

Report of the Special Rapporteur on Child Protection

A Report Submitted to the Oireachtas

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GLOSSARY OF ABBREVIATIONS

CRB	–	Criminal Records Bureau (UK)
DPP	–	Director of Public Prosecutions
ECHR	–	European Convention on Human Rights
ECtHR	–	European Court of Human Rights
EHB	–	Eastern Health Board
EURONET	–	European Children’s Network
GAL	–	Guardian <i>ad litem</i>
GCVU	–	Garda Central Vetting Unit
HSE	–	Health Service Executive
IBB	–	Independent Barring Board (UK)
ORAC	–	Office of Refugee Applications Commission
SCEP	–	Separated Children in Europe Programme
UNCRC	–	United Nations Convention on the Rights of the Child
UNHCR	–	United Nations Refugee Agency
UNICEF	–	United Nations Children’s Fund
VEC	–	Vocational Education Committee

EXECUTIVE SUMMARY

It has been said that a measure of a society is how it treats its most vulnerable citizens. Among the most vulnerable in our society are children. This report examines various aspects of child care and protection law in Ireland. It is important to note, however, that social, cultural and political mechanisms must also be engaged so as to provide the utmost in care and protection for children. An underlying philosophy prevalent throughout this report is the need to act in a proactive as opposed to reactive manner in the provision of care and protection for children. Our law should seek to protect children first and punish offenders second. It is envisaged that the recommendations posited throughout this report will go some way toward executing this philosophy accordingly.

SECTION 2: VETTING AND SOFT INFORMATION

The issue of vetting, incorporating the use of soft information, of those who apply for positions that entail contact with children is a complex and divisive topic. Various constitutional considerations arise, not just in relation to the protection of children's rights but also the rights of those subject to such vetting. Issues concerning equality, privacy, livelihood and a person's good name are all pertinent in this regard. In order for legislation to be enacted permitting the use of soft information in Ireland it is submitted that a constitutional referendum must be held. Furthermore, legislation drafted would have to be clear, concise, limited in application and contain procedural safeguards so as to allow it operate in a harmonious manner with various constitutional provisions and doctrines. Legislation and caselaw from other jurisdictions are instructive in this regard. In any debate concerning such reform there is a need for informative and rational argument and to avoid the hype and reactive policies that may be associated with such an emotive topic. With this in mind the Oireachtas needs to be cognisant of the need to avoid an atmosphere of vigilantism created by any legislation enacted; what may be deemed suitable in some jurisdictions, e.g. United States of America, may not be so in Ireland.

A comprehensive analysis of all the issues must be conducted before a referendum can be put to the people on this subject. In furtherance of an informed and rational debate on the subject this report recommends that legislation be drafted and presented

to the people in advance of a referendum. It is hoped that the analysis provided in this section and the subsequent recommendations go some way towards beginning this task. In conclusion, vetting legislation allowing the use of soft information needs to take a pragmatic, yet rights based approach.

SECTION 3: CRIMINAL LAW

One option available to the Government in the quest to provide better protection for the children of Ireland is to deter offenders by having clear and concise criminal legislation, an issue considered by Professor McAuley in his report. There is a need to re-evaluate certain offences and introduce new offences so as to meet the developing needs of child protection. A prime example of an offence in need of re-evaluation is that of incest. A greater appreciation needs to be afforded to the abuse of the familial relationship inherent in this offence. On that basis it becomes apparent that it is in need of reform. Furthermore, debate needs to be stimulated in relation to the specific offence of child sexual abuse, a debate first initiated almost two decades ago.

In light of our obligations under the ECHR consideration needs to be given to the status of corporal punishment administered by parents and those acting in *loco parentis*. Finally, this section discusses the need to protect children from other children, specifically in relation to sexual offences.

The criminal law is a valuable tool in the pursuit of child protection. However, for it to be effective there is a need to review it on a periodic basis to ensure that it measures up to the perpetually developing and increasing risks that face children in our society.

SECTION 4: CHILD TRAFFICKING, PORNOGRAPHY, SEPARATED CHILDREN AND GROOMING

Among the most vulnerable of all children in our society are those that have fallen victim to trafficking and those known as separated children (unaccompanied minors). Due to the various forms of abuse such children have endured, coupled with their arrival into a foreign country and strange culture, their needs are particularly acute. Ireland needs to be especially vigilant of the modern day global slave industry, typically referred to as human trafficking, not just as a possible destination for such

victims but also as a transit point due to our island status. Specifically, our duties towards child victims of this crime are in need of review.

The concept of separated children should be introduced into Irish law and with it the introduction of broad protections for such children. It is salutary to note however that dealing with child trafficking goes much deeper than simply legislating against it. Where victims of child trafficking exist professional care and services must be made available to them, regardless of their residency status or background. A protective environment must be created for them.

In the aftermath of the *CC*¹ case considerable public debate was generated concerning the offence of grooming. This led to the enactment of legislation, but not to the criminalisation of the actual offence of grooming. The need for such an offence is discussed in this report as are the shortcomings inherent in the legislation already enacted.

The suggestion that the rationale of the Supreme Court in *CC* could be applied to render part of the legislation created in its aftermath unconstitutional is also considered. In creating an offence of grooming, it would have been preferable to include a specific defence of ‘reasonable mistake’. This would have precluded any future constitutional challenge on this point. On balance, however, the author is reasonably optimistic that the Act, although lacking the certainty which one might expect, should survive any such challenge.

SECTION 5: THE INTERACTION OF CHILDREN WITH THE LEGAL SYSTEM

So as to guarantee the effectiveness of the various reforms recommended throughout this report there is a need to review the interaction of children with the legal system in general. Those involved in the legal system must be aware of the special needs and circumstances of children. Moreover there is a need to ensure that the voice of the child is heard in legal matters concerning them. To that extent the recent implementation of Family Welfare Conferences is to be welcomed, however as shall

¹ *CC v Ireland* [2006] 2 I.L.R.M. 161.

become evident throughout this Report there is still a need to improve the law in this area.

The operation of the Children's Court provides some level of protection and comfort to children involved in the legal system. However, its jurisdiction is limited. Therefore the appearance of children in the higher courts needs to be examined in light of their right to a fair trial. In addition to this, and in keeping with the need to better protect children, the issue of child representation needs also to be examined against the backdrop of contemporary concerns.

SECTION 6: MEDICAL LAW

It is of fundamental importance that clear and concise legislation be introduced dealing with the issues surrounding the consent of minors to medical treatment. At present there is a distinct lack of clarity concerning the competence of children in relation to such issues. Remedial legislation would provide guidance to all parties involved in such decisions and avoid the need to go to court to obtain a determination. Very often medical matters require an immediate response and at present the law fails to provide such a response in the context of children.

It is noted that significant and complex constitutional issues shroud the topic of children refusing consent to medical treatment. This, however, cannot be used as an excuse for failure to engage in this topic.

Any reform of the law in this area should consider the provision of medical treatment to children who are subject to care orders. Serious consideration must be given to the competence of such children in these matters. A variety of conflicts may arise in such circumstances between the child, HSE and/or parents. So as to ensure the protection of children in this situation clarity in the form of legislation is required.

SECTION 7: THE CHILD CARE ACT, 1991

Several care options are available to the HSE and the State under child care legislation so as to protect children from harm, both from themselves and others. Nonetheless there is a need to clarify the powers granted by certain care orders so as to provide

those involved with a clear understanding of their roles, and the nature and scope of their duties and powers.

In conclusion, there is a real need to ensure a proactive, as opposed to reactive, stance to the protection of children in Ireland. It is hoped that some of the recommendations in this report, in particular those concerning vetting and soft information, go some way towards achieving that goal.

RECOMMENDATIONS

1

SECTION 2: VETTING AND SOFT INFORMATION

New legislation on the vetting of those applying for positions which entail contact with children and other vulnerable groups is required as a matter of some urgency. In devising such legislation, the experience of jurisdictions such as the UK and South Africa, which already have specific legislation relating to this issue, should be drawn upon.

While it is important that the rights of those vetted are upheld, it is essential that unsuitable persons are not allowed to put children at risk. The use of hard information, that is information pertaining to criminal convictions, is widespread, but this needs to be tightened by a clear definition of what constitutes a relevant offence.

It is the use of soft information in the vetting procedure that poses problems. As highlighted in this report various constitutional considerations emerge in the debate surrounding soft information. As a result, it is recommended that in order for legislation permitting the use of soft information to be introduced into Ireland there is a need for a constitutional referendum. It is further recommended that the proposed legislation be drafted in advance of such a referendum and presented to the people so as to allow for a fully informed and transparent debate.

Any legislation drafted must be clear, concise, limited in application, provide for procedural safeguards and take account of the constitutional doctrine of proportionality. With that in mind the following suggestions are offered:

- *Only consider information that has led to investigations into alleged abuses or crimes;*
- *Consider the circumstances surrounding the offence;*
- *Clearly stipulate the class of persons who will be subject to such disclosure;*
- *Strictly limit the number of persons to whom such disclosure can be made on the basis of necessity;*
- *Put in place appropriate safeguards for such information to be furnished to vetted persons and corrected if this is appropriate;*

- *If used to decline employment, then provide the vetted person with the reasons for this;*
- *Ensure that the entire process is transparent and reasonable, attributing due weight to each charge considered;*
- *Provide a mechanism through which a person can appeal his/her entry onto a soft information register to an independent third party;*
- *Conduct periodic reviews of the status of those included on a soft information register.*

Access to soft information should only be allowed in circumstances of necessity - both the occasion of access and the person accessing it must possess the required necessity.

The GCVU should act as the central authority for the collection, processing and disclosure of such information. It is noted that the GCVU currently has information relating to criminal offences, however it is further recommended that all information relating to Garda and HSE investigations for relevant offences be made available to the Unit.

The implementation of appropriate safeguards would go some way to ensuring that legislation enacted in this area would interact in a harmonious manner with other provisions and rights in the Constitution and ECHR. It is important to remember that not only must the legislation protect children but also those subjected to it. Therefore it is imperative that any legislation enacted pursuant to a referendum on the issue of soft information be proportionate in its application having regard to the constitutional rights, e.g. equality, privacy, good name and to earn a livelihood, of the person subject to it. It is imperative that any legislation drafted in this area be on the basis of an informed debate having regard to all the surrounding issues as opposed to a piece of reactive legislation unlikely to withstand constitutional or convention scrutiny. In order for the ultimate objective of child protection to be achieved there is a pertinent need for comprehensive and intuitive drafting.

There is a need for international protocols for the sharing of information and vetting in general.

2

SECTION 3: CRIMINAL LAW

3.2 Incest

The current law only allows full intercourse to be charged as incest. However, as acts of abuse often fall short of full intercourse, the law should be drafted so as to include such acts and therefore reflect the aggravated impact on the victim arising from the corresponding abuse of the familial relationship. Such legislation would allow for moral equivalence to be made between various types of familial abuse, but allow for a differentiation to be made at the sentencing stage.

Secondly, the relationships to which incest applies should be broadened and include uncles/aunts and step-parents, and adopted children.

Thirdly, gender neutrality should be imposed on the offence. Although the incidence of incest perpetrated by women is small, the law should allow for these cases.

Fourthly, any change in the age of consent to relationships for persons in authority, should be mirrored in incest legislation so as to avoid an anomaly in the law.

Finally, although the primary purpose of legislation on incest must be to protect children from abuse, it also needs to take account of the investigative methods used in presenting a case. This is to avoid false accusations against adults and to ensure that minors are not subject to inappropriate assessment.

3.3 Introduction of a Specific Offence of Child Sexual Abuse

In line with the recommendations of both the Law Reform Commission and the Houses of the Oireachtas Joint Committee on Child Protection, a specific offence of Child Sexual Abuse should be introduced. This would have the benefit of allowing compliance with Article 19(1) of the UNCRC while at the same time allowing prosecutors a measure of flexibility, especially when drafting indictments. The

definition of the offence should be flexible and wide ranging and distinguish between predatory paedophilia and reckless sexual assault.

3.4 Corporal Punishment of Children

At present, parents and those acting in loco parentis are virtually immune from prosecution for using corporal punishment to chastise their children. However, this situation may render the State liable to a claim under Article 3 of the ECHR. In order to address this situation, while at the same time providing for a viable defence to any such action, a provision similar to that of s.43 of the Canadian Criminal Code which allows for the principle of proportionality, should be enacted.

It may be useful for a full survey to be conducted into corporal punishment in Ireland, similar to that undertaken by the ESRI and National Crime Council on domestic violence in 2005. This would be invaluable in determining societal attitudes to the issue, as well as assessing the actual level and nature of such punishment.

3.5 Sexual Offence Convictions for Minors

Specific legislation should be introduced in relation to sexual offences committed by minors. Any such legislation should include a provision for treatment orders. Research conducted in Portugal has shown that where treatment orders are available they are very effective.

3

SECTION 4: CHILD TRAFFICKING, PORNOGRAPHY, SEPARATED CHILDREN AND GROOMING

4.2 Child Trafficking, Pornography and Separated Children

The Criminal Law (Human Trafficking) Bill 2007 is a robust and substantial piece of legislation in the quest to prevent the trafficking and exploitation of children. This Bill is intended to solely deal with the response of the Criminal Law to these offences and not victim support. Instead the Immigration, Residence and Protection Bill 2007 was to contend with this issue. It is recommended, however, that the area of victim support be revised so as to reflect the specific needs of child victims of these offences. Owing to the unique status of children, with particular regard to their vulnerability, it is not desirable to seek to provide protection and support to them in a similar vein and manner as adult victims. The offences of child trafficking and exploitation involve

complex and ever changing elements, furthermore they are concepts of an international dimension. Therefore, it is recommended that particular regard be had to international developments in this field and while it is recognised that the Criminal Law (Human Trafficking) Bill 2007 seeks to enact some of these international provisions consideration should be given to the incorporation of additional international instruments, for example the United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.²

In addition the Immigration, Residence and Protection Bill 2007 should be revised with particular emphasis placed on the need to introduce the concept of separated children into Irish law and to act in accordance with international best practice. Following such revision as detailed in this report the Bill should be brought before the Oireachtas.

It is recommended that a designated authority be appointed charged with the duty of monitoring and seeking to prevent child trafficking in Ireland. This authority would operate under the auspices of one of the national bodies already empowered with the task of protecting and regulating child welfare. This authority should liaise with other countries in seeking to combat child trafficking in as effective a manner as possible.

4.3 Grooming

The Criminal Law (Sexual Offences) (Amendment) Act 2007 does not actually criminalise the act of grooming i.e. the initiation and encouragement of a relationship by an adult with a child for the purposes of sexual exploitation by that adult or others. Instead s.6 of the Act creates the offence of travelling to or meeting with a child with the intention of sexually exploiting that child following at least two previous contacts with the child. It is thought that prosecutions for the offence will be difficult due to issues surrounding proof of mens rea. Furthermore, the nature of the offence is ex post facto due to the fact that in all likelihood the sexual exploitation of the child would need to have been committed before a person could be prosecuted. It is recommended that a specific offence of grooming be enacted. This would go some way toward alleviating the above cited problems in relation to prosecutions as it

² Signed on 7 September 2000.

would allow the DPP to indict a suspect on alternative counts. Furthermore, a specific offence of grooming would act as a means of punishing those who meet or contact a child for the purpose of future sexual exploitation without actually committing the act of sexual exploitation as defined in the 2007 Amendment Act. A successful conviction for the offence of grooming would, it is submitted, act as a deterrent to committing the more serious offence of sexual exploitation under s.6.

Another issue which ought to be addressed relates to the manner in which, at present, s.6 only accounts for circumstances where the adult travels to the child. It fails to contend with the very real concern of the adult arranging for the child to travel to him/her, or the adult taking advantage of the travel plans of the child with a third party e.g. school tour. This would apply equally if a specific offence of grooming was introduced.

In addition s.6 does not appear to provide for the defence of reasonable mistake. This may not be a matter of immediate urgency. It would be preferable, however, if this was expressly provided for in the Act. This would be a prudent amendment as it would reduce the likelihood of a future constitutional challenge.

4

SECTION 5: THE INTERACTION OF CHILDREN WITH THE LEGAL SYSTEM

5.2 Family Welfare Conferences

While family welfare conferences have advantages, a number of issues need to be further addressed. Firstly, legislation is required to guarantee that the conference be subject to the rules of fair procedures and natural and constitutional justice. This should also provide some guidance in formulating best practice for the conduct of conferences and the formulation of procedures at individual conferences. Secondly, in light of our obligations under Article 12 of the UNCRC, ensuring that the child is properly heard should be the primary focus of procedures adopted under the conference system. In deference to this obligation it is recommended that legislation be enacted providing for the role of a lay advocate in family welfare conferences. It is envisaged that such a person would have an ongoing role throughout the conference

process and contend with any issues that arise which may be deemed contrary to the welfare of the child, and in addition provide a medium through which the views, wishes and concerns of the child can be expressed. Furthermore the advocate would have a role in ensuring the decisions and recommendations of the family welfare conference are carried out in the best interests of the child. To this end the advocate would be an active participant in the family welfare conference review. The appointment of a lay advocate should occur in circumstances where a guardian ad litem has not been appointed.

The family welfare conference system as it currently stands may become counter-productive in that the child concerned may be intimidated by the entire process. It is recommended that practice guidelines be established on foot of contributions by all the relevant stakeholders so as to prevent the occurrence of such intimidation. The guidelines could be similar in status to the Children First Guidelines on the welfare and protection of children.

Central to the operation of a family welfare conference is the role of the coordinator. The ultimate function of the coordinator is to provide recommendations. The conference system seeks to achieve unanimous agreement amongst the participants as to these recommendations, and where such agreement cannot be achieved certain default mechanisms can operate. However, the legislation fails to provide any sanction for a breach of these recommendations. A proposed method of addressing this shortcoming would be to introduce the concept of a family welfare conference review into the grounding legislation. Such a mechanism would hold all participants to the original conference accountable in relation to the observance of the recommendations of the coordinator.

Finally, it is recommended that consideration be given to encouraging the attendance of relatives of a child at a family welfare conference. The establishment of a broad support network for a child provides a positive basis upon which the best interests of the child can be achieved.

5.3 Practice and Procedure in Court

Child's Participation in Court

Article 12 of the UNCRC provides that all measures should be taken to ensure that children will be heard in all matters affecting them, including judicial matters. It is imperative, therefore, that all necessary measures are taken to ensure that children, who in legal cases are frequently vulnerable victims or witnesses, are provided with safe and appropriate means so as to have their voices heard. Furthermore, in circumstances where the child appears as the accused outside of the Children's Court setting, his/her right to a fair trial must be recognised and implemented through taking measures ensuring that he/she is capable of actively taking part in his/her trial. It is recommended that procedures be put in place giving effect to this.

Competency

The Law should be reformed so as to operate on the presumption that a child is competent to appear in a judicial matter, and is capable of providing a sufficiently accurate and intelligible account of the events in question.

Cross Examination

An express rule should be introduced prohibiting the cross-examination of a child witness in a sexual offence case by an unrepresented accused. Furthermore, regard should be had to the German model in such matters where children under 16 years of age can only be examined by the presiding judge, or other interested legal parties present with the consent of the judge. In any event, an express statutory provision permitting a judge to intervene in questioning a child witness should be introduced.

Privilege and Immunity

An express provision should be inserted providing legal representatives and guardians ad litem not in attendance at a family welfare conference with access to the minutes of the conference where such disclosure would be in the best interests of the child. Also, the previous recommendation of the Law Reform Commission is reiterated in this report in relation to informer immunity and privilege in the context of child abuse. There is a need to extend the category of persons/bodies who currently enjoy this immunity.

5.4 Children's Representation – the Guardian ad litem (GAL)

It is recommended that the GAL system be revised and made more widely available as a form of legal representation for children. However, a number of weaknesses in the system as it currently operates need to be addressed in legislation.

Firstly, the proceedings in which a GAL can be appointed need to be widened while the condition of it being necessary in the child's best interests or in special circumstances should be removed. Secondly, a professional qualification of GAL is necessary and legislation should set out the minimum qualifications required for the post of GAL. Thirdly, a clear code of conduct for GALs should be drafted to allow uniform conduct of the functions of a GAL. The precise powers and functions of the GAL are also absent from our law at present and the pertinent powers and duties should be precisely set out. Finally, the GAL's access to the child and any documentation relating to the child needs to be put on a legislative footing. The recently enacted Child Care (Amendment) Act, 2007 provides that the Children Acts Advisory Board publish guidelines in relation to the abovementioned matters. It is recommended that these guidelines be published without delay so as to clarify the legal position of the GAL.

§

SECTION 6: MEDICAL LAW

6.2 Competency of Minors under 16 to Consent to or Refuse Medical Treatment

The main issue to arise in respect of minors and medical treatment is their right to refuse such treatment. This is particularly pertinent to children in the care of the State. In this instance, it is recommended that clear guidelines should be set out to address this situation. Children, their families or those acting in loco parentis, and their medical carers should have no doubt about the entitlements of children in care to consent to or refuse medical treatment. Such guidelines should be informed by medical practitioners, among others. The enforceability of such guidelines however would be vulnerable to constitutional challenge, especially in the context of a child of a marital family.

ECHR obligations also arise in this context. Due to the fact that the ECHR has been incorporated into our law on a sub-constitutional level by virtue of the European Convention on Human Rights Act, 2003 the HSE and other interested bodies ought to be aware of its effect in relation to the administration of medical procedures to children where consent is refused.

6.3 Medical Treatment under Child Protection Legislation

An immediate concern surrounds the status of medical treatment to those under child protection legislation. At present the HSE can assume parental responsibility and has the authority to consent to ‘necessary’ medical treatment required by the child. It is recommended that the term ‘necessary’ in this context be given a wide meaning so as to avoid complications between the necessary/elective distinction in the context of medical litigation.

At present there is no guidance as to the status of medical treatment to children aged 16 and 17 who are subject to care orders. Such children can require ongoing medical treatment and may require emergency treatment. Therefore legislative guidelines need to be put in place so as to clarify the role of the HSE in this regard.

6

SECTION 7: THE CHILD CARE ACT, 1991

7.2 Voluntary Care

Guidelines should be introduced to provide assistance in circumstances where there is a conflict between the family and HSE as to whether a child is suitably subject to voluntary care under s.4 of the Child Care Act, 1991. Such guidelines must take account of the views of both the parents and HSE, while affording due deference to the best interests of the child.

7.3 Emergency Care Orders

It is recommended that the procedural rules in relation to emergency care orders be amended so as to allow for such an application to be made as soon as is reasonably possible without the need to wait for two additional days notice. It is thought that

such an amendment would provide a greater level of protection to children in circumstances where a two day notice period may only serve to exacerbate the already incumbent problem. However, any reform in this regard must take into account the constitutional rights of the family in Article 41 of the Constitution.

7.4 Interim Care Orders and Care Orders

In relation to care orders, in particular interim care orders, it is recommended that the standard of proof to be applied in such applications reflect the reality that each and every case will be dependant on its own facts and therefore a degree of flexibility ought to be provided for.

7.5 Special Care Orders

There is a need to ensure that the methods employed in conjunction with special care orders are in line with the obligations of the State under the ECHR. Of particular note is the accommodation given to a child subject to such an order. The accommodation must be suitable to the care of the child and cannot be a place of detention. The overall objective in granting the special care order must be the protection and development of the child, with specific regard to the educational welfare of the child. Furthermore, the methods employed on foot of the special care order should be the least intrusive possible in the light of the surrounding circumstances. Whilst our law as it currently stands would appear to be compatible with the ECHR it is recommended that s.23B of the Child Care Act, 1991 be clarified so as to ensure this compatibility.

7.6 Reciprocal Care Orders

At present there is a gap in our law concerning the placement of children into care in Ireland where these children have been habitually resident in another EU State other than Denmark. Brussels II bis, which has direct effect in Ireland, provides for such a situation and requires guidelines and procedures to be drafted in member states to facilitate these placements. It is recommended that guidelines and procedures be drafted and given effect by way of statutory instrument, with regard being had for the European Judicial Network in civil and commercial matters.

7.7 Transitional Measures in Child Protection Legislation

There is little or no provision for transitional or after care in child care legislation, with the exception of s.45 of the Child Care Act, 1991. Conscious of the fact that s.45 is a discretionary measure and that the Executive is the sole administrator of public funds, it is recommended that guidelines be drawn up in respect of the exercise and application of s.45. Such guidelines ought to be reasonable, which in turn would provide the State with an additional basis for defending a potential negligence claim in respect of decisions rendered under s.45.

SECTION 1: INTRODUCTION

1.1 Introduction

In June 2006 the Government appointed two special rapporteurs to audit legal developments for the protection of children in Ireland. Independent from, but accountable to the Oireachtas, the special rapporteurs are required to review and audit domestic legal developments and assess what impact, if any, international developments may have on child protection in this jurisdiction.

The functions of the Special Rapporteur were set out as follows:

- (1) To keep under review and to audit legal developments for the protection of children.
- (2) To assess what impact, if any, litigation in national and international courts will have on child protection.
- (3) To prepare, annually, a report setting out the results of the previous year's work. This report will be submitted to the Dáil and Seanad for consideration, debate and subsequent publication.
- (4) The Special Rapporteur will be entitled to consult with Departments of Government and the Ombudsman for Children about initiatives in relation to child protection legislation and developing protocols to enhance that protection.

Thus, the remit of this report is to survey a range of child protection issues in order to identify gaps in the law, and where possible, to make recommendations on how these could be dealt with. The Constitution is beyond the scope of the report, and therefore legislation and caselaw have provided the primary focus of attention. However, it is important to declare from the outset that this report is concerned with the State's duty to protect its citizenry. In the context of this report, children from birth to eighteen years will be considered as the chief recipients and beneficiaries of such duties. The origin of this duty is the Constitution. Article 42.5 of the Constitution states:

“In exceptional circumstances, where parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of parents, but always with due regard for the natural and imprescriptible rights of the child.”

As is evident from this provision the Constitution envisaged a role for the State in the care of vulnerable children. It is noted however that the application of Article 42.5 is quite restrictive, in fact it is only utilised by the courts in exceptional circumstances. Such circumstances might include a situation where there is an immediate threat to the life of the child, abandonment of the child or an exceptional transgression in parental duties to such an extent so as to severely impede the development of the child in life.³ Therefore it is correct to state that Article 42.5 only confers the State with a subordinate or default role in the care of children, with parents having primary responsibility. Notwithstanding this, the State is under a duty to vindicate the personal rights of every citizen, as per Article 40.3 of the Constitution. In the context of children the courts have interpreted this general duty in conjunction with Article 42.5.⁴ In addition, it has been held that children enjoy constitutional rights both as part of a family unit and as individuals.⁵

The State has sought to fulfil its constitutional duty towards children by enacting legislation relating to child care and protection. The focus of this report shall be on whether this legislation, both in scope and application, adequately conforms with this duty. Many of the reforms suggested in this report can be implemented by way of legislation, however, some reforms require a referendum to be held in order for the State to fulfil its constitutional duty towards children. Several of the gaps in child care and protection highlighted in this report require new and modern remedies. An example of such innovative measures is the use of ‘soft’ information in the vetting process of those applying for positions working with children. Various constitutional issues arise in this context, and as shall be discussed below a referendum is necessary so as to give effect to such reform. Recent publicity and interest surrounding the protection of children’s rights must be maintained and indeed encouraged so as to ensure that necessary reforms are implemented with the vigour and immediacy so required.

³ *North Western Health Board v HW* [2001] 3 IR 622. These examples originate from the dicta of the various judgments in this case.

⁴ *G v An Bord Uchtala* [1980] IR 32; *In re JH (an infant)* [1985] IR 375.

⁵ *North Western Health Board v HW* [2001] 3 IR 622.

1.2 The Political, Social and Cultural Context

Karin Landgren, Head of Child Protection since 1998, has identified the obstacles, “to improving children’s protection from violence, exploitation, and abuse. Traditional practices are one; others range from a lack of national capacity to the absence of the rule of law”.⁶ The law is one of the strongest tools we have to address these and other barriers. Nonetheless, Landgren forewarns that, “child protection has neither a vaccine nor a universal blueprint for interventions”, implying that legislation is not a cure-all as other issues need to be addressed. A number of these issues can be found in the social, cultural and policy context within which the law is formulated and implemented. While the specific remit of this report is to consider child protection issues from a legal perspective, it is essential to acknowledge this broader context.

This context has changed substantially in Ireland over the past decade. In the policy arena, the launch of the Government’s National Children’s Strategy in 2000, and the creation of the National Children’s Office and the position of Minister for Children both reflected and promoted many of the changes in our approach to children. The consolidation of this work through the establishment in 2005 of the Office of the Minister for Children, which incorporates the former National Children’s Office, further signals an increasingly positive approach to children at Government level.

Most significantly, the Government’s publication in February 2007 of the Twenty-eighth Amendment to the Constitution Bill to introduce constitutional reform through the holding of a referendum on the rights of children signals a significant shift in policy thinking that is favourable to children.⁷ The Bill was not enacted before the dissolution of the Oireachtas in advance of the General Election in May 2007.⁸ Nonetheless, as this report shall highlight a constitutional referendum is necessary to implement some of the recommendations proposed herein to improve the level of child care and protection in this jurisdiction.

⁶ Landgren, “The Protective Environment: Development Support for Child Protection” (2005) 27 Human Rights Quarterly 214, at p.215.

⁷ See Appendix 1.

⁸ The Government has established a Joint Oireachtas Committee to consider the proposed wording of the amendment. The *Joint Oireachtas Committee on the Constitutional Amendment on Children* held its first meeting on 6 December 2007.

More broadly, there is a growing awareness and acceptance of children as individuals who have rights which are specific to them and separate from others, including their family. There is a wider recognition of the right of children's voices to be heard and an increasing number of structures through which this can be achieved. With respect to the suffering and trauma experienced by the victims of physical, sexual, psychological and emotional abuse and neglect inflicted by institutions of State and church, there is now an increasing awareness of the dangers that face our children and the growing need to protect them from such harm. To a lesser degree, and not withstanding the dearth of our knowledge of the area, a small number of high profile cases have brought to our attention the need to protect children from those most trusted to take care of them – their own families. Also, our attention has been brought to the need to allow young people a degree of determination in the question of sexual freedom and the age of sexual consent, while at the same time affording them adequate protection under the law. Through such challenges and change we are, as a society, becoming aware of the power and capacity of children and young people in determining their own boundaries.

This changing social and cultural landscape, however, has a number of very notable black spots. Growing wealth and economic development have improved the quality of life for many people, but there are still children who experience poverty, deprivation, abuse and neglect. Much of this arises and comes to the attention of the State through manifest problems such as parental drug misuse, family disintegration or criminal activity. This applies to many Irish children who rely upon the law and the State to protect them and uphold their rights. Such children must be a priority for child protection legislation and the social services that operate parallel to it.

Furthermore, a small number of particularly vulnerable groups of children present new and pressing challenges to our society and legal system. While growing diversity and multi-culturalism is welcomed by many people, there is increasing evidence of racism and discrimination based on skin colour, ethnicity, nationality or religion. These affect children either through direct experience or through the discrimination experienced by their parents and families. In this broad context, new vulnerable groups have arisen that require specific attention. These include 'Separated Children' (also known as Unaccompanied Minors, who may be asylum seekers), who are

particularly vulnerable not only due to their status as children, but also as members of ethnic minorities and immigrants. Such children tend to be escaping extreme traumatic events including civil war, religious persecution and abuse. Evidently they are in need of special care.

Related to the issue of separated children is that of child trafficking. It is unfortunate in the extreme that this has now become a concern for many of those working in the field of child protection. There is little known about trafficked children in Ireland, but it is widely acknowledged that at least some separated children have been trafficked for labour or sexual exploitation and have been either found by the authorities, escaped their captors or been left by their traffickers.⁹ These children, who are in effect modern day slaves, must be considered to be amongst the most vulnerable within our care. The current levels of care and protection afforded to such children shall be examined in due course.

1.3 Research Issues

Some difficulty has been encountered in researching this report, most specifically relating to the Child Care Act, 1991. This Act is one of the most significant pieces of legislation in the area of child protection. However, there is a dearth of caselaw available relevant to this Act due to the fact that the majority of cases take place in the District Court (and are thereby held *in camera*). There is also a difficulty in that many High Court cases take place without a stenographer. This has made it extremely difficult to discern judicial attitudes to the Act in general and the various orders available under it. Such cases as are available have been analysed with a focus on how they impact on other areas of law and procedure so as to give a complete picture of how the child is protected from harmful treatment.

The recent case of “Miss D” captured significant media attention in May of this year. This case concerned a 17 year old girl, under the care of the Health Service Executive (HSE), who challenged a decision of the HSE to refuse her permission to travel to the

⁹ In 2003 there were 841 applications by unaccompanied minors, this figure then dropped to 124 in 2004. See Smyth, “Refugee Status Determination of Separated Children: International Developments and the Irish Response, Part II” [2005] 2 IJFL 21, at p.26, n.2. The problem of child trafficking in Ireland was also recently highlighted by the United States Department of State in *Trafficking in Persons Report* (June, 2007), at p.218.

UK for an abortion. The applicant was four months pregnant but the foetus suffered from a condition resulting in a life-expectancy of three days outside the womb. The High Court ruled that the applicant was entitled to travel to the UK for an abortion.¹⁰ At present an approved judgment has not been issued in this matter, and it is therefore inappropriate to analyse the issues arising from the case. Suffice to say, however, that there are concerns pertaining to the powers of the HSE as they relate to children who are the subject of interim care orders. It is hoped that these issues can be addressed in the future.

Where gaps exist in Irish caselaw and legislation, as well as for comparative purposes, use has been made of the caselaw of other common law jurisdictions, including the United Kingdom (UK), South Africa and Canada. This has proved helpful by shedding light on shortcomings in the Irish system not immediately discernable from a reading of Irish legal authority alone.

The European Convention on Human Rights (ECHR) is of crucial importance to many of the issues investigated in this report. As the Convention now forms part of our legal system through the European Convention on Human Rights Act, 2003¹¹ there is a need to be cognisant of its provisions. Given its wide relevance, the relevant ECHR caselaw will be discussed within each section rather than being treated as a separate and discrete topic.

1.4 Outline of the Report

Several areas of substantive law are relevant to issues of child protection and are addressed in this report. A theme evident throughout the report is the need to actively participate in the field of child protection and this requires a system focussed on prevention first and sanction second. Problems and issues in child care and protection need to be addressed while in their infancy so as to avoid more detrimental consequences, typically to the child. With this in mind the report begins with a section dealing with the vetting of those seeking to work with children, and in particular it identifies a number of issues concerning the use of ‘soft’ information. Section 3 then deals with certain offences committed against children, with an emphasis on the need

¹⁰ Unreported, High Court, McKechnie J., 9 May 2007.

¹¹ No. 20 of 2003.

to expand these offences and create additional offences so as to provide better protection for children and create a deterrent effect. Section 4 considers the increasing concern surrounding child trafficking, separated children, pornography and grooming. These issues represent a new threat to the safety of children in this jurisdiction and there is an immediate need to counter such threats. The interaction of children with the legal system is then considered in Section 5 of the report. This is a broad section considering various topics ranging from family welfare conferences, practice and procedure in court, the representation of children in legal matters and the need for the legal system to adapt to the requirements of children. Section 6 contends with the complex subject of medical law, with particular focus on the potential right of a child to refuse medical treatment. Furthermore, it considers the provision of medical treatment to children under the care of the State. The final section of the report analyses the various orders available under child care legislation. It notes the shortcomings of such orders and offers recommendations. It further comments on the role of the HSE in such matters. Each subsection concludes with recommendations. However, owing to the complex issues arising in relation to the section concerning vetting and soft information one single set of recommendations is set out at the end of the section which takes into account all the issues that arise within the section as a whole.

SECTION 2: VETTING AND SOFT INFORMATION

2.1 Introduction

The process of vetting persons involved in work with children forms an integral part of any child protection system. In order to be effective vetting procedures need to be based on clear legislation which is informed by best practice standards in the care industry. Such legislation must also be in accordance with the constitutional right to fair procedures, and cognisant of the other delicate constitutional and ECHR balances which need to be struck. This section of the report will examine the constitutional rights affected by the vetting procedure. It will then analyse the use of so-called “soft” information in the vetting process.

It is stated as a preliminary point that many of the recommendations and conclusions reached must remain somewhat speculative. To date, there has only been one High Court case surrounding the vetting of persons working with children in this jurisdiction and this case did not consider any of the constitutional issues at stake.

2.2 Hard and Soft Information

The vetting system relies on relevant authorities and organisations having sufficient information on which to base decisions regarding a person’s appropriateness to work with children and other vulnerable groups. Hard information is, at present, the mainstay of the Irish vetting system. This information relates to criminal activity and the successful prosecution of persons for such behaviour. This information is held by the Garda Síochána and the Garda Central Vetting Unit (GCVU). So-called “soft” information includes information which has come to the attention of the State authorities – be it the relevant local authority, the HSE, Gardaí, or VEC – that falls short of conviction of a relevant offence, such as an allegation of abuse or conduct warranting the placing of a child of the vetted person into care. This information may be highly relevant to persons and bodies working in child protection, but could lead to the rights of the vetted person being infringed. This distinction between those that have been convicted of a crime and those who have not is of central importance in the discussion below of the constitutional and statutory rights of the individual in relation to vetting.

Critically, it should be noted that the use and sharing of soft information was included in the wording of the proposed constitutional amendment contained in the Twenty-eighth Amendment to the Constitution Bill, 2007;¹² and it is anticipated that a proposal in some form will be put to the people in a constitutional referendum next year. One of the proposed amendments will provide for legal authority in the collection and exchange of information relating to the risk or actual occurrence of child sexual abuse. The comments made in this report in respect of the use of such information are made cognisant of the changes in legislation and practice that this amendment will allow.

There are many rights and responsibilities of the State to the parties affected by vetting. Duties are owed to the vetted persons, the persons cared for or supervised by the vetted persons, and the community at large.

2.3 Access to Hard and Soft Information - *Megan's Law and Sarah's Law*

The issue of who has access to both hard and soft information is of critical importance in seeking to construct legislation that is capable of withstanding constitutional and convention challenge. Legislation in this field is commonly referred to as Megan's Law in the United States of America (US), where there is a liberal approach to the access of information on the whereabouts of known child sex offenders. Megan's Law refers to a range of state laws passed following the rape and murder of seven year old Megan Kanka in 1994 by a known sex offender who resided in the child's neighbourhood. In 1996, the Violent Crime Control and Law Enforcement Act of 1994 was amended giving rise to the first federal version of Megan's Law.¹³ This requires all states to adopt procedures for notifying concerned people and communities if a person convicted of a sexual crime is released into their area. These procedures vary by state and cover a range of offences. In some states the procedures cover only those convicted of paedophilia, while in others they apply to those convicted of any sexual crime against any person, or those convicted of very specific offences such as sodomy. States use different methods to issue this information. In some, photographs and details of the offender, including his/her crime and address, is

¹² See Appendix 1.

¹³ Pub. L. No. 104-145, amended s. 170101(d) of the Violent Crime Control and Law Enforcement Act 1994 Pub. L. No. 103-322 (codified at 42 U.S.C. § 14071(d)).

posted on the internet. In others, details are posted at local police stations, while some states only notify those who live within a certain distance of the offender.

In the UK, a version of Megan's Law, called Sarah's Law has been called for by a range of interests. Like Megan Kanka, eight year old Sarah Payne was raped and murdered by a known sex offender in 2000. However, the UK has recently backed away from introducing a full version of Megan's Law, and new procedures aimed at protecting children from sex offenders are due to be piloted in 2007. Under these provisions, parents will be able to ask if sex offenders live on their child's school route, and single parents will be able to ask whether potential partners or people who care for their children are convicted child sex offenders. However, in distinction from the US, no details such as name and address will be provided to parents.

There has been considerable public and legal debate on the merits and demerits of both Megan's Law and the proposed scheme in the UK. Proponents of the law claim that it is about child safety and that any punitive effects experienced through vigilantism or public shame are a result of the offender's illegal activities and not the law. Such a law also allows schools, childcare providers and others an inexpensive means of vetting job applicants. Opponents to Megan's Law and the proposed UK scheme claim that this will in fact put children more at risk than before. This will arise as offenders who are registered, and thereby willing to abide by the law by providing details of their whereabouts, will cease to do so and go underground due to the fear of public retribution. Legal commentators in the US have argued that by allowing Megan's Law to apply to offences that existed prior to its introduction creates *ex-post facto* problems and also a system of double jeopardy, where the offender is punished for a crime twice over. This may render it unconstitutional. In addition, the acts defined as sexual misconduct in a number of states are of little concern in the context of protecting children from sexual predators, e.g. public nudity and urinating in public. Therefore people who pose no threat to children or even to society as a whole can be placed on the sex offenders register and end up being identified as a threat to children.

There have been few calls for a version of Megan's Law to be introduced in Ireland thus far. However, if the scheme currently being piloted in the UK is legislated for, it

is possible that such provisions could be sought in Ireland due to our proximity to that jurisdiction and also to the close correspondence of our legislation. However, it is likely that such a law would be challenged in Ireland on the grounds similar to those concerning the use of hard and soft information which shall be addressed presently.

2.4 The Constitutional and Statutory Rights of Persons Being Vetted

Although public focus tends to be concerned with protecting the child from unsuitable carers, the rights of the person being vetted must also be recognised. It is important that suitable persons are not barred unfairly from working with children and that their constitutional and statutory rights are upheld. Article 40 of the Constitution states that the State shall by its laws seek to vindicate the personal rights of the citizen. Of relevance here is the right to equality before the law, the right to a good name, the right to privacy and the right to earn a livelihood.

2.4.1 *The right to equal treatment before the law*

As a preliminary point, the Aristotelian idea of treating unequals unequally has a distinct relevance here. The State is entitled to treat persons convicted of criminal offences somewhat differently from those who have not been convicted. Therefore, convicted persons would *prima facie* not be entitled to raise the argument that the vetting process violates their right to equality.

The sticking point may come with regard to persons who have not been convicted of any crime. They could potentially argue that as they do not have to be vetted in order to undertake other professions, and as they do not have any obvious apparent reason to be considered a danger to children as convicted persons might be, the law treats them unequally on two counts:

- (i) *vis-à-vis* persons working outside the child care area who do not have convictions and hence need not subject themselves to vetting, and
- (ii) *vis-à-vis* convicted persons who are more readily identifiable as a risk to children.

These arguments are, however, flawed. With regard to the former argument, by seeking to work with children or vulnerable adults, a person knowingly seeks employment in an area which requires special safeguards, much as those seeking to

work in security or law enforcement may have to be vetted in order to ensure that they are suitable for their particular roles. That said, however, the level of encroachment upon the rights of such a person must be proportionate to the objective of ensuring the safety of children under that persons care.

With regard to the second argument, regarding unequal treatment *vis-à-vis* people with criminal convictions, this is largely defeated by reference to the purpose of the procedure. The purpose of vetting is to remove risks and as vetting is the only medium through which risks – characterised in the first instance as convictions – can be exposed, the victory of the equality argument would render the scheme totally ineffective. Although this admits a utilitarian justification, the State has readily identifiable duties and responsibilities to other groups. In the event of a clash between a potential inequality and a potential protection of vulnerable groups, the latter will usually be ranked higher in the hierarchy of rights. Furthermore, the ‘due regard’ clause of our constitutional equality guarantee would appear to permit the State to adopt such a course of action. In addition, it is noted that in circumstances where the constitutional right of equality conflicts with other constitutional rights, equality tends to be trumped by such rights,¹⁴ even to the extent of recognising new unenumerated rights.¹⁵

2.4.2 The right to a good name

The next issue which arises is the person’s right to a good name. Whether vetting is restricted to convictions, or whether soft information is used, the information will have to be processed by some individual who may come into possession of information which may detrimentally affect the reputation of the vetted person. This matter becomes even more acute in relation to the access to such information. Of central importance is whether the information is true or false. Hard information i.e. convictions can be assumed to be true; difficulties arise however with regard to soft information. The use of soft information by its very nature is not verifiable and its introduction into this jurisdiction is opposed by the constitutional protection to the good name of a vetted person. The use and access to such information must therefore

¹⁴ See for e.g. *O’B v S* [1984] IR 316.

¹⁵ See for e.g. *Macaulay v Minister for Posts and Telegraphs* [1966] IR 345; *Murtagh Properties v Cleary* [1972] IR 330.

be handled with extreme care in order to withstand constitutional scrutiny. Legislation will have to balance the use of such information to protect children, while equally prohibiting the spreading of malicious information that would be unfairly detrimental to a person's good name. The very act of recording and circulating allegations which were investigated and found to be unproven is fraught with constitutional difficulties as it necessarily impugns an individual's good name in circumstances where there must be some doubt about the veracity of the allegations. This is *a prima facie* violation of that individual's Article 40.3.2° right. If this sort of system is to have any hope of passing constitutional muster, it must be attended by very significant safeguards.

The case of *Re Haughey*¹⁶ is instructive in that it sets out a number of protections to the good name of a person in circumstances where allegations have been made or implied. These are that a person accused should be:

- (a) Furnished with a copy of the evidence which reflected on his/her good name;
- (b) Allowed to cross-examine, by counsel, his/her accuser;
- (c) Allowed to give rebutting evidence; and
- (d) Permitted to address the tribunal, again by counsel, in his/her own defence.

These criteria are not exhaustive. In their interpretation of the constitutional guarantees of fair procedures and constitutional justice, the courts have tailored the required procedural safeguards to the context of an individual case. A recurring requirement, however, is that a suspected person is given due notice of the allegations against him/her, and afforded the opportunity to respond to them. These sorts of safeguards could be adopted with necessary adaptations to the vetting arena so as to ensure that the good name of the vetted person will be protected and also to determine if the information is sufficiently reliable to permit members of the public to have access to it.

¹⁶ [1971] IR 217.

2.4.3 *The right to privacy*

Privacy, first established as an unenumerated right in *McGee v Attorney General*¹⁷ in the marital sphere and extended to the individual sphere in *Kennedy v Ireland*,¹⁸ was given an erudite expression by Henchy J., dissenting, in *Norris v Attorney General* where he stated:

“[Privacy is] a complex of rights, varying in nature, purpose, and range, each necessarily a facet of the citizen’s core individuality within the constitutional order ... a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not necessarily moral or commendable, but meriting recognition in circumstances which do not endanger considerations such as State security, public order or morality, or other essential components of the common good.”¹⁹

This definition of privacy would appear to protect information such as convictions and soft information. However, if breaches of the right by way of investigation and disclosure were limited by the use of appropriate procedures, and the end of child protection and the common good are seen to justify the means of a breach of rights, any objections to a vetting scheme based on privacy rights would be likely to fail. The rationale of *Desmond v Glackin (No. 2)*,²⁰ where it was adjudicated that Ministers could pass legitimately obtained information between them to assist them effectively carry out their duty, is instructive in this regard. A similar approach was also adopted by the Court of Appeal in the English case of *Marcel v Commissioner of Police of the Metropolis*.²¹ Hence, if the GCVU operating as agent for one Minister (the Minister for Justice) passed information to the Minister for Children or his agent (the HSE) which would aid in the fulfilment of the statutory duty to protect children at risk from harm, it may not be an impermissible breach of the constitutional right of privacy.

In addition, with regard to a person applying to work with at risk groups such as children or vulnerable adults, if a breach of privacy is seen to have occurred, it is firmly within the remit of the Oireachtas as being necessitated by the exigencies of the common good, as allowed for in *Haughey v Moriarty*.²² Comparisons can be made with US Fourth Amendment jurisprudence, which has upheld the compulsory drug

¹⁷ [1974] IR 284.

¹⁸ [1987] IR 587.

¹⁹ [1984] IR 36, at 71-2.

²⁰ [1993] 3 IR 67.

²¹ [1992] 2 WLR 50; [1992] 1 All ER 72.

²² [1999] 3 IR 1.

testing of those who choose to participate in certain activities or professions (such as student athletes²³ or railroad employees²⁴) on the basis that those activities involve wider questions of public safety or welfare. It is important to note however that the US courts have allowed this only where it is regarded as necessary in the interests of *immediate* public safety.

Different considerations arise however in relation to the release of soft information to the general public about an individual. A key problem in devising a scheme which would survive constitutional challenge would be the difficulty of including procedural safeguards in a regime which releases information on such a broad basis as in the US. The act of publishing this information to a general audience – many of whom may have no justifiable interest in it – is an infringement which is so wide-ranging that it is difficult to see how it could accord with ideas of procedural fairness or constitutional justice. Furthermore, any legislation enacted in this jurisdiction would have to abide by the doctrine of proportionality. It would have to:

- “a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
- b) impair the right as little as possible, and
- c) be such that [its] effects on rights [be] proportional to the objective.”²⁵

Another issue which would have to be considered would be the privacy interests of any family members who might also be subject to public opprobrium upon the publication of the fact that a close relative is a convicted sex offender. The unauthorised release of such information to members of the public by Gardaí was at issue in the recent case of *Gray v Minister for Justice*.²⁶ The plaintiffs in this case permitted their nephew, a convicted rapist, to reside with them for a short period of time. Local Gardaí became aware of the presence of the sex offender and, shortly after the matter was reported upon in various newspapers. The plaintiffs were then subjected to media and local attention ultimately resulting in them having to leave the locality. The High Court held that on the balance of probabilities the Gardaí had disclosed this confidential and sensitive information to the media. Quirke J. held that

²³ *Vernonia School District 47J v Acton* 515 U.S. 646; 115 S.Ct. 2386; 132 L.Ed.2d 564.

²⁴ *Skinner v Railway Labor Executives Assn.* 489 U.S. 602; 109 S.Ct. 1402; 103 L.Ed.2d 659.

²⁵ *Heaney v Ireland* [1994] 3 IR 593, at 607.

²⁶ Unreported, High Court, Quirke J., 17 January 2007.

the State owes a duty to citizens who may be affected by its procurement of sensitive and confidential information. There was a breach of this duty which exposed the plaintiffs to a foreseeable risk of injury. The constitutional right to privacy was also considered. Quirke J., on the evidence before the court, rejected the argument on behalf of the State that the plaintiff's right to privacy was restricted by the need to vindicate the constitutional rights of others and also the need to consider the common good. The plaintiffs were awarded €70,000 in damages.

If it was decided to adopt a scheme incorporating the dissemination of soft information, it would have to be very narrowly drawn. It is unlikely, for example, that the naming of offenders who do not pose a threat to children would be permitted. It could even be a requirement that there be a positive assessment (reviewed on an ongoing basis) that an individual represents a danger to children before his/her name could be released.

2.4.4 The right to earn a livelihood

The right to earn a livelihood (and to a lesser extent, the individual's freedom of association) is also engaged by the vetting scheme. This right must be contextualised and particularised by a plaintiff as the Supreme Court in *Murphy v Stewart* stated that the right to work is recognised as a constitutional right, but "the question of whether that right is being infringed or not must depend on the particular circumstances of any given case."²⁷ What is of special relevance in the vetting context is that the right is not so broadly applicable as to entitle a person to earn a living from a particular livelihood as seen in *Greally v Minister for Education (No. 2)*.²⁸ This follows on from the elucidation of the right found in the decision of Costello J. in *Attorney General v Paperlink* where he stated that:

"all citizens ... may choose to exercise that right by doing manual work or non-manual work, by entering a profession or by entering employment, by engaging in commerce (either alone or with others), by manufacturing goods, providing a service, or engaging in agriculture. Their freedom to exercise this constitutional right is not an absolute one, however, and it may be subject to legitimate legal restraints."²⁹

²⁷ [1973] IR 97, at 117.

²⁸ [1999] 1 IR 1.

²⁹ [1984] ILRM 373, at 384.

Restricting persons who work in child care to those who do not have convictions for certain criminal offences is certainly a legitimate restriction. However, vetting legislation needs to clearly stipulate who may and may not work with children where grey areas between accusations and convictions occur. These stipulations must also be rational and reasonable. Restrictions based on generalised fears about threats to child safety could be found to be arbitrary and unconstitutional and fall foul of the proportionality doctrine. Rigorous procedural safeguards would again play a part in securing this system against constitutional challenge.

2.5 The Rights of Persons Being Cared for by Vetted Persons and the Community

The rights of persons who will be cared for by vetted persons have to be considered. It may be more correct however, to talk of the responsibilities of the State towards such people, as they have no enforceable rights in the vetting process. If the State were to conduct the vetting process improperly it would have breached certain statutory duties e.g. s.3(1) of the Child Care Act, 1991, and arguably its duties under the Constitution.

The vetting process would be a means by which the State could discharge its duty to those under its care. It would provide a method of identifying those who may pose a risk to children to whom the State owes a duty of care, and removing that risk. This duty is broad and is owed to children who are currently in the care of the State and also those who will come under the care of the State at some time in the future.³⁰

It must be asked whether or not an alternative means of discharging this duty exists. The interview process is patently insufficient as a child protection mechanism, as a candidate with previous convictions may very easily lie in order to gain employment with children. This would also be the case in relation to voluntarily submitted written information. The only way to ensure the accuracy of information relating to convictions is to obtain them from an objective and independent source, most likely a state body. Thus, some form of vetting process is necessary for the obligations of the State to be fulfilled, and the procedure currently carried out by the GCVU fulfils these criteria. The question remains as to whether or not soft information is necessary for the requirements of child protection to be fulfilled. This shall be discussed presently.

³⁰ See *MQ v Gleeson* [1998] 4 IR 85.

2.6 Use of Soft Information

The anticipated constitutional referendum proposes to allow changes in Irish law relating to the use of soft information, and to allow for the balancing of the right of children to be protected from harm against a person's right to maintain his/her good name. The amendment may not, however, provide a blanket exemption for all 'soft information' measures. The Constitution must be interpreted harmoniously. Any regime which allows for the use of 'soft information' should still be organised in a way which complies, so far as is possible, with the other provisions of the Constitution as highlighted above. It is vital, therefore, that the procedures governing the use of such information be designed with great care. International caselaw is illustrative of the potential hurdles facing the introduction of the use of soft information in the vetting process in this jurisdiction.

In the Australian case of *Carter v Netball Association*³¹ the applicant (a junior netball coach) had been automatically registered with the Commission for Children and Young People due to an adverse finding against her by the Disciplinary Committee of the Defendant. This complaint was the result of an accusation brought by a self-appointed group called 'No Excuse for Abuse'. Although counsel for the defendant had finally admitted that the behaviour of the applicant was no more than 'excessively enthusiastic coaching', due to her vigorous shouting at, and criticism of her charges, the General Manager of the Defendant's Disciplinary Committee gave a notice to the Commission for Children and Young People. In this notice, it was certified that the plaintiff "has been the subject of disciplinary proceedings relating to child abuse, sexual misconduct or acts of violence in the course of employment". She was registered with the Commission as a result. Subsequently, when the plaintiff brought the case to court, a miscarriage of justice was found to have occurred.

In Ireland, soft information was at issue in *MQ v Gleeson*.³² In this case, the applicant brought judicial review proceedings against, *inter alia*, a VEC and the Eastern Health Board (EHB). He had been undertaking a VEC-run social studies course with the ultimate aim of attaining employment working with children. This course entailed a placement with a children's playgroup. The applicant had previously come to the

³¹ Unreported, Supreme Court of New South Wales, 17 August 2004 (1679/04, 2004 NSWSC 737).

³² [1998] 4 IR 85.

attention of the EHB – the fourth named defendant. It informed the VEC of its concerns, which in the EHB’s view made him an unsuitable person for such work. At no point had the applicant been convicted of any crime against children, nor had any of his children been taken into care, but there had been serious allegations made against him including sexual offences and other serious misbehaviour. Barr J. held that the EHB had a statutory duty to protect children under s.3 of the Child Care Act, 1991 and that this duty was wide ranging in scope. Hence, it was incumbent on the EHB to make its concerns known, but at all times it had to comply with the fundamental rules of natural and constitutional justice. He summarised the obligations of the EHB as follows:

- “(i) to obtain details of the charges;
- (ii) to inform the applicant of them;
- (iii) to give him a reasonable opportunity to respond; and
- (iv) to decide the question posed by the [health service executive] in the light of the information furnished by it and the applicant’s response thereto.”³³

Further, the learned judge set out to a limited extent the format that the records of allegations and accusations which do not lead to further actions should take:

“The health board’s records in each case should include factors favourable to the alleged abuser. The board’s assessment of the weight it attaches to each such allegation should be stated and should be objectively based. The purpose should be to create a fair, reasonable assessment of each complaint or finding about an alleged wrongdoer.”³⁴

It thus appears that the use of fair procedures, in particular the safeguards enunciated in *Re Haughey* as set out above, form the bedrock of judicial assessment of the use of soft information. This is in keeping with other cases concerning alleged infringements of natural or constitutional justice. In deciding the case, Barr J. held that there was a duty on the respondents to consider this information but that the way in which it had been done was such as to be prejudicial to the applicant.

It is recommended that in delineating the content of soft information, the primary focus should be on any investigations which have taken place into alleged crimes or abuses, be they conducted by the Gardaí or the HSE, even if the result of such an investigation was inconclusive.

³³ [1998] 4 IR 85, at 104.

³⁴ [1998] 4 IR 85, at 101.

Some thought should also be given to providing for a system under which a person can appeal their entry onto a 'soft information' register to an independent third party, such as a judge. Issues could arise in respect of the impartiality of a health service executive or child care body in the light of the fact that they would be exposed to the threat of legal action if, after reviewing the information, they hired an individual who later harmed a child in any way. With that in mind, there could be a danger that 'soft information', no matter how limited or weak, could act as an automatic bar to a person's application. A system under which such a person could have that information reviewed by a third party to see if, in exceptional cases where it is adjudged to be of almost no relevance, it should not be given to prospective employers would improve the individual's procedural protection and thereby increase the likely constitutionality of the scheme. The question arises however as to the venue of such a hearing. Would it be *in camera* or in open court? If held in open court the practicality of such a review mechanism would be effectively nullified as soft information eventually deemed unreliable would already have been published in the public domain by virtue of the actual hearing determining its reliability for publication. Therefore it is recommended that legislation for the use of soft information include a review mechanism whereby a judge would determine the reliability of such soft information *in camera*.

2.7 Relevant Offences

What is deemed to be a relevant offence is in need of definition. It is submitted that convictions for sexual offences should be of primary concern. Different weight, however, may need to be attached to different offences. Additionally, the circumstances of the offence may be such as to render the information irrelevant to deciding whether a person is a risk to children.

Although it may be intuitive that all sex offenders are automatically barred from working with children, this is not always the case. Due consideration should be given to the circumstances of the offence so that potentially suitable persons are not automatically barred from the care professions. Hence, some form of risk assessment will have to be attached to the provision of information concerning investigations and convictions. In order to do this most effectively, it would have to be done in tandem with any rehabilitation measures being undertaken by sex offenders as part of their sentence or which is privately undertaken. At the very least, the risk assessment

should be thorough, balanced and objective in its outlook. This was noted in *R (on the application of X) v Chief Constable of West Midlands Police & Anor*,³⁵ and it is thought beneficial to set out the list of factors that may form part of such a risk assessment:

- (a) The timeliness of any previous event to this disclosure;
- (b) The seriousness of the event;
- (c) The source and reliability of the non-conviction information held on the local system;
- (d) The age and details known about any victims;
- (e) If proceedings were instigated, why they were not continued?;
- (f) Does the information add anything to the ... information already provided?;
- (g) The subsequent actions of the applicant;
- ...
- (i) The likely impact on the applicant if this information was disclosed; and
- (j) The potential impact on any vulnerable group if this information was not disclosed.

2.8 The Role of the Garda Central Vetting Unit (GCVU)

The form of information available from the GCVU needs to be addressed. Convictions for what may be termed relevant offences should form the primary basis of vetting information. However, it is evidently soft information that causes the most concern in the vetting process and what constitutes soft information capable of being processed by the GCVU is in need of elucidation. The GCVU should have access to all documentation pertaining to any Garda or HSE investigation. It would then be in a position to assess what, if any, soft information should be passed to the persons or body requesting the vetting report. If any adverse findings are made, they should be drawn to the attention of the vetted person who should then be able to make submissions or representations to their putative employer and the GCVU concerning the information. Furthermore, an appeal or review procedure as set out above might be useful in this context. These representations could take the form of correcting any inaccurate information, through to making a submission relating to the incident which is the subject matter of the disclosed investigation. This allows for fair procedures to be afforded to the vetted person while allowing the State to fulfil its duties of child protection.

³⁵ [2005] 1 All ER 610; [2004] EWCA Civ. 1068, para. 51.

It should be borne in mind that none of this information processing would violate the terms of the Data Protection Act, 1988.³⁶ Although criminal records and information relating to the alleged commission of any offence are defined as sensitive personal data by s.1(d) of the Act,³⁷ s.8(b) allows for the use of such information if it is for the purpose of “preventing, detecting or investigating offences, apprehending or prosecuting offenders”, a clause which would protect the vetting process from attack on data protection grounds.

2.9 ECHR Considerations

The ECHR is also relevant to the use of soft information. It has been decided in *Leander v Sweden*³⁸ that the use of a secret police register to determine the suitability or otherwise of a candidate for state employment was valid. Use of the register in question was in accordance with law, for a legitimate purpose (the protection of state security) and it was limited in its application by a range of safeguards so as to be compliant with the ECHR.

Another relevant case, *Antunes Rocha v Portugal*³⁹ is of more recent vintage. Here, the applicant was employed by the National Council for Emergency Civil Planning. As part of her job, she was subject to security vetting which entailed her home being placed under surveillance and her friends and acquaintances being questioned. She did not realise that this was part of her employment, and resigned when she found out. It was held that these measures were in accordance with the law, and that the aim of the legislation was clear. However, it was clearly defective in a number of respects. It was too vague, did not alert those subject to it that they may be placed under surveillance, and did not provide for any safeguards or control mechanisms. Consequently, the ECtHR found in favour of the applicant. On an analysis of these two judgments it is clear that for a vetting scheme to be deemed in accordance with the ECHR it must be clear, limited in application and contain procedural safeguards.

³⁶ No. 25 of 1998.

³⁷ As inserted by Data Protection (Amendment) Act 2003, s.2(a).

³⁸ (1987) 9 EHRR 433.

³⁹ 64330/01, judgment delivered 31 May 2005.

The case of *Sidabras and Dziautas v Lithuania*⁴⁰ contains an analysis of how a person's previous behaviour may be applied to prevent them occupying certain positions of employment. The applicants had been deemed liable to restriction from certain forms of employment due to their previous association with the KGB. Under national legislation (s.2 of the KGB Act), persons found to have been involved with this body were unable to work in certain capacities. The relevant section read:

“For a period of ten years from the date of entry into force of this Act, former employees of the SSC may not work as public officials or civil servants in government, local or defence authorities, the State Security Department, the police, the prosecution, courts or diplomatic service, customs, State supervisory bodies and other authorities monitoring public institutions, as lawyers or notaries, as employees of banks and other credit institutions, on strategic economic projects, in security companies (structures), in other companies (structures) providing detective services, in communications systems, or in the educational system as teachers, educators or heads of institutions[;] nor may they perform a job requiring the carrying of a weapon.”

This is obviously a very wide ranging list of occupations and covers both the public and private sectors, as well as persons who may be employees and self-employed. The court reiterated its decision in *Thlimmenos v Greece*⁴¹ that the Convention does not give someone the right to choose a particular profession. It was held that the above quoted provision engaged both Articles 8 and 14 of the Convention. In addressing the question of whether those Articles were breached the issue of proportionality played a key role in the Court's decision. Firstly, the comparison between persons who had worked for the KGB and persons who had not done so was a valid comparison for the purposes of Article 14 despite the voluntary assumption of that association on behalf of the applicants. Further, it was found that the State was entitled to impose some restrictions on former KGB employees in light of the nature of the work which these persons had undertaken and noted that it may conflict with the interests of the Lithuanian state; the restrictions to a limited extent were a proportionate response to concerns over national security. However, if the aim of the restriction was to ensure loyalty to the State, there could be no justification for restricting employment in the private sector where loyalty to the State was an irrelevant consideration. Consequently, the manner in which the restrictions applied to the applicants was a disproportionate method of securing national security, and hence a breach of Article

⁴⁰ [2004] 42 EHRR 104.

⁴¹ [2000] 31 EHRR 411.

14 in conjunction with Article 8 was found to have occurred. The Court considered it unnecessary to consider the question of whether Article 8 as a stand alone measure had been breached.

The lessons in relation to the use of both hard and soft information are clear. If the scheme of information sharing were to be challenged, the ECtHR would find that persons who do not work with children and persons with other forms of convictions are legitimate comparisons to make. However, the right to work with children is not one guaranteed by the Convention and hence a scheme cannot be challenged on the basis that an applicant is denied the chance to pursue a particular career. Nevertheless, the legislation must be drafted in such a manner that only specific persons are subject to vetting, and that only those parts of public and private organisations dealing with children and vulnerable adults are affected. For example, if a person is seeking employment with the HSE in a capacity that involves no contact with these groups, he/she should not be subject to vetting as it would infringe on his/her privacy, and his/her right to earn a livelihood.

The *Sidabras* case is also relevant to paragraph 2.3 in relation to Megan's Law and 2.4.3 in relation to the right to privacy. The information relating to a vetted person should not impede him/her in aspects of his/her daily life other than the seeking of employment. The Court in *Sidabras* was clear on this point. It recalled the decision of *Smirnova v Russia*⁴² in which it held that the seizure of a passport unnecessarily impacted upon a whole range of ordinary, mundane activities. If information were made available under a Megan's Law-type statute it would entail serious consequences for people as regards their day to day lives in a manner disconnected from the purpose of the law, which in turn would allow it to be considered a disproportionate measure. Similarly, it would breach their privacy as most people in receipt of the information would have no interest in receiving it.

2.10 Vetting Legislation and Practice: the Case of the UK and South Africa

The Safeguarding Vulnerable Groups Act, in England and Wales, and the South African Children's Act, 2005 are presented here as case studies of vetting and the use

⁴² Nos. 46133/99 and 48183/99, §§ 96-97, ECHR 2003-IX.

of soft information legislation. Both of these pieces of legislation are forerunners in vetting and soft information legislation in regard to the protection of children and vulnerable adults.

2.10.1 UK – *The Safeguarding Vulnerable Groups Act*

In response to the Bichard Inquiry Report,⁴³ in particular recommendation 19, the British Parliament enacted the Safeguarding Vulnerable Groups Act in October 2006.⁴⁴ The purpose of the Act was to establish the Independent Barring Board (IBB), which along with the Criminal Records Bureau (CRB) has the responsibility of maintaining two lists of individuals barred from working with children or vulnerable adults. These lists are known as

- (a) the Children’s Barred List, and
- (b) the Adults’ Barred List.⁴⁵

Sex offenders are automatically added to the lists under Schedule 2, Part 1 of the Act.

The Act provides for the use of soft information by the IBB in the vetting procedure and a person can be placed on the Barred Children’s List by reason of their behaviour and information pertaining to non-criminal behaviour. The Act also provides safeguards for the vetted person.⁴⁶ That said, however, the Irish constitutional right to fair procedures as discussed above is thought to be more comprehensive. Furthermore, and in addition to the vetting process, the Act provides for an ongoing monitoring process.

As well as establishing two lists of barred individuals with the IBB, the Safeguarding Vulnerable Groups Act also established a single central vetting scheme built on information from the CRB. This enables employers to carry out a secure, instant

⁴³ House of Commons, *The Bichard Inquiry Report*, (The Stationary Office, London, June 2004). The Bichard Inquiry was an independent inquiry following the conviction of Ian Huntley at the Old Bailey on 17 December 2003 for the murder of Holly Wells and Jessica Chapman in Soham. The Inquiry investigated the vetting processes which led to Huntley’s employment at a local school, and the manner in which the police had managed intelligence about his past. It identified failures in the pre-existing vetting and barring systems and recommended the establishment of a central body to manage a register of people who work with children.

⁴⁴ The Act extends to England and Wales; however, it does not extend to Scotland, other than provisions for the supply of information from the IBB and the Secretary of State to professional bodies. Some provisions apply directly to Northern Ireland, with the remainder to be implemented through an Order in Council.

⁴⁵ Safeguarding Vulnerable Groups Act, s.2.

⁴⁶ s.5(2).

online check with a private pin number, to ascertain if an individual has barred status. Such disclosure is made strictly on the basis of necessity, following the appropriate authorisation process.

The Act establishes criminal offences for failure to abide by its requirements, thereby encouraging active participation amongst employers and others involved in the recruitment of persons to work with children with its provisions.

2.10.2 Republic of South Africa – Children’s Act, 2005⁴⁷

The pertinent section of this Act is Chapter 7 titled *Protection of Children*. This section establishes the National Child Protection Register which consists of two parts. Part A records the children that have been abused or neglected, and Part B records the individuals “who are unsuitable to work with children”. Being placed within this register of unsuitable persons is not dependent “upon a finding of guilty or innocent in the criminal trial of that person”.⁴⁸ Therefore, soft information is included within Part B of the National Child Protection Register. Paragraph 120(1) stipulates where, how or who can decide that a person is found unsuitable to work with children.⁴⁹

As with the UK legislation the 2005 Act puts the onus on employers and those involved in recruiting persons to work with children to consult the register. Access to Part B of the Register is strictly limited on a necessity basis, so that the reputation of the individuals involved is not affected, indicating a rights-based approach to the legislation.⁵⁰ This rights-based approach is also found in the legislation governing

⁴⁷ Act No. 38, 2005.

⁴⁸ Children’s Act, 2005, s.120(6).

⁴⁹ S.120:

- (1) A finding that a person is unsuitable to work with children may be made by-
 - (a) a children’s court;
 - (b) any other court in any criminal or civil proceedings in which that person is involved; or
 - (c) any forum established or recognised by law in any disciplinary proceedings.
- (2) A finding in terms of subsection (1) may be made by a court or a forum concerning the conduct of that person relating to a child contemplated in subsection (1) of its own volition or on application by-
 - (a) an organ of state involved in the implementation of this Act;
 - (b) a prosecutor, if the finding is sought in criminal proceedings; or
 - (c) a person having a sufficient interest in the protection of children.

⁵⁰ See s.125.

disclosure of names in Part B of the Register, where legislation is provided to prohibit disclosure of names.⁵¹

2.10.3 Observations

The Children's Act, 2005 and the Safeguarding Vulnerable Groups Act represent a strong step towards actualising the real protection of children. This is in line with obligations under Article 19 of the United Nations Convention on the Rights of the Child (UNCRC) regarding legislative, administrative, social and educational measures to protect the child.⁵² It is through enacting legislation such as that discussed, that important issues such as vetting and soft information can be addressed.

However, it should be noted that vetting legislation has nevertheless come under criticism. For many, such legislation is necessary for the prevention of child abuse, for others it is a violation of democratic rights; whether that is the right of a father to teach his son's football team, or the right of those within a community to engage with one another without being subject to vetting and monitoring. This new legislation can therefore be viewed in two ways: firstly as blurring the boundary between the public and the private sphere, where the rule of law is encroaching too far into day-to-day life, acting as a constraint; or secondly, where the rule of law is seen to be used for popular mobilisation of the public will, to ensure that their children's collective and individual rights to a safe and secure childhood are reinforced.

⁵¹ See s.127.

⁵² Article 19:

1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

2.11 RECOMMENDATIONS

New legislation on the vetting of those applying for positions which entail contact with children and other vulnerable groups is required as a matter of some urgency. In devising such legislation, the experience of jurisdictions such as the UK and South Africa, which already have specific legislation relating to this issue, should be drawn upon.

While it is important that the rights of those vetted are upheld, it is essential that unsuitable persons are not allowed to put children at risk. The use of hard information, that is information pertaining to criminal convictions, is widespread, but this needs to be tightened by a clear definition of what constitutes a relevant offence.

It is the use of soft information in the vetting procedure that poses problems. As highlighted in this report various constitutional considerations emerge in the debate surrounding soft information. As a result, it is recommended that in order for legislation permitting the use of soft information to be introduced into Ireland there is a need for a constitutional referendum. It is further recommended that the proposed legislation be drafted in advance of such a referendum and presented to the people so as to allow for a fully informed and transparent debate.

Any legislation drafted must be clear, concise, limited in application, provide for procedural safeguards and take account of the constitutional doctrine of proportionality. With that in mind the following suggestions are offered:

- Only consider information that has led to investigations into alleged abuses or crimes;*
- Consider the circumstances surrounding the offence;*
- Clearly stipulate the class of persons who will be subject to such disclosure;*
- Strictly limit the number of persons to whom such disclosure can be made on the basis of necessity;*
- Put in place appropriate safeguards for such information to be furnished to vetted persons and corrected if this is appropriate;*
- If used to decline employment, then provide the vetted person with the reasons for this;*

- *Ensure that the entire process is transparent and reasonable, attributing due weight to each charge considered;*
- *Provide a mechanism through which a person can appeal his/her entry onto a soft information register to an independent third party;*
- *Conduct periodic reviews of the status of those included on a soft information register.*

Access to soft information should only be allowed in circumstances of necessity - both the occasion of access and the person accessing it must possess the required necessity.

The GCVU should act as the central authority for the collection, processing and disclosure of such information. It is noted that the GCVU currently has information relating to criminal offences, however it is further recommended that all information relating to Garda and HSE investigations for relevant offences be made available to the Unit.

The implementation of the aforementioned safeguards would go some way to ensuring that legislation enacted in this area would interact in a harmonious manner with other provisions and rights in the Constitution and ECHR. It is important to remember that not only must the legislation protect children but also those subjected to it. Therefore it is imperative that any legislation enacted pursuant to a referendum on the issue of soft information be proportionate in its application having regard to the constitutional rights, e.g. equality, privacy, good name and to earn a livelihood, of the person subject to it. It is imperative that any legislation drafted in this area be on the basis of an informed debate having regard to all the surrounding issues as opposed to a piece of reactive legislation unlikely to withstand constitutional or convention scrutiny. In order for the ultimate objective of child protection to be achieved there is a pertinent need for comprehensive and intuitive drafting.

There is a need for international protocols for the sharing of information and vetting in general.

SECTION 3: CRIMINAL LAW

3.1 Introduction

Criminal law issues relating to children usually centre on sexual offences committed against children, but children may also perpetrate offences, including sexual offences. Here, the laws relating to the various types of offences against individual children, as opposed to children as a class in society, will first be considered. These are incest, child sexual abuse and corporal punishment.

3.2 Incest

The first crime to be considered is that of incest. Two pieces of legislation are relevant – the Punishment of Incest Act, 1908⁵³ and the Criminal Law (Incest Proceedings) Act, 1995.⁵⁴ The latter is a procedural act introduced in the wake of *The People (DPP) v WM*,⁵⁵ with the substantive law contained in the earlier act. Essentially, a man of any age who engages in sexual intercourse with his granddaughter, daughter, sister, or mother shall be guilty of an offence. Any female who consents to such an act is also punishable. Half-siblings are also included. Knowledge of the relationship is a critical part of the offence, and therefore if a man did not know that the female was related to him, he would not be guilty of an offence. The law in this regard is in need of a substantial amount of reform.

Firstly, the law should be drafted so as to include acts falling short of sexual intercourse. Abuse often falls short of full intercourse with it taking the form of forced oral intercourse, anal intercourse or masturbation. Although these are prosecutable under the rubric of sexual assault or aggravated sexual assault, the effect on the victim is likely to be significantly different from most sexual assault victims due to the abuse of the familial relationship. It is this which is the crucial element of the offence of incest, and it should be possible to prosecute such persons for the offence of incest. Therefore, a moral equivalence can be made between various types of familial abuse while allowing for a differentiation to be made at the sentencing stage.

⁵³ 1908, c.45.

⁵⁴ No. 12 of 1995.

⁵⁵ [1995] 1 IR 226.

This moral equivalence should also be extended to cover a wider range of people who can be prosecuted for the offence. Gender neutrality should be imposed on the offence. Although there may be a much smaller incidence of female familial abusers, the law must take account of such situations. The offence could also be extended to cover uncles and aunts. This type of relationship can be as important as that of a grandparent, and so should be included within those prosecutable for the offence. The same is to be said of step-parents. Adopted children should also be included within the protective umbrella of the offence.

Foster children or children in respect of whom a non-family member is in *loco parentis* are in a somewhat ambiguous position. They are undoubtedly deserving of equivalent protection, but there is not necessarily the same mental connection to the perpetrator of the abuse and so the nature of the abusive relationship is not necessarily equivalent to that of a classic incest case. It could however, be prosecuted under a separate abuse of authority provision, or under the existing sexual assault/aggravated sexual assault regime with the abuse of relationship seen as an aggravating factor to be considered at the sentencing stage. Another alternative would be to introduce a specific offence of child sexual abuse, as discussed below.

In relation to consenting females, their criminal responsibility is engaged at 17 years of age. If the age of consent generally is to be lowered to 16 years of age or a higher age of 18 introduced for relationships for persons in authority, this should be mirrored in incest legislation so as to avoid an anomaly in the law.

A final point to note is that proper investigative methods into incest are of critical importance in order to protect families from false conclusions. In *T and Others v Finland*⁵⁶ one of the applicants (the father) was falsely accused of incest in relation to one of his sons on the basis of conclusions drawn by the child's therapist, with the result that the child was taken into care. The applicant accused the therapist as well as public officials of having abused their positions by subjecting the child to inappropriate methods of investigation with the result that false conclusions were made. The father was later acquitted of incest. Although the case before the ECtHR

⁵⁶ 27744/95, judgment delivered 13 December 2005.

concerned the issue of delay in domestic proceedings, the case highlights the need for incest legislation to take into consideration the investigative methods relied upon so that false accusations are not made and that minors are not subjected to inappropriate assessment.

3.2.1 RECOMMENDATIONS

The current law only allows full intercourse to be charged as incest. However, as acts of abuse often fall short of full intercourse, the law should be drafted so as to include such acts and therefore reflect the aggravated impact on the victim arising from the corresponding abuse of the familial relationship. Such legislation would allow for moral equivalence to be made between various types of familial abuse, but allow for a differentiation to be made at the sentencing stage.

Secondly, the relationships to which incest applies should be broadened and include uncles/aunts and step-parents, and adopted children.

Thirdly, gender neutrality should be imposed on the offence. Although the incidence of incest perpetrated by women is small, the law should allow for these cases.

Fourthly, any change in the age of consent to relationships for persons in authority, should be mirrored in incest legislation so as to avoid an anomaly in the law.

Finally, although the primary purpose of legislation on incest must be to protect children from abuse, it also needs to take account of the investigative methods used in presenting a case. This is to avoid false accusations against adults and to ensure that minors are not subject to inappropriate assessment.

3.3 Introduction of a Specific Offence of Child Sexual Abuse

A further reform which may be desirable would be the introduction of a specific offence of child sexual abuse. This would allow compliance with Article 19(1) of the UNCRC⁵⁷ while at the same time allowing prosecutors a measure of flexibility,

⁵⁷ See n.52 above.

especially when drafting indictments. This reform has long been before the Legislature and Executive, having originally been proposed by the Law Reform Commission in 1990.⁵⁸ A significant amount of time has passed since this reform was initially raised but it remains to be acted upon. The definition of child sexual abuse offered by the Law Reform Commission reads as follows:

- “ i Intentional touching of the body of a child for the purpose of the sexual gratification of the child or the person;
- ii Intentional masturbation in the presence of the child;
- iii Intentional exposure of the sexual organs of a person or any other sexual act intentionally performed in the presence of a child for the purpose of sexual arousal or gratification of the older person or as an expression of aggression, threat or intimidation towards the child; and
- iv Sexual exploitation, which includes permitting, encouraging, or requiring a child to solicit for or to engage in prostitution or other sexual act as referred to above with the accused or any other person, persons, animal or thing or engaging in the recording (on video-tape, film, audio tape, or other temporary or permanent material), posing, modelling, or performing of any act involving the exhibition of a child’s body for the purpose of sexual gratification of an audience or for the purpose of any other sexual act (referred to in sub-paragraphs (i) and (ii) above).”⁵⁹

The introduction of a specific offence of child sexual abuse was also recommended by the Oireachtas Joint Committee on Child Protection, which reported in November 2006.⁶⁰

It is noted that the offence of ‘causing or encouraging sexual offence upon a child’ is present on our statute book.⁶¹ For the purposes of this section a sexual offence means unlawful sexual intercourse, buggery, prostitution or sexual assault. Although this offence goes some way toward addressing the concerns expressed herein, it is submitted that it is not enough. The introduction of the offence of child sexual abuse is preferred for a number of reasons. It contains a very flexible definition, covering almost every conceivable type of sexual interference with children. The distinction between predatory paedophilia and reckless sexual assault is allowed for by

⁵⁸ Law Reform Commission, *Report on Child Sex Abuse*, (LRC 32-1990).

⁵⁹ *Ibid.*, at p.8. This definition originates from the *Western Australia Task Force on Child Sexual Abuse Report 1987*.

⁶⁰ Houses of the Oireachtas Joint Committee on Child Protection, *Report on Child Protection*, November 2006.

⁶¹ Children Act, 2002, s.249. This section was enacted on 1 May 2002 pursuant to SI No.151 of 2002 Children Act 2001 (Commencement) Order 2002.

separating the criminal act from criminal intention. This is achieved by including the motive of the crime – that of sexual gratification – within the *mens rea*. Differential sentencing is currently the only way that this distinction can be made. This is a situation where a moral imperative, such as child protection, can justifiably inform the substantive criminal law without upsetting or infringing upon the rights of any person.

3.3.1 RECOMMENDATION

In line with the recommendations of both the Law Reform Commission and the Houses of the Oireachtas Joint Committee on Child Protection, a specific offence of Child Sexual Abuse should be introduced. This would have the benefit of allowing compliance with Article 19(1) of the UNCRC⁶² while at the same time allowing prosecutors a measure of flexibility, especially when drafting indictments. The definition of the offence should be flexible and wide ranging and distinguish between predatory paedophilia and reckless sexual assault.

3.4 Corporal Punishment of Children

In Ireland teachers who administer corporal punishment are now liable to be charged with assault as s.24 of the Non-Fatal Offences Against the Person Act, 1997,⁶³ removes their immunity from liability in respect of physical chastisement. This reform was not extended to parents or others acting *in loco parentis*, and so, *prima facie*, they can still use physical force in chastising their children. In 2005, following a collective complaint brought by the World Organisation Against Torture, the Council of Europe held that Ireland's common law "reasonable chastisement" defence was in violation of Article 17 of the Revised European Social Charter.

The question of whether corporal punishment of children constitutes assault or a violation of Article 3 of the ECHR (prohibition of torture, inhuman treatment, degradation or physical punishment) must also be considered in the context of crimes against children. In *Campbell and Cosans v UK*⁶⁴ it was held that although neither child had suffered any actual punishment the mere threat of same could be in conflict

⁶² See n.52 above.

⁶³ No. 26 of 1997.

⁶⁴ (1982) 4 EHRR 293.

with the article. The English statutory ban on corporal punishment was challenged in the case of *R (Williamson) v Secretary of State for Education and Employment*,⁶⁵ on the basis that it constituted a breach of the right to freedom of religion. The House of Lords dismissed the claim as the claimants were not exercising a right to manifest a religious belief under Article 9 of the ECHR or Article 2 to Protocol 1 of the ECHR as set in Schedule 1 to the Human Rights Act, 1998. In this case, the legitimate prohibition of corporal punishment within all schools was not held to affect the democratic right of the minority, but rather upheld the right of all children to be treated equally with respect and recognition.

The only case concerning punishment by a parent is *A v UK*⁶⁶. In this case, a step-father had been charged with assault occasioning actual bodily harm after severely beating his nine year-old stepson with a cane. He was acquitted by a jury who believed that the accused had only used the force necessary for lawful correction. The ECtHR, however, found that the applicant was not afforded adequate protection from such treatment and as such there was a violation of his rights under Article 3 of the ECHR.

Some guidance as to the test to be applied in any prosecution for assault in which chastisement is used as a defence is provided by s.43 of the Canadian Criminal Code:⁶⁷

“Every schoolteacher, parent, or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.”

A relevant and instructive case on s.43 of the Canadian Code is the case of *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*.⁶⁸ This was a challenge to the compatibility of the reasonable chastisement defence in Canadian criminal law with the Charter of Rights. The majority held that the section did not offend the Charter, but there was strong dissent from three of the nine judges. This focussed, in part, on the elastic interpretation of the provision in cases such as

⁶⁵ [2005] 2 All ER 1; [2005] 1 AC 246.

⁶⁶ (1999) 27 EHRR 611.

⁶⁷ R.S., 1985, C-46. This provision has been upheld as constitutional in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 S.C.R. 76.

⁶⁸ [2004] 1 SCR 76.

those just mentioned, which helped to render the section constitutionally vague. It was also considered that the section, by stating that contact which otherwise would be an assault was lawful because it was committed on a child, breached the non-discrimination rules of s.15 of the Charter. Article 19 of the UNCRC was cited on a number of occasions as demonstrating that international law obliges the State to remove exculpatory provisions allowing for reasonable chastisement.⁶⁹

The Irish Government has given a commitment to introduce legislation according to “developing social standards”. It is recommended that we should aim to prohibit corporal punishment within the family and in care settings. The model found in s.43 of the Canadian Criminal Code may be workable as an interim measure in the Irish context given it protects children from unreasonable force, while preserving the ostensible authority of persons having parental responsibility for children.

From a constitutional perspective, any legislation in this area would have to respect the principle of parental autonomy, as set out in Articles 41 and 42 of the Irish Constitution. It has already been noted that the Constitution provides a very high level of protection to the decision-making autonomy of parents. Any attempt to prohibit corporal punishment would likely fall foul of these Articles. It is arguable that Articles 41 and 42 could require a margin of reasonableness – that is they could protect parental punishment which was objectively unreasonable, but which was not so unreasonable as to fall outside the scope of Articles 41 and 42.⁷⁰ For this reason, very careful consideration should be given as to the appropriate point at which parental punishment will be capable of being found to be unjustifiable. The Constitution may require a different standard from that which would be objectively reasonable.

Once more the Canadian model is instructive in this regard. The concept of reasonableness within s.43 has been interpreted by the Canadian Courts. When assessing the manner of chastisement adopted by a parent the Court examines the

⁶⁹ It should also be noted however, that the majority judgment delivered by McLachlin CJ was emphatic that the punishment be for a purely corrective purpose, and in light of this could not be used against children under 2 years of age as evidence had shown that they were incapable of understanding why they had been hit.

⁷⁰ See *North Western Health Board v HW* [2001] 3 IR 622.

totality of events and not specific acts in isolation. Furthermore, contemporary standards of tolerance and discipline must be considered when deciding what is reasonable.⁷¹ The Court is cognisant of the need in some cases for some form of corporal punishment, but will only tolerate that which is necessary, anything in excess of that will not fall under the scope of s.43.⁷²

The Law Reform Commission has rejected the abolition of corporal punishment in the home, although it recommended such a change in relation to educational institutions.⁷³ It should be noted that the Commission was clear in its view that physical abuse of children was intolerable but that the pragmatic issues surrounding the reform were crucial in ensuring its effectiveness. It was stated that sudden change in the law without further education would be inimical to good reform, and should only be done “at the right time”.⁷⁴

In light of the above, it may be useful for a full survey to be conducted into corporal punishment in Ireland, similar to that undertaken by the ESRI and National Crime Council on domestic violence in 2005. This would be invaluable in determining societal attitudes to the issue, as well as assessing the actual level and nature of such punishment.

3.4.1 RECOMMENDATIONS

At present, parents and those acting in loco parentis are virtually immune from prosecution for using corporal punishment to chastise their children. However, this situation may render the State liable to a claim under Article 3 of the ECHR. In order to address this situation, while at the same time providing for a viable defence to any such action, a provision similar to that of s.43 of the Canadian Criminal Code which allows for the principle of proportionality, should be enacted.

It may be useful for a full survey to be conducted into corporal punishment in Ireland, similar to that undertaken by the ESRI and National Crime Council on domestic

⁷¹ *R v D (RS)* (1995) 102 CCC (3d). 319.

⁷² *R v M (RW)* (1995) 103 CCC (3d). 375.

⁷³ Law Reform Commission, *Report on Non-Fatal Offences against the Person*, (LRC 45-1994) p. 284 *et. seq.*

violence in 2005. This would be invaluable in determining societal attitudes to the issue, as well as assessing the actual level and nature of such punishment.

3.5 Sexual Offence Convictions for Minors

While children must be protected from offences by adults, children may also be the perpetrators of sexual offences. In particular, there is a need for clear legislation in relation to children who commit sexual crimes against other minors. Two cases illustrate where the lack of clarity on this issue can lead. In *R v G (Home Secretary intervening)*⁷⁵ a boy, the defendant, aged 15, was charged with the rape of a 12-year-old girl at his home. The complainant told friends that she had not consented to having sexual intercourse, while the defendant offered to plead guilty on the basis that whilst the complainant had agreed to sexual intercourse, he had believed that she was 15 years old. However, as the girl was under 13, the defence of reasonable mistake as to age was not available. The defendant pleaded guilty and was sentenced to a 12-month detention and training order which he appealed, contending that s.5 of the Sexual Offences Act, 2003 was incompatible with the presumption of innocence guaranteed by Article 6(2) of the ECHR. The defendant also argued that the effect of his prosecution constituted a disproportionate interference with his right to respect for his private life, contrary to Article 8 of the ECHR. The appeal was allowed against his sentence and the sentence replaced with a conditional discharge of 12 months; provided the defendant committed no offence during that period, he would not thereafter be deemed to have had a conviction.

However, in the Australian case of *R v KNL*⁷⁶ a Crown Court Appeal was brought against a nineteen year old male by the Director of Public Prosecutions on the basis of inadequacy of sentence. The respondent had pleaded guilty in the District Court to one count of sexual intercourse with a child between the age of 10 and 16 years, pursuant to s.66C(1) of the Crimes Act, 1900, (the child had been 12 years old). The respondent claimed that he had believed the girl to be 16 years old. He claimed they had consensual sexual intercourse. The claimant stated she had asked him to “pull away”.⁷⁷ The offence carried a maximum penalty of imprisonment for eight years.

⁷⁵ [2006] EWCA Crim 821.

⁷⁶ Unreported, Supreme Court of New South Wales – Court of Criminal Appeal, 29 July 2005, (2005/709, 2005 NSWCCA 260).

⁷⁷ *Ibid.*, para. 9.

However on appeal he was re-sentenced, with a bond of good behaviour for 18 months being imposed on him, setting aside the original sentence. The Crown Appeal by the Director of Public Prosecutions was based on a failure of the deciding judge to reflect the objective gravity of the offence – sexual intercourse with a twelve year old child. The appeal was allowed, Judge Latham noting that, “in particular, his Honour failed to have due regard to the complainant’s age in assessing the objective gravity of the offence”.⁷⁸

3.5.1 RECOMMENDATION

Specific legislation should be introduced in relation to sexual offences committed by minors. Any such legislation should include a provision for treatment orders. Research conducted in Portugal has shown that where treatment orders are available they are very effective.

⁷⁸ *Ibid.*, para. 51.

SECTION 4: CHILD TRAFFICKING, PORNOGRAPHY, SEPARATED CHILDREN AND GROOMING

“Trafficking in persons is a modern-day form of slavery, a new type of global slave trade.”⁷⁹

4.1 Introduction

With children constituting a vast proportion of the victims of trafficking it is vital that Ireland adopts measures so as to provide the appropriate care, support and protection for such children. Children are also susceptible to the offence of grooming and although this topic received considerable public attention in the past year it is thought necessary to address it in this report and highlight some of the outstanding issues in need of attention.

4.2 Child Trafficking, Pornography and Separated Children

4.2.1 Child Trafficking and Pornography

The Child Trafficking and Pornography Act, 1998⁸⁰ and the Child Trafficking and Pornography (Amendment) Act, 2004⁸¹ address the serious issues of child trafficking and pornography. In summary, the 1998 and 2004 Acts protect children in three ways. Firstly, they protect against the trafficking of children for the purpose of their sexual exploitation.⁸² Secondly, they protect children from being used and thereby sexually abused, in the making of child pornography. Finally, they criminalise the possession of child pornography. However, while children are protected under this legislation by the prohibition of activity and punishment of offenders, the 1998 Act and the 2004 Act do not provide for the creation of a protective environment for victims of child trafficking and pornography.

⁷⁹ Condoleezza Rice, *Trafficking in Persons Report 2007*, (US Department of State, June 2007), p. 2.

⁸⁰ No. 22 of 1998.

⁸¹ No. 17 of 2004.

⁸² It is noted that due to the clandestine nature of child trafficking it is inherently difficult to calculate the number of children being trafficked into Ireland every year. See the Criminal Law (Human Trafficking) Bill 2007, Explanatory Memorandum, p.6.

Child trafficking is not merely a concept of international concern, it is becoming a critical issue of growing importance in Ireland. In order to ensure the demise of this trading in children, legislation needs to be enacted based on the central tenet of the protection of the child. In addition to robust domestic legislation there needs to be collaboration between different countries with “regional agreements on child trafficking prevention and victim protection.”⁸³ This requirement, endorsed by the European Commission, specifies that on a local level, “[b]est practices on the prevention of child trafficking should be developed, implemented and disseminated”, but importantly that “[e]xisting international instruments dealing with children should be enforced”.⁸⁴ In this regard, the Criminal Law (Human Trafficking) Bill 2007 is to be welcomed. The origins of this Bill can be traced back to the proposed Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006. It would appear that the Oireachtas has decided to exclude the originally intended provisions concerning sexual offences in order to advance the drafting and publication of the proposals concerning trafficking.

At present this Bill has completed the Committee Stage in Dáil Éireann. This piece of legislation is intended to combat trafficking in human beings, especially women and children and it incorporates several international instruments in striving to achieve this objective, in particular it seeks to give effect, in part, to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Council of Europe Convention on Action against Trafficking in Human Beings concluded at Warsaw on 16 May 2005. The 2007 Bill is a commendable piece of legislation in that it is both robust and expansive and demonstrates an appreciation of the criminal acts it seeks to prevent and/or subsequently punish. Section 3 of the Bill addresses the offence of trafficking children for the purposes of exploitation, not including sexual exploitation, and states that any person involved in such activity or in attempting such an activity shall be guilty of an offence and liable upon conviction on indictment to a fine and/or imprisonment for life. Furthermore, s.3(2) criminalises the act of selling, offering or exposing a child for sale or inviting the making of an offer to purchase a child.

⁸³ UNICEF, *Combating Child Trafficking* (Inter-Parliamentary Union, 2005), at p.63.

⁸⁴ European Commission, *Report of the Experts Group on Trafficking in Human Beings* (Directorate-General Justice, Freedom and Security, Brussels, 22 December 2004), at p.13.

Section 4 of the Criminal Law (Human Trafficking) Bill 2007 contends with the specific offence of the trafficking and detention of children for the purposes of sexual exploitation. The very fact that this offence is set out in a separate provision independent of s.3 of the Bill illustrates an appreciation by the legislature of the serious nature of the offence. Section 4 creates a number of offences demonstrating a proactive attitude on the part of the legislature to both prevent and prohibit all manifestations of the sexual exploitation of children. It criminalises the trafficking of children for purposes of sexual exploitation; the act of sexual exploitation of a child itself; the restriction of a child's liberty for the purpose of sexual exploitation; the assistance in the commission of any of the above offences and any attempt to commit such an offence. A person convicted on indictment for any of these offences shall be liable to a fine and/or imprisonment for life. The scope and depth of these offences are intended to punish all those involved in the sexual exploitation of children. In the vast majority of cases there is more than one person involved in the commission of such an offence and very often there are organised groups of people each partaking in a different stage with the ultimate objective of sexually exploiting a child. This Bill seeks to capture all these stages in the process and punish any and all people involved.

The Criminal Law (Human Trafficking) Bill 2007 is seen as a welcome progression in the protection of children within the Irish legal system. It is suggested, however, that additional provisions ought to be inserted providing for a response to the needs of a child who has been subjected to trafficking for the purposes of exploitation, both sexual and otherwise. The 'Screening Regulatory Impact Analysis' attached to the Bill states that "[t]he Bill is solely concerned with the criminal law response" and not the provision of services for victims,⁸⁵ instead such provisions are to be included in the Immigration, Residence and Protection Bill 2007. The Immigration, Residence and Protection Bill 2007 addresses these issues but does so in a general manner without due deference to the internationally recognised vulnerable position of children who are victims of trafficking and exploitation. Section 58(4)(a) of the Immigration, Residence and Protection Bill 2007 states that a foreign national under the age of 18 that comes to the attention of the relevant authorities in Ireland shall benefit from the provisions of the Child Care Act 1991 and other enactments concerning the care and

⁸⁵ Criminal Law (Human Trafficking) Bill 2007, (as initiated) Explanatory Memorandum, p.5.

welfare of persons under 18 years of age. It is submitted that this does not go far enough to alleviate the serious concerns surrounding the child victims of trafficking and exploitation. By virtue of their vulnerable position in society children are in need of greater protection and support. Whilst both Bills seek to provide substantial protection for such children they fail to consider the aftermath of such an event on the child. As both these initiatives are at an early stage in their development it is recommended that consideration be given to the establishment of victim support in this regard. The protection of children from the effects of trafficking and exploitation ought to be given specific express recognition owing to the unique sensitivities surrounding the area, and not be addressed in a general manner in conjunction with adult victims.

The trafficking of people is an international industry generating approximately \$8 billion per year,⁸⁶ with over half of the victims being children.⁸⁷ The point has been made that Ireland is particularly susceptible to child trafficking, not merely as a destination for the victims of trafficking but also as a transit point due to our island status.⁸⁸ In addition, a further and arguably greater risk arises when one considers the common travel area between Ireland and the United Kingdom which may entice those involved in the trafficking of people to use Ireland as a transit point to the United Kingdom. These children, who are in effect modern day slaves, must be considered to be amongst the most vulnerable within our care. With this in mind it is imperative that Ireland enacts robust domestic legislation so as to prevent the growth of child trafficking and it is therefore recommended that the Criminal Law (Human Trafficking) Bill 2007 be enacted without delay. The duty of the State extends beyond merely attempting to prevent child trafficking to providing protection for the child victims of trafficking. There is also a need for the systematic collection and reporting of data on trafficking cases so as to better understand the needs and means of caring for victims. Child protection workers and others who come into contact with children need to receive specific training so as enable them to best interact with victims of child trafficking. This is in accordance with UNICEF's *Guidelines for the Protection of the Rights of Child Victims of Trafficking* which states that any individuals working

⁸⁶ See www.irishrefugeecouncil.ie/press06/trafficking.html.

⁸⁷ United States Department of State, *Trafficking in Persons Report* (June, 2004), at p.8.

⁸⁸ *Ibid.*, at p.218.

with children that have been victims of trafficking should be appropriately trained professionals who are conscious of the issues and needs of such victims.⁸⁹

4.2.2 *Separated Children*

Separated children have been identified as highly vulnerable to trafficking. The Separated Children in Europe Programme (SCEP) was established in 1997 due to the rising number of separated children arriving in Western Europe.⁹⁰ SCEP defines separated children as:

“under 18 years of age who are outside their country of origin and separated from both parents or their previous/legal customary primary caregiver...they may be victims of trafficking for sexual or other exploitation, or they may have travelled to Europe to escape conditions of serious deprivation.”⁹¹

The European Children’s Network (EURONET) maintains that “separated children should never be refused entry or returned at the point of entry” and that countries should legislate accordingly, in line with the 1951 Refugee Convention, 1997 United Nations Refugee Agency (UNHCR) guidelines and the SCEP Statement of Good Practice.⁹²

Many of these children may be escaping traumatic events including civil war, religious persecution and physical or sexual abuse. Such children evidently are in need of care. However, separated children are often placed in inadequate and inappropriate, largely unsupervised accommodation, and are processed through an immigration system that was designed for adults, and left in legal limbo for protracted periods of time. They are treated as immigrants first, and children second – a position that would appear contrary not only to international convention but also to humanitarian intuition. Between 2003 and 2006, 599 separated children seeking asylum were presented to, or presented themselves to the Office of Refugee Applications Commission (ORAC), with over 4,500 estimated to have arrived in

⁸⁹ UNICEF, *Guidelines on the Protection of Child Victims of Trafficking* (September, 2006), at p.30.

⁹⁰ Mooten, *Making Separated Children Visible* (Irish Refugee Council, Dublin, 2006), at p.8.

⁹¹ Separated Children in Europe Programme, *Statement of Good Practice* (UNCHR, Third Edition, 2004), at p.2.

⁹² Ruxton, ‘What About Us?’ *Children’s Rights in the European Union Next Steps* (EURONET, 2005), at p.77.

Ireland over the past decade.⁹³ While some of these children are reunited with family members in Ireland, many others remain in the child care system under the care of the HSE for considerable periods of time.

So as to fulfil the protection rights of vulnerable children and victims of trafficking there is a need to set up a designated authority in order to facilitate a strong and co-ordinated response to any protection-rights violations, as well incorporating a national plan of action to combat child trafficking. At present the Health Services Executive, the Office of the Minister for Children and the Ombudsman for Children all contribute to the protection and regulation of child welfare and it is recommended that one of these authorities be assigned the task of monitoring and seeking to prevent child trafficking. Due to the larger scale of trafficking in the United Kingdom an operation has been put in place in Heathrow airport, piloted as Operation Paladin, wherein a multi-agency team consisting of social services, the police, immigration officials and the National Society for the Prevention of Cruelty to Children all work in tandem to combat the trafficking of persons. At present it is thought that the scale of child trafficking in Ireland does not yet justify such an operation. However, it is stressed that this does not condone a lack of action in this field. It is recommended that the designated authority charged with the monitoring and prevention of child trafficking in Ireland liaise with other jurisdictions and maintain a vigilant watch on any developments in this jurisdiction having particular regard to our apparent status as a potential point of transit.⁹⁴

The Immigration, Residence and Protection Bill 2007⁹⁵ seeks to amend the law concerning the entry into and removal from the State of foreign nationals. In the context of separated children it is recommended that the Bill, if it is to be restored before the Oireachtas, be amended in a number of areas. At present s.8(5) of the Refugee Act, 1996⁹⁶ makes narrow provision for separated children described therein as “children not in the custody of any person”. It is recommended that the term ‘separated children’ be introduced into Irish law by way of the 2007 Bill. The above

⁹³ Mooten, *Making Separated Children Visible* (Irish Refugee Council, Dublin, 2006), at p.1.

⁹⁴ United States Department of State, *Trafficking in Persons Report* (June, 2004), p.218.

⁹⁵ No. 37 of 2007, presented before the Seanad on 25 April 2007. The Bill lapsed following the rise of the 22nd Seanad. The 23rd Seanad convened on 26 September 2007.

⁹⁶ No. 17 of 1996.

cited definition of the SCEP ought to be adopted in this regard.⁹⁷ In furtherance of the above mentioned reform in relation to the need to provide more services and facilities to separated children and a general need to understand their plight it is suggested that a register of separated children be established and identification documentation issued. The development of a register is already envisaged under s.39 of the Bill, however, it is recommended that it be extended so as to include separated children. Moreover, and in accordance with the necessity to better understand the needs of separated children and to ensure they receive appropriate care and protection, it is recommended that age assessment measures be implemented. This would be in accordance with international best practice. At present an EU Council Directive⁹⁸ exists that can be used as a template for minimum standards in this area. Furthermore the Irish Refugee Council cite the ‘UK Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers’ as another model worthy of examination. The issue of the age of apparent separated children has been a cause for concern with the Government.⁹⁹ It is submitted that the above recommendation would go some way toward alleviating such concerns and tackling the perceived problem.

The 2007 Bill accords a role to the HSE in the protection and care of separated children. Section 23(1) is a welcome provision in that it states that the HSE should be informed “as soon as practicable” of the arrival of a person under 18 years of age. It is imperative that the HSE coordinate with other domestic and international bodies to ensure that the appropriate level of care and protection is provided for separated children.

It has been previously recommended that the status of temporary permission to remain in the State be afforded to separated children so as to provide them with legal status while their interests are being assessed.¹⁰⁰ This report reiterates this recommendation.

⁹⁷ See p.41 above.

⁹⁸ “Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status” O.J. L326/13, 13 December 2005. In particular Article 17(5).

⁹⁹ 2004 *Progress Report on the National Children’s Strategy*, p.84.

¹⁰⁰ Law Society of Ireland (Law Reform Committee), *Rights Based Child Law: The Case for Reform*, March 2006.

4.2.3 RECOMMENDATIONS

The Criminal Law (Human Trafficking) Bill 2007 is a robust and substantial piece of legislation in the quest to prevent the trafficking and exploitation of children. This Bill is intended to solely deal with the response of the Criminal Law to these offences and not victim support. Instead the Immigration, Residence and Protection Bill 2007 contends with this issue. It is recommended, however, that the area of victim support be revised so as to reflect the specific needs of child victims of these offences. Owing to the unique status of children, with particular regard to their vulnerability, it is not desirable to seek to provide protection and support to them in a similar vein and manner as adult victims. The offences of child trafficking and exploitation involve complex and ever changing elements, furthermore they are concepts of an international dimension. Therefore, it is recommended that particular regard be had to international developments in this field and while it is recognised that the Criminal Law (Human Trafficking) Bill 2007 seeks to enact some of these international provisions consideration should be given to the incorporation of additional international instruments, for example the United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.¹⁰¹

In addition the Immigration, Residence and Protection Bill 2007 should be revised with particular emphasis placed on the need to introduce the concept of separated children into Irish law and to act in accordance with international best practice. Following such revision as detailed in this report the Bill should be brought before the Oireachtas.

It is recommended that a designated authority be appointed charged with the duty of monitoring and seeking to prevent child trafficking in Ireland. This authority would operate under the auspices of one of the national bodies already empowered with the task of protecting and regulating child welfare. This authority should liaise with other countries in seeking to combat child trafficking in as effective a manner as possible.

¹⁰¹ Signed on 7 September 2000.

4.3 Grooming

The Criminal Law (Sexual Offences)(Amendment) Act 2007¹⁰² was enacted following emergency legislation¹⁰³ introduced in response to the Supreme Court ruling in the *CC* case.¹⁰⁴ This Act imposes stricter penalties for the offences of soliciting and importuning children for sexual purposes, but it does not introduce the specific offence of ‘grooming’. This consists of the initiation and encouragement of a relationship by an adult with a child for the purposes of sexual exploitation by that adult or others. Instead s.6 of the 2007 Amendment Act deals with the offence of intentionally travelling to meet with a child, following at least two previous contacts, with the objective of sexually exploiting that child. This section regulates the commission of such an offence in cases where the travel occurs within or outside the State. The issue of jurisdiction in this regard is somewhat ambiguous as it is not clear from the legislation whether both the communication and contact have to occur within the same jurisdiction. This is a particularly acute problem having regard to the border with Northern Ireland, and also in an age where internet communications are prevalent.

It is salutary to note that the offence created under s.6 of the 2007 Amendment Act is that which arises from grooming, as opposed to the grooming itself. Grooming is the process which precedes and leads to the offence. This process can be timely and may not result in the sexual exploitation of the child. In such circumstances it might be difficult to prove *mens rea* until the criminal act has in fact occurred i.e. the child has been sexually exploited,¹⁰⁵ a problem compounded by the fact that there is no requirement that the previous communications be sexual in nature.

A notable problem with the Irish legislation in this respect is that it only refers to the adult travelling to or arranging to meet with the child and fails to contemplate the situation whereby the adult might arrange for the child to travel to meet him/her, or where the adult would take advantage of the child’s travel arrangements with a third party e.g. school tour. A similar problem exists under English legislation,¹⁰⁶ whereas

¹⁰² No. 6 of 2007.

¹⁰³ No. 15 of 2006, Criminal Law (Sexual Offences) Act, 2006.

¹⁰⁴ *CC v Ireland* [2006] 2 I.L.R.M. 161.

¹⁰⁵ Gillespie, “*The Future of Child Protection and the Criminal Law*” (2007) 17(3) ICLJ 2.

¹⁰⁶ Sexual Offences Act, 2003 (c.42).

Scottish legislation has specifically addressed this issue by providing for the situation in which the child travels to the adult following previous communications.¹⁰⁷ It has yet to be seen how s.6 of the 2007 Amendment Act will be interpreted by the Irish courts. With this in mind an analysis of similar laws in other jurisdictions is thought beneficial.

Interestingly a number of jurisdictions provide for the defence of reasonable mistake as to the age of the child. The burden of proof in this regard varies. Some jurisdictions require the prosecution to prove that the defendant did reasonably believe that the child was below the age of consent,¹⁰⁸ while others require the defendant to prove that he/she did not reasonably know that the child was below the age of consent.¹⁰⁹

There is some scope for uncertainty over the status in Ireland of such a defence to the offence enacted under s. 6 of the 2007 Amendment Act. As illustrated above the 2007 Amendment Act does not specifically criminalise the offence of grooming, but rather sexual exploitation arising from grooming. The Act does not expressly provide for a defence of reasonable mistake. In the aftermath of the decision in *CC v Ireland*, this could be seen as an unfortunate omission.

The better view, however, is probably that a defence of reasonable mistake will be implied into the Act. The Supreme Court's first decision in the *CC* litigation recognised the existence of an interpretative principle that, where a statute is silent on the issue of *mens rea*, it will be presumed that *mens rea* must be established if a prosecution is to be sustained. The Court relied on the statement of Walsh J. in *DPP v Murray* [1977] IR 360 to the effect that:

“It is well established that, unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, a court cannot find a person guilty of an offence against the criminal law unless he has a guilty mind.”

¹⁰⁷ Protection of Children and Prevention of Sexual Offences (Scotland) Act, 2005.

¹⁰⁸ UK Sexual Offences Act, 2003, s.15(1)(d).

¹⁰⁹ Canada – Canadian Criminal Code, s.172.1(4); New Zealand – Crimes Act 1961, s.131B(2); Australia – The Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No.2) Act, 2004, s.474.29(1).

It was only because of the specific circumstances in which s.1(1) of the Criminal Law (Amendment) Act 1935 was enacted that the majority found that the presumption had been rebutted in that case. No such considerations seem present in respect of the 2007 Act. The Court in *CC* also rejected the suggestion that the presumption is generally rebutted in cases concerning sexual offences against young children. It would therefore seem open to a court to hold that the presumption of *mens rea* does apply to the offences created in the 2007 Act.

The application of the double-construction rule, following the finding in the second *CC* decision that an offence of strict liability contravened the Constitution, would also point towards this conclusion.

For the avoidance of doubt, it would be preferable if the Act was amended to specifically acknowledge the existence of this defence. On balance, however, there are grounds for optimism that this section could survive a constitutional challenge on *CC* grounds.

The offence promulgated under s.6 is that of sexual exploitation of a child following grooming. Therefore as the *actus reus* is only complete upon travelling to or meeting the child any applicable defence could only be activated at this stage as opposed to the grooming stage. If the above analysis is correct, the defence of reasonable mistake may be available depending on the particular act of sexual exploitation which constituted the purpose of the travel or meeting.

As noted above, Irish legislation does not specifically criminalise the offence of grooming, but rather sexual exploitation arising from grooming. Other jurisdictions have taken the additional step of actually legislating for the offence of grooming, albeit under different synonyms.¹¹⁰ Federal Australian law provides for the offence of transmitting communications to a child which includes indecent material communicated by the sender with the intention of making it easier to procure the child to engage in or submit to sexual activity with the sender or third party.¹¹¹ Of note, it

¹¹⁰ Canada provides for the offence of “luring a child”, see Canadian Criminal Code, s. 172.1.

¹¹¹ The Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No.2) Act, 2004, s.474.27(1) and (2).

remains an offence even if it was impossible for the sexual activity intended to actually take place.¹¹²

4.3.1 RECOMMENDATIONS

The Criminal Law (Sexual Offences) (Amendment) Act 2007 does not actually criminalise the act of grooming i.e. the initiation and encouragement of a relationship by an adult with a child for the purposes of sexual exploitation by that adult or others. Instead s.6 of the Act creates the offence of travelling to or meeting with a child with the intention of sexually exploiting that child following at least two previous contacts with the child. It is thought that prosecutions for the offence will be difficult due to issues surrounding proof of mens rea. Furthermore, the nature of the offence is ex post facto due to the fact that in all likelihood the sexual exploitation of the child would need to have been committed before a person could be prosecuted. It is recommended that a specific offence of grooming be enacted. This would go some way toward alleviating the above cited problems in relation to prosecutions as it would allow the DPP to indict a suspect on alternative counts. Furthermore, a specific offence of grooming would act as a means of punishing those who meet or contact a child for the purpose of future sexual exploitation without actually committing the act of sexual exploitation as defined in the 2007 Amendment Act. A successful conviction for the offence of grooming would, it is submitted, act as a deterrent to committing the more serious offence of sexual exploitation under s.6.

Another issue which ought to be addressed relates to the manner in which, at present, s.6 only accounts for circumstances where the adult travels to the child. It fails to contend with the very real concern of the adult arranging for the child to travel to him/her, or the adult taking advantage of the travel plans of the child with a third party e.g. school tour. This would apply equally if a specific offence of grooming was introduced.

In addition s.6 does not appear to provide for the defence of reasonable mistake. This may not be a matter of immediate urgency. It would be preferable, however, if this

¹¹² *Ibid.*, s. 474.28(8).

was expressly provided for in the Act. This would be a prudent amendment as it would reduce the likelihood of a future constitutional challenge.

SECTION 5: THE INTERACTION OF CHILDREN WITH THE LEGAL SYSTEM

5.1 Introduction

The Children's Court is the forum within which children are tried of both summary and indictable offences and within which the District Court exercises its jurisdiction under the Child Care Act, 1991.¹¹³ Essentially, the Children's Court is a facet of the District Court. Its formulation and operation shows a very clear policy of separating children from other parts of the court process. Notwithstanding this however, the area of evidence and practice and procedure has room for improvement where child protection is concerned. Issues of child representation are important in this regard, as are issues surrounding the actual mode of receipt of evidence in practice. The recent introduction of the Family Welfare Conferences in the Children Act 2001 is to be welcomed and has enormous potential.

5.2 Family Welfare Conferences

When ordered to do so by the Children's Court, or where it appears that orders under Part IVA of the Child Care Act, 1991 may have to be made in respect of a child, the HSE must convene a family welfare conference. Provision for these conferences are included in Parts 2, 4 and 8 of the Children Act, 2001.¹¹⁴ The reasoning behind this and the practice surrounding it is that it essentially allows the child's family to play an important role in the care and criminal justice system. The conference cannot have any direct impact upon the court's decision, but by setting out a plan for the future care of the child, the family and hence the community at large are engaged with the purposes of the care and criminal justice system and carrying out its functions to a limited extent.

One measure clearly missing from the legislation is the guarantee that the conference be subject to the rules of fair procedures and natural and constitutional justice. This may be implicit as the conference is a creation of statute and as such is automatically subject to such rules, but this should be set out clearly. It would also give some

¹¹³ No. 17 of 1991.

¹¹⁴ No. 24 of 2001. These provisions were implemented in their entirety on 17 July 2007. Therefore it remains to be seen what will be the full scope and effect of these conferences.

element of guidance in formulating best practice for the conduct of conferences and the formulation of procedures at individual conferences. This opens up the question of whether a conference, or conference co-ordinator, is amenable to suit. There is no provision for oversight of conferences in the Children Act, 2001 and this has also been an issue in New Zealand where the conference model originated. There, it has been reported that children have been intimidated, and there is no guarantee that the conference will operate along the intended lines.¹¹⁵

This further impacts on another obligation, that being Article 12 of the UNCRC,¹¹⁶ which seeks to ensure that the child is properly heard. This should be the primary focus of procedures adopted under the conference system. In the light of this it is recommended that the needs and wishes of a child be expressed through a lay advocate in family welfare conferences. The advocate would have a key role in preparing the child for the family welfare conference. It is noted that the legislation currently provides for the attendance of the child in question and/or his guardian *ad litem*, however it is thought advantageous to consider the role of a lay advocate on behalf of the child in this regard. Owing to the inherently vulnerable nature of a child, and in keeping with statutory obligations pertaining to the welfare of a child being the first and paramount consideration and giving due regard to Article 12 of the UNCRC, it is thought prudent to specifically provide for the role of a lay advocate in the primary legislation. It is envisaged that such an advocate would have standing throughout the conference process and would be in a position to contend with any issues or difficulties which may be seen as having a possible adverse effect on the child. A central element to the role of the advocate would be to ensure the views and opinions of the child are given due weight at the family welfare conference and during “family private time” which is the defining feature of the family welfare

¹¹⁵ Mason (Chairperson), *Inquiry under s. 47 of the Health and Disability Services Act 1993 in respect of certain mental health services: report of the Ministerial Inquiry to the Minister for Health Hon. Jenny Shipley* (Wellington, Ministry of Health, May 1996).

¹¹⁶ Article 12:

1. 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, 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.

conference. Furthermore the advocate would have a role in ensuring the decisions and recommendations of the family welfare conference are carried out in the best interests of the child. To this end the advocate would be an active participant in the family welfare conference review.

The intimidation of children in respect of whom conferences are convened is counter-productive. Many of the children concerned have behavioural difficulties and so an atmosphere where the child feels that everyone is against him/her due to the format of the conference is contrary to the child's best interests. It is noted that this could be alleviated through the adoption of flexible procedures in relation to the administering of such a conference. It is recommended that practice guidelines be established in this regard wherein all the relevant stakeholders contribute. It is thought this would be a positive development alleviating any negative effect which the setting or conduct of a family welfare conference may have on a child.

Section 7 of the Children Act 2001 refers to the role of the coordinator of a family welfare conference. Simply put the coordinator is to act as a chairperson to the conference. It is clear that the role of the coordinator is envisaged to be of a procedural nature. This is further evidenced in the provisions of the Children (Family Welfare Conference) Regulations 2004.¹¹⁷ It is thought that the role of the coordinator cannot extend beyond this and adopt a substantive character as determinations relating to the welfare of a child are matters peculiarly within the expertise of the judiciary and part of the inherent jurisdiction of the courts. Nonetheless, the coordinator is charged with the duty of regarding the welfare of the child as the first and paramount consideration and to promote the health, safety, development and welfare of the child in drawing up recommendations in respect of the said child.¹¹⁸ It would therefore appear that the extent to which a coordinator may seek to impose him/herself upon the substantive aspects of a child's welfare is strictly limited to the rather nebulous realm of recommendations. The end product of a family welfare conference are the recommendations of the coordinator. The entire conference system is premised on the basis that all participants therein consent to abide by the recommendations of the coordinator. If a party fails to agree to the recommendations

¹¹⁷ SI No. 549 of 2004.

¹¹⁸ Children (Family Welfare Conference) Regulations 2004, s.4.

and the coordinator regards this disagreement as being unreasonable, the coordinator may dispense with the need for that person's agreement.¹¹⁹ In circumstances where unanimous agreement cannot be reached the matter shall be referred to the HSE for determination.¹²⁰ However, the legislation in its present form fails to provide for the situation whereby a party to a family welfare conference agrees with the recommendations of the coordinator but subsequently breaches the said recommendations. There is no provision for sanction where a recommendation of the family welfare conference has been breached. It is recommended that the introduction of a family welfare conference review would be beneficial in this regard and the legislation ought to be amended accordingly. It is envisaged that this review would act as a means of monitoring compliance with the recommendations of the coordinator. It would hold all participants to the family welfare conference, including the lay advocate as recommended in this report, accountable and sanction those who have failed to abide by the recommendations. The observations of the family welfare conference review could be made known to a court which in turn has jurisdiction to make necessary orders pertaining to the best interests of the child in the light of the outcome of the review. Any amending legislation in this regard ought to clearly set out the purpose, role and function of the family welfare conference review. At present the HSE recommends and provides for the conducting of such a review, nonetheless this review mechanism ought to be made a statutory requirement as it is clearly advantageous and ultimately in the best interests of the child concerned.

The Children Act 2001¹²¹ and the Children (Family Welfare Conference) Regulations 2004¹²² both provide for the attendance of various parties to a family welfare conference. Included amongst these are relatives and persons who would make a positive contribution to the conference. Despite this basis, anecdotal evidence suggests that extended family members are not attending these conferences. The influence and positive impact of particular relatives on a child's life, for example grandparents, is not to be dismissed lightly. It is essential for the development of a child to provide a broad support network within which the child can benefit from the care and attention of others over and above his/her parents. It is therefore

¹¹⁹ Children Act 2001, s.8(2).

¹²⁰ Children Act 2001, s.8(3); Children (Family Welfare Conference) Regulations 2004, s.7(5).

¹²¹ Section 9.

¹²² Section 6.

recommended that participation amongst extended family members in family welfare conferences, where deemed beneficial to the child, be promoted. A further problem arises however in relation to persons being unwilling to attend a family welfare conference in circumstances where their attendance would be beneficial to the child. A number of instances have arisen in this regard where parents either refuse to attend the family welfare conference, or will not provide the names and addresses of extended family members on foot of a request to do so, thereby undermining the role and function of the conference. Such an occurrence would be contrary to the best interests of the child. It is recommended that the legislation be amended so as to provide for a mechanism whereby the HSE, of its own initiative or on foot of a request from the coordinator, can compel the attendance of such persons and/or disclosure of other suitable participants, or in default, apply to the court for an order to that effect.

5.2.1 RECOMMENDATIONS

While family welfare conferences have advantages, a number of issues need to be further addressed. Firstly, legislation is required to guarantee that the conference be subject to the rules of fair procedures and natural and constitutional justice. This should also provide some guidance in formulating best practice for the conduct of conferences and the formulation of procedures at individual conferences. Secondly, in light of our obligations under Article 12 of the UNCRC, ensuring that the child is properly heard should be the primary focus of procedures adopted under the conference system. In deference to this obligation it is recommended that legislation be enacted providing for the role of a lay advocate in family welfare conferences. It is envisaged that such a person would have an ongoing role throughout the conference process and contend with any issues that arise which may be deemed contrary to the welfare of the child, and in addition provide a medium through which the views, wishes and concerns of the child can be expressed. Furthermore the advocate would have a role in ensuring the decisions and recommendations of the family welfare conference are carried out in the best interests of the child. To this end the advocate would be an active participant in the family welfare conference review. The appointment of a lay advocate should occur in circumstances where a guardian ad litem has not been appointed.

The family welfare conference system as it currently stands may become counter-productive in that the child concerned may be intimidated by the entire process. It is recommended that practice guidelines be established on foot of contributions by all the relevant stakeholders so as to prevent the occurrence of such intimidation. The guidelines could be similar in status to the Children First Guidelines on the welfare and protection of children.

Central to the operation of a family welfare conference is the role of the coordinator. The ultimate function of the coordinator is to provide recommendations. The conference system seeks to achieve unanimous agreement amongst the participants as to these recommendations, and where such agreement cannot be achieved certain default mechanisms can operate. However, the legislation fails to provide any sanction for a breach of these recommendations. A proposed method of addressing this shortcoming would be to introduce the concept of a family welfare conference review into the grounding legislation. Such a mechanism would hold all participants to the original conference accountable in relation to the observance of the recommendations of the coordinator.

Finally, it is recommended that consideration be given to encouraging the attendance of relatives of a child at a family welfare conference. The establishment of a broad support network for a child provides a positive basis upon which the best interests of the child can be achieved.

5.3 Practice and Procedure in Court

5.3.1 Child's Participation in Court

In relation to the participation of children in the court system it is necessary to be cognisant of Article 12 of the UNCRC which provides that the child has the right to be heard in all matters affecting him/her, with due regard to his/her age and maturity. The Criminal Evidence Act, 1992¹²³ and Children Act, 1997¹²⁴ are landmark pieces of legislation in this regard.

¹²³ No. 12 of 1992.

¹²⁴ No. 40 of 1997.

Under the Criminal Evidence Act, 1992, it is now possible for children to give evidence otherwise than on oath if the child is deemed capable of giving an intelligible account of the events. Evidence can be given via the medium of video recording or television link. Questions can be put to the child witness using anatomically correct dolls or through an interpreter. The main difficulty in respect of vulnerable witnesses has always been cross-examination. It is self-evident to state that cross-examination is central to the adversarial system, but the manner of its operation is an issue of live concern where vulnerable child witnesses are concerned. These reforms have survived constitutional challenge¹²⁵ but there is a fear that further reform in this field could be deemed unconstitutional in respect of fair procedures and due process rights of the accused.

A further concern arises in relation to the possible reduction in the age of consent to sexual intercourse as this would expose more children to cross-examination in the court room, an issue Professor McAuley considers in detail in his report. It is submitted, however, that this concern is not so great in that those involved in the court system i.e. judges and lawyers, are sensitive to the nature of such cases and strive to maintain an accommodating atmosphere so as to enable a child feel at ease when giving evidence.

In relation to cases where the child appears before the court as the accused, the law needs to be particularly cognisant of the child's right to a fair trial protected under Article 38.1 of the Constitution and Article 6, ECHR. By virtue of the child's age, maturity, intellectual and mental ability there may be a need to customise the court setting and procedures so as to appreciate the status of the child. On a general level this is done daily in Ireland by virtue of the Children's Court. However, the Children's Court does not have jurisdiction to hear murder cases, and furthermore it generally sends children charged with serious indictable offences forward to be heard in the higher courts. In such courts the child may be susceptible to being overcome by the general setting of the courtroom. In such circumstances it is imperative that the child's right to a fair trial be respected and acted upon. The case of *SC v The United*

¹²⁵ *White v Ireland* [1995] 2 IR 268; *Donnelly v Ireland* [1998] 1 IR 338.

*Kingdom*¹²⁶ saw the ECtHR determine that the trial of the applicant, an 11 year old boy, was in breach of his Article 6 right under the Convention. In this case the applicant was tried for attempted theft in an adult court and sentenced to two-and-a-half years detention. The applicant claimed that owing to his young age and low intellectual ability (a fact determined by two independent experts before trial) he was unable to properly participate in his trial in the adult court. The ECtHR agreed. With this in mind and also Article 12, UNCRC, there is a very real need to put in place practices that enable children of a young age and low intellectual ability to take part in a trial outside of the Children's Court.

5.3.2 Competency

At present for a child to appear in court it must be shown that the child is capable of giving a sufficiently accurate and intelligible account of the events in question, thereby requiring competency to be proved. It is submitted that a reversal of this requirement would give greater effect to the provisions of Article 12, UNCRC. Such a situation exists in the UK where the position taken is that a child is presumed to be competent.¹²⁷ Such a position allows the child concerned to give vocal expression to events impacting upon his/her development and protection.

The effect of this presumption was considered in the English case of *Mabon v Mabon*¹²⁸ involving three children aged 17, 15 and 13 who had a guardian appointed to represent them. The appointment of the guardian was appealed and, in overturning the decision of the lower court, the Court of Appeal found there to be no doubt as to the competence and understanding of the children and it was therefore unimaginable not to allow three capable young people of sufficient maturity to participate in a case that so essentially affected them. In reaching this conclusion the court took into account Article 8, ECHR and also referred to Article 12 of the UNCRC.

It must also be noted that the issue of competency would not impact upon the jury, as the matter would be dealt with by way of *voir dire*. Thus, the attractiveness of this

¹²⁶ 60958/00, judgment delivered 10 November 2004.

¹²⁷ Youth and Criminal Evidence Act, 1999 (c.23), s.53.

¹²⁸ [2005] EWCA Civ 634.

provision lies essentially in its philosophical grounding in children's rights and the further fulfilment of international law obligations.

5.3.3 *Cross-Examination*

There is no express rule in Irish law which prohibits the cross-examination of a child witness in a sexual offence case by an unrepresented accused. Such a rule does exist in the UK.¹²⁹ Arguably a purposive interpretation of our law could prohibit such questioning, in particular in relation to questions concerning the sexual activity of a child witness. An example of such an interpretation is evident in the case of *O'Sullivan v Hamill*¹³⁰ in which the District Court Judge made an order permitting the alleged victim to give evidence by deposition via a television link. The witness suffered from a mental impairment and was not specifically permitted to give evidence in this manner by the relevant legislation. Nonetheless the order was upheld as the accused was not prejudiced. Despite this, it is recommended that this matter be clarified through legislation or at the very least through a practice direction.

A further potential reform of interest can be seen in operation in Germany. There, s.241a of the Code of Criminal Procedure allows that witnesses under 16 years of age will only be examined by the presiding judge. Others, including associate judges, the public prosecution office, the defendant, defence counsel, and lay judges may request the presiding judge to ask the witnesses further questions or may be granted permission by the presiding judge to ask these directly. While this type of inquisitorial judicial role prevalent in European civil law systems is alien to Irish legal culture, the notion that judges take an active role in assisting relevant facts to come to light so that a jury can make a more informed decision is worthy of consideration.

A more appropriate solution would be to put judicial intervention in questioning of child witnesses on a sound statutory basis. This would give the judge the ability, inherent within him/her by the nature of the judicial power, to rule out any question deemed inappropriate for the witness¹³¹ as well as the capability to put his/her own questions to the witness should any matter require clarification. A more difficult issue

¹²⁹ Criminal Justice Act, 1991 (c.53), s.55.

¹³⁰ [1999] 2 IR 9.

¹³¹ As seen in *People (DPP) v DR* [1998] 2 IR 106.

is whether the judge should be able to ask questions related to areas which have not been touched on by either examination-in-chief or cross-examination. In light of general judicial powers and the comparable power to make orders in relation to children *proprio motu*, this issue should not in actuality prove any great difficulty.

5.3.4 Privilege and Immunity

Privilege is a legal concept which refers to the state of affairs that justify a person in receipt of information from refusing to disclose the source of such information or the information itself. In the context of child protection the issue of privilege needs to be clarified by legislation. A number of issues arise in this respect.

Firstly, the proceedings of family welfare conferences are privileged under s.14 Children Act, 2001. However, there is no guidance as to whether legal representatives or guardians *ad litem* who were not in attendance at a meeting of the conference should have access to the minutes of that particular meeting where the disclosure of such information would be in the child's best interests. One would assume that as the privilege extends only as far as prohibiting such information being produced in court, the information could be disclosed to such appropriate persons.

Secondly, the issue of so-called informer privilege needs to be addressed. This coincides with the issue of immunity and in this context the Protection of Persons Reporting Child Abuse Act, 1998¹³² is relevant. This protects a person from civil law prosecution in respect of his/her communication of concerns over abuse if he/she discloses such information and in doing so acts reasonably, and in good faith when forming the opinion and communicating it. This is not a privilege but immunity and only applies to information communicated to designated persons (Gardaí and certain employees of the HSE).

The Law Reform Commission has called for a higher level of protection to be afforded to informants,¹³³ a recommendation which is reiterated in this report. While certain persons already have immunity from prosecution in reporting suspected cases of child abuse, a more coherent and comprehensive regime should be put in place by

¹³² No. 49 of 1998.

¹³³ Law Reform Commission, *Report on Child Sex Abuse*, (LRC 32-1990), p.11.

statute. There is a need to extend the category of persons/bodies that enjoy immunity from suit in respect of communications concerning child abuse. In addition to those already protected by the 1998 Act others involved in the care of children should be included e.g. employees of certain child agencies, school counsellors and others in similar positions. In addition, the legislation should be amended so as to deem the actual communication to be privileged. It is noted that the extension of the categories of privilege in Ireland is a relatively rare phenomenon due to the prevailing philosophy of the balance lying in favour of the court having all available information before it so as to make an informed decision. With this in mind it is recommended that although legislation should specifically provide for such communications to be capable of being privileged, such privilege should be decided on a case-by-case basis. The legislation could set out factors which the court can take into account in deciding whether or not to uphold a claim of privilege, and the court should also explicitly enjoy the power to read such documents for itself and make redacted versions of documents available and/or limit access to the documents to the parties' legal representatives and a guardian *ad litem*.

5.3.5 RECOMMENDATIONS

Child's Participation in Court

Article 12 of the UNCRC provides that all measures should be taken to ensure that children will be heard in all matters affecting them, including judicial matters. It is imperative, therefore, that all necessary measures are taken to ensure that children, who in legal cases are frequently vulnerable victims or witnesses, are provided with safe and appropriate means so as to have their voices heard. Furthermore, in circumstances where the child appears as the accused outside of the Children's Court setting, his/her right to a fair trial must be recognised and implemented through taking measures ensuring that he/she is capable of actively taking part in his/her trial. It is recommended that procedures be put in place giving effect to this.

Competency

The Law should be reformed so as to operate on the presumption that a child is competent to appear in a judicial matter, and is capable of providing a sufficiently accurate and intelligible account of the events in question.

Cross Examination

An express rule should be introduced prohibiting the cross-examination of a child witness in a sexual offence case by an unrepresented accused. Furthermore, regard should be had to the German model in such matters where children under 16 years of age can only be examined by the presiding judge, or other interested legal parties present with the consent of the judge. In any event, an express statutory provision permitting a judge to intervene in questioning a child witness should be introduced.

Privilege and Immunity

An express provision should be inserted providing legal representatives and guardians ad litem not in attendance at a family welfare conference with access to the minutes of the conference where such disclosure would be in the best interests of the child. Also, the previous recommendation of the Law Reform Commission is reiterated in this report in relation to informer immunity and privilege in the context of child abuse. There is a need to extend the category of persons/bodies who currently enjoy this immunity.

5.4 Children's Representation – the Guardian *ad litem* (GAL)

The issue of children's representation itself needs to be addressed, and the guardian *ad litem* (GAL) is crucial in this regard. In public law proceedings, a GAL can be appointed in cases under Part IV and Part VI of the Child Care Act, 1991. This must be necessary in the interests of the child and consistent with the requirements of justice. This means that the presiding judge must be satisfied of the need to appoint a GAL and is bound by the wording of the legislation not to presume that such an appointment is necessary. A number of issues need to be addressed in respect of the GAL system and its operation in Ireland.

5.4.1 *Narrowness of the application of the GAL system*

In private law proceedings, the GAL can be appointed in custody or access cases, as well as applications by a natural father to be made a guardian of the child. In Ireland in private law proceedings, however, there must be special circumstances meriting the

appointment.¹³⁴ Factors influencing whether or not a GAL is to be appointed include the age and understanding of the child, the finding of a relevant report, the wishes of the child, and any submissions made by any other parties. It is provided in the legislation that the author of a s. 47¹³⁵ welfare report may be appointed as a GAL in respect of the child. It is clear therefore that a GAL can be an officer of the Court. As such the GAL is a court resource to be utilised and further consideration ought to be given to this as it has the advantage of reducing the costs of the parties involved because it would be an expense to be met by the State. It is also clear that a GAL may be legally represented in private law proceedings, unlike the position in public law proceedings.

A primary failing of the GAL system is the paucity of proceedings in which a GAL can be appointed. In public law proceedings, it extends to Part IV and Part VI proceedings under the Child Care Act, 1991 and in private law only custody or access disputes and guardianship applications allow for a GAL. Coupled with this is the barrier to appointment of the GAL, especially in private law. By making necessity in the child's best interests, or "special circumstances", a prerequisite of appointment, there is an inbuilt and schematic opposition to the GAL system. This is in stark contrast to the UK model where there is an effective presumption in favour of the appointment of the GAL in a wide range of areas.¹³⁶

5.4.2 *Lack of statutory qualifications for a GAL*

Quite apart from the narrow application of the statutory GAL system, the actual practice of the system is impeded by gaps in the law. The most fundamental of these gaps is the lack of any statutory qualifications for a GAL. In theory, anyone can be appointed to the office. Common sense demands that some expertise in child welfare and child law be essential for the GAL to operate effectively. Legislation should clearly set out certain minimum qualifications for GALs to prevent unsuitable or under-qualified persons being appointed. There should also be provision for background checks to prevent potentially dangerous persons being appointed, and this could be dealt with under an efficient vetting system as discussed in section 2 above.

¹³⁴ Section 28 of the Guardianship of Infants Act, 1964, inserted by s.11 of the Children Act, 1997, is one of two sections of the Children Act, 1997 not yet in force.

¹³⁵ Family Law Act 1995, s.47.

¹³⁶ See in general Timms, *Children's Representation* (Sweet and Maxwell, London, 1995).

This would then lead to a *de facto* panel of approved persons capable of being appointed as a GAL. They could then either be regulated directly by the State or self-regulate, but either way a clear code of conduct should then be drafted to allow for uniform conduct of the functions of a GAL. The Child Care (Amendment) Act 2007 provides for the establishment of the Children Acts Advisory Board in place of the Special Residential Services Board.¹³⁷ A function of the Children Acts Advisory Board is to publish guidelines relating to the qualifications, criteria for appointment, training and the role of the GAL.¹³⁸ It is hoped that such guidelines will be published in the near future as the current absence of guidelines represents a gap in the operation of our law in this context.

5.4.3 Powers and functions of the GAL

The precise powers and functions of the GAL are also missing from the legislation. There are no provisions setting out the precise nature of the role, and so a GAL must attempt to use common sense to determine what he/she should do. Presumably the idea is to put forward a legal solution which is in the child's interests. This should also, presumably, be done independently and without reference to the parents or the HSE. Yet parents will need to also be involved given the constitutional dimension surrounding any child and family issues. It would be preferable if legislation set out the pertinent powers and duties precisely. This could include a statement directing the GAL to have the child's best interests as the first and paramount consideration at all times. Any other interests, such as those of the parents, could then be stated to be relevant. The independence of the GAL should also be explicitly stated.

The means by which the GAL should carry out his/her task should also be enunciated. Currently, the GAL has no statutory entitlement in respect of access to either the child or any documentation relating to the child. The GAL should be specifically allowed access to the child in order to interview him/her. This would serve the twin purpose of allowing the GAL to ascertain information relating to the child so as to evaluate how his/her welfare could best be served, as well as allowing the child to express his/her own views to the GAL. It should also be set down whether or not the parents of the

¹³⁷ Children Act, 2001, s.226A, as inserted by Child Care (Amendment) Act, 2007, s.19.

¹³⁸ Children Act, 2001, s.227(1)(b), as substituted by the Child Care (Amendment) Act, 2007, s.20. This section was commenced on 23 July 2007 pursuant to SI No. 509 of 2007, Child Care (Amendment) Act 2007 (Commencement) Order, 2007.

child should be interviewed. The same should apply to the child's siblings, other family members, and people outside the family who may have a contribution to make, such as schoolteachers. Again, the recently commenced provisions of the Child Care (Amendment) Act, 2007 provide for the publication of guidelines regulating this area. It is recommended that such guidelines be published in the near future without delay.

5.4.4 RECOMMENDATIONS

It is recommended that the GAL system be revised and made more widely available as a form of legal representation for children. However, a number of weaknesses in the system as it currently operates need to be addressed in legislation.

Firstly, the proceedings in which a GAL can be appointed need to be widened while the condition of it being necessary in the child's best interests or in special circumstances should be removed. Secondly, a professional qualification of GAL is necessary and legislation should set out the minimum qualifications required for the post of GAL. Thirdly, a clear code of conduct for GALs should be drafted to allow uniform conduct of the functions of a GAL. The precise powers and functions of the GAL are also absent from our law at present and the pertinent powers and duties should be precisely set out. Finally, the GAL's access to the child and any documentation relating to the child needs to be put on a legislative footing. The recently enacted Child Care (Amendment) Act, 2007 provides that the Children Acts Advisory Board publish guidelines in relation to the abovementioned matters. It is recommended that these guidelines be published without delay so as to clarify the legal position of the GAL.

SECTION 6: MEDICAL LAW

6.1 Introduction

This section examines a number of issues that are relevant to child protection and medical law. The primary issue to be considered is that of the right of minors, or their guardians, to consent to or refuse medical treatment, followed by a specific examination of the issues that arise for children in the care of the State. As in other sections, case law at home and abroad is drawn upon.

6.2 Competency of Minors under 16 to Consent to or Refuse Medical Treatment

Part of the concern relating to the competency of minors in medical cases stems from Article 12 of the UNCRC which demands that children's voices be heard in matters affecting them so far as their maturity will allow.¹³⁹

However, while the law explicitly addresses the question of consent to medical treatment, the issue of the right to refuse treatment remains relatively vague. The Non-Fatal Offences Against the Person Act, 1997¹⁴⁰ allows children of 16 years of age to consent to medical treatment without any input from their parents, yet the section does not disclose any guidance on whether there is a right to refuse medical treatment.

The issue of the right to refuse medical treatment is fraught with constitutional difficulties, a fact even more compounded when the patient is a child. The case of *Re Ward of Court (No.2)*¹⁴¹ dealt with this issue in the context of a woman who lived in a near vegetative state for almost 20 years. The Court in a 4:1 majority recognised the right to refuse treatment at common law. There is no clear test however that emerges from this case owing to the differing philosophies adopted by the judges. That said, the right to refuse medical treatment would appear to emanate from the right to individual autonomy. The court's interpretation of this right appears to be centred on the notion that it is the right to be free from the interference of others, thus

¹³⁹ See *n.115* above.

¹⁴⁰ Non-Fatal Offences Against the Person Act, 1997, s.23.

¹⁴¹ [1995] 2 I.L.R.M. 401.

safeguarding the existence of this right for incompetent persons. Nonetheless, the individual judgments in the *Ward* case place different degrees of emphasis on the strength of this right to determine matters. Furthermore, the countervailing factor of paternalism appears to occupy a role in such matters with the majority providing some scope for a 'best interests' test i.e. 'would the treatment be in the best interests of the patient?'

The situation in relation to children is even more complex particularly in relation to two issues. Firstly, if a paternalistic approach is given effect under the Constitution then it would be operated with even more enthusiasm in the context of a child patient. Paternalism is evident in various fields of child law with the courts often left to determine what is in the best interests of the child. In such circumstances the courts would have a wide scope to substitute their judgment for that of a child when it comes to determining whether the child is capable of refusing medical treatment. Secondly, the right to autonomy appears in two guises in relation to a child of a family. Not only does the child enjoy the individual right to autonomy, but also comes under the scope of the right to family autonomy. Family autonomy essentially protects the decision making authority of the family from State interference. Where a child is a member of a family then his/her parents would most likely express a view as to whether the child should refuse medical treatment or not. The strength of this right is evident in the Supreme Court decision in *North Western Health Board v HW*¹⁴² where a majority of the Supreme Court upheld the authority of the parents of an infant to refuse consent for their child to undergo a PKU test. This case can be seen as authority for the proposition that the decision to refuse medical treatment might not always be that of the child.

A cautionary note should be sounded when analysing the position in other jurisdictions. Our position is different in comparison to that of England as, amongst other factors, we have a written Constitution. Bearing that in mind any reform in this area must be cognisant of the Constitution and in particular the rights of the family in relation to children of a family. Reform in this field will be fraught with legal and social complications and care is advised.

¹⁴² [2001] 3 IR 622.

ECHR obligations arise in this context also. Article 3 (prohibition of torture and degrading treatment) and Article 8 (respect for private and family life) are relevant. Article 8 is more pertinently engaged with regard to personal autonomy and integrity.¹⁴³ It is unlikely that the threshold necessary for Article 3 to be engaged would be reached in the majority of circumstances, though end of life cases may present difficulties in this regard. A controversial case which has recently been litigated is that of *Glass v United Kingdom*.¹⁴⁴ In this case, a terminally ill boy had been administered morphine and diamorphine despite his mother's wishes. It was held that the use of these drugs was an infringement of the child's private life and in particular his physical integrity. This has implications for the HSE in deciding what, if any, treatment to consider for children under its care. This may become a point of dispute especially in the context of a voluntary care order where there is mandated close contact between the child's family and the HSE.

6.2.1 RECOMMENDATIONS

As set out above, the main issue to arise in respect of minors and medical treatment is their right to refuse such treatment. This is particularly pertinent to children in the care of the State. In this instance, it is recommended that clear guidelines should be set out to address this situation. Children, their families or those acting in loco parentis, and their medical carers should have no doubt about the entitlements of children in care to consent to or refuse medical treatment. Such guidelines should be informed by medical practitioners, among others. The enforceability of such guidelines however would be vulnerable to constitutional challenge, especially in the context of a child of a marital family.

ECHR obligations also arise in this context. Due to the fact that the ECHR has been incorporated into our law on a sub-constitutional level by virtue of the European

¹⁴³ Article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country; for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹⁴⁴ 61827/00, judgment delivered on 9 March 2004.

*Convention on Human Rights Act, 2003*¹⁴⁵ the HSE and other interested bodies ought to be aware of its effect in relation to the administration of medical procedures to children where consent is refused.

6.3 Medical Treatment under Child Protection Legislation

Of more immediate concern is medical treatment under child protection legislation. Under the Child Care Act, 1991, the HSE can assume parental responsibility for a child under s.18(3)(a), with mandatory language being used to state that it shall have authority to consent to any necessary medical treatment required by the child.¹⁴⁶ The question of necessity in this context has not given rise to any caselaw in this area, but it may be surmised that the word “necessary” be given a fairly wide meaning so as not to fall foul of the necessary/elective distinction that informs medical negligence litigation.

There is no guidance for what situation may prevail where the treatment of minors aged 16 and 17 in care is concerned. The provisions relating to the special care orders also need to be considered. Under s.23B(3) and s.23B(7) of the Child Care Act, 1991 medical measures may be taken in respect of a child.¹⁴⁷ However, the language is discretionary rather than mandatory. There is no mention of parental responsibility as there is under s.18, and similarly there is a lack of guidance on the refusal of minors over the age of 16 years. The position needs to be clarified as many children in care require some element of medical treatment on an ongoing basis, as well as the possible need for emergency treatment.

In the UK, there has been a long line of authority dealing with the medical treatment of minors. The case of *Gillick v West Norfolk and Wisbech AHA*¹⁴⁸ concerned a claim brought by a mother that her daughters, all of whom were under 16, should not be able to obtain contraceptive advice and treatment without her prior consent. By a majority the House of Lords held that a minor, under the statutory age of consent but who was sufficiently mature, capable to make consenting decisions in regard to his/her own medical treatment. The Court noted that a strictly age based regime failed

¹⁴⁵ No. 20 of 2003.

¹⁴⁶ Child Care Act, 1991, s.18(3)(b).

¹⁴⁷ See Appendix 6.

¹⁴⁸ [1985] 3 All E.R. 402; [1985] 3 WLR 830; [1986] 1 A.C. 112.

to take account of the understanding and maturity of the children involved. None of the Law Lords adverted to the capacity to refuse medical treatment. However, it is arguable that the same rationale extends to the refusal of medical treatment. There is *dicta* in cases such as *Re E (A minor) (Wardship: Medical Treatment)*¹⁴⁹ that a distinction can be drawn in the situation where the minor refuses or is incapable of consenting to life saving treatment as opposed to other elective treatment. Notwithstanding this, it will not be the ordinary course of events faced by a state body charged with child care and protection. This type of situation should, of course, be provided for, but of greater relevance are cases concerning children with behavioural difficulties.

*Re R (A Minor) (Wardship: Consent to Medical Treatment)*¹⁵⁰ was the first case in the UK to consider the question of *Gillick* competency. *R* was a fifteen year old girl who had been voluntarily placed in the care of the local authority following an argument with her father. Her mental state deteriorated and she began to suffer hallucinations. She threatened suicide and, having absconded from the care facility, attacked her father. A care order was eventually made in respect of *R* and she was admitted to a child psychiatric unit. During lucid periods, when she was capable of understanding the treatment regime and its effects, she refused to take medication. The care unit was unprepared to continue caring for her without her condition being treated, and so sought that she be made a ward of court so that her consent would be irrelevant.

Lord Donaldson M.R. stated *Gillick* allows a child to consent but that if the *Gillick* competent child refuses treatment, someone else may consent on his/her behalf. If everyone with the power to consent refuses to do so, this means that treatment is vetoed. Somewhat more stark is the dictum in the judgment of Farquharson L.J. that *Gillick* is irrelevant in cases where there are lucid and manic states during which capacity to consent may fluctuate, a state which may exist in many cases of psychological disturbance.

Even if clear statutory guidance is given in respect of the child's refusal to submit to treatment, there is still the difficulty of the High Court's inherent jurisdiction over

¹⁴⁹ [1991] 2 F.L.R. 585.

¹⁵⁰ [1991] 4 All E.R. 177.

children. This jurisdiction also exists in the UK and was at issue in *South Glamorgan County Council v W and B*.¹⁵¹ In this case, A, a fifteen year old girl, suffered from psychiatric disturbance. She lived as a recluse in her room, receiving no formal schooling for a number of years, and threatened to harm herself and others if her wishes were not complied with. A number of child psychiatrists recommended that care proceedings be commenced in respect of her, and that she be removed from her home for assessment and treatment. A's father opposed the application. During the case, the court had to consider the provisions of the Children Act, 1989. It allows a local authority to invoke the inherent jurisdiction of a court where there is significant risk of harm. It also mandates that a child's wishes be ascertained as his/her age and understanding allow and as well as this, appears to grant children the right to refuse treatment where they have a sufficient understanding to make an informed decision.¹⁵²

It was submitted that if the child exercises his/her statutory right to refuse it cannot be overridden. The court refused to accept this argument as the Act had specifically retained the inherent jurisdiction of the court. In this type of case, the child's welfare had to be the paramount consideration with her wishes being taken into account. This decision is open to criticism as the message is conveyed that statutorily conferred rights can be overridden by judges. That said, however, the legislature had chosen to protect the inherent jurisdiction of the court.

This type of situation could easily arise in Ireland, and our lack of legislative guidance means that only litigation could resolve the problem. This was evident in the *C* case¹⁵³ and the recent *D* case¹⁵⁴. The *C* case concerned a thirteen year old girl who became pregnant as a result of a rape. The girl was subject to an interim care order and it was accepted that there was a substantial risk of her committing suicide if she was not permitted to travel to the UK for the purposes of an abortion. Her parents, the applicants, initially supported her decision but then opposed it, resulting therefore in the above cited proceedings. The High Court refused the application of the parents.

¹⁵¹ [1993] 1 F.L.R. 574.

¹⁵² Children Act, 1989 (c.41), ss. 38(6), 43(8), and 44(7).

¹⁵³ *A and B v Eastern Health Board* [1998] 1 IR 464.

¹⁵⁴ Unreported, High Court, McKechnie J., 9 May 2007. At the time of concluding the report (November 2007) an approved judgment had not been issued in this matter. In the absence of an approved written judgment, it is inappropriate to analyse the issues arising from the case.

Although that case may be at the extreme end of the spectrum, the fact that the case had to be brought illustrates the difficulties with the current legislation.

6.3.1 RECOMMENDATIONS

An immediate concern surrounds the status of medical treatment to those under child protection legislation. At present the HSE can assume parental responsibility and has the authority to consent to 'necessary' medical treatment required by the child. It is recommended that the term 'necessary' in this context be given a wide meaning so as to avoid complications between the necessary/elective distinction in the context of medical litigation.

At present there is no guidance as to the status of medical treatment to children aged 16 and 17 who are subject to care orders. Such children can require ongoing medical treatment and may require emergency treatment. Therefore legislative guidelines need to be put in place so as to clarify the role of the HSE in this regard.

SECTION 7: THE CHILD CARE ACT, 1991¹⁵⁵

7.1 Introduction

The Child Care Act, 1991 is the primary legislation dealing with children who are in need of the protection and care of the State. This section sets out the main types of care orders that are allowed for in the sequence in which they appear in the Act. It then examines the statutory child protection functions of the HSE. Finally, this section looks briefly at the need for transitional measures in child protection legislation.

7.2 Voluntary Care¹⁵⁶

This provision allows a family to voluntarily place a child into the care of the HSE. It is explicitly stated under s.4 of the Child Care Act that the HSE shall have regard to the wishes of the child's parents or other person acting *in loco parentis* in the provision of care.¹⁵⁷ This is crucial in situations involving the child's education and health where there is a divergence of views between the HSE and the child's parents.

While s.4 is one of the most widely used child care provisions under the 1991 Act, it may result in conflict between families and the HSE. Where such conflict arises, there is no guidance provided in the relevant section of the Child Care Act, 1991 for the resolution of such a conflict. The system would, therefore, benefit from a tightening of the language so as to give some guidance to the parties concerned and to the courts in resolving such a dispute. Clear and accessible guidelines, rules or procedures for the resolution of such conflicts setting out the roles and responsibilities of each party should be developed and made available to parents or their representatives. In all of these it should be stipulated that the HSE will have regard to the views of parents, but that the best interests of the child shall remain paramount in any decision affecting his/her welfare. In cases involving the children of married parents, the best interests of the child will have to be interpreted in the light of the constitutional presumption that the decisional autonomy of the parents should be respected.

¹⁵⁵ No. 17 of 1991.

¹⁵⁶ Child Care Act, 1991, s.4. See Appendix 2.

¹⁵⁷ Child Care Act, 1991, s.4(3)(b). See Appendix 2.

7.2.1 RECOMMENDATION

Guidelines should be introduced to provide assistance in circumstances where there is a conflict between the family and HSE as to whether a child is suitably subject to voluntary care under s.4 of the Child Care Act, 1991. Such guidelines must take account of the views of both the parents and HSE, while affording due deference to the best interests of the child.

7.3 Emergency Care Orders¹⁵⁸

Section 13 allows the HSE to apply to the District Court for an “emergency care order” in circumstances where it believes that there is an “immediate and serious risk to the health or welfare of a child”, or where there will be such a risk if the child is removed from his/her current location, thereby necessitating the child to be placed into the care of the HSE.

Proceedings under this section must be made on two days clear notice to the relevant parties.¹⁵⁹ There is no provision for a direction to be sought at shorter notice. This is partially because of the due process rights which inform procedural rules and also the primacy afforded to the family and natural parents by the Constitution.

7.3.1 RECOMMENDATION

It is recommended that the procedural rules in relation to emergency care orders be amended so as to allow for such an application to be made as soon as is reasonably possible without the need to wait for two additional days notice. It is thought that such an amendment would provide a greater level of protection to children in circumstances where a two day notice period may only serve to exacerbate the already incumbent problem. However, any reform in this regard must take into account the constitutional rights of the family in Article 41 of the Constitution.

7.4 Interim Care Orders and Care Orders¹⁶⁰

The Act not only provides for the making of care orders but also interim care orders. Interim care orders are made where an application for a care order has been or is

¹⁵⁸ Child Care Act, 1991, s.13. See Appendix 3.

¹⁵⁹ SI 338/1995: District Court (Child Care) Rules, 1995, s.9(1).

¹⁶⁰ Child Care Act, 1991, ss.17 and 18. See Appendices 4 and 5 respectively.

about to be made, requiring that the child named in the order be placed in the care of the HSE. In the first instance, interim care orders may not exceed 28 days, although extensions can be sought. Care orders are more long-term and can result in the child being taken into the care of the HSE until the age of majority (18 years). Moreover, only the HSE may apply for such orders. It must be stressed that each and every case is dependant upon its own facts and is decided in that regard. The granting of such orders does not require the voluntary participation of parents. In these sections the standard of proof to be applied is not readily clear due to the fact that each and every case is unique. A degree of flexibility is required in this regard and the standard of proof ought to reflect the circumstances specific to any given case as it is thought that a generic test could lead to unwanted consequences.

7.4.1 RECOMMENDATION

In relation to care orders, in particular interim care orders, it is recommended that the standard of proof to be applied in such applications reflect the reality that each and every case will be dependant on its own facts and therefore a degree of flexibility ought to be provided for.

7.5 Special Care Orders¹⁶¹

A special care order operates in circumstances where, by virtue of the behaviour of a child, there is a real and substantial risk to his/her health, safety, development or welfare, thereby requiring special care or protection. Special care orders are vulnerable to challenge in the light of our obligations under the ECHR.¹⁶² Special care orders are necessary in cases where children with behavioural difficulties cannot be adequately cared for by conventional means, such as in the family home. In such cases there is a duty on the State under Articles 40, 41, and 42 of the Constitution to provide care for the child. Article 5 of the ECHR seeks to secure the right of personal liberty, but certain exceptions are allowed for, including those specific to minors.¹⁶³

¹⁶¹ Child Care Act, 1991, s.23B, as inserted by the Children Act, 2001, s.16. See Appendix 6.

¹⁶² The ECHR aspects underpinning such orders were not considered in the recent case of *HSE (South Eastern Area) v WR and LR*, unreported, High Court, MacMenamin J., 18 July 2007.

¹⁶³ Article 5(1)(d) allows for:

“the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.”

The ECHR exception in relation to minors is aimed at securing educational provision, or to ensure that the minor is brought before a competent court. The purpose of a special care order under s.23B of the Child Care Act 1991 is to provide appropriate care, education and treatment to the child in question.¹⁶⁴ It has been held that even if the detention is legal by national standards, it must comply with the general tenor of Article 5, ECHR so as to protect the detained individual from arbitrariness.¹⁶⁵ Evidently an issue arises as to whether a detention imposed under s.23B can be justified in the light of our ECHR obligations, and in particular whether it has due regard for the Article 5 requirement of educational provision.

7.5.1 Special Care Order – ECHR Compatible?

A case on Article 5 and minors worthy of consideration is *Bouamar v Belgium*.¹⁶⁶ In this case, a minor with behavioural difficulties was incarcerated for what was described as an interim custody measure. While the State was held liable for breach of the ECHR, what is notable in the light of the current discussion is that the Court allowed in principle for a minor to be detained in a manner which was not readily identifiable with educational supervision once that was the end which the impugned detention served. However, the Court was clear that any detention must be speedily followed by the implementation of a regime of supervised education.

Ireland has already been found by the ECtHR to be in breach of Article 5 in the case of *DG v Ireland*.¹⁶⁷ This case concerned a minor who was detained in St. Patrick's Institution. The applicant sought to have his detention declared illegal as St. Patrick's was a penal institution and so did not comply with the need to be detained for the purposes of educational supervision. His argument based on the legal process did not succeed, but he was successful in the argument relating to the nature of his detention in St. Patrick's Institution.

The court then had to consider whether the custody concerned was an interim measure such as that in *Bouamar*. This argument too was rejected. This was because

¹⁶⁴ Child Care Act, 1991, s.23B(2) and s.23B(7)(a) as inserted by the Children Act, 2001, s.16. Both allude to these purposes. See Appendix 6.

¹⁶⁵ *Winterwerp v The Netherlands* (1979-80) 2 EHRR 387.

¹⁶⁶ (1989) 11 EHRR 1.

¹⁶⁷ (2002) 35 EHRR 33.

the first two High Court orders in relation to the applicant were not made in contemplation of any specific proposal for his education, and that the third order was made in relation to accommodation which was neither secure nor appropriate, which led in turn to the impugned order detaining the applicant in St. Patrick's Institution.

Although the purpose of education is included in s.23B it is overtly linked with the concept of harm prevention. While s.23B would appear to satisfy the ECHR requirements in the wake of the *DG* case it does not do so with sufficient clarity or certainty. A particular difficulty may arise again in relation to the facility in which the child is placed and the status of any education provided therein (i.e. is it compulsory or voluntary) as seen in the *DG* case. This was considered in relatively minor detail in the *Koniarska* case.¹⁶⁸ In that case, secure accommodation orders similar in scope and nature to special care orders were upheld by the ECtHR. This indicates that special care orders will not be overturned lightly. Moreover, the amendments introduced by way of the Children Act, 2001 and the significant increase in resources allocated to special care provision, support the argument that the situation as it currently stands would not fall foul of the ECHR in a manner similar to that in *DG*.

Another difficulty is that orders made by Courts may be made by the consent of all parties at an initial stage, but can later be impugned. This arose in the case of *HL v United Kingdom*.¹⁶⁹ The only area where detention for the prevention of harm is allowed is in relation to alcoholics and persons with infectious diseases. Even in these cases, the onus is on the State to ensure that less intrusive measures have been tried and have proven to be insufficient. A failure to do so will render any detention illegal under Article 5, ECHR. Thus, the very principle on which special care orders rest may be incompatible with the ECHR. It must be noted however that frequently a special care order provides the least intrusive form of care to those children who require it having regard to their circumstances. Often the only alternative would appear to be a place of detention which would be wholly unsatisfactory and contrary to the health, safety, development and welfare of a child.

¹⁶⁸ *Koniarska v The United Kingdom* 33670/96, judgment delivered on 12 October, 2000.

¹⁶⁹ (2005) 40 EHRR 761.

7.5.2 RECOMMENDATION

There is a need to ensure that the methods employed in conjunction with special care orders are in line with the obligations of the State under the ECHR. Of particular note is the accommodation given to a child subject to such an order. The accommodation must be suitable to the care of the child and cannot be a place of detention. The overall objective in granting the special care order must be the protection and development of the child, with specific regard to the educational welfare of the child. Furthermore, the methods employed on foot of the special care order should be the least intrusive possible in the light of the surrounding circumstances. Whilst our law as it currently stands would appear to be compatible with the ECHR it is recommended that s.23B of the Child Care Act, 1991 be clarified so as to ensure this compatibility.

7.6 Reciprocal Care Orders

Having regard to the free movement of people throughout the EU and the increase in transnational marriages and relationships there is a need to be aware of the possibility of placing a child in care in another member state or alternatively the situation whereby a foreign court wishes to place a child into care in Ireland. The “European Union Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility”,¹⁷⁰ commonly referred to as “Brussels II *bis*”, makes provision for such an occurrence. Chapter IV of Brussels II *bis* deals with “cooperation between central authorities in matters of parental responsibility”. A central authority is a body within each member state designated the task of assisting in the application of the regulation in that member state through the provision of information and cooperation with other central authorities. The Minister for Justice, Equality and Law Reform is the designated central authority in Ireland.¹⁷¹ Article 56 of Brussels II *bis* permits a court to place a child in another member state. The central authority of that state must be consulted and is in turn obliged to provide such information and assistance as required. Article 56 specifically provides for the need to have procedures in place regulating the consultation and consent process between a foreign court and the

¹⁷⁰ Council Regulation (EC) No. 2201/2003 O.J. L338, 23 December 2003.

¹⁷¹ SI 112/2005 European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005, s.3.

central authority of the requested state. Such procedures are to be governed by the national law of the requested state.

At present there are no such guidelines or procedures in Irish law. It is true to state that the District Court has jurisdiction to authorise the placement of a child outside of the state,¹⁷² but the situation is less clear in relation to the placement of a child of another jurisdiction into care in Ireland. So as to instil clarity into this area, and in keeping with Brussels II *bis*, it is recommended that guidelines and procedures be drawn up in this regard and given effect by way of statutory instrument. It is further noted that Brussels II *bis* foresees the usage of the European Judicial Network in civil and commercial matters¹⁷³ as a means of giving effect to the cooperation between central authorities in such matters.

7.6.1 RECOMMENDATION

At present there is a gap in our law concerning the placement of children into care in Ireland where these children have been habitually resident in another EU State other than Denmark. Brussels II bis, which has direct effect in Ireland, provides for such a situation and requires guidelines and procedures to be drafted in member states to facilitate these placements. It is recommended that guidelines and procedures be drafted and given effect by way of statutory instrument, with regard being had for the European Judicial Network in civil and commercial matters.

7.7 Transitional Measures in Child Protection Legislation

Throughout child care and protection legislation the various orders that may be granted specifically state that the effect of the order shall end when the person in respect of whom the order is made ceases to be a child (18 years). There is no provision for transitional care or after care, with the exception of s.45 of the Child Care Act, 1991¹⁷⁴ which only provides for a discretionary power. Such a position is generally, and legitimately, justified on the basis that there is a lack of resources to continue the care of persons who have reached 18 years. Notwithstanding this,

¹⁷² *Western Health Board v KM* [2002] 2 IR 493.

¹⁷³ Council Decision 2001/470/EC O.J. L174/25, 27 June 2001. Ireland agreed to adopt and apply this Decision pursuant to Article 3 of the Protocol annexed to the Treaty on the European Union and to the Treaty establishing the European Community.

¹⁷⁴ See Appendix 7.

however, this position does lead to potentially vulnerable individuals being deprived of continuing support. It is possible to imagine a situation where this could lead to the State being liable in tort for an injury caused due to the unreasonable denial of care available under s.45.

As noted, the defence to such a claim might be based on resource allocation and such a defence could very well prevail owing to the non-interventionist attitude of the Irish courts when it comes to the allocation and distribution of State resources.¹⁷⁵ Furthermore, a similar defence would be mounted in an action taken by an applicant seeking a court order requiring such care pursuant to s.45 of the 1991 Act. As is evident from the Supreme Court decisions in *Sinnott v Minister for Education*¹⁷⁶ and *TD v Minister for Education*¹⁷⁷ the doctrine of the separation of powers prohibits the courts from making mandatory orders against the Executive in relation to the allocation and distribution of public resources, save in exceptional circumstances where there has been a clear disregard by the Executive of its constitutional powers and duties.

7.7.1 RECOMMENDATION

There is little or no provision for transitional or after care in child care legislation, with the exception of s.45 of the Child Care Act, 1991. Conscious of the fact that s.45 is a discretionary measure and that the Executive is the sole administrator of public funds, it is recommended that guidelines be drawn up in respect of the exercise and application of s.45. Such guidelines ought to be reasonable, which in turn would provide the State with an additional basis for defending a potential negligence claim in respect of decisions rendered under s.45.

¹⁷⁵ *O'Reilly v Limerick Corporation* [1989] 1 ILRM 181.

¹⁷⁶ [2001] 2 IR 545.

¹⁷⁷ [2001] 4 IR 259.

APPENDICES

Appendix 1: The Twenty-Eighth Amendment of the Constitution Bill 2007

TWENTY-EIGHTH AMENDMENT OF THE CONSTITUTION BILL 2007

BILL

entitled

AN ACT TO AMEND THE CONSTITUTION.

WHEREAS by virtue of Article 46 of the Constitution, any provision of the Constitution may be amended in the manner provided by that Article:

AND WHEREAS it is proposed to amend the Constitution:

BE IT THEREFORE ENACTED BY THE OIREACHTAS AS
FOLLOWS:

1.—The Constitution is hereby amended as follows:

- (a) section 5 of the Irish text of Article 42 shall be repealed,
- (b) section 5 of the English text of Article 42 shall be repealed,
- (c) the Article the text of which is set out in *Part 1* of the *Schedule* shall be inserted after Article 42 of the Irish text,
- (d) the Article the text of which is set out in *Part 2* of the *Schedule* shall be inserted after Article 42 of the English text.

2.—The amendment of the Constitution effected by this Act shall be called the Twenty-eighth Amendment of the Constitution. This Act may be cited as the Twenty-eighth Amendment of the Constitution Act 2007.

SCHEDULE

PART 2

CHILDREN

Article 42(A)

1. The State acknowledges and affirms the natural and imprescriptible rights of all children.
2. 1° In exceptional cases, where the parents of any child for physical or moral reasons fail in their duty towards such child, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.
2° Provision may be made by law for the adoption of a child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child, and where the best interests of the child so require.
3. Provision may be made by law for the voluntary placement for adoption and the adoption of any child.
4. Provision may be made by law that in proceedings before any court concerning the adoption, guardianship or custody of, or access to, any child, the court shall endeavour to secure the best interests of the child.
5. 1° Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law.
2° No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.
3° The provisions of this section of this Article do not, in any way, limit the powers of the Oireachtas to provide by law for other offences of absolute or strict liability.

Appendix 2: Child Care Act 1991, s. 4 – Voluntary Care

4. –

(1) Where it appears to a health board that a child who resides or is found in its area requires care or protection that he is unlikely to receive unless he is taken into its care, it shall be the duty of the health board to take him into its care under this section.

(2) Without prejudice to the provisions of *Parts III, IV and V*, nothing in this section shall authorise a health board to take a child into its care against the wishes of a parent having custody of him or of any person acting in *loco parentis* or to maintain him in its care under this section if that parent or any such person wishes to resume care of him.

(3) Where a health board has taken a child into its care under this section, it shall be the duty of the board –

(a) subject to the provisions of this section, to maintain the child in its care so long as his welfare appears to the board to require it and while he remains a child, and

(b) to have regard to the wishes of a parent having custody of him or of any person acting in *loco parentis* in the provision of such care.

(4) Without prejudice to the provisions of *Parts III, IV, and VI*, where a health board takes a child into its care because it appears that he is lost or that a parent having custody of him is missing or that he has been deserted or abandoned, the board shall endeavour to reunite him with that parent where this appears to the board to be in his best interests.

Appendix 3: Child Care Act 1991, s. 13 – Emergency Care Order

13. —

(1) If a justice of the District Court is of opinion on the application of a health board that there is reasonable cause to believe that—

(a) there is an immediate and serious risk to the health or welfare of a child which necessitates his being placed in the care of a health board,
or

(b) there is likely to be such a risk if the child is removed from the place where he is for the time being,

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

(2) An emergency care order shall place the child under the care of the health board for the area in which the child is for the time being for a period of eight days or such shorter period as may be specified in the order.

(3) Where a justice makes an emergency care order, he may for the purpose of executing that order issue a warrant authorising a member of the Garda Síochána, accompanied by such other members of the Garda Síochána or such other persons as may be necessary, to enter (if need be by force) any house or other place specified in the warrant (including any building or part of a building, tent, caravan or other temporary or moveable structure, vehicle, vessel, aircraft or hovercraft) where the child is or where there are reasonable grounds for believing that he is and to deliver the child into the custody of the health board.

(4) The following provisions shall have effect in relation to the making of emergency care orders—

(a) any such order shall, subject to *paragraph (b)*, be made by the justice for the district in which the child resides or is for the time being;

(b) where a justice for the district in which the child resides or is for the time being is not immediately available, an order may be made by any justice of the District Court;

(c) an application for any such order may, if the justice is satisfied that the urgency of the matter so requires, be made *ex parte*;

(d) an application for any such order may, if the justice is satisfied that the urgency of the matter so requires, be heard and an order made thereon elsewhere than at a public sitting of the District Court.

(5) An appeal from an emergency care order shall not stay the operation of the order.

(6) It shall not be necessary in any application or order under this section to name the child if such name is unknown.

(7) (a) Where a justice makes an emergency care order, he may, of his own motion or on the application of any person, give such directions (if any) as he thinks proper with respect to—

(i) whether the address or location of the place at which the child is being kept is to be withheld from the parents of the child, or either of them, a person acting in *loco parentis* or any other person;

(ii) the access, if any, which is to be permitted between the child and any named person and the conditions under which the access is to take place;

(iii) the medical or psychiatric examination, treatment or assessment of the child.

(b) A direction under this subsection may be given at any time during the currency of the order and may be varied or discharged on the application of any person.

Appendix 4: Child Care Act, 1991, s. 17, as amended by s. 267(1) of the Children Act 2001 – Interim Care Orders

17. —

(1) Where a justice of the District Court is satisfied on the application of a health board that—

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

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

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

(2) 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 twenty-eight days, or

(b) where the health board 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 care order continue to exist with respect to the child.

(3) An application for an interim care order or for an extension of such an order shall be made on notice to a parent having custody of the child or to a person acting in *loco parentis* except where, having regard to the interests of justice or the welfare of the child, the justice otherwise directs.

(4) Where an interim care order is made, the justice may order that any directions given under *subsection (7) of section 13* may remain in force

subject to such variations, if any, as he may see fit to make or the justice may give directions in relation to any of the matters mentioned in the said subsection and the provisions of that section shall apply with any necessary modifications.

Appendix 5: Child Care Act, 1991, s. 18 – Care Orders

18. —

(1) Where, on the application of a health board with respect to a child who resides or is found in its area, the court is satisfied that—

- (a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or
- (b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or
- (c) the child's health, development or welfare is likely to be avoidably impaired or neglected,

and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section, the court may make an order (in this Act referred to as a “care order”) in respect of the child.

(2) A care order shall commit the child to the care of the health board for so long as he remains a child or for such shorter period as the court may determine and, in such case, the court may, of its own motion or on the application of any person, extend the operation of the order if the court is satisfied that grounds for the making of a care order continue to exist with respect to the child.

(3) Where a care order is in force, the health board shall—

- (a) have the like control over the child as if it were his parent; and
- (b) do what is reasonable (subject to the provisions of this Act) in all the circumstances of the case for the purpose of safeguarding or promoting the child's health, development or welfare;

and shall have, in particular, the authority to—

- (i) decide the type of care to be provided for the child under *section 36*;
- (ii) give consent to any necessary medical or psychiatric examination, treatment or assessment with respect to the child; and
- (iii) give consent to the issue of a passport to the child, or to the provision of passport facilities for him, to enable him to travel abroad for a limited period.

(4) Any consent given by a health board in accordance with this section shall be sufficient authority for the carrying out of a medical or psychiatric examination or assessment, the provision of medical or psychiatric treatment, the issue of a passport or the provision of passport facilities, as the case may be.

(5) Where, on an application for a care order, the court is satisfied that—

(a) it is not necessary or appropriate that a care order be made, and

(b) it is desirable that the child be visited periodically in his home by or on behalf of the health board,

the court may make a supervision order under *section 19*.

(6) Between the making of an application for a care order and its determination, the court, of its own motion or on the application of any person, may give such directions as it sees fit as to the care and custody of, or may make a supervision order in respect of, the child who is the subject of the application pending such determination, and any such direction or supervision order shall cease to have effect on the determination of the application.

(7) Where a court makes a care order, it may in addition make an order requiring the parents of the child or either of them to contribute to the health board such weekly or other periodic sum towards the cost of maintaining the child as the court, having regard to the means of the parents or either of them, thinks fit.

(8) An order under *subsection (7)* may be varied or discharged on application to the court by the parent required to contribute or by the health board.

Appendix 6: Child Care Act, 1991, s. 23B (as inserted by The Children Act, 2001, s. 16) – Special Care Orders

23B.—

(1) A court may, on the application of a health board with respect to a child who is in its care or who resides or is found within its area and having taken into account the views of the Special Residential Services Board referred to in section 23A(2)(b), make a special care order in respect of the child if it is satisfied that—

(a) the behaviour of the child is such that it poses a real and substantial risk to his or her health, safety, development or welfare, and

(b) the child requires special care or protection which he or she is unlikely to receive unless the court makes such an order.

(2) A special care order shall commit the child to the care of the health board concerned for so long as the order remains in force and shall authorise it to provide appropriate care, education and treatment for the child and, for that purpose, to place and detain the child in a special care unit provided by or on behalf of the health board pursuant to section 23K.

(3) Where a child is detained in a special care unit pursuant to a special care order, the health board may take such steps as are reasonably necessary to prevent the child from—

(a) causing injury to himself or herself or to other persons in the unit, or

(b) absconding from the unit.

(4) (a) Subject to subsections (5) and (6), a special care order shall remain in force for a period to be specified in the order, being a period which is not less than 3 months or more than 6 months.

(b) The court may, on the application of the health board concerned, extend the period of validity of a special care order if and so often as the

court is satisfied that the grounds for making the order continue to exist with respect to the child concerned.

(5) If, while a special care order is in force in respect of a child, it appears to the health board concerned that the circumstances which led to the making of the order no longer exist with respect to the child, the board shall, as soon as practicable, apply to the court which made the order to have the order discharged.

(6) A special care order shall cease to have effect when the person in respect of whom it was made ceases to be a child.

(7) Where a special care order is in force, the health board may—

(a) as part of its programme for the care, education and treatment of the child, place the child on a temporary basis in such other accommodation as the board is empowered to provide for children in its care under section 36,
or

(b) arrange for the temporary release of the child from the unit on health, education or compassionate grounds,

and any such placement or arrangement shall be subject to its control and supervision.

(8) Subject to this section, subsections (3), (4), (6), (7) and (8) of section 18 shall apply in relation to a special care order as they apply in relation to a care order, with any necessary modifications.

Appendix 7: Child Care Act, 1991, s. 45 – After Care

45.—

- (1) (a) Where a child leaves the care of a health board, the board may, in accordance with *subsection (2)*, assist him for so long as the board is satisfied as to his need for assistance and, subject to *paragraph (b)*, he has not attained the age of 21 years.

(b) Where a health board is assisting a person in accordance with *subsection (2)(b)*, and that person attains the age of 21 years, the board may continue to provide such assistance until the completion of the course of education in which he is engaged.
- (2) A health board may assist a person under this section in one or more of the following ways—

 - (a) by causing him to be visited or assisted;
 - (b) by arranging for the completion of his education and by contributing towards his maintenance while he is completing his education;
 - (c) by placing him in a suitable trade, calling or business and paying such fee or sum as may be requisite for that purpose;
 - (d) by arranging hostel or other forms of accommodation for him;
 - (e) by co-operating with housing authorities in planning accommodation for children leaving care on reaching the age of 18 years.
- (3) Any arrangement made by a health board under section 55 (4) or (5) of the [Health Act, 1953](#), in force immediately before the commencement of this section shall continue in force as if made under this section.
- (4) In providing assistance under this section, a health board shall comply with any general directions given by the Minister.