may have to make a report – for example to the HSE under the Children First draft Bill, when enacted.

Section 4 of the Withholding Information Act provides for a number of defences which include *inter alia* that where a child is under the age of 14 or is a vulnerable person, it is also a defence for an accused person to show that the parent or guardian of the child made known his or her view, on behalf of that child or vulnerable person, that the commission of that offence, or information relating to it, should not be disclosed to the Gardaí, and that the accused person relied upon that view.

Equally, it is a defence for a parent or guardian of a child under the age of 14 or of a vulnerable person to show that he or she formed the view on behalf of the child or vulnerable person that the commission of that offence or information relating to it should not be disclosed to the Gardaí.

The applicability of the latter two defences referred to above is, however, subject to the following: (a) the parent or guardian concerned must have had reasonable grounds for forming the view concerned having regard to the health of the child or vulnerable person; (b) in forming this view, the parent or guardian of the child must have acted bona fide in the best interests of that child or vulnerable person; (c) the parent or guardian concerned who formed the view must not be a family member of the person who is known or believed to have committed the alleged offence.

Another defence applies if the accused person can show that a member of a designated profession, who provided services to the child or vulnerable person in respect of the alleged offence committed against such child or vulnerable person, has made known their view on behalf of the child or vulnerable person that the commission of the offence or information relating to it should not be disclosed to the Gardaí. The Act also provides that the parent, guardian or the member of a designated

profession should have regard to the wishes of the child or vulnerable person when determining whether the commission of the offence or information relating to it should be disclosed to the Gardaí.

A further defence provided under the Withholding Information Act is for a member of a designated profession to show that he or she is or was providing services to the child or vulnerable person (regardless of age or mental capability) and formed the view that the matter should not be disclosed to the Gardaí. This defence is only available where such professional had reasonable grounds for forming such a view and acted in a manner in accordance with the standards of practice and care that can reasonably be expected of the said person.

#### **4.7.3 National Vetting Bureau (Children and Vulnerable Persons) Act 2012**

The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 (hereinafter referred to as the “Vetting Act”) has recently been passed into law. It seeks to “make provision for the protection of children and vulnerable persons and for that purpose, to provide for the establishment and maintenance of a National Vetting Bureau (Children and Vulnerable Persons) Database System”. It also seeks “to provide for the establishment of procedures that are to apply in respect of persons who wish to undertake certain work or activities relating to children or vulnerable persons or to provide certain services to children or vulnerable persons....”.

The Vetting Act provides for the establishment of a National Vetting Bureau (Children and Vulnerable Persons) Database System to comprise of a register of relevant organisations, a register of specified information and a register of vetted persons. This Database System will contain a register of organisations which are obliged to apply to the Bureau to be registered or organisations which immediately before the commencement of the section were already registered with the Garda Central Vetting Unit. It is an offence for an organisation which knew or ought to have reasonably known that it was a relevant organisation to fail to register with the Bureau.

The Vetting Act provides that a relevant organisation that is registered must nominate a person - to be known as the liaison person - who is to be the person who applies for and receives the results of vetting applications. The Bureau is to establish and maintain a register of vetted persons who were or are subject to applications for vetting. Importantly, the Act provides that unless a relevant organisation receives a vetting disclosure from the Bureau in respect of a person it shall not employ (under contract or otherwise), or enter into a contract for services with, that person to undertake relevant work or activities, nor shall it permit or make arrangements for the placement of that person to undertake relevant work or activities as part of any education or training. Relevant work and activities are defined under the Act. Any person/organisation in breach of this provision will be guilty of an offence.

The Vetting Act provides for the information which must be provided in the vetting disclosure and there is a requirement that the Chief Bureau Officer be satisfied that the disclosure of the information is necessary, proportionate and reasonable in the circumstances for the protection of children or vulnerable persons or both. Where the Chief Bureau Officer determines that the specified information should be disclosed it will be necessary for him or her to notify the person concerned in writing of the determination and the reasons for it and to furnish them with a copy.

The Vetting Act allows organisations to whom a vetting disclosure is made to take into account the information in assessing whether the person concerned is suitable for relevant work or activities. However, it is a criminal offence for information contained in a vetting disclosure to be used or disclosed in any fashion other than as provided for under the legislation.



#### **4.7.4 Considerations in light of existing legislation, the Constitution and the European Convention on Human Rights**

##### The Data Protection Acts 1998 and 2003

Concerns have been raised by organisations that the Data Protection Acts have had the effect of impeding child protection.<sup>475</sup> As noted above, Head 18 of the draft Children First Bill provides that the Data Protection Acts are not to prevent the exchange of information for the purpose of protecting a child. The Data Protection Acts stipulate that the restrictions on processing (which includes disclosure) of personal data under those Acts do not apply where processing is “required by or under any enactment or by a rule of law or order of a court.”<sup>476</sup> Thus, to the extent that child protection legislation (when it comes into force) requires certain information to be disclosed, the Data Protection Acts will not prevent this.

Where disclosure is not required by legislation organisations have latitude under the Data Protection Acts to disclose particular information in certain circumstances.<sup>477</sup>

##### The Right to Privacy

The effect of the above legislation on the interaction between the obligations to disclose and the right to individual privacy which exists under the Data Protection Acts, the Constitution and Article 8 of the European Convention on Human Rights (hereinafter referred to as the “ECHR”) remains unclear. Existing case law in this general area concerning the rights of suspected persons and the public interest in making disclosure has looked to a number of factors when determining whether a breach of an individual’s right to privacy has occurred, such as: (i) to whom the disclosure of information was made e.g. to an entire (department of an) organisation or to one individual who had a reasonable requirement to be informed; (ii) whether

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<sup>475</sup> See for example, “Church chief claims legislation is preventing information on abuse allegations being shared” <http://www.rte.ie/news/2012/1127/abuse-catholic-church-data-protection.html> (27 November 2012).

<sup>476</sup> Section 8(e).

<sup>477</sup> Section 8 and section 2B(1)(b)(iii).

the person affected by the disclosure has an existing criminal record; (iii) whether this person has been the subject of previous complaints; and (iv) whether there was a ‘pressing need’ for disclosure to be made.

In the English case of *R v A Local Authority in the Midlands, ex p. LM*<sup>478</sup> Mr. Justice Dyson held that disclosure of mere allegations of sexual misconduct should be the exception and not the rule, and that the test was whether there was a ‘pressing need’ that disclosure be made. He clarified that the test of a ‘pressing need’ applied not only when information was disclosed to members of the public, but also when it was disclosed to a local authority. Mr. Justice Dyson also listed factors which should be considered when contemplating disclosure of allegations of child sex abuse to a third party.

The principles in the existing case law may well apply to the many circumstances which fall outside the ambit of the new legislation. These would include, for example, the question of when and whether disclosure should be made to persons residing near a suspected person or organisations (other than the Gardaí and HSE).

To minimise the risk of a breach to the right to privacy and a subsequent liability for an award of damages organisations which are faced with the question of whether and how to pass on suspicions of allegations against a particular person may need, depending on the circumstances, to engage legal advice. The following actions are among those which could be taken by organisations to attempt to reduce the legal risks to them:

- Information about allegations or concerns should be limited only to those staff members of an organisation who truly need to know about them.<sup>479</sup>
- As allegations of criminal conduct amount to ‘sensitive personal data’ within the meaning of the Data Protection Acts steps should be taken to ensure any relevant files are kept secure – e.g. in locked drawers.

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<sup>478</sup> 6<sup>th</sup> September, 1999, Dyson J.

<sup>479</sup> This is a consideration to which the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 for example, is sensitive. Section 13 provides that it is a specific person, the Liaison Officer, who is to make requests for disclosure.

- Those who are privy to allegations or concerns should be instructed that if these are communicated to persons who do not need to know about them, or are not required to be informed under legislation, there is a risk that the organisation could be exposed to liability for damages for breach of privacy.

An effect of these recent legislative enactments is that organisations will be handling and processing a greater amount of sensitive information than beforehand. In some cases organisations themselves will be required to generate new information which would not otherwise exist – for example the requirement under the Heads of the Children First Bill for the Designated Officer to record any reasons for not reporting to the HSE an allegation or concern regarding child sexual abuse, along with any action taken.

### The Right to a Good Name

An individual's constitutional right to a good name (Art. 40.3.2°) is protected through the Defamation Act 2009 which provides that it is a defence to a defamation action for the defendant to prove that the allegations are true. The forthcoming child protection legislation does not make reference to the protection of persons from a defamation claim on foot of their passing on of concerns or allegations. Under the Protection of Persons Reporting Child Abuse Act, 1998 (as amended) communications made to the HSE and Gardaí are protected, and persons will not be liable in damages if they “reasonably and in good faith” form an opinion that a child is being abused and report this to the HSE or Gardaí. This legislative protection does not extend to reports made to any other organisations or persons.

Outside of that context, the defence of qualified privilege will be relevant. Where qualified privilege applies, it means that the person or organisation responsible for the statement will not be liable in defamation for statements which turn out to be false and defamatory, unless the person or organisation acted with ‘malice’ (section 19(1) of the Defamation Act 2009).

As with guarding against a breach of privacy claim, in order to conserve the defence of qualified privilege, it will be crucial that the allegations and information are not communicated to any staff other than those to whom such communication is legally required or otherwise absolutely necessary.<sup>480</sup>

### Proportionality

Should the courts at some future point be called upon to conduct a constitutional assessment of the effect of the new legislation upon citizen's rights, they will weigh this effect against the State's interest in child protection, to consider if it is proportionate. Even though the recent case of *MD v Ireland* (referred to above) was concerned with dismissing an equality challenge, and was concerned with a very different aspect of child protection, there are statements in that judgment which are possibly noteworthy regarding the question of proportionality of the new legislation. Thus, the Supreme Court stated that "[t]he framing of sexual offences in such a way as to protect young people from the dangers of early sexual activity is a matter of notorious difficulty"<sup>481</sup> and that Courts should be deferential to the legislative view on such matters of social policy."<sup>482</sup> The High Court also appears to have recently considered that a law can be proportionate by reason of the importance of fostering a particular culture or set of mores or values,<sup>483</sup> which also may be relevant insofar as the new legislation seeks to build up a stronger culture of vigilance and child protection.

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<sup>480</sup> This was made clear in the English case of *Clift v Slough Borough Council* [2011] 1 WLR 1774 where the Judge stated that "...Ill-considered and indiscriminate disclosure is bound to be disproportionate and no plea of administrative difficulty in verifying the information and limiting publication to those who truly have the need to know or those reasonably thought to be at risk can outweigh the substantial interference with the right to protect reputations."

<sup>481</sup> [2012] IESC 10, at para. 49.

<sup>482</sup> At para 50.

<sup>483</sup> See *Marie Fleming v Ireland* [2013] IEHC 2.

#### **4.7.5 Recommendation**

*The Children First Bill is to be welcomed in that it reflects a commitment by Ireland to comply with its international child protection obligations. However, greater clarity ought to be achieved in relation to some of the proposed provisions so as to ensure that those affected by the provisions of the Bill fully understand their obligations and responsibilities.*

### **4.8 Court Ordered Disclosure of Confidential Records: the need for legislation**

As stated in the *Fourth Report of the Special Rapporteur on Child Protection (2010)*<sup>484</sup> Ireland urgently requires legislation to address the worrying gap in the law governing the issue of non-party disclosure regarding confidential records concerning children. This need arises in light of the contest of rights at issue and due to the increasing number of requests and/or court orders from the DPP's office, Gardaí and solicitors seeking access to children's private therapy notes. Sensitive and delicate issues of confidentiality, negative impact and potential for re-traumatisation, informed consent, pressure on children and their families and wider implications arise and require an effective solution so that disclosure of personal records does not become a powerful disincentive against reporting sexual offences or seeking counselling/therapy. In any discussion regarding potential legislation in this field consideration ought to be given to approaches taken in other jurisdictions. Much discussion has taken place around the delicate and difficult issues of the need to balance the complainant's right to privacy, the public interest to see crimes prosecuted and the accused's right to a fair trial. It was noted that the DPP cannot both serve the public interest and adequately shield the complainant from disclosure applications. Thus, in the absence of any express statutory rights of advocacy in respect of a child complainant's interests, the right of a child complainant to privacy is seriously undermined. On this basis it was recommended in the *Fourth Report of the Special*

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<sup>484</sup> Section 3.

*Rapporteur on Child Protection (2010)* that an independent legal adviser should be appointed to act as a Children's Advocate.<sup>485</sup>

#### **4.9.1 Recommendations regarding legislation and/or a national protocol for the exchange of information in relation to the investigation and prosecution of cases of abuse**

The *Fourth Report of the Special Rapporteur on Child Protection (2010)* recommended that a National Protocol for the Exchange of Information in relation to the Investigation and Prosecution of Cases of Abuse would be an important development in child protection.<sup>486</sup> Any new measures must utilise existing frameworks, alongside an independent review committee, as a foundation to establish a transparent process with clear, unambiguous guidelines for sharing information. Given the prejudicial nature of such evidence for complainants, the potential to infringe their privacy rights and to damage a counsellor/client relationship, it is crucial that the admission of such evidence is tightly controlled so that it is only available when it is absolutely necessary. Discussions between the DPP and relevant interlocutors are ongoing to reach agreed protocols, including a Memorandum of Understanding. While there is agreement over many areas, e.g. disclosure of medical reports, assessment reports and notes, the position regarding therapy and counselling notes is significantly more challenging.<sup>487</sup> In the absence of such a protocol the exchange of information in the investigation and prosecution of cases involving abuse is impeded. Whilst it may be argued that legislation would provide the greatest possibility of success, the effectiveness of protocols in the United Kingdom is noteworthy.<sup>488</sup>

In the *Fourth Report of the Special Rapporteur on Child Protection (2010)* the

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<sup>485</sup> At p.102.

<sup>486</sup> Section 3.2.11.

<sup>487</sup> Kate Mulkerrins, Head of Prosecution Policy Unit, Office of the DPP, 13th Annual National Prosecutor's Conference, 19 May 2012.

<sup>488</sup> Department of Children, Schools and Families, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, (March 2010).

approaches taken by other jurisdictions were considered – England and Wales, Northern Ireland, Scotland and Australia.<sup>489</sup> The legislative approach adopted in Canada was also considered, where regulation of third party disclosure of records is contained in the Criminal Code. The definition of “record” is broad and offers protection to any record containing sensitive personal information and this applies to any such information that the prosecution may have in its possession. There must be a logical link between the record and an issue at trial. Groundless requests for disclosure are filtered out by a written application procedure and by the list of reasons which are not adequate on their own to ground an application for disclosure. The application of the *in camera* rule to determine whether disclosure should be made allows all parties concerned to be heard. The two-stage decision-making process and the guidelines contained therein means that judges are not making decisions in a vacuum. If the judge grants an order of disclosure, conditions can be attached such that only information which is directly relevant to the case can be disclosed.

Recent academic commentary supports the approach taken in Canada and suggests that it would provide an “inherently sensible solution to fill the current gap in Irish law”.<sup>490</sup> The Canadian approach is not without its pitfalls which have come to light over the fifteen years or so since the statutory scheme for the regulation of the third party disclosure of personal records in trials for sexual assault and similar sexual offences was enacted.

Canadian judicial interpretation of the standards which are required to be met before disclosure is granted means that the judge is not required to engage in an in-depth evaluation of each of the guidelines, rather the judge must merely take them into account. Furthermore, if after consideration of the guidelines a judge is left uncertain whether production of the record is necessary to provide a full answer and defence, then judgment should be in favour of inspecting the document. It is suggested that a means to avoid this restrictive interpretation and ensure maximum

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<sup>489</sup> Section 3.2.9.

<sup>490</sup> Susan Leahy, “*The Defendant's Right or a Bridge too Far? Regulating Defence Access to Complainants' Counselling Records in Trials for Sexual Offences—Part 2*” (2012) 2 I.C.L.J., 34-39.

respect for the rights of both complainants and defendants “is to educate judges about proper application of the provision and to monitor its application after it is implemented to ensure that it is being applied in the manner which law reformers intended.”<sup>491</sup> Another issue encountered with the Canadian scheme is a lack of funding for legal representation at the hearing regarding disclosure which is a serious shortcoming especially in times of scarce resources. To avoid this issue arising it must be ensured that there is access to legal aid so that the parties concerned are guaranteed access to legal representation when an application regarding disclosure is being heard. This could reflect the scheme of legal aid available to complainants in hearings of admissibility of sexual history evidence under s.3 of the Criminal Law (Rape) Act 1981.

As has been well documented, the possibility of disclosure of confidential records in particular, counselling records, can be a source of enormous distress for complainants in sexual offence trials. Therefore, any new provisions must be tightly regulated in order to maximise the protection of complainants’ privacy but at the same time must be flexible in order to respect the fair trial rights of defendants. Anything less would be contrary to the Constitution and the ECHR.

This current lacuna in Irish law must be addressed without delay. The frequency of requests for such information and the particularly sensitive issues and rights that have to be considered and balanced require careful thought and the approach taken in Canada and the experience in other jurisdictions offers a ready-made template to be adopted in Ireland.

#### **4.9.2 Recommendation**

*As previously detailed in the Fourth Report of the Special Rapporteur on Child Protection (2010) the lacuna in Irish law concerning the disclosure of confidential records relating to children to third parties requires immediate attention. The difficulties in this area persist. The frequency of requests for such information and*

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<sup>491</sup> *Ibid.*



*the particularly sensitive issues and rights that have to be considered and balanced require careful thought and the approach taken in Canada and the experience in other jurisdictions offers a ready-made template to be adopted in Ireland.*

#### **4.9 Criminal Law Update: *DPP v Judge Mary Devins***

In the case of *DPP v. Judge Mary Devins*,<sup>492</sup> the Supreme Court held that the notice party was not liable for prosecution for alleged buggery of a child in 1970 and that prosecutions of the former crime of buggery cannot be pursued. This decision has halted the trial of a priest on a charge of alleged buggery of a teenage boy in 1970 and has implications for other persons charged with buggery offences prior to 1993. The Oireachtas repealed the offence in 1993 and the question for the Court to consider was whether it is nevertheless possible to prosecute someone for committing the offence before 1993.

The effect of the new Criminal Law (Sexual Offences) Act 1993 was to decriminalise the act of buggery committed consensually between adults and to create a new offence of buggery with minors. That said, the statute did not explicitly preserve the possibility of prosecution for pre-1993 offences of buggery. The appeal to the Supreme Court was wholly concerned with whether Judge Devins was correct in making no order about the buggery charge.

An issue for the Court to consider was whether buggery was a common law offence or a statutory offence because the Interpretation Act of 1937 would have allowed for a post-repeal prosecution for a pre-repeal offence, provided that the offence was a *statutory* offence. Buggery was previously a common law offence but had also been mentioned in successive statutes over time. Section 61 of the Offences Against the Person Act 1861 provided:

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<sup>492</sup> [2012] IESC 7. Another significant criminal law judgment delivered in 2012 was that of Mr. Justice Hogan in *GC v DPP* [2012] IEHC 430 (where the accused sought to prohibit his trial for a number of offences arising from allegations that he had indecently assaulted four young girls in 1996). Mr. Justice Hogan's decision clearly identifies the difficulties in obtaining an order of prohibition on the grounds of delay in such cases.

Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than ten years.

The majority of the court held that this provision simply provided a *sentence* for the pre-existing common-law crime of buggery.

Other legislation reviewed by the court was the Interpretation Act 1997. Section 1 of that Act allows post-repeal prosecution for a pre-repeal offence, if the offence was a common law offence. However, this Act post-dated the repeal of the offence of buggery in 1993. The Court held that to permit the 1997 Act to operate in this instance would be a breach of the defendant's constitutional rights.

By a three-two majority, the Supreme Court ruled that the priest could not be tried on the buggery charge because, when repealing the offence of buggery "between persons" in 1993, the Oireachtas failed to enact the necessary saving measures to allow prosecutions for such common law offences committed prior to 1993. While general saving provisions for abolished common law offences were made four years later via the Interpretation (Amendment) Act 1997, it was held that that legislation could not be retrospectively applied to pre-1993 buggery offences.

The priest may, however, be prosecuted on alternative charges of indecent assault.

This is an important decision which seemed to focus on the requirement that the criminal law be clear and certain. It also establishes that with the repeal of an offence in circumstances similar to those detailed above, an accused acquires a permanent immunity against prosecution.

The approach of Mr. Justice Hogan to the issue of delay in *GC v DPP*, if followed in other decisions, will make it more difficult to obtain an order of prohibition on the grounds of delay.

## SECTION 5:

### NORTH/SOUTH CROSS-BORDER COOPERATION

#### 5.1 Introduction

Under the terms of the Belfast (or ‘Good Friday’) Agreement, the Irish government is committed to ensuring “at least an equivalent level of protection of human rights as [pertains] in Northern Ireland.”<sup>493</sup> This guarantee was significant in bringing about the eventual incorporation of the European Convention on Human Rights (hereinafter referred to as the “ECHR”) in the Republic. As Hogan commented, the Convention provides a useful neutral yardstick by which compliance with human rights standards can be measured.<sup>494</sup> Further impetus to ensure equivalence of protective measures is provided by the effect of the EU Charter of Fundamental Rights (hereinafter referred to as the “CFR”) in both jurisdictions. Given that the CFR is accorded the same status and legal effect as the other European Union treaties, the CFR is directly effective in both Northern Ireland and the Republic insofar as EU law is being implemented. Given the potential for the EU to become a party to the ECHR, it is increasingly important the European child protection standards are met in both jurisdictions.

Violence against children and sexual violence in particular, can meet the threshold established by Article 3 ECHR.<sup>495</sup> States which are party to the ECHR also have positive obligations to ensure that the rights provided for in Article 3 are not violated. In *Z. v. United Kingdom*, the European Court of Human Rights (hereinafter referred to as the “ECtHR”) stressed that this positive obligation to protect people from conduct which violates Article 3 includes an obligation to protect people from the infliction of such conditions by private actors, such as parents, or other known risks.<sup>496</sup> As the ECtHR argued:

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<sup>493</sup> “Rights, Safeguards, and Equality of Opportunity”, Northern Ireland Peace Agreement, 10 April 1998, Strand 3, para 9.

<sup>494</sup> Gerard Hogan, ‘The Belfast Agreement and the Future Incorporation of the European Convention on Human Rights in the Republic of Ireland’ (1999) 4(4) *Bar Review* 205.

<sup>495</sup> See *Costello Roberts v United Kingdom* (1993) 13 EHRR 622; *Tyrer v United Kingdom* (1979) 2 EHRR 1; *A v United Kingdom* (1998) 27 EHRR 1; *Z v United Kingdom* (2002) 34 EHRR 3.

<sup>496</sup> See *Osman v United Kingdom* (2000) 29 EHRR 245.

“The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals ... These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.”<sup>497</sup>

Additionally, the CFR stipulates in Article 24(1) that children shall have the right to such protection and care as is necessary for their well-being. With respect to the interrelationship between the CFR and ECHR, the Charter provides in Article 52(3) that:

“[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

Therefore, the minimum level of child protection which must pertain in either Northern Ireland or the Republic is found in the text of the ECHR and case law interpreting it. However, it is not impermissible for the European Union to extend the minimum level of required protection beyond that imposed by the ECHR.

In light of these obligations generally, and the need for equivalence in human rights protection more specifically, this report will discuss the potential legal basis for developing cross-border mechanisms by which children’s right to protection can be equally protected in each jurisdiction. In doing so the following areas will be addressed: the potential for the cross-border sharing of information relating to convicted sex offenders and the exchange of soft-information, the issues relating to

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<sup>497</sup> *Z. v. United Kingdom* (2002) 34 EHRR 3, para 73.

the current protocols on the transfer of social care cases between the jurisdictions, and the obligations to prevent, and protect the victims of, child trafficking.

## **5.2 The Exchange of Information on Sex Offenders and Soft Information**

There is already a significant level of cooperation between the relevant authorities in relation to sex offender management and information sharing under the auspices of the Intergovernmental Agreement on North/South Co-operation on Criminal Justice Matters.<sup>498</sup> This section will deal with two related issues – first, the management of information relating to convicted offenders, and secondly, the potential to develop mechanisms for the sharing of soft information after the commencement and implementation of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 in this jurisdiction.

With respect to the current management system for convicted sex offenders, both jurisdictions have notification requirements in place for persons convicted of sexual offences. Although such requirements are commonly spoken of as if there were a register of convicted sex offenders, the relevant legislation in each jurisdiction does not establish a register in the form of a central database, but instead places an obligation on offenders convicted of certain offences to disclose certain information. Therefore, neither the Sex Offenders Act 2001 nor the Sexual Offences Act 2003 establish a centralised database containing details of all relevant offenders,<sup>499</sup> although the UK has moved towards such a centralised system with the introduction of the VISOR (Violent and sex offender register) system in 2004. This system centralises information relating to all offenders subject to multi-agency public protection arrangements (MAPPA), or Public Protection Arrangements as they are referred to in Northern Ireland. At present, Ireland does not have as detailed an information management system.

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<sup>498</sup> See generally, Department of Justice, *The Management of Sex Offenders: A Discussion Document* (Stationary Office, 2009) 12.

<sup>499</sup> Although see Cathy Cobley, *Sex Offenders: Law, Policy and Practice* (2<sup>nd</sup> ed, Jordan's, 2005) at p.362 regarding the different databases that existed in the United Kingdom, and her discussion on the Sex Offenders Act 1997 which failed to introduce such a centralised database.

The Intergovernmental Agreement on North/South Co-operation on Criminal Justice Matters was signed on behalf of the Irish and British Governments in July 2005. Under the Agreement, a Registered Sex Offenders Advisory Group was established, and its functions then passed to the Public Protection Advisory Group. This is staffed by representatives of the probation services in each jurisdiction, as well as police and civil service representatives.<sup>500</sup> This increasingly formal co-operation structure led to the drafting of a Memorandum of Understanding between the governments to share information relating to offenders subject to notification and eventually to a Protocol for Sharing Information.<sup>501</sup>

The Protocol is designed to facilitate the exchange of information between the probation services tasked with sex offender management in each jurisdiction, for the purpose of agreeing arrangements for community sentences, post-custodial supervision, the preparation of pre-sentencing reports, and the general enhancement of public protection in both jurisdictions. Importantly, the protocol provides that where there is a clear risk to the public, the relevant probation service shall exchange information with the appropriate child protection agency; the Irish Probation Service will therefore disclose information to the HSE. However, there are gaps in that there is no provision for the full cross-border exchange of information – the Probation Service cannot directly disclose information to the Health Care Trusts in the North or vice versa. In addition, the Protocol explicitly states that the “agreement does not impose a duty to disclose information in any particular case nor does it provide the power to demand disclosure.”<sup>502</sup>

There are presently legislative differences between the two jurisdictions with respect to the disclosure of personal data relating to offenders. While the Protocol prescribes the type of information that should be shared, there are certain differences arising from data protection legislation that ought to be addressed. It would appear that the

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<sup>500</sup> See Michael Donnellan and Brian McCaughey, “The Public Protection Advisory Group: A Model for Structured Co-operation” (2010) 7 *Irish Probation Journal* 6.

<sup>501</sup> Probation Service for Northern Ireland and The Probation Service, *Protocol for Sharing Information on the Management of Sex Offenders Between the Probation Service for Northern Ireland and The Probation Service (Ireland)*, May 2010. This Protocol replaces an earlier protocol from 2006.

<sup>502</sup> *Ibid*, para 4.5.

public interest exceptions found in section 8 of the Data Protection Acts 1988 and 2003 are different from the equivalent measures in Northern Ireland.<sup>503</sup> In particular section 8(b) of the Irish legislation lifts restrictions on the disclosure of information held by a law enforcement agency, but it does not impose any obligation on the data controller to disclose information. However, section 8(e) provides that if a legal obligation to disclose information is imposed under another rule of law or court order, the data controller has no discretion and must release the information. Therefore, one of the gaps in the Irish legislative scheme can be rectified by the introduction of legislation requiring the disclosure of information relating to convicted sex offenders in such circumstances as may be specified either within the primary act itself or by way of ministerial order.

The draft scheme of the Criminal Records Information System Bill must also be considered. This Bill seeks to give effect to Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States,<sup>504</sup> while also providing for the exchange of information with states that are not members of the EU. Head 4 envisages the establishment and maintenance of a National Criminal Records Register, thereby ensuring that the Republic establishes a system that is equivalent to the UK's VISOR system. Under Head 5, the Garda Commissioner is to be constituted as the Irish Central Authority for the purposes of the Framework Decision. As such, the Commissioner has the function of maintaining and updating three registers: the national register of criminal records, a register relating to the criminal records of Irish citizens or persons that currently or formerly were resident in Ireland where that information has been provided by other states, and finally, a register of offences committed in other states by persons charged with offences in this state.

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<sup>503</sup> See Data Protection Act 1998.

<sup>504</sup> OJ L 93/23. The provisions of the "Swedish Initiative" - Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union – are also relevant here. Although Art 10 of this Decision indicates that requests for access to information can only be denied in very limited circumstances, concerns have been raised about its effectiveness. See International Centre for Migration Policy Development and European Public Law Organization, *Study on the status of information exchange amongst law enforcement authorities in the context of existing EU instruments* (European Commission, 2010) 36-43.

The purpose of maintaining these registers is to ensure the easy transmission and receipt of criminal records, or alterations to them, between states. Importantly, the Garda Commissioner would be empowered to submit a request to any state for information and related data to be extracted from the criminal record of that state. The information can be in respect of any person under investigation for a criminal offence, charged with a criminal offence or convicted of a criminal offence, or for the purposes provided for in vetting legislation. It appears that the draft Bill as envisaged would allow information relating to convictions to be transmitted between states, and used in the vetting process. However, it is not clear that soft information can be transmitted. This is in line with Article 6 of the Framework Decision which appears to limit the transfer of information to information relating to convictions, even though that information can be used for purposes other than criminal proceedings.<sup>505</sup>

It appears that the proposed Information System Bill could fill the gap that is created by section 8(b) of the Data Protection Act 1988 by imposing a rule of law that takes away (in line with section 8(e)) the discretion of a data controller, in this case the Garda Commissioner as the designated Central Authority, to disclose information. However, the problem of exchange of soft information remains. The difficulty here is that the Framework Decision only applies to conviction based information, and so questions could be raised as to the legality of any protocol for the cross-border sharing of soft information.

One potential answer to such concerns would be to highlight the positive obligations imposed on both jurisdictions under Article 3 ECHR, when read in conjunction with Article 24(1) CFR. The judgment in *Z. v. United Kingdom*, outlined above, obliges states to provide effective protection measures to prevent ill-treatment of children of which the state had, or ought to have had, knowledge. If information is held in one jurisdiction that indicates that an individual is a significant risk to children, it is logical to posit that if he/she goes on to abuse a child, the state in question ought to have had knowledge of this potentiality. Indeed, the Court of Justice of the European

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<sup>505</sup> However, Article 9(2) of the Framework Decision provides that when making a request for information from another state, the purpose of the request must be specified if it is intended to be used in something other than criminal proceedings. Therefore, if a request for information is sought to conduct a vetting inquiry, the purpose of the request needs to be disclosed.



Union (hereinafter referred to as the “CJEU”) has indirectly indicated that preventing harm to children which has not yet occurred can justify measures to restrict the free movement of goods (and implicitly workers) within the internal market. The decision in *Dynamic Meiden* was predicated on the idea that the restrictions on the importation and sale of videos and other image storage media which could be regarded as harmful to children was legitimate having regard to the principles of Article 24(1) CFR.<sup>506</sup> Member States also have the right to take measures necessary for the protection of children.

It could legitimately be argued that the obligations imposed by *Z. v. United Kingdom*, when read alongside the reasoning in *Dynamic Meiden*, would permit the conclusion of a protocol, or some other instrument, that would enable the sharing of soft information on a cross-border basis. In effect, this approach would view the Framework Decision as a setting down of minimum standards of information sharing, while not prohibiting the exchange of soft information. In such circumstances, it may be better to incorporate soft information exchange, and clear safeguards regarding its use, within the scheme of the proposed Criminal Justice Information System Bill rather than by way of a protocol.

### **5.3 Issues Relating to the Interjurisdictional Protocol on the Transfer of Social Care Cases**

The movement of children and families between jurisdictions can cause significant difficulties if those children and families have come to the attention of the child protection services. Case law under the Hague Convention on Civil Aspects of Child Abduction has already highlighted some of the problems in this area. Three cases have come before the Irish courts in the last decade – *London Borough of Sutton v RM*,<sup>507</sup> *Foyle Health Trust v C*,<sup>508</sup> and *Nottinghamshire County Council v B*<sup>509</sup> - in

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<sup>506</sup> *Dynamic Meiden Vertriebs GmbH v Avides Media AG* (Case C-244/06) [2008] ECR I-505.

<sup>507</sup> [2002] 4 IR 488.

<sup>508</sup> [2007] 4 IR 528.

<sup>509</sup> [2011] IESC 48.

which families whose children were to be adopted due to child protection concerns have moved between jurisdictions to avoid this happening.

While there are provisions for the automatic return of children to the care of the appropriate child protection authority where there is a court order relating to the care of the child,<sup>510</sup> no such protections exist where a case has not progressed to that stage. Therefore, it was essential to develop some mechanism for ensuring that where families cross between jurisdictions, the child concerned would not be left without the support he or she requires. To this end a protocol has been established for the handling of those cases where families move between Northern Ireland and the Republic.<sup>511</sup> This document establishes the procedures to be followed in the event that a family which is engaged with the child protection services moves across the border, including the establishment of time limits for convening of formal case transfer meetings.

This development is to be welcomed, as it provides clarity for social workers in both jurisdictions as to how such cases are to be handled. In addition, it provides stability for children and families so that they can enjoy continuity of care. However, given the comparative ease of movement between the UK mainland and the Republic of Ireland, consideration should be given to extending the protocol that currently exists between the Republic and Northern Ireland to the remainder of the United Kingdom.

## **5.4 Obligations with Respect to Child Trafficking**

The UN Convention on the Rights of the Child requires states to protect children. Article 11(1) seeks to prevent the illicit transfer of children abroad and Article 19(1) seeks to protect children from exploitation and abuse. Article 34 seeks to protect children from sexual exploitation and Article 35 provides:

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<sup>510</sup> The court order has the effect of vesting custody rights in the child protection authority, or where an order is sought but has not yet been determined, the court may possess inchoate custody rights for the purposes of the Hague Convention and the Brussels II bis Regulation.

<sup>511</sup> Department of Health and Social Services and Department of Children and Youth Affairs, *Interjurisdictional Protocol for the Transfer of Child Care cases between Northern Ireland and the Republic of Ireland* (2011).

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

In addition to the Convention, there is an Optional Protocol on the sale of children, child prostitution and child pornography.<sup>512</sup> Article 2 of the Protocol defines the key terms. The sale of a child is defined as any act or transaction where the child is transferred by any person or group of persons to another for remuneration or any other type of consideration. Child prostitution means the use of a child in sexual activities for remuneration or any other consideration, while child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activity or any representation of the sexual parts of a child's body for purposes which are primarily sexual. As can be seen from these definitions, they are intended to be wide ranging and flexible so that the wording of the Protocol can be adapted to meet changing circumstances.

Interestingly, Article 3 includes a list of offences which, at a minimum, states parties must criminalise in order to fulfill their obligations under the Protocol. These include offering, delivering or accepting a child for the purpose of sexual exploitation, transfer of a child's organs or the use of the child as forced labour, as well as wide ranging offences relating to prostitution and pornography. Article 9 urges attempts at the prevention of such offences through means of law and social programmes. Article 5 requires that states parties put measures in place dealing with the extradition of suspects in offences outlined in Article 3, while Article 6 seeks to promote mutual assistance between states.

Perhaps the most interesting provision of the Protocol is Article 8 which imposes positive obligations on the state with respect to child victims. Measures are to be taken which recognise their special needs as especially vulnerable victims, in particular with respect to their role as witnesses in civil or criminal proceedings. Child victims are to be informed of their rights in relation to court proceedings and of the

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<sup>512</sup> UNGA Res 54/263, Annex II, 54 UN GAOR Supp (No 49) 6, UN Doc A/54/49, Vol III (2000), entered into force on 18 January 2002.

time scales involved in such proceedings. Importantly, states parties are obliged to provide support services throughout the legal process. While there is no further detail on what these services might be, it is important that services are recognised as being important at every stage of the process, from the time of the initial complaint to the facilitation of victim involvement in the sentencing process.<sup>513</sup>

The UNICEF Guidelines on the Protection of Child Victims of Trafficking identifies eight key areas in developing good practice in the protection of child victims of trafficking. These are listed as: identification, appointment of a guardian, registration and documentation, regularisation of status, interim care and protection, individual case assessment, implementation of durable solutions, and access to justice. UNICEF contextualises these key areas within a rights-based framework that recognises children as rights holders, indicating the importance not only of having specific measures to deal with child victims but of ensuring that children's rights rather than simply their welfare are central to measures designed to protect child trafficking victims.<sup>514</sup>

In addition, the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (commonly known as the Palermo Protocol) aims to define trafficking, the criminalisation of trafficking, the protection of victims and international co-operation aimed at preventing trafficking. In particular, Article 6 requires the protection and support of victims of trafficking. Article 8 provides that measures should be in place to enable trafficking victims to remain in the country temporarily or permanently, while Article 9 requires that their return to a country of origin should 'preferably' be voluntary. Both Ireland and the United Kingdom have ratified the Protocol.

As well as the ECHR itself, which prohibits slavery, servitude and forced labour under Article 4, the key Council of Europe instrument on trafficking is the 2005 Convention on Action against Trafficking in Human Beings, which is largely based

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<sup>513</sup> See also United Nations Committee on the Rights of the Child, General Comment No 13: The right of the child to freedom from all forms of violence (2011) CRC/C/GC/13.

<sup>514</sup> UNICEF, UNICEF Guidelines on the Protection of Child Victims of Trafficking (UNICEF 2006).

on the Palermo Protocol. In *Siliadin v France*,<sup>515</sup> the ECtHR connected the historic concepts of forced labour, servitude and slavery to the modern phenomenon of human trafficking,<sup>516</sup> and in doing so noted that France had failed in its positive obligations under the Convention to ensure that domestic slavery was a criminal offence. While there were offences within the Criminal Code dealing with obtaining unpaid work from a vulnerable person, national procedures were not sufficient to afford the applicant effective protection of her Article 4 rights.

In 2010, the ECtHR clarified the extent of state obligations to prevent cross-border human trafficking in *Rantsev v Cyprus and Russia*.<sup>517</sup> The applicant's daughter had been trafficked from Russia to Cyprus where she was sexually exploited. The court found that Cyprus, the state of destination in this case, had not only failed to protect Ms. Rantseva from being trafficked or from being unlawfully detained prior to her death, but it had also failed to adequately investigate her death. Russia, the state of origin, was found by the Court to have failed to adequately investigate the manner in which Ms. Rantseva had been trafficked from its borders. In its judgment, the court clarified the obligations of states in relation to trafficking – whether states of origin, transit or destination – as well as noting the importance of cross-border co-ordination in fighting trafficking. In particular, it noted that trafficking falls within the ambit of Article 4 and that there is a positive obligation on states to adopt appropriate and effective legal and administrative frameworks, to take protective measures, and to investigate trafficking where it has already occurred. The court described as 'indisputable' that the latter obligation involved the need for a full and effective investigation covering all aspects of trafficking allegations, from recruitment to exploitation. The court noted that these positive obligations applied to the various

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<sup>515</sup> Application no. 73316/01, judgment of 26 July 2005. See Holly Cullen, "*Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights" (2006) 6(3) *Human Rights Law Review* 585.

<sup>516</sup> Robin C.A. White and Claire Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (5<sup>th</sup> edn, Oxford University Press, 2010) 198.

<sup>517</sup> Application no. 25965/04, judgment of 7 January 2010. See generally, Jean Allain, "*Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery" (2010) 10(3) *Human Rights Law Review* 546; Roza Pati, "States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v. Cyprus and Russia*" (2011) 29 *Boston University International Law Review* 79; and Ryszard Piotrowicz, "States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations" (2012) 24(2) *International Journal of Refugee Law* 181.

states potentially involved in human trafficking – states of origin, states of transit and states of destination. Given the cross-border nature of trafficking, the court emphasised the importance of cross-border co-operation in investigating incidents of trafficking.

In developing this view, the court relied on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (hereinafter referred to as the “ICTY”). The judgment of the ICTY in *Prosecutor v Kunarac, Vukovic and Kovac* was discussed in order to determine that trafficking effectively constitutes a form of modern slavery.<sup>518</sup> In particular, one had to assess “whether there was control of a person’s movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour”.<sup>519</sup> The Court concluded that:

“trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere...It implies close surveillance of the activities of victims, whose movements are often circumscribed...It involves the use of violence and threats against victims, who live and work under poor conditions...[therefore trafficking] cannot be considered compatible with a democratic society and the values expounded in the Convention...the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court considers that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.”<sup>520</sup>

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<sup>518</sup> IT-96-23-T & IT-96-23/1-T, 12 June 2002.

<sup>519</sup> Ranstev, *supra* n.517, at para 280.

<sup>520</sup> *Ibid*, paras 281-282.

Article 79(1) of the Treaty on the Functioning of the European Union (hereinafter referred to as the “TFEU”) obliges the Union to develop a common immigration policy aimed at ensuring the prevention of, and enhancement of measures to combat, illegal immigration and trafficking in human beings, while Article 79(2) TFEU imposes an obligation on the Parliament and Council to adopt legislation to combat the trafficking of, in particular, women and children. Additionally, Article 5(3) CFR expressly prohibits the trafficking of human beings, as well as prohibiting slavery, servitude and forced labour. When taken together with the rights of children, including the right to adequate child protection mechanisms, contained within Article 24 CFR, it is clear there is a legal imperative to introduce mechanisms that adequately address people-trafficking generally, but child-trafficking in particular. There have been two recent directives which have greatly enhanced the protection of children who experience sexual violence, namely the Directive on combating sexual abuse, sexual exploitation of children and child pornography,<sup>521</sup> and the Directive on preventing and combating trafficking in human beings and protecting its victims.<sup>522</sup>

The Combating Exploitation Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes.<sup>523</sup> It establishes that states must institute minimum sentences for a variety of sexual offences involving children.<sup>524</sup> Importantly, Article 10(1) obliges states to take the necessary measures to ensure that a person who has committed a sexual offence against children is “temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children,” while Article 10(2) obliges that national laws be implemented to ensure that employers conduct properly the vetting of potential employees when hiring for positions involving direct and regular contact with children. Finally, Article 10(3) highlights the obligation to ensure compliance with Council Framework Decision 2009/315/JHA on

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<sup>521</sup> Dir 2011/93, [2011] OJ L335/1, replacing Framework Decision 2004/68/JHA.

<sup>522</sup> Dir 2011/36, [2011] OJ L101/1 replacing Framework Decision 2002/629.

<sup>523</sup> Certain aspects of this Directive, especially those involving protection of child victims and online child abuse imagery, were discussed in the *Fifth Report of the Special Rapporteur on Child Protection (2011)*.

<sup>524</sup> See Articles 3-6.

the transmission of criminal records. As discussed above, the Criminal Justice Information System Bill will implement this Framework Decision in Irish law, while the enactment of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012, together with the impending introduction of the Children First Bill, will also assist in discharging the State's obligations under Article 10.

Many of the offences outlined in the Directive relating to substantive criminal law can relate to child trafficking. Causing a child to witness sexual activities, or participate in sexual activities, are to be criminalised and minimum sentences provided. Instances where a child's particularly vulnerable situation - including where the child is in a situation of dependence or where the child is coerced into sexual activity - is exploited is to be punished by higher penalties.<sup>525</sup> Article 4 is especially important for trafficking, as it concerns sexual exploitation offences. These include recruiting a child, or coercing a child to engage in pornographic performances or child prostitution, or profiting from such activities. In addition, the provisions of Article 7 oblige Member States to introduce offences relating to the incitement, aiding, abetting and attempt of the offences outlined in Articles 3 to 6.

There are two directives dealing specifically with trafficking – the Trafficking Co-operation Directive<sup>526</sup> and the Trafficking Victims Directive.<sup>527</sup> The Trafficking Co-operation Directive enables third country nationals who have been the victims of trafficking to be issued with residence permits, on condition that they co-operate with the host state in identifying the perpetrators of the trafficking offence. Under the terms of Article 3, children are excluded from the terms of the Directive, unless Member States decide otherwise. In the event that they do so, states are obliged to incorporate further protective measures.<sup>528</sup> These include taking due account of the best interests of the child and ensuring the procedures adopted are age appropriate.

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<sup>525</sup> See Article 3.

<sup>526</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L261.

<sup>527</sup> Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L101/1.

<sup>528</sup> Article 10.



Furthermore, measures should be directed to ensuring equality of access to education as well as specific measures designed to facilitate the identification and location of family members.

While the Victims Directive has a greater focus on providing protective measures to cater for victims' needs, the Co-operation Directive adopts a criminal justice approach.<sup>529</sup> Article 2(1) provides that acts relating to the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons shall be punishable, if they are based on the use of threats, coercion or fraud. Where children are concerned, there is no need to show that threats or coercion were used in order for conduct to be punishable.<sup>530</sup> Offences against particularly vulnerable victims, including child victims, are punishable by a maximum penalty of at least 10 years imprisonment.<sup>531</sup> Similar sentencing guidelines apply when the offence is committed as part of an organised criminal enterprise, where there is deliberate conduct or gross negligence concerning the endangerment of the victim's life, or where the offence was committed by use of serious violence or has caused particularly serious harm to the victim.<sup>532</sup> Member States are also required to take the necessary measures to ensure that victims are not prosecuted for any criminal acts they have been compelled to commit as a result of being trafficked.<sup>533</sup> Certain jurisdictional rules are outlined in the Directive. In particular, Member States are to take measures to establish their jurisdiction in cases where the offence is committed wholly or in part on their territory or where the offender is one of their nationals.<sup>534</sup>

The Co-operation Directive also outlines protective measures for victims of child trafficking. Although Article 11(3) is made without prejudice to the provisions of the Victims Directive, the provision of protective measures is not to be conditional on co-operation with any criminal investigation or trial. Specific rights are provided for

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<sup>529</sup> Although Articles 11-17 do provide for protective measures for trafficking victims.

<sup>530</sup> Article 2(5). Inchoate offences shall be punishable in accordance with Article 3.

<sup>531</sup> Article 4(2)(a).

<sup>532</sup> Article 4(2)(b)-(d).

<sup>533</sup> Article 8. This may be wider than the defence of duress which operates at common law in respect of criminal offences in Ireland.

<sup>534</sup> Article 10(1).

child victims, in addition to those outlined in Framework Decision 2001/220/JHA.<sup>535</sup> While Article 12 outlines several rights for victims generally, Article 13(1) ensures that when dealing with child victims, the child's best interests is to be a primary consideration. Where the age of a victim is in question, states shall presume that they are under 18 so as to entitle them to the supports outlined in Articles 14 and 15. These entitlements include an individual assessment of the circumstances of each child victim, the appointment of a guardian for him/her where the holders of parental responsibility are precluded from exercising those responsibilities due to a conflict of interest, free legal representation and age appropriate interviews. Article 16 clarifies that unaccompanied child trafficking victims are also entitled to legal protection.

Prevention of trafficking is regarded as a crucially important aspect of the Directive. Article 18 sets out the obligations of Member States to prevent trafficking. First, "appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings" must be taken.<sup>536</sup> Information and awareness raising (including through online methods) with a view to assisting in reducing the risk of people, especially children, becoming victims of trafficking is also to be undertaken, as is increased levels of specialised training.<sup>537</sup> Crucially, states are obliged to consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2, where there is knowledge that the person is a victim of an offence referred to in Article 2.<sup>538</sup> In essence, this obliges states to consider introducing criminal offences that arise from the exploitation of trafficking victims. Implicitly, this urges Member States to consider criminalising the purchase of sexual services or the use of trafficking victims in domestic servitude where the users of those services are aware that trafficking has occurred. However, as direct knowledge of trafficking is unlikely, it would seem that in order to fulfil the purpose of this article, consideration should be given to criminalising the use of trafficking victims

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<sup>535</sup> Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings 2001/220/JHA, OJ L 82/1.

<sup>536</sup> Article 18(1).

<sup>537</sup> Article 18(2) and Article 18(3).

<sup>538</sup> Article 18(4).

where a user ought to have known or had a reasonable suspicion that it involved trafficking.

In Northern Ireland, legislation concerning trafficking includes the Nationality, Immigration and Asylum Act 2002, the Sexual Offences Act 2003, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the Coroners and Justice Act 2009 and the Protection of Freedoms Act 2012. When taken together these measures, alongside further proposed amendments to the Sexual Offences Act and the Asylum and Immigration Act 2004, bring the UK into line with EU obligations as imposed by the aforementioned Directives as well as ensuring that the positive obligations imposed by the ECHR are respected.

In the Republic, the Child Trafficking and Pornography Act 1998, the Illegal Immigrants (Trafficking) Act 2000 and the Criminal Law (Human Trafficking) Act 2008 govern the area. In addition, the Department of Justice has established an Anti-Human Trafficking Unit and has published a National Action Plan to Prevent and Combat Trafficking of Human Beings in Ireland.<sup>539</sup> Despite this legislation, the UN Human Rights Agency and the US Department of State's *Trafficking in Persons Report 2011* have argued that Ireland is "a destination, source and transit country for women, men, and children subjected to trafficking in persons, specifically forced prostitution and forced labour."<sup>540</sup> The Immigration, Residence and Protection Bill 2010 seeks to provide more robust protective measures, specifically new types of leave to remain permits which are to be subject to certain conditions, in particular, the condition of co-operation. There is also movement towards developing protocols for interagency co-operation in respect of trafficked children. However, this Bill has not yet been passed, and so administrative arrangements are in place in the meantime.<sup>541</sup> These arrangements do not contain any commitment to have regard to the best

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<sup>539</sup> Department of Justice, Equality and Law Reform, *National Action Plan to Prevent and Combat Trafficking of Human Beings in Ireland* (Stationary Office, 2009).

<sup>540</sup> United States Department of State, *Trafficking in Persons Report 2011*, at p.198.

<sup>49</sup> Department of Justice, *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking* (Stationary Office, 2011).

interests of the child when taking decisions in relation to the granting of permits to children victims.<sup>542</sup>

Developing cross-border co-operation in this area is complicated by the fact that immigration in Northern Ireland is an area that appears to be reserved for the Westminster parliament, and so direct links between bodies north and south of the border cannot be forged in the same way as in other areas. In December 2010, for example, the Cross-Border Policing Strategy was launched jointly by An Garda Síochána and the PSNI which does not mention trafficking explicitly. This is despite the relative freedom of movement that exists due to the Common Travel Area between the UK and Ireland which allows both traffickers and victims relatively unfettered ease of movement between the two jurisdictions.

Given the extent of the problems faced by trafficking victims, the barriers imposed by the reservation of the immigration control functions to Westminster ought not to pose a significant problem; joint protocols can be developed between the relevant agencies under policing, health and social care functions. There is, however, limited co-operation in this area. Although cooperation exists, it is best characterised as occurring on the basis of *ad hoc* requests.<sup>543</sup> More permanent and structured co-operation arrangements should be put in place. European human rights standards should be applied to ensure equal respect and protection for the rights of trafficked children in each jurisdiction. The Immigration, Residence and Protection Bill must be passed in a form that ensures compliance with the State's obligations under EU Directives, as well as the ECHR and the Palermo Protocol. In addition, the recommendation of the report into *Safe Care for Trafficked Children in Ireland* that priority be given to assigning guardians *ad litem* for child trafficking victims should be urgently implemented.<sup>544</sup> At present, such children are largely without representation within the care system; this represents a major barrier to effective

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<sup>542</sup> Immigrant Council of Ireland, *Comments and requests for clarification in relation to the revised Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking* (2011).

<sup>543</sup> See North South Parliamentary Forum Joint Working Group Meeting, *Parliamentary Relationships and Europe*, Paper 106/11, 22 September 2011, at 42.

<sup>544</sup> Deirdre Horgan, Jacqui O'Riordan, Alistair Christie and Shirley Martin, *Safe Care for Trafficked Children in Ireland: Developing a Protective Environment* (Children's Rights Alliance, 2012).

safeguarding of trafficked children's rights and interests and should be remedied immediately.

Additional protocols should be developed between the relevant agencies to ensure that state obligations both in respect of the criminal justice aspects of trafficking and the protection of victims are fulfilled. With respect to the criminal justice issues, people convicted of offences related to child trafficking are subject to the same kind of notification requirements as other persons convicted of sexual offences. Therefore, information regarding their convictions can already be shared under the existing information sharing arrangements, and will be affected by the introduction of the Information System Bill. Where soft information is at issue, it should be shared on the same basis as any other soft information. With respect to victim protection, it is important that the existing protocol on the transfer of social care cases be amended so as to include trafficked children. A protocol already exists for cooperation between the Garda National Immigration Bureau and the separated children's social work team within the HSE. This should be extended to include the social services in Northern Ireland and the PSNI. There is an additional Joint Protocol on Children Missing from Care to facilitate coordination between the Gardaí and the HSE. However, this makes little reference to separated migrant children, and should be updated not only to reflect this concern, but also to allow for further cross-border cooperation in cases where it is feared that a separated child has crossed the border. All of these protocols can be developed under existing provisions for both devolved power in Northern Ireland and for North-South cooperation.