

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

**A Report Submitted to the Oireachtas**

**Professor Dr Geoffrey Shannon**

**2016**

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The Report reflects the law and practice as at December 31, 2015, but it has been possible to include new developments since that date.

**Dr Geoffrey Shannon**

## EXECUTIVE SUMMARY

### SECTION1: CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

Children may be involved in the justice system in either civil or criminal proceedings. Regardless of the context of such proceedings the rights and interests of children must be protected. The EU is promoting the Council of Europe guidelines on child-friendly justice as published in 2010. The EU Agency for Fundamental Rights (“FRA”) produced a report in 2015 examining the extent to which judicial proceedings are in fact child-friendly. This FRA report examines matters from the perspectives of the professionals involved and children.

The report highlights that whilst it is widely acknowledged that children have a right to be heard in judicial proceedings concerning them, issues arise as to the effectiveness with which this right is implemented and applied. For such a right to be meaningful it must be applied effectively. In Ireland the guardian *ad litem* is the most appropriate conduit to ensure that a child is properly heard in judicial proceedings concerning him/her. However, as highlighted in previous reports, the appointment and role of a guardian *ad litem* is a matter that requires legislative clarity and structure.

A child’s right to be heard in judicial proceedings can only be aided where those proceedings take place in a child-friendly environment. Specialised family or child courts operate in many EU Member States, but not in Ireland. In addition, specific support services ought to be made available to children involved in judicial proceedings to ensure that they fully understand the process and can actively partake. Communication of information to children is key in this regard. Further, focus needs to be brought to bear on those professionals operating in the justice system to ensure that they are appropriately skilled and trained in dealing with children and cases concerning children.

Any judicial process involving a child must have the child’s best interests at its core. The identification, assessment and reporting of a child’s best interests is crucial. The factors that go towards what might constitute the best interests of a child ought to be identified. This can be seen in other jurisdictions, e.g. England and Wales.

The FRA also published a further useful report entitled ‘Handbook of European Law on the Rights of the Child’. This resource is of particular benefit to those involved in the justice system who may not be specialised, or sufficiently experienced, in matters concerning children’s rights. It provides an overview in respect of all sources of European law and highlights certain inconsistencies also.

Children with disabilities fall into a category of particularly vulnerable persons in our society. Special protection measures are required for such children to ensure they are not exploited. This is a particular topic that the FRA has sought to promote throughout 2015 in various different guises. Awareness and implementation of the different conventions and provisions is required. Whilst there is a personal safety skills programme operational in Irish schools, known as the Stay Safe Programme, the effectiveness of this programme has not been evaluated recently. With the advent of social media and technological advances in modes of communication a re-evaluation of the effectiveness of this programme is long overdue so as to ensure that protection measures keep pace with social developments.

With the recent influx of refugees into the EU the need to have appropriate systems in place to care for and protect children deprived of parental care has come into sharp focus. The systems in place throughout the EU differ greatly from one Member State to another. Uniformity is required at EU level. In Ireland there is a specialised unit within the Child and Family Agency for separated children seeking asylum. This is to be commended. However, the entitlement of a child to benefit from this service is somewhat limited in that specific criteria are to be met in order to qualify. The scope and availability of this unit ought to be broadened. This is an area in which the role of the guardian *ad litem* could be expanded thereby significantly benefitting such children.

The Council of Europe is in the process of ascertaining the views of children as part of formulating its strategic plan for 2016 – 2019. This is a prime example of the necessity for, and benefit of, ascertaining the views of children when formulating policy concerning them. The benefits to be derived from such an approach cannot be underestimated. As members of our society children have as much a right as other sectors of society to partake in decisions concerning policy and services relating to their sector of society. In order to develop an effective child protection system it is necessary to take account of the views of children so as

to fully understand and appreciate matters from their perspective. Otherwise there is a significant risk that programmes and services will not fulfil their objectives.

In the last number of years forums involving children both in Ireland and across the EU have brought to the fore a number of issues that concern children that might not previously have been fully appreciated. A significant proportion of children still highlight violence in the home as being their primary concern. These children note the absence of specific supports for them. Rather, the supports made available for children appear to be secondary to whatever supports might be made available to the abused parent. Further, a surprising degree of discrimination appears to operate amongst children. This discrimination takes on many forms and can be linked to bullying. In order to properly combat these issues it is first necessary to fully understand them and the best means of doing so is through interaction with children and ascertaining their views.

There have also been a number of developments at UN level throughout the past year. In 2015 the UN Committee on Economic, Social and Cultural Rights reviewed Ireland's compliance with the International Covenant on Economic, Social and Cultural Rights. The Committee welcomed the International Protection Act, although it made recommendations as to how it ought to be amended. The Committee also noted a number of areas in which Ireland has fallen short of its obligations. In particular the Committee noted the increase in the number of children living in poverty in Ireland, the increase in homelessness, the lack of social housing, poor nutrition, deteriorating healthcare services and the need to take immediate action to separate children from adults in psychiatric facilities.

2016 will also see the review by the UN Committee on the Rights of the Child of Ireland's third and fourth reports as submitted in 2013. The Children's Rights Alliance published a shadow report to that as submitted by the State. It points to a number of issues that the Committee is likely to comment on. More needs to be done to address apparent violations of the UN Convention on the Rights of the Child concerning children in the traveller community, children seeking asylum, children in direct provision and children suffering from mental health difficulties. It is apparent that Ireland has more to do on these fronts domestically. However, internationally Ireland is to be commended in its efforts to achieve the Sustainable Development Goals by 2030. Ireland is at the forefront of this international initiative designed to tackle some of the key social problems across the globe.

Article 31 of the UN Convention on the Rights of the Child enshrines the right to play. This right has often been neglected. As a consequence the UN Committee on the Rights of the Child drafted General Comment No 17: The right of the child to rest, leisure, play, recreational activities, cultural life and the arts (2013) in order to highlight and clarify State obligations, the role and responsibilities of the private sector as well as providing guidelines for professionals and parents. Play is intrinsic to the healthy development of children. In order to promote this right adequate space and time has to be afforded to children to play. Child-friendly facilities must be put in place. In particular access to such facilities must be made available to all children regardless of their physical or social status. Previously Ireland introduced active steps to improve play facilities amongst children throughout the country. However, little has been done in more recent times. Scotland has been proactive in this field more recently and the steps taken in that jurisdiction might readily be mirrored in Ireland.

In 2015 the Human Rights Council discussed the freedom of opinion and expression, including the right to seek, receive and impart information online. This is now seen as a human rights issue, but is one that is particularly under-explored in the context of children's rights. A wide variety of human rights issues arise in respect of the operation of the internet. In terms of children the focus is often on seeking to protect them from online abuse. Various methods are employed in that regard. However, it is important to ensure that such methods do not curtail other rights of children, e.g. the right to obtain information from the internet. A careful balance must be struck. Children need to be educated in the internet so that they can maximise the benefit of using it whilst at the same time executing sound judgment decisions in respect of inappropriate behaviour online.

2015 saw Ireland take the very progressive step in removing the defence of reasonable chastisement for parents accused of assaulting children. This makes Ireland the 47th State to ban physical punishment of children. Questions have been raised in the past, and continue to be raised, in respect of appropriate methods of disciplining children. Information is available in this regard and various parenting support programmes are also available. These services ought to be promoted to ensure that parents understand how to appropriately discipline children without resorting to unlawful physical punishment.



## **SECTION 2: DOMESTIC DEVELOPMENTS**

This section of the Report considers the written decisions of the Irish Courts from 2015 which have issues pertaining to children's rights. The various legal topics which these cases traverse are adoption; Care Orders granted in the District Court pursuant to the Child Care Act 1991; costs in Child Care cases; immigration; surrogacy; the jurisdiction of the Irish Courts to hear Child Care cases where the child the subject of the proceedings has a connection with another country; whether child protection case conferences are subject to Judicial Review; whether parents are entitled to legal representation at child protection case conferences; developments in Hague Convention Cases; High Court Secure Care cases; including issues arising where a child in secure care comes of age; as well as general issues arising in the area of Judicial Separation, Divorce and Maintenance applications.

## **SECTION 3: CHILD PROTECTION AND THE CRIMINAL JUSTICE SYSTEM**

The Criminal Law (Sexual Offences) Bill 2015 is very much to be welcomed for creating a wide range of new criminal offences in relation to child pornography and the grooming of children for sexual exploitation and in particular for addressing the role of Information and Communication Technology (ICT) in committing such offences.

Part 2 of the 2015 Bill concerns the sexual exploitation of children and its provisions are designed to target acts of sexual grooming and enhance the protection of children from sexual exploitation, including exploitation through child prostitution and child pornography

Soliciting a child for sexual exploitation is an offence under the Bill. Previous definitions of 'sexual exploitation' were insufficient in capturing all possible forms of sexual exploitation of a child and loop holes in the legislation were apparent. The revised definition closes off those loop holes thereby rendering the offence more robust. In general terms the Bill addresses previous concerns in that it now prohibits the sexual exploitation of children taking place entirely online or through ICT. However, an express reference to the use of ICT in those parts of the Bill concerning the sexual exploitation of children would be a further prudent step.

The Bill also revises the offence of grooming and provides a new definition of this offence which brings it in line with internationally recognised standards thereby providing for greater child protection in Ireland.

Mobile devices are now very powerful computers with the memory capacity to contain many thousands of images, text and video files that constitute child pornography, along with ICT evidence of grooming, solicitation, sexual exploitation and important evidence relating to contact sexual offences (e.g. images, ir chat/SMS messages discussing the incident). To reflect this development, An Garda Síochána should be provided with a power to search a suspect of such crime in a place other than the home - either a power similar to section 23 of the Misuse of Drugs Acts or a category of warrant to allow a search of a specific person in a public place.

Facebook, Google, Yahoo, Adobe, Microsoft are some of the many non-Irish companies with offices in this country. Many of them store their Irish data in Ireland but some of them claim it is stored in the US, etc. For the investigation of child pornography cases and sexual offences against children where ICT is involved An Garda Síochána need a production order that can be served on any such company registered in Ireland requiring production of ICT evidence – photos, chat, account information, IP Addresses. An order similar to that provided for in section 15 of the Criminal Justice Act 2011 for fraud and banking is worthy of consideration. It seems anomalous that powers introduced to deal with the banking crisis should not be available to protect vulnerable children.

The definition of child for the purposes of child pornography offences has been increased from 17 to 18 thereby bringing Ireland in line with international standards. A significant gap in the Child Trafficking and Pornography Act 1998 that has been addressed by the 2015 Bill is the inclusion of an offence of viewing child pornography. The previous gap in our law concerning the streaming of child pornography or accessing of same without necessarily downloading it has also been rectified in the Bill.

Whilst the Bill expands the remit of the jurisdiction of the Irish Courts to deal with child sex offences there is still scope for further improvement in this regard, particularly if a victim-centred approach to jurisdiction is adopted.

The issue of a child who is the victim of a sexual offence giving evidence in criminal trials remains a live one, and one of concern. The Bill makes some progress towards ameliorating the suffering of further trauma by such children as part of the criminal justice process. However, more far reaching reform is required. The protective measures available for children are triggered in respect of sexual offences. However, the definition of sexual offences omits a number of offences that ought to also trigger these protective measures, e.g. an offence of attempting to commit a sexual offence against a child.

Perhaps the most surprising omission from the Bill is a definition of consent. Such a statutory definition would avoid ambiguity in respect of what is a critical issue in most sexual offence cases.

The 2015 Bill introduces a two year proximity rule with a view to providing a defence in circumstances where two children engage in sexual activity of a consensual nature. The introduction of such a rule has been recommended for a number of years, particularly since the decision in *CC v Ireland* and its introduction in the 2015 Bill is to be welcomed as it avoids the ambiguity that operated heretofore where the decision to prosecute such offences was at the discretion of the DPP.

The Bill now specifically penalises offences against a child where the offender has abused a position of trust. Such positions of trust are held by persons in authority. The Bill defines persons in authority to include various family members but also persons responsible for the education, supervision, training, care or welfare of a child. Longer sentences are also imposed for offences committed by such persons.

The Bill addresses the defence of honest mistake as to the age of a child in the context of defilement offences. This defence came to the fore in the Supreme Court case of *CC v. Ireland* and was given a statutory footing in the Criminal Law (Sexual Offences) Act 2006. However, the defence as prescribed in the statute was both of a subjective and objective nature and the subject of much criticism. The 2015 Bill addresses this by rendering the defence wholly objective. This change is to be welcomed but is somewhat offset by the removal in the Bill of increased sentences for those who commit subsequent defilement offences. This change is regrettable and ought to be reconsidered.

Finally the 2015 Bill creates new offences regarding the purchase of sexual services. This will act as a deterrent for child prostitution and trafficking as these offences target those who purchase as oppose to sell such services.

In a further welcome development in July 2015 the Heads and General Scheme of the Criminal Justice (Victims of Crime) Bill 2015 was published. Hailed as a landmark new Bill, Minister Frances Fitzgerald stated that it has been introduced to “strengthen the rights of victims of crime and their families, to ensure that victims and their needs are at the heart of justice process and that rights to information, advice and other appropriate assistance are met effectively and efficiently.” For the first time in Ireland, this Bill seeks to put the rights of victims of crime on a statutory footing and the place of victims in the criminal justice system is being explicitly recognised. This welcome development follows a definite movement on the part of the State in recent years towards greater acknowledgement of the victim within the criminal process and mirrors significant developments in this regard at EU level.

The overriding objective of the General Scheme and Heads of the Criminal Justice (Victims of Crime) Bill is to put in place a rights-based approach to victims, as envisaged by both the Directive and the Commitment in the Programme for Government. The 2015 Bill affects each stage of the criminal process, from the making of the complaint and the beginning of the investigation to the criminal trial and outcome of prosecutions, and its broad scope is undeniably a very positive development for victims in this country.

Directive 2012/29/EU provides extensive rights for crime victims within the criminal process, seeking to ensure that all victims benefit from minimum standards, support and protection throughout the EU. In accordance with Article 27 of the Directive, Member States must have brought into force the laws, regulations and administrative provisions necessary to comply with the Directive by 16 November 2015. Ireland has generally been slow to take action with regard to these international standards. While the Directive is directly effective in Irish law as of 16 November 2015, its implementation is to be carried out through the Victims of Crime Bill and Minister Fitzgerald, upon the publication of the Heads and General Scheme confirmed that the Bill is designed to transpose the Victims’ Directive into Irish law.

The Heads of Bill stipulate that information is to be provided to the victim of a crime throughout the process from the outset and the aftermath following a court hearing. Head 8

of the Victims of Crime Bill creates a statutory right for victims to be informed, where they request, of any decision not to proceed with or to discontinue an investigation into the offence alleged and any decision not to prosecute an alleged offender. Furthermore, it states that the victim is to be given the reasons for said decision, or a brief summary of the reasons. In circumstances where the Directive is now directly effective in Ireland and the State has yet to enact legislation transposing same into Irish law, the DPP has taken the proactive step of nonetheless establishing a new Communications and Victim Liaison Unit for developing the structures and procedures required to ensure that the rights of victims and their families, as set out in the Directive, are implemented.

The Heads of Bill also address the support to be provided to victims of crime throughout the criminal justice process. The Victim Personal Statement is one of the more significant aspects of the Heads of Bill. Previously the entitlement of a victim to address a Court through a Victim Impact Statement was limited to certain offences. The Heads of Bill propose broadening the application of this tool thereby enabling victims of crime to feel more an integral part of the criminal justice process as opposed to a mere witness.

Section 99 of the 2001 Act places a statutory obligation upon the court to order a probation and welfare report in certain circumstances prior to sentencing a young offender. The obligation set out in section 99 is of crucial importance in order to protect the interests of a young offender and to support the principle that detention should only be imposed as a last resort. This pre-sanction report enables the probation service to assess the offender's suitability for a non-custodial sentence and outlines proposals for the safe management of the young person, whether by means of a community sanction or an alternative programme.

From a child protection perspective, the decision in *Robert Allen v. Governor of St. Patrick's Institution* is to be welcomed. The High Court has clearly recognised that the obligation to order a probation and welfare report under section 99 of the 2001 Act is a mandatory one and young offenders who could face a period of detention must be given the opportunity to engage with the Probation Service. Even in a situation where a child is informing the court that he or she will not cooperate with a probation officer in the preparation of a pre-sanction report, the court is mandated to make an order under section 99. In this way, the interests of young offenders are protected and their misguided refusal to cooperate, whether as a result of

their youth, inexperience or vulnerability, will not deprive them of the chance to address their criminal activity with an experienced probation officer.

For child offenders, the imposition of a sentence of detention is measure of last resort. All legal options on the statute book which allow for the detention of children in adult facilities have been repealed and these developments are undoubtedly to be welcomed as a very positive step for the protection of children who have been sentenced to detention. Non-custodial options are available as a means of sentencing for children. Community-based sanctions and community service orders are available yet are underutilized and ought to be promoted as alternatives when sentencing.

## RECOMMENDATIONS

### SECTION1: CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

#### 1.2.6 Child-Friendly Justice

*Irish professionals involved with proceedings affecting children should be made aware of the report of the EU Agency for Fundamental Rights on the experiences of professionals of child-friendly justice.*

*Greater assistance should be provided to professionals working with children in proceedings, particularly those in civil law, on how to balance children's participation rights on the one hand and their protection rights on the other.*

*Children should have representation in all cases concerning their interests, and the exact role of the guardian ad litem should be made clear. This is particularly pressing in order to bring Ireland into conformity with CRC Article 12.*

*In Ireland, objective methods should be introduced to assess children's maturity, taking into account both "age and capacity" in accordance with Article 12 of the CRC.*

*Ireland should develop specialised criminal and civil courts to cater for children's cases. Such specialised structures should be made child-friendly and should involve trained child specialists.*

*Child-sensitive interviewing should be a requirement for child victims of crime. Children should be properly informed in advance of the interview process. Moreover, children should not be interviewed repeatedly or inappropriately.*

*Strong support services should exist for children involved in legal proceedings, in particular child victims and witnesses. It is crucial that information on support services should be adequately communicated to children and parents.*

*Services for children in judicial proceedings must be provided in a way that is facilitative of particular groups of children such as children with disabilities and those from minority groups. Data should be disaggregated to reflect their experiences. Professionals should be trained to work with vulnerable children and should either delegate or work with experts on cases involving such children. Guidelines should be developed for professionals in such cases.*

*Children should be better informed about their rights and the nature of any proceedings in which they are involved. They should receive adequate information about the stages of the proceedings, what hearings will be like and the availability of any special measures for children's protection. Parents and those working to support the child in proceedings should receive special materials prepared for children, in order to help those adults in conveying relevant information in child-friendly language.*

*In Ireland, section 24 of the Child Care Act 1991 should be amended to include a checklist in order to provide a list of factors to assist judges in coming to a conclusion about the welfare of the child. The Act should also contain the obligation to explain how the decision has been reached.*

*Professionals involved in working with children's interests in proceedings should receive training on children's needs, rights and interests, and they should learn communication techniques with children. Both state authorities and professional associations should ensure that all relevant staff have appropriate mandatory training in this area.*

### **1.3.1 FRA 'Handbook on European Law relating to the rights of the child'**

*Irish professionals working on legal issues concerning children should be made aware of the handbook of the EU Agency for Fundamental Rights on European law relating to the rights of the child.*

*The matter of the education and experiences of children who are exempted from religious classes should be urgently examined in order to ensure compliance with the ECHR, and to uphold the highest children's rights standards.*



### **1.4.1 Children with Disabilities**

*Ireland should ratify both the UN Convention on the Rights of Persons with Disabilities and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse without delay.*

*It should be considered whether there are sufficient concrete measures for protecting children with disabilities in Ireland. The Stay Safe Programme in Ireland should be subject to extensive evaluation to identify whether it is suitable for a modern context. It should also be identified whether it results in an actual reduction in child abuse, particularly against children with disabilities.*

*Irish professionals working with children should be made aware of the report of the EU Agency for Fundamental Rights on violence against children with disabilities.*

*It should be considered whether Ireland's child protection programme is sufficiently inclusive from the perspective of protecting children with disabilities. It should be ensured that a sufficiently collaborative process is in place whereby all stakeholders work together to identify risk situations. The Children Act 2015 makes provision for a Child Safeguarding Statement which should assist in achieving this objective.*

*Compulsory training courses should be in place for professionals working in different fields which bring them into contact with children with disabilities. The training should involve information on the child protection framework, recognising and reporting violence and training on how to communicate with children with disabilities.*

### **1.5.1 Guardianship Systems for Children Deprived of Parental Care in the EU**

*It should be ensured that Irish professionals working with children should be made aware of the report of the EU Agency for Fundamental Rights on guardianship and the new handbook on guardianship for children deprived of parental care which aims to assist guardianship systems to cater for the needs of child victims of trafficking.*

*Authorities in Ireland should enact broader legal rights to protection and support for possible victims of trafficking in accordance with the recommendations of GRETA.*

*Conflicts of interests arise where guardianship tasks for unaccompanied minors are performed by social workers employed by the Child and Family Agency, who may also lodge an application disputing the age of such children. This problem should be rectified.*

*Guardians ad litem should be appointed in all cases of unaccompanied minors.*

*Only children who have been identified as victims of trafficking are entitled to be referred immediately to the specialised social work team in Dublin. A broader approach should be taken, and children at risk should also receive this treatment.*

### **1.6.1 Council of Europe Report on Children's Views of their Rights**

*Irish professionals working with children should be made aware of the report of the Council of Europe on children's views on their rights. It is a useful tool which facilitates the inclusion of children's views in policies and practices.*

*Services specific to children must be ensured for children with experience of domestic violence. In particular, there should be an availability of women's shelters where teenage sons are permitted to stay. Children should never be ordered to have contact with domestically violent parents against their will. Families must have assistance such as counselling to repair relationships damaged by domestic violence.*

*Considerable progress has been made in recent years in the youth justice area. That said, further attempts should be made to avoid the use of force, including restraint, of children in custodial settings. Staff recruitment should have a clear focus on individuals with a proven ability of working with children, and those who come from similar backgrounds as those in custody.*

*Greater efforts are needed to ensure that sex education challenges "victim blame" in respect of sexual violence, and to ensure that children fully understand consent. Young victims of*

*sexual violence should have the therapeutic/support services of a single professional and a single service over time so that they can build relationships of trust with service providers.*

*All efforts should be made to refrain from placing children in custody where they come into conflict with the law. Such children need alternatives such as community service, a second chance, and opportunities to fix their own problems.*

*High-quality support services should be in place for children with a parent in prison. Parents should be supported and encouraged to ensure that children have adequate information when a parent goes to prison.*

*A broad range of mechanisms must be developed to facilitate the participation of children in decisions affecting them across different groups and contexts, and children should always receive information on how and whether their views have had an impact.*

*In particular families should be encouraged and facilitated to ensure that children are heard in decisions affecting them. This is very likely to indirectly benefit children's experiences in many ways, including by decreasing school bullying.*

*Politicians must do more to hear children's views and to facilitate them to engage in local and national political processes. While progress in Ireland has been made with the establishment of Comhairle na nÓg and Children and Young People's Services Committees, further progress is required. Innovative practices, such as the Children's City Council in Croatia should be considered, where children communicate with the mayor and give views on budgetary matters. So too should the potential for online tools for helping children to communicate with elected representatives.*

*Where children live in institutions, their views should be pivotal regarding decisions on their personal circumstances and their everyday living conditions. Practice in the Netherlands, where young people are trained by their peers on how to contribute to the running of care homes, should be considered.*

*Greater consideration should be given to the importance of retaining family links for children in care where possible. Children in care most frequently and strenuously emphasise this issue as important to them.*

*Children should have legislative protection against age discrimination in Ireland, and Ireland should increase awareness of age-discrimination against children.*

*All schools should have programmes in place tackling discrimination, including on the basis of race and ethnicity and disability. Greater efforts should be made to ensure minority and disadvantaged groups have opportunities to socialise and interact. In the case of children with disabilities, for example, all efforts should be made to ensure that they should be able to attend mainstream school if it is in their best interests. Children with and without disabilities should have many opportunities to meet together.*

*Greater attention should be given to children's participation in the running of schools in Ireland. 'Democratic schools' where children's participation is embedded in everyday practice should be considered. Teachers should receive increased training on child participation.*

*Teachers should be trained to seek children's views in a manner that will ensure the most positive environment for children's development.*

*In 2013 the Department of Education and Skills published new anti-bullying procedures to be adopted by all primary and post primary schools. Further progress is required in promoting the implementation of these procedures. In particular, teachers should be better trained to notice and respond better to bullying and children should have more opportunities to discuss issues relating to bullying.*

*Children should have a greater say in budget decisions to ensure that their needs and rights are properly met and facilitated.*

*Service providers should consider how to better involve families and friends in various efforts to assist children, because of the importance of relationships of trust to all aspects of children's well-being.*

### **1.7.1 Ireland before the UN Committee on Economic, Social and Cultural Rights**

*The Direct Provision system should be abolished, and in the interim living standards at Direct Provision centres should be improved.*

*Affordable public childcare services should be expanded in Ireland, considering the high level of criticism by the Committee on Economic, Social and Cultural Rights. The maternity benefits scheme should be improved and made accessible to all, and adequate provision should also be made for paternity leave.*

*Authorities should increase efforts to reduce poverty, particularly considering the high rates of children living in poverty. Poverty reduction programmes should be adopted which have concrete targets and time-frames, and a human rights basis which ensures entitlements and accountability.*

*The state has an obligation to progressively realise the right to adequate food. Concrete measures should be taken to address the nutrition needs of poor families. A “national action plan on food security and nutrition” should be drafted in line with the 2004 ‘Voluntary Guidelines’ on implementing the right to food, which requires the availability of healthy food for the poor and a legal human rights-based approach.*

*Ireland should tackle the housing crisis in line with General Comment No. 4 (1991) on the right to adequate housing and General Comment No. 7 (1997) on forced evictions. The needs of vulnerable groups should be prioritised, social housing units should be built and homelessness adequately dealt with. Satisfactory consultation with Travellers and Roma to ensure culturally appropriate accommodation should be prioritised.*

*Ireland must “take all necessary measures” to improve healthcare services, including through increased public spending. Immediate action should be taken to separate children from adults in psychiatric facilities.*

*The Equal Status Acts 2001 and the Education (Admission to Schools) Bill 2015 should be amended to ensure the principle of non-discrimination in school admission policies. Austerity measures which disproportionately affect the education of disadvantaged children should be*

*revoked. Ireland must increase efforts to enhance inclusive education for all, particularly Traveller children, because of the significant educational barriers they face as evidenced by much lower levels of educational attainment.*

### **1.8.1 Preparing for Examination of Ireland's Submission to the UN Committee on the Rights of the Child**

*Significant efforts should be made to publicise, in line with the requirements of CRC Article 42, Ireland's combined third and fourth periodic report to the UN Committee on the Rights of the Child and the Children's Rights Alliance shadow report entitled 'Are We There Yet?'*

*The process in 2016 of the examination of Ireland's report by the UN Committee on the Rights of the Child should also be publicised as much as possible.*

*The recommendations in the shadow report of the Children's Rights Alliance should be considered, in particular necessary legislative change and steps to facilitate the rights of vulnerable groups such as children in the Traveller community and children with mental health needs.*

### **1.9.1 Ireland and the Millennium Development Goals**

*Ireland should continue its excellent work at international level progressing work on eliminating child poverty through human rights-based approaches.*

*Ireland needs to do more to match these efforts by ensuring human rights-based approaches in budgetary and other decisions at home. This is a complex matter, although a number of practical initiatives may help achieve this objective. For example, children's rights audits/analysis should be conducted to ensure that austerity measures do not disproportionately affect children.*

*Ireland should implement a plan to meet the Sustainable Development Goals targets by 2030. A children's rights audit/analysis should also be used in order to ensure the prominence of their rights in such a plan.*

### **1.10.1 Committee on the Rights of the Child General Comment No 17: The Right to Play**

*Awareness-raising should be undertaken to ensure that professionals and parents are aware of the importance of CRC Article 31 and the obligations which exist in relation to children's rights to play, recreation, rest and the participation in the arts. Caregivers should receive guidance and facilitation to progress children's rights in this regard.*

*Ireland should invest in measures to change negative cultural attitudes which devalue play and view it as a 'nuisance'. Non-discrimination legislation should guarantee access for children to all recreational, cultural and artistic environments.*

*Child protection policies and standards for professionals working with children in the field of play should be ensured by the State. This will involve regulation of the commercialization of toys and games to children, such as through television advertising.*

*Children must be adequately consulted on planning and implementation of planning policies at the national and local levels to ensure adequate provision for children's spaces.*

*Legislation should be enacted to accord rights status to CRC Article 31 for every child. Moreover, there should be a plan and a timetable for implementation of CRC Article 31.*

*The implications of CRC Article 31 for children from different groups should be adequately considered to ensure equality for those who suffer disadvantage, and monitoring of implementation should include data disaggregated to recognise different groups of children.*

*Universal design should be embedded in the designing of products and the built environment to ensure equal access for children with disabilities.*

*An updated strategy on play and recreation should be drafted and implemented. It should be based on CRC Article 31 and implementation should be adequately evaluated.*

*Practice in Scotland should be considered, in particular the pro-active role of the Children's Commissioner and the involvement of civil society groups in efforts to implement CRC Article 31.*

### **1.11.1 Developments Concerning Children's Digital Rights**

*Human rights debates around online freedoms should consider children's rights and children's protection.*

*Irish authorities should continue efforts to protect net neutrality, as one benefit is that it upholds the ability of small groups and organisations to facilitate the progression of children's rights.*

*The relevance for children of the 'right to be forgotten' should be acknowledged, children should be educated about the matter, and it should be understood that the age at which an individual posts information online should be considered a very important factor in decisions about whether to remove an individual's personal information from sites.*

*It must be ensured that children's access to information is not unreasonably restricted by blanket filters blocking websites which offer education and support.*

*It is vital to take steps to combat cyber-bullying, including through education of parents. However the importance of dialogue and support for children, rather than simply prohibitions on Internet usage, should be part of this education.*

### **1.12.1 Protecting Children from Violence through Positive Parenting**

*Measures for the prevention of violence, awareness-raising activities and the promotion of positive, non-violent relationships must be implemented in line with General Comment No. 13 on the prevention of violence against children. Monitoring of efforts are also vital.*

*Ireland should implement Council of Europe Recommendation CM/Rec (2006)19 to support positive parenting and engage with the resources available from the Council of Europe.*



*Efforts to ensure environments conducive to positive parenting, such as dignified material conditions for families, and services to support parents such as counselling and helplines should be increased.*

*Sufficient support and funding should be provided for well-evidenced parenting supports such as the Community Mothers Programme.*

## **SECTION 3: CHILD PROTECTION AND THE CRIMINAL JUSTICE SYSTEM**

### **The Criminal Law (Sexual Offences) Bill 2015**

#### **3.1.2 Solicitation and Grooming Offences**

*A coherent and comprehensive approach should be adopted throughout the Criminal Law (Sexual Offences) Bill 2015 in combatting the use of Information and Communication Technology (ICT) in perpetrating sexual offences against children. Whilst the 2015 Bill addresses this in parts, there are other parts where ICT is not expressly addressed. For example, it is recommended that ICT be expressly referenced in section 4, 5 and 6 of the 2015 Bill which create new offences inviting a child to sexual touching, sexual activity in the presence of a child and causing a child to watch sexual activity.*

*Section 7 of the 2015 Bill addresses the offence of “grooming”. There remains a possible prosecutorial difficulty regarding this offence in proving that an offender was meeting the child or making arrangements to meet the child for the purpose of doing anything that would constitute sexual exploitation. Consideration should therefore be given to amending section 7 of the 2015 Bill to address this lacuna in so far as is practicable.*

*Mobile devices are now very powerful computers with the memory capacity to contain many thousands of images, text and video files that constitute child pornography, along with ICT evidence of grooming, solicitation, sexual exploitation and important evidence relating to contact sexual offences (e.g. images, ir chat/SMS messages discussing the incident). To reflect this development, An Garda Síochána should be provided with a power to search a suspect of such crime in a place other than the home - either a power similar to section 23 of the Misuse of Drugs Acts or a category of warrant to allow a search of a specific person in a public place.*

*Facebook, Google, Yahoo, Adobe, Microsoft are some of the many non-Irish companies with offices in this country. Many of them store their Irish data in Ireland but some of them claim it is stored in the US, etc. For the investigation of child pornography cases and sexual offences against children where ICT is involved An Garda Síochána need a production order that can be served on any such company registered in Ireland requiring production of ICT evidence – photos, chat, account information, IP Addresses. An order similar to that provided for in section 15 of the Criminal Justice Act 2011 for fraud and banking is worthy of consideration. It seems anomalous that powers introduced to deal with the banking crisis should not be available to protect vulnerable children.*

### **3.1.3 Child Pornography Offences**

*The definition of “child pornography” as contained in section 9 ought to be expanded so as to expressly include computer-generated images of abuse and images of fictitious children.*

### **3.1.4 Jurisdiction of Child Sex Offences**

*Consideration should be given to amending the jurisdictional remit of the Irish Courts so as to adopt a victim-centred approach, thereby establishing jurisdiction over an offence if perpetrated against an Irish national or person habitually resident in Ireland.*

*In addition, further consideration might be given to Article 17(3) of the Directive, whereby offences committed using ICT are regarded as coming within the jurisdiction of the State where the technology is accessed, thereby preventing a situation where material is accessed from within the EU, but it hosted on a server located outside the EU.*

### **3.1.5 Children Giving Evidence**

*It is recommended that Irish law be expanded so as to permit the admission of a video-recorded statement given in an interview by any child under 18, whether complainant or not, in respect of a violent or sexual crime, including an attempt to commit such an offence. The scheme as set out in sections 21 and 22 of the Youth Justice and Criminal Evidence Act 1999 in England and Wales provide a useful template for future reform in Ireland on this issue.*

*Consideration should be given to allowing pre-trial cross-examination of a child witness to take place immediately after the examination-in-chief, all of which is to be recorded to be used in the subsequent trial.*

*The lack of clarity in section 30 of the 2015 Bill is problematic. Section 30 enables a Judge direct that a child give evidence in Court behind a screen where the child is giving evidence other than through a live television link. The presence of a child in a Courtroom is to be avoided where possible. It is feared that section 30 might cause children to attend Court. The specific circumstances in which this may happen need to be set out clearly and debated upon before any such provision might be enacted.*

### **3.1.6 Statutory Definition of Consent**

*Consideration should be given to providing a statutory definition of consent in the 2015 Bill. The vague nature of the current rules on consent is unsatisfactory. The model of consent set out in sections 75 and 76 of the Sexual Offences Act 2003 in England and Wales provides a useful platform from which to work.*

### **3.1.8 Abuse of Position of Trust**

*The definition of “person in authority” set out in section 15 of the 2015 Bill should specifically enumerate examples of relationships that fall within subsection (f), including a priest.*

### **3.1.9 Defilement Offences**

*Increased penalties for those who commit subsequent offences against children ought to be provided for in the 2015 Bill.*

### **3.1.10 Child Prostitution and Trafficking**

*Section 21 addresses the purchase of sexual services from persons who are trafficked. At present it allows a defence for the defendant to prove that he or she did not know and had no reasonable grounds for believing that the person was trafficked. That will give rise to*

*prosecutorial difficulties as a purchaser is likely to avoid making any enquiries as to whether trafficking has taken place and direct knowledge of trafficking is unlikely. Instead it is recommended that the mens rea be amended so as to capture an offender who ought to have known or had a reasonable suspicion that the person was trafficked. That said, in order to provide the best protection from human trafficking, a strict liability approach might be taken as is the case in England, Wales and Northern Ireland.*

*The 2015 Bill ought to be clarified so that it is made clear that a person need not be convicted for a trafficking offence before a user can be prosecuted for soliciting a trafficked person for the purposes of prostitution.*

## **General Scheme of the Criminal Justice (Victims of Crime) Bill**

### **3.2.8 Special Measures for Certain Victims**

*Clarification should be provided on the “operational or practical reasons” that must exist that will justify the special measures in Head 15 not applying for certain victims during the investigation stage of the criminal process.*

*“Domestic Violence offence” in Head 15 should include an offence under section 17 of the Domestic Violence Act 1996, as amended.*

*Head 16 should be amended to clarify when a measure in Part III of the 1992 Act will not be utilised due to injustice to the accused. It should also be amended to give the court jurisdiction to direct the use of special measures of its own volition and to allow a victim seek the assistance of such measures, where the prosecutor fails or refuses to make an application on his or her behalf.*

*Head 26 should be revised. A possible alteration would be to state that a screen may be used only in relation to child witnesses where the child specifically opts out of giving his or her evidence by a television link, subject to the approval of the court, having regard to the child’s wishes. A review of the provision in the Youth Justice and Criminal Evidence Act 1999 in the UK may be of some assistance in framing an amendment in line with that proposed above. This would allow a measure of protection for a child where he or she chooses to be present in court, but would not allow screens or other such devices to become the norm.*

### **3.2.9 Victim Personal Statement**

*Head 19 of the Bill does not deal with the situation where the victim is a young child, unable to prepare a Personal Statement. Where the child is capable of writing such a statement, he or she should be afforded every opportunity to do so. Where a child is not capable, however, the Bill should cater for this situation and include a provision allowing a parent, guardian or other appropriate person compile a statement on behalf of the child victim. In this way, the impact of the crime on the child will be before the court, written by a person who has been able to see and discern the effect the offence has had on his or her young life.*

### **3.2.10 Case Management**

*A case management system in relation to criminal cases involving children should be introduced by way of a statutory instrument amending the rules of court. This process should be judge-led and it should have a considerable focus on time-limits for processing the case. To ensure that all parties adhere to the system, sanctions should be introduced to penalise any party who does not comply with the directions of the court.*

## **Section 99 Children Act 2001 – Probation Reports**

### **3.3.4 Probation Reports**

*Section 99 of the Children Act 2001 should be amended to include a provision to the effect that a child cannot, under any circumstances, waive, or be deemed to have waived, his or her right to have a probation report compiled under section 99 of the 2001 Act.*

## **Sentencing for Children**

### **3.4.2 Community Service Orders**

*Promote community service as a viable alternative to detention for children.*

### **3.4.3 Imaginative New Community Service Programmes**

*In respect of juveniles, it is recommended that more imaginative community service programmes be introduced specifically designed to develop the skills and interests of each individual young offender, while simultaneously benefiting his or her local community.*

#### **3.4.4 Suspended Sentences**

*Further legislative intervention is required to ensure that one comprehensive statutory regime is enacted to govern effectively the use of suspended sentences.*

## **SECTION 1:**

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

### **1.1 Introduction**

This report opens with an analysis of child protection and developments in international law. In keeping with past reports this report seeks to set out international developments with a view to considering such developments from a domestic perspective in order to highlight areas for improvement in the Irish child protection and welfare system. In particular this report will consider recent developments in the establishment of child-friendly justice systems at EU level in addition to recent commentary from the United Nations on matters concerning children.

### **1.2 Children's Involvement in the Justice System in the EU: Child-Friendly Justice Perspectives and Experiences of Professionals**

Hundreds of thousands of children across the EU are involved in legal proceedings each year. Such proceedings include those initiated by parents in dispute over custody and access issues, child protection proceedings, and those where children are accused of, or victims of, a crime. All EU Member States have made a commitment to children's rights, for example to ensure that children are heard in matters affecting them, that their best interests are considered at all times, and that they are protected from discrimination. The EU is, therefore, currently promoting the Council of Europe's 2010 Guidelines on child-friendly justice,<sup>1</sup> which aim to ensure the implementation of children's rights in proceedings affecting them, including the right to information, representation, participation and protection. The EU is seeking to help EU Member States to improve the workings of their justice systems through improved protection and participation of children.

The EU Agency for Fundamental Rights (FRA) produced a report in 2015 examining the extent to which such proceedings are child-friendly.<sup>2</sup> The report is part of a large body of work being produced both by the European Commission and the Council of Europe,

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<sup>1</sup> See <http://www.coe.int/en/web/children/child-friendly-justice> (last accessed 18 December 2015).

<sup>2</sup> EU Agency for Fundamental Rights, *Child-friendly justice – Perspectives and Experiences of Professionals on Children's Participation in Civil and Criminal Judicial Proceedings in 10 EU Member States* (European Union, 2015).

including the child rights indicators that the FRA developed in 2010<sup>3</sup> and the Council of Europe guidelines on child-friendly justice.<sup>4</sup> Most recently, the FRA conducted interviews in 10 EU Member States<sup>5</sup> with both professionals and children involved in criminal and civil judicial proceedings. This first report concerns the perspectives of 570 professionals including judges, lawyers, and social workers.

Inevitably, for research conducted across ten nations, the findings point to a variety of practices between and within EU Member States. Often practice depends on the type of cases, other times it depends on the approach of the individual judge or other professional. The report's findings provide Member States with tools with which to identify and tackle weaknesses and gaps for children's rights in judicial proceedings.

### **1.2.1 Children's Right to be Heard**

Children have a right to be heard under Article 12 of the UN Convention on the Rights of the Child (CRC) and various other international and regional instruments, such as the EU Charter of Fundamental Rights. Although this concept has become broadly accepted in the past two decades, there is less consensus on the specifics of how and when children should be heard. The FRA research found that professionals were much more likely to agree on the importance of hearing children in criminal proceedings, rather than civil proceedings, where many professionals felt that it was important to avoid drawing the child into family conflict. Therefore, in practice, professionals find it challenging to balance children's participation rights on the one hand and their protection rights on the other.

In any case, it is emphasised in the report that meaningful participation for children requires that they have a child-friendly environment, involving, for example, appropriate methods of questioning to determine a child's specific needs.<sup>6</sup> Children should have representatives, professionals believed, who are responsible for the access of children to information about their case, and someone who will also represent their views on their behalf. Such representation is also a requirement of CRC Article 12.<sup>7</sup>

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<sup>3</sup> See <http://fra.europa.eu/en/publication/2012/developing-indicators-protection-respect-and-promotion-rights-child-european-union> (last accessed 13 December. 2015).

<sup>4</sup> See <https://wcd.coe.int/ViewDoc.jsp?id=1705197> (last accessed 13 Dec. 2015).

<sup>5</sup> Bulgaria, Croatia, Estonia, Finland, France, Germany, Poland, Romania, Spain and the United Kingdom.

<sup>6</sup> EU Agency for Fundamental Rights, *Child-friendly justice* – Summary.

<sup>7</sup> See Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12.



In my Seventh Report I highlighted the lack of clarity concerning the role of the guardian *ad litem*, a professional appointed by the court in Ireland to represent a child's interests in proceedings.<sup>8</sup> This professional is the obvious conduit in Ireland to provide information to children about proceedings concerning them, and to represent them in those proceedings. Yet, in practice, it is not mandatory that this professional be appointed and therefore children's representation varies depending on geographic location and individual judges. Although there is a guidance document outlining standards for guardians *ad litem*, this is not on a statutory footing. I recommended in my Seventh Report that children should have the representation of a guardian *ad litem* in all cases concerning their interests, and that the exact role of the guardian *ad litem* should be made clear. The emphasis in this FRA report makes it all the more pressing that action be taken in Ireland to ensure that the system works in a manner that fully facilitates children's rights under CRC Article 12.

Another aspect of ensuring the right of children to be heard is developing a clear legal definition of maturity for children. The maturity of a child, the report states, is critical to determining the means and extent of the participation of an individual child in judicial proceedings. Yet States do not have clear criteria in place and individual judges tend to use their own discretion to assess maturity, even though they do not have training to do so. EU Member States should introduce objective methods to assess children's maturity, taking into account both "age and capacity" in accordance with Article 12 of the CRC.

### **1.2.2 Ensuring a Child-Friendly Environment for Children Involved with Proceedings**

The report points to the fact that many, but not all, EU Member States have specialised criminal and civil courts. Such specialised structures are more likely to be child-friendly and to involve trained child specialists. Currently in Ireland there is no specialised family court division. The District Court, the Circuit Court and the High Court each deal with separate family issues. It is recommended in the report that States lacking specialist family law structures establish them, and that legal/judicial professionals are trained to ensure competence on children's rights and child-friendly justice.

Another important issue identified in the report is the need for child-sensitive interviewing for child victims of crime. It was found that in many instances children were not properly

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<sup>8</sup> Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014), at section 2.14.

informed when being brought for interview, and that children were interviewed repeatedly or inappropriately. The report points to examples of good practice, such as the guidelines for interviewing children in England and Wales. The Ministry of Justice produced these guidelines in 2011 – *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Guidance on Using Special Measures* (ABE).<sup>9</sup> These guidelines are directed at those involved in investigations, including the police, social care workers, and lawyers. ABE interviews may be recorded on video and submitted instead of a child's initial testimony. Other measures taken in the UK include raising the upper age limit of those automatically eligible for special measures from children under 17 to those under 18, and the provision of child witnesses with greater choice and flexibility as to how to provide evidence.<sup>10</sup>

In the report, it is also identified that there is a lack of support services to assist children and parents involved in legal proceedings. Such services, for example those providing for victims and witnesses, are crucial for the provision of information to children and parents, preparing victims and witnesses for trial hearings, assisting them through proceedings, helping them to understand the process and ensuring the protection of their overall well-being. Such services include pre-trial visits to the courts for the purpose of familiarising children with surroundings, visits to children's homes, and support before, during and after trial.

It was found that, whilst most Member States offer support services, professionals feel that much more should be done. In some States, there are no mandatory requirements for information procedures, and support programmes focus on the most severe types of crimes, such as sexual abuse. The focus may also be on the needs of victims rather than witnesses. A further problem is that children and parents may not be provided with sufficient information about the support services available to them and may not, therefore benefit from them. It is recommended in the report that States should ensure that information on support services should be adequately communicated to children and parents. Furthermore, it is stated that in Germany, particular pieces of legislation (the Victims Protection Act of 1986 and two Victims' Rights Reform Acts), which strengthen victims' and witnesses' rights, place

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<sup>9</sup> Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Guidance on Using Special Measures* (Ministry of Justice, 2011).

<sup>10</sup> See Ministry of Justice, Circular 2011/03 (21 March 2011), *Publication of Achieving Best Evidence: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (3rd edition).

obligations on authorities to provide information to victims about the verdict in a case, as well as access to relevant court files.

The report emphasises the importance of protecting particularly vulnerable groups of children in proceedings, groups such as children with disabilities and children from minority backgrounds. It is stated that all relevant procedural safeguards and services for children relating to their involvement in judicial proceedings must be provided in a manner that treats children equally. Data on children's access to justice in Member States should be gathered, and must be broken down to reflect the experiences of vulnerable groups of children. Professionals interviewed expressed concern that there is a lack of expertise on diversity issues across Member States, which can make services less accessible for children. It was suggested that professionals should be trained to work with vulnerable children and should either delegate or work with experts on cases involving such children. It was also suggested that guidelines should be developed for professionals in such cases, and should form part of packages on protection and safety measures. Guidelines should also assist in identifying vulnerable children and in providing them adequate protection. In England and Wales there is an initiative to translate child-friendly material into a variety of languages and guidelines have been prepared for prosecutors on how to conduct interviews with persons with learning disabilities.

At EU level, there is at present a particular focus on hostility against children with disabilities. The FRA is currently developing a project to address problems in this area including the under-reporting of abuse of children with disabilities, the lack of support and the lack of awareness amongst children with disabilities of their rights. Comprehensive comparative information on legislation, policies and services available across the EU will assist EU institutions, EU Member States and civil society to efficiently counteract such hostility.<sup>11</sup>

### **1.2.3 The Right of Children to Information**

Children have the right to information about proceedings concerning them under CRC Article 13 and other international instruments. Although debates continue about the extent to which children should have access to information that might be upsetting, it is increasingly

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<sup>11</sup> See <http://fra.europa.eu/en/project/2012/children-disabilities-targeted-violence-and-hostility> (last accessed 13 December 2015).

recognised that excluding children from proceedings may also cause them harm.<sup>12</sup> The right to information was found by the FRA research to be enshrined in the legislation of all the EU Member States studied, save one (Scotland). The report found however that the way children are informed in practice varies significantly between States. The nature of the information provided, when it is provided and by whom can differ significantly, and is less regulated in civil than criminal proceedings. In the former, legal and social work professionals have greater discretion concerning the information to be provided to a child.

Professionals involved in both the criminal and civil proceedings were of the opinion that children should be better informed about their rights. They should receive adequate information about the stages of the proceedings, what hearings will be like and the availability of any special measures for children's protection. It was reported, for example, that pre-trial visits can ensure child victims feel more inclined to talk, ensuring greater participation and consequently better justice outcomes. Professionals spoke of the importance of finding the right balance between ensuring that children are adequately informed, and refraining from overwhelming children with information.<sup>13</sup>

Concrete understandable information can ease anxiety, whereas an overload of information can increase it... information should be tailored to children's age, developmental phase, background and psychological condition.

Professionals reported the use of online materials guiding professionals on how to inform children, face to face explanations for children about their rights, and specifically developed information booklets for children of different ages and mother tongues. Professionals stated that parents and those working to support children in proceedings (for example social workers and legal representatives) should also receive any special materials prepared for children, in order to help those adults in conveying relevant information in child-friendly language.

Practice in France was commended, whereby several cities have established contact points where children can access specially trained lawyers equipped to provide them with information about the law and about their rights in both civil and criminal legal matters. These meetings, which are provided free of charge, may offer drop-in services, hotlines and

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<sup>12</sup> In the context of England and Wales, see e.g. the case of *Mabon v Mabon and Others* [2005] EWCA Civ 634.

<sup>13</sup> EU Agency for Fundamental Rights, *Child-friendly justice – Perspectives and Experiences of Professionals on Children's Participation in Civil and Criminal Judicial Proceedings in 10 EU Member States* (European Union, 2015), at p.54.

awareness-raising sessions in schools. The report also refers to the development in Scotland of a collection of child-friendly leaflets about Children's Hearings, a system in which highly trained lay members make decisions around child protection and youth justice at hearings in which it is assumed that children will participate. The Scottish Children Reporter Administration has developed leaflets for different age groups, and they are sent to children in advance of hearings to inform them about the nature of hearings and their role in them. The social worker has discussions with children based on these materials, and answers any questions children might have. The leaflets are designed with input from children themselves.

#### **1.2.4 Children's Best Interests**

The report acknowledges the principle of the best interests of the child as a fundamental principle of child-friendly justice. The concept of the child's best interests was found to be embedded within the legal framework of most of the EU Member States studied. Yet professionals identified it to be a complex and vague term which was open to very subjective interpretation. They identified the need for tools to concretise definitions and evaluations concerning children's best interests. It was felt that the lack of a concrete definition can lead to decision-making which does not conform to children's rights standards.

Professionals also identified a lack of tools for identifying, assessing and reporting on how a child's best interests have been met in a particular decision-making process. It should, therefore, be a statutory requirement that decisions include an explanation as to how the best interests of the child have been met in a given decision, the criteria used to reach the decision, and how the child's best interests were weighed against other considerations.

The report points-out that the Committee on the Rights of the Child lists seven elements to be taken into account when a child's best interests are being assessed:

- the right of children to express their views in every decision that affects them;
- the child's identity;
- the preservation of the family environment and maintaining relations;
- care, protection and safety of the child;
- situations of vulnerability;
- the right to health; and
- the right to education.

It is useful to consider the fact that, in England and Wales a welfare checklist is used. The Children Act 1989 states in section 1 that in all matters concerning the child's upbringing or property, the welfare of the child is the paramount consideration. The welfare principle is for the most part equivalent to the principle of the best interests of the child. Helpfully, this legislation points out a number of factors which judges must consider when determining the outcome which best suits the welfare of the child:

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

In Ireland, where the principle of the welfare of the child is also used (most notably in the Child Care Act 1991),<sup>14</sup> there is no such checklist in public law cases while an extensive definition is provided in private law cases in Part V of the Guardianship of Infants Act 1964, as inserted by section 63 of the Children and Family Relationships Act 2015. The various models of practice should be considered, and section 24 of the Child Care Act 1991, which contains the welfare principle, should be amended to contain a list of factors to assist judges in coming to a conclusion about the welfare of the child. The Child Care Act 1991 should also contain the obligation to explain how the decision has been reached in order to meet the requirements of CRC Article 12.

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<sup>14</sup> Section 24 states that:

In any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the Constitution or otherwise, shall —

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

### 1.2.5 Training of Professionals

The report points to the fact that the Council of Europe 2010 Guidelines state that children must have the benefit of specialised and trained professionals to assist them in proceedings. However, this does not occur in reality. A low level of awareness of the Council of Europe Guidelines on child-friendly justice was identified amongst the professionals interviewed. It was established that professionals should receive training on children's needs, rights and interests, and that they should learn communication techniques with children. Importantly, they should learn about child-friendly proceedings, in particular the need to take into account differences in the ages, cultural backgrounds and personal circumstances of individual children. In the words of one professional:<sup>15</sup>

A lot of things [...] where I had the feeling that I've done it somehow intuitively right before, maybe, but of course it's good once to hear how to do that right from a psychological view, and then be able to correct mistakes, and see to it that you also keep up with these guidelines a little bit. I wish there were many more trainings, because there are absolutely none in the judicial education (Germany, family judge, female).

Two thirds of professionals interviewed had participated in training programmes on children's rights, with social professionals more likely to have had such training compared to legal professionals. Such training is generally offered on a voluntary basis, although it is mandatory according to legal regulations in a number of countries. Many professionals state that there is a lack of specialisation and that there is insufficient training for working with children across all professions associated with the justice system. It is recommended that states and professional associations should ensure that professionals dealing with children, including police and court staff, have appropriate mandatory training on children's rights and communication with children.

### 1.2.6 Recommendations

*Irish professionals involved with proceedings affecting children should be made aware of the report of the EU Agency for Fundamental Rights on the experiences of professionals of child-friendly justice.*

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<sup>15</sup> EU Agency for Fundamental Rights, *Child-friendly justice – Perspectives and Experiences of Professionals on Children's Participation in Civil and Criminal Judicial Proceedings in 10 EU Member States* (European Union, 2015), at p.105.

*Greater assistance should be provided to professionals working with children in proceedings, particularly those in civil law, on how to balance children's participation rights on the one hand and their protection rights on the other.*

*Children should have representation in all cases concerning their interests, and the exact role of the guardian ad litem should be made clear. This is particularly pressing in order to bring Ireland into conformity with CRC Article 12.*

*In Ireland, objective methods should be introduced to assess children's maturity, taking into account both "age and capacity" in accordance with Article 12 of the CRC.*

*Ireland should develop specialised criminal and civil courts to cater for children's cases. Such specialised structures should be made child-friendly and should involve trained child specialists.*

*Child-sensitive interviewing should be ensured for child victims of crime. Children should be properly informed in advance of the interview process. Moreover, children should not be interviewed repeatedly or inappropriately.*

*Strong support services should exist for children involved in legal proceedings, in particular child victims and witnesses. It is crucial that information on support services should be adequately communicated to children and parents.*

*Services for children in judicial proceedings must be provided in a way that is facilitative of particular groups of children such as children with disabilities and those from minority groups. Data should be disaggregated to reflect their experiences. Professionals should be trained to work with vulnerable children and should either delegate or work with experts on cases involving such children. Guidelines should be developed for professionals in such cases.*

*Children should be better informed about their rights and the nature of any proceedings in which they are involved. They should receive adequate information about the stages of the proceedings, what hearings will be like and the availability of any special measures for children's protection. Parents and those working to support the child in proceedings should*



*receive special materials prepared for children, in order to help those adults in conveying relevant information in child-friendly language.*

*In Ireland, section 24 of the Child Care Act 1991 should be amended to include a checklist in order to provide a list of factors to assist judges in coming to a conclusion about the welfare of the child. The Act should also contain the obligation to explain how the decision has been reached.*

*Professionals involved in working with children's interests in proceedings should receive training on children's needs, rights and interests, and they should learn communication techniques with children. Both state authorities and professional associations should ensure that all relevant staff have appropriate mandatory training in this area.*

### **1.3 Children's Involvement in the Justice System in the EU: Handbook on European law relating to the rights of the child**

The FRA has prepared a handbook on children's rights in cooperation with the Council of Europe, the *Handbook of European Law on the Rights of the Child*.<sup>16</sup> This handbook is designed to assist professionals working on legal issues concerning children to understand relevant European law. The professionals for whom the handbook will prove particularly useful are lawyers, judges, prosecutors, social workers and others who are not specialised in the field of children's rights. The handbook considers case law relevant to children from the European Court of Human Rights, the European Committee on Social Rights and the Court of Justice of the European Union. Topics covered include civil rights and freedoms; equality; family life; violence against children; migration; economic rights and children's rights within criminal justice proceedings.

In 'European children's rights law', the handbook refers to primary sources of law of the Council of Europe and the EU. This means treaties, conventions, secondary legislation and case law; however reference is also made throughout to other sources that influence the development of European law, including guidelines, policy documents and other non-binding instruments. Of course, these primary sources aim to implement and elaborate on the

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<sup>16</sup> EU Agency for Fundamental Rights, *Handbook on European Law Relating to the Rights of the Child* (European Union, 2015).

standards of the CRC and other UN instruments. This handbook therefore serves the purpose of bringing to practitioners information which may help them to assist clients.

The handbook raises some very important points. A child is defined in Article 1 of the CRC as a person under the age of 18, yet there is no single definition of ‘child’ set out in any of the EU treaties or case law and the notion of ‘child’ differs for certain purposes under EU law. Laws governing the free movement rights of EU citizen family members, for example, define ‘children’ as “direct descendants who are under the age of 21 or are dependent”.<sup>17</sup> Yet directive 94/33/EC on the protection of young people at work (Young Workers Directive),<sup>18</sup> refers to persons under the age of 18 years as ‘adolescents’ and those under 15 as ‘children’ (members of this group are largely prohibited from engaging in formal employment). The European Court of Human Rights has accepted the CRC definition of a child as an individual “below the age of 18 years”.<sup>19</sup>

The report provides information on European legislation, standards and case law across a number of areas. It is outlined, for example, that children have a right to freedom of religion under Article 17 of the CRC. Under EU law, parents have a right to the education of their children in conformity with their religious convictions and Article 10 of the EU Charter of Fundamental Rights guarantees to all the right to freedom of thought, conscience and religion. This right is also enshrined in Article 9 of the ECHR. Under Article 2 of Protocol No. 1 to the ECHR, States must consider the parent’s religious convictions when providing education. This broad duty applies both to school curricula and other state functions. The curriculum should provide education on religion in a manner which respects the parents’ religious convictions. The report then outlines a number of relevant cases, including the European Court of Human Rights case of *Grzelak v. Poland*.<sup>20</sup> In this case, agnostic parents requested that their child be exempted from religious education. No ethics classes were provided as a replacement for religious classes (this had originally been intended by the school), and a line was drawn in his report card next to the class ‘religion/ethics’ to indicate

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<sup>17</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30 April 2004 and OJ L 158, 29 April 2004, Art. 2 (2) (c).

<sup>18</sup> Directive 94/33/EC of 20 August 1994 on the protection of young people at work, OJ 1994 L 216, Art. 3.

<sup>19</sup> *Güveç v. Turkey*, No. 70337/01, 20 January 2009, European Court of Human Rights; *Çoşelav v. Turkey*, No. 1413/07, 9 October 2012, European Court of Human Rights.

<sup>20</sup> *Grzelak v. Poland*, No. 7710/02, 15 June 2010, European Court of Human Rights.

the lack of a grade in this class. The court held that this outcome was stigmatising for the boy, as it made clear his failure to take religious classes. This case is particularly useful to consider in the Irish context because of the effective monopoly of the Catholic church when it comes to patronage of Irish schools. The issue of the education and experiences of children who are exempted from religious classes is a crucial consideration. The report covers a number of other areas concerning children's rights which are also useful to consider in the Irish context.

### **1.3.1 Recommendations**

*It should be ensured that Irish professionals working on legal issues concerning children are made aware of the handbook of the EU Agency for Fundamental Rights on European law relating to the rights of the child.*

*The matter of the education and experiences of children who are exempted from religious classes should be urgently examined in order to ensure compliance with the ECHR, and to uphold the highest children's rights standards.*

### **1.4 European Developments Concerning Children with Disabilities**

The UN Convention on the Rights of Persons with Disabilities (CRPD), which entered into force in 2008, aims to advance the rights of people with disabilities. The CRPD has been ratified both by the EU and by 25 EU Member States of the EU. Article 4 (1) of this instrument requires States to adopt the legislative measures necessary to realise the rights of people with disabilities, including changing any relevant discriminatory laws. The development of the CRPD has led to broad legislative changes at EU level and across Member States. EU law covers protection against discrimination in employment and occupation. Yet there are many other areas where States have improved protection from discrimination for people with disabilities. There has been significant reform for example as regards legal capacity, involuntary institutionalisation and treatment, and inclusive education systems.

The FRA has sought to promote the CRPD and to examine how and whether States are implementing the obligations of that instrument. In a 2015 report, the FRA examined the implementation of the CRPD generally by providing an overview of relevant law reform in

EU Member States.<sup>21</sup> This report on law reform notes that by January 2015, the CRPD has not been ratified by only three Member States of which Ireland is one, although it is noted that these three States have signed the instrument and are in the process of harmonising relevant national legislative provisions with CRPD standards in advance of ratification.

Another FRA report in 2015 involved research on violence against children with disabilities.<sup>22</sup> The report begins by outlining the relevance of the EU Charter of Fundamental Rights. Article 24 of the EU Charter of Fundamental Rights enshrines the right of all children in the EU to protection, including the right to be heard, and Article 26 recognises the right of persons with disabilities to participate equally in community life. UN instruments also provide extensive provisions on relevant standards. CRPD Article 7 places an obligation on States to ensure that children with disabilities enjoy their rights to the same extent as other children. CRC Article 23 requires States to ensure the protection and participation of this group. There are therefore significant legal bases in place which justify, and indeed require, significant focus on the rights of this group of children.

The report notes that the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse<sup>23</sup> has been signed by all EU Member States, but has yet to be ratified by six states, of which Ireland is one. This instrument aims to ensure the prevention of sexual abuse against children, the protection of victims and the prosecution of those who commit such crimes. The instrument represents a very comprehensive legal tool for the protection of children against all forms of sexual exploitation and abuse.

The report also points to the fact that children with disabilities are an extremely vulnerable group who can face significant barriers to enjoying their rights. As noted in my previous report, UNICEF estimates that children with disabilities are three to four times more likely than other children to experience violence, and neglect.<sup>24</sup> This FRA report highlights that children with disabilities may also struggle to access basic services, such as education. This is because they are disproportionately excluded from society compared to other groups, as they are more likely to live in institutions far from their families.

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<sup>21</sup> FRA, *Implementing the UN CRPD: An Overview of Legal Reforms in EU Member States* (EU, 2015).

<sup>22</sup> FRA, *Children with Disabilities: Targeted Violence and Hostility* (EU, 2015).

<sup>23</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No: 201, Lanzarote, 25 October 2007.

<sup>24</sup> See further Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2013).

The FRA recommends that authorities in EU Member States work to fight violence against children with disabilities, focusing on various action areas. The FRA first examines child protection systems and their efficacy in protecting children with disabilities from violence. FRA research on child protection systems shows that most EU Member States have national policies addressing the protection of children generally. The FRA identifies three categories of child protection or children's rights policies:

- Those that include the protection of children with disabilities in child protection policies;
- Those that address the protection of children with disabilities in policies on the rights of persons with disabilities;
- Those with specific policies to address violence against all children in schools or at home.

Ireland falls into the first category, having adopted a general child protection policy containing specific objectives regarding violence against children with disabilities. The FRA references the Irish national guidance on child welfare and protection, for example, which sets out protocols for relevant professionals for dealing with suspected child abuse or neglect.

In the guidelines, it is emphasised that the abuse of children with disabilities is a particular problem and that professionals should be alert to this. This is positive, as a majority of those interviewed in this FRA research asserted that policies should be holistic in nature, covering *all* children – including children with disabilities. This avoids having separate, disparate instruments targeting different groups of children. The FRA notes, however, that whilst such general policies acknowledge that children with disabilities are at greater risk of abuse, they often fail to establish concrete measures to prevent and tackle this.

Awareness-raising campaigns are one important measure considered in the report. The Stay Safe Programme in Ireland – a personal safety skills programme for specialised and mainstream primary schools – is referenced in the FRA report as an example of an awareness-raising programme for children about violence. The overall objective of the Stay Safe Programme is to prevent child abuse, bullying and other forms of victimisation, aiming to teach children how to recognise an unsafe situation and to inform adults where necessary. It is very positive that there is a specific programme targeted at children with disabilities, and

that there are separate programmes for children with physical disability, visual impairment, hearing impairment, intellectual disability, and psychosocial disability built into this. Unfortunately there does not appear to have been an evaluation of the effectiveness of this programme in recent times. The 1999 study<sup>25</sup> demonstrated increases in self-esteem, but did not indicate whether or not any victimisation had actually been prevented by the programme. Considering the advent of modern technology such as social media it appears crucial that the effectiveness and appropriateness of this programme, particularly for children with disabilities, is examined.

The FRA also recommends that States establish more inclusive child protection systems, that is, systems that involve all of the individuals, groups and services involved in a child's life, for example families, communities, professionals and the general public. Child protection systems should also embed consideration of other factors, like a child's ethnic, gender or socioeconomic characteristics. These types of characteristics can increase the risk of violence for children with disabilities and it is therefore important to ensure that services and measures are developed with this in mind. Early intervention systems for violence against children must be suitable for children with disabilities and capable of rapidly identifying and responding to risk situations. This requires that services are accessible for children with disabilities, and in particular that staff have the necessary skills and training. The lack of unified procedures across professional groups was noted in the report. It was advised that Member States should create a network of coordination mechanisms to oversee the implementation of national policies to improve collaborative responses to violence against children with disabilities, bringing together professionals (e.g. teachers, judicial authorities, social workers and victim support organisations) as well as organisations of children with disabilities and their families. This would help avoid the compartmentalisation of responses and improve the coordination of services. It should involve compulsory training courses for professionals working in different fields. The training should involve information on the child protection framework, recognising and reporting violence and training on how to communicate with children with disabilities.

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<sup>25</sup> D. MacIntyre and A. Carr, 'Evaluation of the Effectiveness of the Stay Safe Primary Prevention Programme for Child Sexual Abuse' (1999) 23 *Child Abuse Negl* 1307.

### **1.4.1 Recommendations**

*Ireland should ratify both the UN Convention on the Rights of Persons with Disabilities and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse without delay.*

*It should be considered whether there are sufficient concrete measures for protecting children with disabilities in Ireland. The Stay Safe Programme in Ireland should be subject to extensive evaluation to identify whether it is suitable for a modern context. It should also be identified whether it results in an actual reduction in child abuse, particularly against children with disabilities.*

*It should be ensured that Irish professionals working with children should be made aware of the report of the EU Agency for Fundamental Rights on violence against children with disabilities.*

*It should be considered whether Ireland's child protection programme is sufficiently inclusive from the perspective of protecting children with disabilities. It should be ensured that a sufficiently collaborative process is in place whereby all stakeholders work together to identify risk situations. The Children Act 2015 makes provision for a Child Safeguarding Statement which should assist in achieving this objective.*

*Compulsory training courses should be in place for professionals working in different fields which bring them into contact with children with disabilities. The training should involve information on the child protection framework, recognising and reporting violence and training on how to communicate with children with disabilities.*

## **1.5 Guardianship Systems for Children Deprived of Parental Care in the EU**

The FRA also published a report entitled *Guardianship Systems for Children Deprived of Parental Care in the European Union*<sup>26</sup> in 2015. It examines guardianship systems across all EU Member States which are in place to meet the needs of children without parental care. There is particular focus in the report on children at risk of becoming victims of human trafficking. The report identifies strengths and weaknesses of Member States' national

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<sup>26</sup> FRA, *Guardianship Systems for Children Deprived of Parental Care in the European Union* (EU, 2015).

guardianship systems, emphasising the extent to which such systems differ greatly between and even within countries. The report aims to assist decision-makers to ensure the effective protection of all children, and in particular for measures to conform to the EU's anti-trafficking Directive (2011/36/EU)<sup>27</sup> and Strategy on trafficking (2012).<sup>28</sup>

In accordance with Directive 2011/36/EU Member States must focus on prevention of trafficking (Art. 18), on prosecution of the criminals involved (Art. 9) and on the protection of victims of trafficking (Art. 12 et seq.). The Strategy establishes that the EU will concentrate on five priorities in its action against trafficking: Identify, protect and assist victims of trafficking; increase efforts to prevent trafficking; increase rates of prosecution of traffickers; enhance cooperation among key actors; increase the effective response to problems related to trafficking as they emerge. The strategy underlines the importance of “comprehensive child-sensitive protection systems that ensure interagency and multidisciplinary coordination” for the purposes of catering to the different needs of diverse groups of children, such as child victims of trafficking; calling on EU Member States to strengthen existing child protection systems. The importance of guardianship as a vital element of child protection systems is emphasised in the Strategy and it calls for progress at EU level in ensuring the strengthening of this role.

The authors of the FRA report point to the prominence of guardianship in the Strategy, and indeed the many references to “legal guardian” in the CRC as an indication that legal guardians are a vital element of protection systems for children deprived of their family environment. It is also highlighted that there is no uniform definition of the legal guardian/representative across EU Member States. Nor is there a uniform understanding of their roles, qualifications and training. There is an intention that the European Commission and FRA will together develop a good practice model on the role of the legal guardian/representative. This report, a review of law and policy across EU member states concerning children's guardians/legal representatives, is a step towards achieving this goal. The report considers a variety of relevant areas of law practice including: Appointment procedures; qualifications and skills; duties and tasks; systems for foreign or trafficked children; legal representation and legal aid; accountability and monitoring.

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<sup>27</sup> Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>28</sup> EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, adopted by the European Commission on 19 June 2012.



Practice in Ireland is considered throughout the report. It is noted that the Child and Family Agency provides care for unaccompanied children, and that each child is assigned a dedicated social worker who will perform guardianship duties in respect of a particular child.<sup>29</sup> Some aspects of law and practice in Ireland are praised. It is noted, for example, that there are specific protocols concerning child victims of trafficking between relevant judicial and child protection authorities and specialised accommodation facilities are provided for child victims of trafficking. It is noted that a specialised team of social workers has been established in Dublin to deal with unaccompanied minors seeking asylum – the Child and Family Agency Social Work Team for Separated Children Seeking Asylum. It is also outlined that the team receives referrals from the Garda National Immigration Bureau, the Office of the Refugee Applications Commissioner and also from other social work teams from around Ireland lacking the necessary experience to care for separated children.

There are, however, aspects of Irish practice which are criticised by the FRA. It is noted that the Group of Experts on Action against Trafficking in Human Beings (GRETA) has urged authorities in Ireland to enact broader legal rights to protection and support for possible victims of trafficking generally.<sup>30</sup> The report also considers issues more specific to children which require attention. Conflicts of interests may arise when the State child protection authority is assigned the guardianship of children. The example is provided of the scenario where the age of an unaccompanied minor is disputed. It is highlighted that in Ireland guardianship tasks for children in care are performed by social workers employed by the Child and Family Agency, yet social workers may also lodge an application disputing the age of such children. It is possible that children in this situation will be appointed a guardian *ad litem* in any proceedings in order to represent the child's best interests, which will mitigate the conflict of interest. However, the FRA report points-out, guardians *ad litem* are not necessarily appointed in all cases, they will be appointed at the request of the child's social workers, and in any event this professional does not continue the representation of the child outside specific proceedings.

It is outlined that in Ireland, all necessary provisions must be provided for the protection of unaccompanied children identified as potential or suspected victims of trafficking. Yet it is

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<sup>29</sup> Child Care Act 1991 as amended, section 18.

<sup>30</sup> GRETA, *Report on Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland* (Council of Europe, 2013), p.62.

specifically *victims* who must be referred immediately to the specialised social work team in Dublin. It is emphasised that, consequently, only children who have been identified as victims of trafficking are entitled to this particular care, and the authors of the FRA report argue that this poses a serious limitation to the protection of those at risk:<sup>31</sup>

Only a limited number of victims are detected and identified as such by the competent authorities, with many remaining undetected. It also undermines the role of guardianship systems in the identification of child victims of trafficking and in the prevention of child trafficking and exploitation of children at risk.

The report concludes by pointing to the lack of a uniform approach to guardianship in EU Member States, despite provisions in national and international law. Even where provision exists in legislation, it may be discretionary to appoint guardians, it may be a lengthy process, and the professionals or other individuals involved may not always have adequate training for the role. These shortcomings and inconsistencies often result in inadequate support and protection for children, particularly victims of child trafficking. The authors of the report urge that the findings be brought to the attention of relevant decision-makers, and that general awareness-raising of the issue take place.

The report also points to a new handbook, *Guardianship for Children Deprived of Parental Care* which aims to assist guardianship systems to cater for the needs of child victims of trafficking.<sup>32</sup> It aims to assist Member States to strengthen guardianship systems, and provides comprehensive guidance for policy makers and practitioners, focusing on how to strengthen guardianship systems for all children who need them. It addresses in particular the specific needs of child victims of trafficking. The handbook emphasises that an integrated approach on child protection is needed, whereby understandings of the particular needs of children with disabilities, etc. are embedded in the system (as considered in Section 1.2), but it is best practice that the specialist skills and knowledge must exist within the context of the overall child protection system in place.

### **1.5.1 Recommendations**

*It should be ensured that Irish professionals working with children should be made aware of the report of the EU Agency for Fundamental Rights on guardianship and the new handbook*

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<sup>31</sup> FRA, *Guardianship Systems for Children Deprived of Parental Care in the European Union* (EU, 2015), p.76. The FRA report cites European Migration Network (EMN) (2014).

<sup>32</sup> FRA, *Guardianship for Children Deprived of Parental Care* (EU, 2014).

*on guardianship for children deprived of parental care which aims to assist guardianship systems to cater for the needs of child victims of trafficking.*

*Authorities in Ireland should enact broader legal rights to protection and support for possible victims of trafficking in accordance with the recommendations of GRETA.*

*Conflicts of interests arise where guardianship tasks for unaccompanied minors are performed by social workers employed by the Child and Family Agency, who may also lodge an application disputing the age of such children. This problem should be rectified.*

*Guardians ad litem should be appointed in all cases of unaccompanied minors.*

*Only children who have been identified as victims of trafficking are entitled to be referred immediately to the specialised social work team in Dublin. A broader approach should be taken, and children at risk should also receive this treatment.*

## **1.6 Council of Europe Report on Children's Views of their Rights**

In 2015 the Council of Europe commissioned a report to establish the most important rights issues for children in Europe. The study is based on available research, and aims to gather together children's views with the purpose of feeding these views into the Council of Europe's next Strategy for the Rights of the Child, 2016-2019.<sup>33</sup> All available research on children's views from across Europe is examined, and a number of themes are identified which children describe as most important to them. Special priority is given by the authors to factors such as children who are particularly disadvantaged through, for example, disability or poverty. The report is especially useful for providing a general overview of the views, experiences and recommendations of children across various themes such as poverty, education and violence. It will assist policy-makers and practitioners, providing a crucial tool for taking children's views into account.

The first theme considered in the report is violence against children. Children state that they experience high levels of violence in the home and in society more broadly, and they note it as a priority rights issue in a number of studies. 44% of EU children listed this as a first or

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<sup>33</sup> A. Daly *et al.*, *Challenges to Children's Rights Today: What do Children Think?* (Council of Europe/European Children's Rights Unit, 2015).

second place priority issue in European Commission research, for example.<sup>34</sup> CRC Article 19 places obligations on states to protect children from violence, yet they experience high levels of violence within the family, in the context of peer groups and in the institutions with which they have contact. Particular groups of children, such as girls and minorities, can be at greatest risk.

Children who witness domestic violence in the home – usually against their mother by their father – state that services are very much tailored for adults, with the assumption that helping parents will automatically help their children. The need for services specific to children is emphasised. In particular, the difficulties caused by women’s shelters where teenage sons are not permitted to stay are highlighted. Another significant issue for children is that they do not want courts to order them to have contact with domestically violent parents against their will. A children’s rights approach is crucial in this area. Children who experience domestic violence most frequently describe that their families are their greatest support. In Ireland, for example, research has shown that: “For most of the children interviewed, their greatest supports — practical and emotional — came from their siblings and then from their mothers.”<sup>35</sup> Yet the bonds between mothers and children can be greatly harmed through the trauma of domestic violence, and families require assistance such as counselling to repair relationships.

Children also emphasise the significance of violence by staff in custodial settings.<sup>36</sup> The use of restraint comes in for particular criticism from children. Children feel that too much force is being used, and that greater attempts should be made to talk through the issues. The mental distress arising from restraint is frequently described by children: “Someone’s got your arm and head down... it makes you want to struggle. It hurts.”<sup>37</sup> Girls report particular distress at the use of this type of force. Children recommend careful staff recruitment to avoid the problem of excess force and other issues; emphasising the need to recruit staff who have a proven ability of working with children, and who come from similar backgrounds as those in custody.

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<sup>34</sup> European Commission, *Flash Eurobarometer – The Rights of the Child* (May 2009).

<sup>35</sup> Office of the Minister for Children Ireland, *Listening to Children: Children’s Stories of Domestic Violence* (Office of the Minister for Children Ireland, 2007).

<sup>36</sup> Children’s Commissioner for England, *Young People’s Views on Restraint in the Secure Estate* (Children’s Commissioner for England, 2011).

<sup>37</sup> National Society for the Prevention of Cruelty to Children, *A Consultation with Young People on the use of Restraint in Custody* (National Society for the Prevention of Cruelty to Children, 2008).

The issue of sexual violence is also described by many children as a significant problem. They describe how low self-esteem can lead to depression, risky behaviour and consequently unhealthy and exploitative relationships. In the words of one girl from the project: “Young girls are vulnerable, if someone gives them the slightest bit of attention, they think they know what they are getting themselves into. However, they just end up getting used and abused.”<sup>38</sup> Children generally have an awareness of legal frameworks around consent to sexual activity. However there is a tendency to blame rape on the victim, for example where they are wearing revealing clothing or drinking alcohol:<sup>39</sup> “It gives out the wrong idea the way you’re dressed.” Significant education is required in order to challenge “victim blame”, to ensure that it is perpetrators, not victims who are understood to be blameworthy, and to ensure that children fully understand consent. As regards the therapeutic treatment of young victims of sexual violence, they say that working with a single professional and a single service over time is important – they do not want to have to go to different services for different things. This reinforces the very prevalent theme highlighted in the report, which is the importance of building relationships of trust with service providers.

The Council of Europe report also examined children’s views of the justice systems with which they are involved. Unfortunately, although children very much want to have a say in justice systems affecting them, they: “[H]ave little faith in those in authority”.<sup>40</sup> Children feel strongly that, where they are in conflict with the law, they should not be in custody. Instead, authorities should prioritise alternatives to custody: “If I had to pick my own sentence, I would choose to do community service, or working at a project or something like that. In that way problems are addressed that should be addressed.”<sup>41</sup> They emphasise how much they want to be given a second chance, and that they wish to have the opportunity to solve their own problems.

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<sup>38</sup> National Working Group for Sexually Exploited Children and Young People, *In a New Light – Photographs & Words from the Having Our Say Project* (Children in Need/University of Bedfordshire).

<sup>39</sup> Coy, M. et al., “*Sex without Consent, I Suppose that is Rape*” – *How Young People in England Understand Sexual Consent* (Children’s Commissioner for England, 2013).

<sup>40</sup> Kilkelly, U., *Listening to Children about Justice: Report of the Council of Europe’s Consultation with Children on Child-Friendly Justice* (Council of Europe, 2010).

<sup>41</sup> UNICEF Belgium, *This is what we Think About It! Second Report by the Belgian Children to the Committee on the Rights of the Child* (UNICEF Belgium, 2010).

The views and experiences of children with a parent in prison are also considered in the Council of Europe report. There are estimated to be 800,000 such children in Europe.<sup>42</sup> The large-scale COPING project (*Children of Prisoners, Interventions and Mitigations to Strengthen Mental Health*), which has documented the views of 891 children in Europe, is considered. The COPING project research highlights that decisions to send parents to prison often do not include consideration of the experiences of their children, who are: “virtually silent” in the process. Frequently services are not in place for children in these circumstances, despite the fact that such children are at far greater risk of mental health problems than other children. They feel they must hide their distress because of the stigma of having a parent in prison, and so often feel they have “no one to talk to” when a relative goes to prison. Many children would like to talk to a counsellor. It is also crucial that children have adequate information when a parent goes to prison – adults can make misplaced efforts to protect them from the facts, whereas in reality a lack of information causes additional distress.

The participation of European children in matters affecting them is also considered in the report. Children strongly believe that they should have a say in the important decisions affecting them, but they face many obstacles, including adult indifference and the lack of knowledge about participation rights amongst both adults and children. Formal structures established for children’s participation, they say, must function well and avoid tokenism, otherwise they “create a feeling of frustration.”<sup>43</sup> Children report feeling most heard in their families, but they often report feeling least heard by politicians.<sup>44</sup> Many wish to have greater opportunities to better participate in their local community and relevant services such as health care provision, yet they report that they “are often not aware of what support and activities are on offer or how to access them, let alone how to have a say in what services should be provided or how.”

One positive example of political participation noted in the report is the *Children’s City Council* in Opatija, Croatia.<sup>45</sup> Children can question the mayor of the City Council through this forum, and they also present the results of projects to the mayor. They make proposals in respect of the city budget, and have a budget of their own. Children in Belgium proposed the

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<sup>42</sup> Jones, A., et al., *Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health* (University of Huddersfield, 2013).

<sup>43</sup> Report cited in Ecorys/University of West of England/Child-to-Child, *Evaluation of Legislation, Policy and Practice on Child Participation in the EU* (European Commission, 2015).

<sup>44</sup> YouthLink Scotland, *Being Young in Scotland* (YouthLink Scotland, 2009).

<sup>45</sup> Report cited in Ecorys/University of West of England/Child-to-Child.

creation of a website on which they could post their opinions, to which ministers and political decision-makers would have ready access. In general, children advise that States develop a wide range of mechanisms to facilitate participation across different groups and contexts. They also state that it is crucial that they always receive feedback on how and whether their recommendations have been put into effect.

The views of children in care are also considered in the Council of Europe report. Children in care report that having their views taken into account is very important to them, but sadly a majority of children in care across Europe express that their views make little difference or no difference at all.<sup>46</sup> There is much more work to be done in this area.

Children feel that foster and adoption placements are far preferable to care homes, and greater efforts should be made to facilitate these types of care, which help them to feel more as if they are part of society and more hopeful about the future. Where they do live in institutions, their everyday living conditions are obviously crucial to their experience of care. One good practice example is in the Netherlands where care homes are legally obliged to establish youth councils through which children's views contribute to the running of their care homes.<sup>47</sup> Other young people from the Dutch National Youth Council train children in homes on how to run the councils, and: "The children feel more comfortable when training is given by young people." Both children and staff feel that children contribute significantly to their living conditions.

The most prominent issue for children living in care, however, is the importance of retaining family links where possible.<sup>48</sup> In Ireland, children highlighted the importance of this matter to them through research by the Department of Children and Youth Affairs: "With limited exception, most young people living in foster care still had contact, or aspired to have contact and/or further contact, with their birth family."<sup>49</sup> In spite of the importance of this issue to children, however, evidence exists that their wish to have more contact with birth families receives insufficient attention from courts and others.

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<sup>46</sup> Munro, E., *The Munro Review of Child Protection: Final Report* (Department for Education, 2011). The review was commissioned by the UK government in 2011.

<sup>47</sup> Schuurman, M. (ed.), *Valuing Children's Potential: How Children's Participation Contributes to Fighting Poverty and Social Exclusion* (Eurochild, 2010).

<sup>48</sup> European Commission, *Eurobarometer Qualitative Study – The Rights of the Child: Aggregate Report*.

<sup>49</sup> Department of Children and Youth Affairs, *Listen to our Voices: A Report of Consultations with Children and Young People Living in the Care of the State* (Department of Children and Youth Affairs, 2011).

The Council of Europe report also highlights the large body of research indicating that children place a high priority on the right to freedom from discrimination, with children from vulnerable groups emphasising that it is a particularly important issue for them.<sup>50</sup> Discrimination on the basis of age is one point raised in the report, that is that those under 18 years can experience discrimination because they are children. Many research studies demonstrate negative stereotyping of children and poor treatment on this basis.<sup>51</sup> Children are well aware of this: “Some adults these days don’t listen to what us kids say. Am I right or wrong?” and describe treatment such as being moved on from shops and other areas: “[W]e get chucked out of the food court.”<sup>52</sup> Children are also regularly denied access to services because of a failure to provide for their particular needs, for example where at age 16 they are too old for children’s wards yet too young for adults’ wards.<sup>53</sup> This constitutes negative discrimination, in that it involves a failure to account for the particular needs and rights of a specific group. There is, however little recognition or understanding of age discrimination against children. It is recommended in the report that states should increase awareness of age-discrimination against children and that children should have legislative protection against age discrimination at domestic level.

Many children also describe facing racial discrimination, including Irish Traveller children who highlight the widespread abuse they sometimes experience, including derogatory name-calling and not being allowed into particular schools because of their background. Children of Roma origin also talk about experiences of: “[R]acial discrimination, prejudice, pain and humiliation.” Children want to speak freely about the discrimination they face and many speak passionately in this study about the importance of equality: “We aren’t all the same, but it’s essential that we are all treated as equally important.” Many children with disabilities perceive that society holds negative stereotypes of them, and they recommend that efforts be made to change attitudes towards them,<sup>54</sup> including greater opportunities to attend

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<sup>50</sup> European Commission, *Eurobarometer Qualitative Study – The Rights of the Child: Aggregate Report*.

<sup>51</sup> See e.g. Northern Ireland Commissioner for Children and Young People, *Young People’s Thoughts about and Experiences of Age-Related Negative Stereotyping, An Analysis of Questions from the Young Life and Times Survey* (Northern Ireland Commissioner for Children and Young People, 2010).

<sup>52</sup> Northern Ireland Youth Forum, *What We Want* (Northern Ireland Youth Forum, 2009).

<sup>53</sup> Children’s Rights Alliance for England, *Making the Case: Why Children should be Protected from Age Discrimination and how it Can be Done. Proposals for the Equality Bill* (Children’s Rights Alliance for England, 2009).

<sup>54</sup> Every Disabled Child Matters, *Disabled Children’s Manifesto for Change* (Every Disabled Child Matters, 2009), available at: <http://www.edcm.org.uk/young-campaigners/manifesto-for-change>.



mainstream schools and to meet children without disabilities: “I want more clubs for disabled and non-disabled young people so we can play together.”<sup>55</sup>

Education was also considered in the Council of Europe report. In one poll of European children, 77% cite education as their primary rights issue of concern.<sup>56</sup> Children report significant differences in the quality of initiatives to facilitate their participation in schools, ranging from ‘democratic schools’ where children’s participation is embedded in everyday practice through alternative curriculums based on ‘mutual learning’ between students and teachers (such as the *Transparent and Participative School* programme in Poland) and those initiatives which are more formal, such as school councils.<sup>57</sup> Children are sometimes dissatisfied with school councils on the basis that they are tokenistic or unrepresentative of all children. Children feel that they themselves can take action to overcome obstacles, such as through having greater willingness to express their views and to become more positive towards school. They also feel, however, that schools and policy-makers have significant changes to make, including through increased training on child participation for teachers.

The Council of Europe report emphasises that even very young children can express views on education. Research conducted in Italy is identified, in which pre-school children express that they should not be shouted at: “When the teacher shouts at me I feel sad and also I will start to cry”; but that instead they respond well to teachers who are firm but kind. Sharing the views of young children with their teachers is found to assist them to find better ways to establish positive environments for children’s development.<sup>58</sup>

Although children generally report feeling safe at school, they are very concerned about school bullying, with one large-scale research study in Europe indicating that bullying is very widespread.<sup>59</sup> Children can be bullied for many reasons but there are some risk factors – children experiencing poverty, for example, are at greater risk: “Kids will pick on you at school – it’s unbelievable – if you don’t have the same lunch bag as them, or you haven’t got

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<sup>55</sup> Children’s Commissioner for England, “*They Still Need to Listen to More*”, *A Report about Disabled Children and Young People’s Rights in England* (Children’s Commissioner for England, 2014).

<sup>56</sup> European Commission, *Flash Eurobarometer – The Rights of the Child*.

<sup>57</sup> Ecorys/University of West of England/Child-to-Child.

<sup>58</sup> Harcourt, D. and Mazzoni, V. ‘Standpoints on Quality: Listening to Children in Verona, Italy’ 37 *Australasian Journal of Early Childhood* 2 (2012).

<sup>59</sup> European Commission, *European Bullying Research: Final Report* (European Commission, 2012).

a new jacket, or a new bag.”<sup>60</sup> This issue appears to worsen in countries that place greater importance on material symbols of status.<sup>61</sup> Children who bully are more likely to be from families in which violence and domination is used, so it is likely that dealing with family violence, and encouraging communication and children’s participation in families will improve bullying rates. Children say that teachers should be trained to notice and respond better to bullying and that they would like more opportunities to discuss issues relating to bullying.

Child poverty and austerity is the final theme considered in the Council of Europe report. Children report that poverty is a very important issue for them, and they are concerned about the impact of the current economic climate on themselves and their families. Many children report rights limitations due to financial constraints. Children report that poverty can put a strain on family relationships, resulting in a lack of parental time due to long working hours and risking family breakdown.<sup>62</sup> They call for financial support (such as free school meals) and advice services for those who are struggling. Many children who are themselves “better off” agreed that such services were important for those struggling financially. A large-scale research study led by Queen’s University Belfast demonstrates that children also think that they should have a voice in decisions about public expenditure, and that decisions should be made in a manner which upholds children’s rights.<sup>63</sup> They believe that their insight will help governments to improve decision-making in this regard: “Maybe they need to be trained to understand our views.”

The authors of the Council of Europe report conclude with the point that children in Europe wish to have some influence on matters regarding their rights and relevant initiatives should not be tokenistic. Moreover, because of the importance of families and friends to children, service providers should think about how to better involve them in various efforts to assist children. Children also want in particular to ensure that their interests are given adequate

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<sup>60</sup> Martin K. and Hart R., *“Trying to Get By”: Consulting with Children and Young People on Child Poverty* (Office of the Children’s Commissioner for England, 2011).

<sup>61</sup> Ipsos MORI and Nairn, A., *Children’s Well-Being in UK, Sweden and Spain: The Role of Inequality and Materialism – A Qualitative Study* (Ipsos MORI, 2011).

<sup>62</sup> Martin K. and Hart R., *“Trying to Get By”: Consulting with Children and Young People on Child Poverty* (Office of the Children’s Commissioner for England, 2011).

<sup>63</sup> Lundy, L., Orr, K. and Marshall, C., *Towards Better Investment in the Rights of the Child: The Views of Children* (Queen’s University Belfast, 2015).

consideration in resource allocation. These points, and those noted throughout the report, should be given particular prominence in policy-making in Ireland.

### **1.6.1 Recommendations**

*Irish professionals working with children should be made aware of the report of the Council of Europe on children's views on their rights. It is a useful tool which facilitates the inclusion of children's views in policies and practices.*

*Services specific to children must be ensured for children with experience of domestic violence. In particular, there should be an availability of women's shelters where teenage sons are permitted to stay. Children should never be ordered to have contact with domestically violent parents against their will. Families must have assistance such as counselling to repair relationships damaged by domestic violence.*

*Considerable progress has been made in recent years in the youth justice area. That said, further attempts should be made to avoid the use of force, including restraint, of children in custodial settings. Staff recruitment should have a clear focus on individuals with a proven ability of working with children, and those who come from similar backgrounds as those in custody.*

*All efforts should be made to refrain from placing children in custody where they come into conflict with the law. Such children need alternatives such as community service, a second chance, and opportunities to fix their own problems.*

*High-quality support services should be in place for children with a parent in prison. Parents should be supported and encouraged to ensure that children have adequate information when a parent goes to prison.*

*A broad range of mechanisms must be developed to facilitate the participation of children in decisions affecting them across different groups and contexts, and children should always receive information on how and whether their views have had an impact.*

*In particular families should be encouraged and facilitated to ensure that children are heard in decisions affecting them. This is very likely to indirectly benefit children's experiences in many ways, including by decreasing school bullying.*

*Politicians must do more to hear children's views and to facilitate them to engage in local and national political processes. While progress in Ireland has been made with the establishment of Comhairle na nÓg and Children and Young People's Services Committees, further progress is required. Innovative practices, such as the Children's City Council in Croatia should be considered, where children communicate with the mayor and give views on budgetary matters. So too should the potential for online tools for helping children to communicate with elected representatives.*

*Where children live in institutions, their views should be pivotal regarding decisions on their personal circumstances and their everyday living conditions. Practice in the Netherlands, where young people are trained by their peers on how to contribute to the running of care homes, should be considered.*

*Greater consideration should be given to the importance of retaining family links for children in care where possible. Children in care most frequently and strenuously emphasise this issue as important to them.*

*Children should have legislative protection against age discrimination in Ireland, and Ireland should increase awareness of age-discrimination against children.*

*All schools should have programmes in place tackling discrimination, including on the basis of race and ethnicity and disability. Greater efforts should be made to ensure minority and disadvantaged groups have opportunities to socialise and interact. In the case of children with disabilities, for example, all efforts should be made to ensure that they should be able to attend mainstream school if it is in their best interests. Children with and without disabilities should have many opportunities to meet together.*

*Greater attention should be given to children's participation in the running of schools in Ireland. 'Democratic schools' where children's participation is embedded in everyday practice should be considered. Teachers should receive increased training on child participation.*

*Teachers should be trained to seek children's views in a manner that will ensure the most positive environment for children's development.*

*In 2013 the Department of Education and Skills published new anti-bullying procedures to be adopted by all primary and post primary schools. Further progress is required in promoting the implementation of these procedures. In particular, teachers should be better trained to notice and respond better to bullying and children should have more opportunities to discuss issues relating to bullying.*

*Children should have a greater say in budget decisions to ensure that their needs and rights are properly met and facilitated.*

*Service providers should consider how to better involve families and friends in various efforts to assist children, because of the importance of relationships of trust to all aspects of children's well-being.*

## **1.7 UN Developments: Ireland before the UN Committee on Economic, Social and Cultural Rights**

In 2015 the Committee on Economic, Social and Cultural Rights reviewed Ireland's compliance with the International Covenant on Economic, Social and Cultural Rights.<sup>64</sup> In accordance with the relevant requirements, the State provides a report on efforts to facilitate such rights, various NGOs provide 'shadow reports' to highlight the situation from a civil society perspective, and the Committee delivers 'concluding observations' – observations on the situation generally and recommendations for change in order to ensure greater compliance with international law. There were a number of children's issues in the area of economic, social and cultural rights identified by the Committee in its concluding observations.

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<sup>64</sup> See Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of Ireland* E/C.12/IRL/CO/3 (2015).

Concerning asylum-seekers, the Committee welcomed the International Protection Act, which will bring Ireland into conformity with other EU Member States in having a single procedure to deal with all applications for those seeking asylum. Separately, the UN Refugee Agency criticised the legislation for a number of reasons, including changes in relation to family reunification provisions which will restrict the categories of family members with whom refugees can apply to be reunited.<sup>65</sup> This will obviously significantly affect children and their relationships. The Committee on Economic, Social and Cultural Rights also heavily criticised the Direct Provision system, which has already been considered in my previous reports,<sup>66</sup> and recommends that the State party: “Expedite the adoption of the International Protection Bill (now Act) with a view to introducing a single procedure to assess and determine without undue delay all forms of protection status for asylum-seekers as well as to strengthening the protection and promotion of their economic, social and cultural rights” and to improve living standards at Direct Provision centres.

The Committee criticised the very high cost of childcare services in Ireland and the relatively poor maternity benefits scheme, advising that Ireland ensure that all women workers benefit from the scheme and that adequate provision is made for paternity leave. It also recommends that affordable public childcare services are expanded.

The Committee further notes the increase in the number of people living in poverty – particularly children. It criticises the lack of a basis in economic, social and cultural rights evident in poverty reduction policies. The Committee also identifies an absence of concrete policies aimed at addressing the specific needs of groups such as children. Ireland is urged to increase efforts to reduce poverty, and to ensure special attention to disadvantaged groups. The adoption of poverty reduction programmes with concrete targets and time-frames is urged. It is recommended that Ireland integrate a human rights- based approach in all poverty reduction programmes, an approach which should ensure entitlements and accountability. In addition, the Committee expresses concern at the increase in food insecurity and malnutrition among poor families, expressing particular concern for children.

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<sup>65</sup> <http://www.unhcr.ie/news/irish-story/unhcr-welcomes-publication-of-the-international-protection-bill> (last accessed 18 December 2015).

<sup>66</sup> See, for example, Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014), section 1.4.

The State obligation to progressively realise the right to adequate food is emphasised. In a previous report I noted the high levels of obesity and the international obligations which must be implemented in Ireland to tackle this.<sup>67</sup> Ireland is urged by the UN Committee on Economic, Social and Cultural Rights to take concrete measures to address the nutrition needs of poor families. In particular, the adoption of a “national action plan on food security and nutrition” in line with the 2004 ‘Voluntary Guidelines’ on implementing the right to food is recommended.<sup>68</sup> This document outlines that the right to food requires basic prerequisites, such the inclusion of the private sector and civil society, and allocation of sufficient resources to fight poverty; adoption of strategies and policies, and a legal human rights-based approach, that is one which ensures state accountability. The Guidelines also require education – in particular of children and women; guaranteed availability of healthy food on the market; and additional support for the vulnerable such as those in poverty.

The Committee expresses concern at the housing crisis in Ireland, including the lack of social housing, culturally inappropriate housing provision for Travellers and Roma, and the growing number of homeless families and children. An unacceptable 1,500 children are living in emergency homeless accommodation in 2015.<sup>69</sup> The Committee points to General Comment No. 4 (1991) on the right to adequate housing and General Comment No. 7 (1997) on forced evictions, which assist States to ensure implementation of rights in these areas in conformity with the International Covenant on Economic, Social and Cultural Rights. The Committee urges Ireland, amongst other things, to adopt policies in line with these documents. Policies need to be more effective in responding to real needs in Ireland, particularly those of vulnerable groups. Social housing units should be increased, the Committee emphasises, and Ireland must adequately tackle homelessness and consultation with Travellers and Roma to ensure culturally appropriate accommodation.

The Committee is concerned at insufficient healthcare services in Ireland, and notes a number of particularly concerning issues such as the poor life expectancy and infant mortality rates of Travellers. It is recommended that Ireland “take all necessary measures” to improve healthcare services, including through increased public spending. The admission of children

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<sup>67</sup> Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014), section 1.3.3.

<sup>68</sup> Food and Agriculture Organization of the United Nations (FAO), *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security* (Adopted by the 127th Session of the FAO Council, November 2004).

<sup>69</sup> See <http://www.barnardos.ie/riseup/children-made-homeless/> (last accessed 1 December 2015).

to psychiatric facilities for adults is criticised, with the Committee recommending that Ireland take immediate action to separate children from adults in psychiatric facilities. This is all the more urgent considering the fact that 3,000 children are on waiting lists for mental health support,<sup>70</sup> and Ireland has the highest rate of youth suicide in the EU according to figures from the Central Statistics Office.<sup>71</sup>

The Committee expressed concern at discrimination experienced by vulnerable children such as those with disabilities, Traveller and Roma children, migrant children and children belonging to a religious minority. It references section 7 of the Equal Status Acts 2000, which permits schools to give preference in admissions policies to children based on religion; the lack of a regulatory framework for children with special educational needs; and the effects of the austerity measures on schools, for example the reduced number of teachers. Such measures, the Committee states, disproportionately affect disadvantaged children. The Committee recommended that Ireland bring the Equal Status Acts 2001 and the Education (Admission to Schools) Bill 2015 into conformity with international human rights standards by ensuring the principle of non-discrimination in school admissions policies. Ireland should also increase the number of non-denominational schools; and establish a regulatory mechanism to monitor school policies, including admissions policies. Moreover, Ireland should revoke the austerity measures which disproportionately affect disadvantaged children. The Committee expresses particular concern at the educational barriers for Traveller children as evident from numerous statistics on educational attainment such as access to higher education. The Committee recommends that Ireland increase efforts to enhance inclusive education for all.

These observations on Ireland's provision for economic, social and cultural rights provide an excellent snap shot into the current rights climate in the state. It enables a clear picture of the primary areas of concern for these elements of children's rights as, in spite of the fact that the International Covenant on Economic, Social and Cultural Rights is a human rights instrument which examines the rights of the population generally, there is a strong focus by the Committee on children. These concluding observations provide an excellent focus for the areas in most urgent need of attention for the purpose of meeting human rights requirements.

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<sup>70</sup> See <https://www.amnesty.ie/our-work/more-30-organisations-unite-launch-childrens-mental-health-coalition> (last accessed 1 December 2015).

<sup>71</sup> See <http://www.thejournal.ie/suicide-rates-1070842-Sep2013/> (last accessed 1 December 2015).



### **1.7.1 Recommendations**

*The Direct Provision system should be abolished, and in the interim living standards at Direct Provision centres should be improved.*

*Affordable public childcare services should be expanded in Ireland, considering the high level of criticism by the Committee on Economic, Social and Cultural Rights. The maternity benefits scheme should be improved and made accessible to all, and adequate provision should also be made for paternity leave.*

*Authorities should increase efforts to reduce poverty, particularly considering the high rates of children living in poverty. Poverty reduction programmes should be adopted which have concrete targets and time-frames, and a human rights basis which ensures entitlements and accountability.*

*The state has an obligation to progressively realise the right to adequate food. Concrete measures should be taken to address the nutrition needs of poor families. A “national action plan on food security and nutrition” should be drafted in line with the 2004 ‘Voluntary Guidelines’ on implementing the right to food, which requires the availability of healthy food for the poor and a legal human rights-based approach.*

*Ireland should tackle the housing crisis in line with General Comment No. 4 (1991) on the right to adequate housing and General Comment No. 7 (1997) on forced evictions. The needs of vulnerable groups should be prioritised, social housing units should be built and homelessness adequately dealt with. Satisfactory consultation with Travellers and Roma to ensure culturally appropriate accommodation should be prioritised.*

*Ireland must “take all necessary measures” to improve healthcare services, including through increased public spending. Immediate action should be taken to separate children from adults in psychiatric facilities.*

*The Equal Status Acts 2001 and the Education (Admission to Schools) Bill 2015 should be amended to ensure the principle of non-discrimination in school admission policies. Austerity measures which disproportionately affect the education of disadvantaged children should be revoked. Ireland must increase efforts to enhance inclusive education for all, particularly*

*Traveller children, because of the significant educational barriers they face as evidenced by much lower levels of educational attainment.*

## **1.8 Preparing for Examination of Ireland's Submission to the UN Committee on the Rights of the Child**

In 2013 Ireland submitted its combined third and fourth periodic report to the UN Committee on the Rights of the Child. It follows Ireland's Second Report, published by the National Children's Office in 2005. It outlines the progress made in the intervening years, highlighting any important changes in law, policy and practice concerning children.<sup>72</sup> The Children's Rights Alliance has since then engaged in consultation with both Irish children and civil society in advance of the Committee's 2016 examination of the report of the Irish government.

The Children's Rights Alliance prepared a shadow report for the Committee on the Rights of the Child entitled 'Are We There Yet?'.<sup>73</sup> The report is a useful resource for understanding the state of children's rights in Ireland in 2015. It outlines the positive changes since the last report to the Committee on the Rights of the Child – children's rights are explicitly recognised in the Constitution of Ireland, the role of Minister for Children and Youth Affairs has been established with full Cabinet status and Ireland has a dedicated agency for children and families. These are very significant milestones and lay the foundation for an Ireland where children can flourish. It is acknowledged that in Ireland, many children have their rights respected, protected and fulfilled.

It is also acknowledged that many Irish children face significant violations of their CRC rights. Children in the Traveller community, asylum-seeking children in Direct Provision accommodation and children in need of mental health support are highlighted as amongst those most in need of assistance in accessing their rights. The Children's Rights Alliance points to significant areas in need of action, such as the need for enacting legislation to satisfy the Constitution's Article 42A provisions on children's views. The age of criminal responsibility should be raised to 14 years for all criminal offences. A clear legal framework

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<sup>72</sup> Department of Children and Youth Affairs, *Ireland's Consolidated Third and Fourth Report to the UN Committee on the Rights of the Child* (Department of Children and Youth Affairs, 2013).

<sup>73</sup> Children's Rights Alliance, *Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child* (Children's Rights Alliance, 2015). Available at <http://www.childrensrights.ie/content/are-we-there-yet-report-un> (last accessed 13 December 2015).

is required to facilitate the right of children to consent to, or refuse, treatment in health and social care settings. The report contains a number of other important recommendations for change.

Ireland has an obligation under CRC Article 42 to ensure that the principles and provisions of the CRC are made widely known “by appropriate and active means” to both adults and children. The Committee on the Rights of the Child has outlined in detail in General Comment No. 5 (2003) on general measures of implementation of the CRC how States can and should do this. It is important that the 2016 reporting process is made widely known in Ireland. Children themselves should be involved in this, and the government should liaise with the media in ensuring that adults and children in Ireland are aware of the process.

### **1.8.1 Recommendations**

*Significant efforts should be made to publicise, in line with the requirements of CRC Article 42, Ireland’s combined third and fourth periodic report to the UN Committee on the Rights of the Child and the Children’s Rights Alliance shadow report entitled ‘Are We There Yet?’*

*The process in 2016 of the examination of Ireland’s report by the UN Committee on the Rights of the Child should also be publicised as much as possible.*

*The recommendations in the shadow report of the Children’s Rights Alliance should be considered, in particular necessary legislative change and steps to facilitate the rights of vulnerable groups such as children in the Traveller community and children with mental health needs.*

## **1.9 Ireland and the Millennium Development Goals**

In 2015 the UN published the final report on the Millennium Development Goals (MDGs).<sup>74</sup> The MDGs are a set of eight objectives with specific targets and timelines, set in 2001 aiming to achieve the elimination of poverty by 2015:

- Eradicate extreme poverty and hunger;
- Achieve universal primary education;
- Promote gender equality;

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<sup>74</sup> UN, *The Millennium Development Goals Report 2015* (UN, 2015).

- Reduce child mortality;
- Improve maternal health;
- Combat HIV/AIDS, malaria, and other diseases;
- Ensure environmental sustainability;
- Develop a global partnership for development.

The final report outlines that significant progress has been made – for example, the number of people living in extreme poverty has halved since 1990. However 800 million people still live in extreme poverty. Approximately 16,000 children under five years die every day, mostly from preventable causes. Children are far more likely to live in poverty than adults making this a highly relevant children’s rights issue. The MDGs aim to tackle poverty in both the industrialised and non-industrialised world and therefore are highly relevant to Ireland. Ireland has an obligation to tackle the inequality which leads to child poverty both at home and abroad. As outlined in the previous section, child poverty is a significant issue in Ireland. Ireland also has international obligations under the CRC to ensure co-operation with other States to improve children’s well-being globally (CRC Article 4).

Ireland has been leading in global efforts to bring forward the objectives above beyond the now outdated MDG remit. Ireland was appointed, along with Kenya, as co-facilitator of the sustainable development negotiations from 2015 onwards.<sup>75</sup> These talks aimed to solve a broad range of economic, social and environmental problems, such as how to eliminate poverty and gender equality and how to ensure democratic governance and environmental sustainability. A new global framework was developed to replace the Millennium Development Goals – Sustainable Development Goals.<sup>76</sup> In September 2015, this new set of goals to end poverty, protect the environment, and ensure prosperity was introduced, with specific targets to be achieved by 2030. Many of them are highly relevant to child protection in the Irish context, such as:

- End hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round; and

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<sup>75</sup> Luke Holland, ‘Ireland can make its mark on UN development goals’ *Irish Times* 26 January 2015.

<sup>76</sup> See <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last accessed 15 December 2015).

- Ensure universal access to sexual and reproductive health-care services, including for family planning, information and education.<sup>77</sup>

The Irish Government has been central to efforts to embed human rights in international efforts to eliminate poverty. The discourse has shifted from one of charity to social justice – there are international obligations in place through which States must work together to tackle inequality. The difficulty is in ensuring accountability which is so pivotal to the human rights approach. People on the ground must be able to hold governments to account for commitments to end inequality and ensure a good standard of living for all. States must have mandatory periodic reviews of their progress in this regard. The policies and reviews should be based on international human rights obligations.

Yet the efforts of the Irish Government in this context, whilst highly commendable, are somewhat in contrast to the situation at home, where, as outlined in the previous section, child poverty is at a high level, and the austerity measures drafted and implemented by Irish authorities disproportionately affect children, causing these high levels of child poverty. Measures to tackle child poverty are not human rights-based and, as outlined above, UN human rights monitoring mechanisms are urging Ireland to change practice in this regard.

### **1.9.1 Recommendations**

*Ireland should continue its excellent work at international level progressing work on eliminating child poverty through human rights-based approaches.*

*Ireland needs to do more to match these efforts by ensuring human rights-based approaches in budgetary and other decisions at home. This is a complex matter, although a number of practical initiatives may help achieve this objective. For example, children's rights audits/analysis should be conducted to ensure that austerity measures do not disproportionately affect children.*

*Ireland should implement a plan to meet the Sustainable Development Goals targets by 2030. A children's rights audit/analysis should also be used in order to ensure the prominence of their rights in such a plan.*

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<sup>77</sup> See <https://sustainabledevelopment.un.org/?menu=1300> (last accessed 15 December 2015).

### **1.10 Committee on the Rights of the Child General Comment No 17: The Right to Play**

It is self-evident that play is important for children. The drafters of the UN CRC recognised play as so crucial, however, that it should be enshrined as a right in that instrument. CRC Article 31 provides that “States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.” Yet the right has been significantly neglected as frivolous or as lying outside of the rights context. To address this, the Committee on the Rights of the Child has drafted General Comment No 17: The right of the child to rest, leisure, play, recreational activities, cultural life and the arts (2013) in order to highlight and clarify State obligations, the role and responsibilities of the private sector (including companies and civil society), as well as providing guidelines for professionals and parents.

The Committee points to well-established understandings of the importance to children of play, leisure and rest. It is intrinsic to children’s healthy development that they sufficiently enjoy these rights and it is, therefore, a crucial children’s rights and child protection issue. Yet the Committee also acknowledges the poor recognition given by states to Article 31. The lack of understanding of the significance of the right in the lives of children is evidenced by inadequate investment in provision for children’s play and leisure, a lack of protective legislation and the lack of emphasis on children’s rights and interests in national and local-level planning. Furthermore, provision may be made for structured and organised activities, the Committee states, but it is equally important to create time and space to facilitate children’s spontaneous play and to promote attitudes in society that support and encourage this activity.

The Committee points in the General Comment to conditions necessary for children to realise their rights under Article 31 to the maximum extent. Children should have:

- Freedom from stress;
- Freedom from social exclusion, prejudice or discrimination;
- Freedom from social harm or violence;
- Freedom from waste, pollution, traffic and other physical hazards;
- Sufficient rest appropriate to their age and development;
- Sufficient leisure time, free from other demands;
- Sufficient space and time for play, free from adult control;

- Sufficient space and opportunities to play outdoors;
- Opportunities to experience natural environments;
- The chance to use their imagination:
- The chance to explore the cultural and artistic heritage of their community;
- Opportunities to play and interact with other children;
- Recognition by parents and others of the value of the rights provided for in Article 31.

The Committee points to obstacles to children's enjoyment of CRC Article 31, such as hazardous environments, over-protectiveness of children at the expense of their ability to explore and play, pressure for formal academic success, a lack of investment in cultural and artistic opportunities for children, and the lack of access to opportunities for disadvantaged groups such as children with disabilities and minority children. The challenges posed for children by technology and the Internet, because of violent video games and online dangers, is noted although the benefits of these facilities are also recognised.

It is stated that there are particular challenges for the enjoyment of Article 31 rights by girls. They are often pushed towards toys which prepare them for the domestic, rather than the professional sphere. They also generally have lower participation rates in sports and games due to cultural exclusion or the lack of appropriate provision for their needs and interests. The Committee urges that States take action to challenge gender stereotypes at national level which compound patterns of inequality of opportunity for girls.

The Committee also emphasises the disadvantages for children living in poverty regarding access to enjoyment of their CRC Article 31 rights. They have lower levels of access to facilities, often cannot afford to participate in activities, and may live in dangerous and neglected neighbourhoods which are not conducive to play and recreation. They also often live in home environments with insufficient space or opportunities for play and recreation. The importance of parks and playgrounds for the play and recreation of children in poverty is emphasised, as is the obligation on States to take action to ensure equal opportunities for cultural and artistic activities for all children.

In the General Comment the Committee also highlights the multiple obstacles to enjoyment by children with disabilities to play and recreation rights under Article 31. They may be excluded from school, which is where friendships are made and where much of a child's play

and recreation take place. The Committee also points to negative stereotypes which can lead to the rejection of children with disabilities as participants in play and recreation. The physical inaccessibility of public spaces, parks, playgrounds, and many other areas and facilities for play and recreation are highlighted, as is the lack of accessible transport. The Committee points to the fact that Article 30 of the UN Convention on the Rights of Persons with Disabilities enshrines the obligations of State parties to ensure equal access to play and recreation for children with disabilities. Special measures are needed to remove obstacles to ensure that children with disabilities can participate in all these activities.

The Committee outlines a number of concrete obligations for States to implement in order to ensure realisation of CRC Article 31 for all children. The first concerns support for caregivers, who should receive guidance and facilitation to progress children's rights to play and recreation. They should receive practical guidance on how to play with children, on how to create environments to facilitate children's play, and on how to manage the balance between safety and discovery. States should also engage in awareness raising, invest in measures to change negative cultural attitudes which devalue play and tackle the exclusion of children from public spaces on the basis that they are a 'nuisance'.

Non-discrimination legislation is also required to guarantee access for children to all recreational, cultural and artistic environments. This links to the point made above that legislation prohibiting discrimination on the basis of childhood should exist at state level.

Regulation is required for private actors to ensure that members of civil society, such as the corporate sector, comply with the provisions of CRC Article 31. States are under an obligation to ensure adequate work breaks for working children, to ensure safety standards for toys, and other types of regulation in this area. Children must be protected from harm when engaging in play and recreation and therefore States must ensure the existence of child protection policies, and standards for professionals working with children in the field of play and recreation. Measures should also be introduced to both promote online access and accessibility and ensure online safety for children. Children should be empowered and informed to act safely online. Marketing and media must also be regulated. Policies to control the commercialization of toys and games to children, such as through television advertising, should be considered. Effective and accessible complaints mechanisms must exist for children where they wish to make complaints and seek redress where they claim their CRC



Article 31 rights are violated. It is positive that Ireland has already signed and ratified the Optional Protocol to the UN Convention on the Rights of the Child on a communications procedure, which will allow Irish children to submit complaints of violations to the Committee on the Rights of the Child. Adequate provision for complaints mechanisms should exist at domestic level, however.

Another important obligation highlighted by the Committee is that created by CRC Article 12 which requires that States consult children on planning and implementation of matters such as planning policies at the national and local levels to ensure adequate provision for children's spaces. In fact, the Committee "strongly encourages" that States introduce legislation at national level to accord genuine rights status to CRC Article 31 for every child and that there should be a plan and a timetable for implementation of CRC Article 31. The plan should address the implications of Article 31 for children from different groups to ensure equality for those who suffer disadvantage. CRC Article 31 also requires data collection and research. Indicators and evaluation should be used to monitor compliance and data should be disaggregated by age, sex, ethnicity and disability, to ensure that the rights involved are implemented adequately for all children.

A further important requirement of CRC Article 31 is that States engage in 'universal design': the concept of designing products and the built environment to be usable for people with disabilities. This is required, states the Committee, so that play and recreation facilities are accessible for children with disabilities in order to protect them from exclusion and discrimination. States are urged to engage with professionals, people with disabilities and others to ensure that universal design is implemented in play environments, including those in schools, parks and community centres, sports and playgrounds that are safe and accessible to all children. Children should also have access to green areas, open spaces and nature. Children of all ages should be able to access clubs, sports facilities, games and activities and learning environments (particularly in school) should be active and participatory. Training is required for professionals working with children or on children's issues on implementation of CRC Article 31.

In consultations with children in 2011 by the Department of Children and Youth Affairs children said that improving play and leisure opportunities was among the main changes they

felt could make Ireland a better place to live.<sup>78</sup> Ireland had a National Play Policy from 2004-2008 which had a number of objectives. It aimed to ensure that children are heard as regards play policies and facilities, to raise awareness of the importance of play, to ensure a child-friendly environment, to provide more public play opportunities and particularly for disadvantaged children, to improve playgrounds and play areas and to improve and evaluate play provision for children in Ireland.<sup>79</sup> A National Recreation Strategy for Children and Young People was also launched in 2007 to further positive activities for young people aged 12 to 18.<sup>80</sup> Some gains have undoubtedly been made in the past decade, such as the doubling of the number of playgrounds in Ireland and the consideration of the issue of play at local level.<sup>81</sup> Unfortunately, however, it appears that there have not been efforts to assess achievements made during the timelines of these strategies, nor has action been taken to develop further policy objectives since then.<sup>82</sup>

Gaps exist in Irish practice, as evidenced in research which reports high levels of parents who identify an absence of safe parks, play areas, and recreational facilities in local areas, and the fact that children in Ireland have fewer freedoms than children in many other European countries.<sup>83</sup> Furthermore, although both the National Play Policy and the National Recreation Strategy for Children and Young People make passing reference to CRC Article 31, the principles involved were not embedded within the strategies. Therefore the special needs of girls, children with disabilities, children in poverty and other disadvantaged groups does not receive sufficient consideration.

Practice in Scotland should be considered in Ireland, where Scotland's Commissioner for Children and Young People has placed significant emphasis on the right to play and recreation.<sup>84</sup> A conference on the theme of CRC Article 31 was held in 2013 to consider how to implement General Comment No. 17 in Scotland. The event, entitled 'A Richer Understanding of Article 31: What does this mean for Scotland's children?', was organised

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<sup>78</sup> <http://www.itsyourright.ie/say/> (last accessed 1 December 2015).

<sup>79</sup> National Children's Office, *Ready Steady Play! A National Play Policy* (National Children's Office, 2004).

<sup>80</sup> Office of the Minister for Children, *National Recreation Strategy for Children and Young People* (Office of the Minister for Children, 2007).

<sup>81</sup> Department of Children and Youth Affairs, *Ireland's Consolidated Third and Fourth Report to the UN Committee on the Rights of the Child* (Department of Children and Youth Affairs, 2013).

<sup>82</sup> Children's Rights Alliance, *Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child* (Children's Rights Alliance, 2015).

<sup>83</sup> *Ibid.*

<sup>84</sup> Scotland's Commissioner for Children & Young People, *Children's right to play, culture and arts: A special supplement* (Scotland's Commissioner for Children & Young People, 2013).

by the International Play Association Scotland and Scotland's Commissioner for Children and Young People. It included professionals and organisations from across children's sectors and urged central and local government to fully realise CRC Article 31 rights for all children in Scotland. Particular emphasis was placed on the obstacles for disadvantaged groups of children which are caused by "non-inclusive planning, policies, procedures, practices, attitudes and design" and young people working on issues around poverty presented on the difficulties for children in poverty of accessing leisure activities. There is much to learn from this initiative which could be utilised in the Irish context to ensure better implementation of CRC Article 31.

### **1.10.1 Recommendations**

*Awareness-raising should be undertaken to ensure that professionals and parents are aware of the importance of CRC Article 31 and the obligations which exist in relation to children's rights to play, recreation, rest and the participation in the arts. Caregivers should receive guidance and facilitation to progress children's rights in this regard.*

*Ireland should invest in measures to change negative cultural attitudes which devalue play and view it as a 'nuisance'. Non-discrimination legislation should guarantee access for children to all recreational, cultural and artistic environments.*

*Child protection policies and standards for professionals working with children in the field of play should be ensured by the State. This will involve regulation of the commercialization of toys and games to children, such as through television advertising.*

*Children must be adequately consulted on planning and implementation of planning policies at the national and local levels to ensure adequate provision for children's spaces.*

*Legislation should be enacted to accord rights status to CRC Article 31 for every child. Moreover, there should be a plan and a timetable for implementation of CRC Article 31.*

*The implications of CRC Article 31 for children from different groups should be adequately considered to ensure equality for those who suffer disadvantage, and monitoring of implementation should include data disaggregated to recognise different groups of children.*

*Universal design should be embedded in the designing of products and the built environment to ensure equal access for children with disabilities.*

*An updated strategy on play and recreation should be drafted and implemented. It should be based on CRC Article 31 and implementation should be adequately evaluated.*

*Practice in Scotland should be considered, in particular the pro-active role of the Children's Commissioner and the involvement of civil society groups in efforts to implement CRC Article 31.*

### **1.11 Developments Concerning Children's Digital Rights**

In 2015 the Human Rights Council discussed freedom of opinion and expression and freedoms of peaceful assembly and of association, including the right to seek, receive, and impart information online,<sup>85</sup> an emerging human rights issue which is as yet little understood. It is particularly under-explored in the context of children's rights.

The human rights consequences for matters such as online surveillance by governments can be grave for ordinary citizens, including children. The right to privacy, the right to freedom of expression as well as the right to life can be at issue in States in which political dissent is forbidden by governments.<sup>86</sup> The human rights debates around such matters often fail to consider threats specific to children, such as online abuse. Nevertheless child protection arguments are often used to justify censorship. The NGO Children's Rights International Network (CRIN) argues that these challenging issues must be considered in a children's rights context. They have outlined the most urgent issues concerning children's digital rights issues in order to initiate the debate.

CRIN highlights that all citizens, including children, must have free and equal access to the Internet. This concerns physical and economic barriers, but also the question of who controls access to the Internet, as often private companies attempt to restrict free and equal access by trying to decrease 'net neutrality' – the principle that all data should be treated equally

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<sup>85</sup> See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16095&LangID=E> (last accessed 5 December 2015).

<sup>86</sup> See Children's Rights International Network, [https://www.crin.org/en/home/what-we-do/crinmail/childrens-rights-united-nations-142#digital\\_rights](https://www.crin.org/en/home/what-we-do/crinmail/childrens-rights-united-nations-142#digital_rights) (last accessed 5 December 2015) and A. Daly, *A Commentary on the United Nations Convention on the Rights of the Child, Article 15: The Right to Freedom of Association and Peaceful Assembly* (Monograph– Martinus Nijhoff Publishers, 2016).

whether it derives from a large company or a small NGO. Without net neutrality, “fast lanes” could be created by Internet service providers, facilitating fee-paying websites to offer a faster connection to users. Websites of organisations which cannot afford to pay for such a service would load so slowly as to be unusable. CRIN points out that this would also affect Internet users’ access to all websites, and the small NGOs which are crucial for facilitating children’s rights. The European Parliament voted in 2015 against rules intended to safeguard net neutrality in the EU.<sup>87</sup> It is positive that Irish authorities have indicated unwillingness to retreat from net neutrality<sup>88</sup> and they should continue to do so to the extent possible, not least to uphold the ability of small groups and organisations to facilitate the progression of children’s rights.

CRIN also points to the relevance for children of the ‘right to be forgotten’ – the right to request Google to remove one’s name from a particular name search as determined by the European Court of Justice.<sup>89</sup> Google staff make the decision based on a balancing of the potential damage to the individual making the request on the one hand and the public interest in the information on the other. This is highly relevant to children, who are less likely than adults to be aware that information they post may be available long-term. CRIN argues that children should have as much control over such information as possible, and that informed consent should be obtained from them before any transfer of data is made. The age of the individual at the time of the posting of the information should be a key factor in such decisions by Google, argues CRIN, who also question whether such decisions should be in the hands of private companies at all.

CRIN highlights the importance of the Internet for children’s freedom of information. Whilst there is a genuine need, and indeed obligation, to protect children from the dangers of the Internet, States must ensure that they do not unreasonably restrict children’s civil and political rights such as the right to freedom of information and expression. CRIN identifies instances whereby Internet service providers are pressured by State authorities to institute blanket filters to block websites containing material which is argued to be unsuitable for under-18s. Yet some of the sites contain material which could be important for the well-being

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<sup>87</sup> <http://www.bbc.com/news/technology-34649067>.

<sup>88</sup> <http://www.independent.ie/business/technology/government-set-to-oppose-any-moves-to-water-down-net-neutrality-30771031.html>.

<sup>89</sup> *Google Spain, S.L., Google Inc. y Agencia Española de Protección de Datos (AEPD), Mario Costeja González* ECLI:EU:C:2014:317.

of many under-18s such as material on sex education, politics and support groups for alcohol and suicide. These blanket filters may not be in conformity with CRC Article 5, which requires that children are facilitated to exercise their rights in line with their evolving capacities. For some under-18s access to such sites will provide them with crucial help and support.

CRIN also point to the importance of responding appropriately to cyber-bullying, something which I considered in detail in my Sixth Report.<sup>90</sup> The problem is very prevalent – one EU study indicated that 21% of children have been exposed to potentially harmful user-generated content such as hate, pro-anorexia and self-harm.<sup>91</sup> CRIN states that, where such problems are encountered, child development experts advise that parents should not restrict children's access to the Internet, as it may prevent dialogue and discourage them from reporting abuse. Alternatively, supporting children with information about how to stay safe online, for example through changing privacy settings and reporting abuse, is recommended.

CRIN concludes that, although there are many unanswered questions about how to balance protection of children online with the participation rights crucial to their social and psychological well-being, blanket censorship is not the answer. Children should be guided to think critically in order to support their ability to play a part in their own protection.

### **1.11.1 Recommendations**

*Human rights debates around online freedoms should consider children's rights and children's protection.*

*Irish authorities should continue efforts to protect net neutrality, as one benefit is that it upholds the ability of small groups and organisations to facilitate the progression of children's rights.*

*The relevance for children of the 'right to be forgotten' should be acknowledged, children should be educated about the matter, and it should be understood that the age at which an*

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<sup>90</sup> Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2013), at section 2.2.

<sup>91</sup> EU Kids Online network, available at: [www.eukidsonline.net](http://www.eukidsonline.net) (last accessed 1 December 2015). Funded by the European Commission Safer Internet Programme (2009-11).

*individual posts information online should be considered a very important factor in decisions about whether to remove an individual's personal information from sites.*

*It must be ensured that children's access to information is not unreasonably restricted by blanket filters blocking websites which offer education and support.*

*It is vital to take steps to combat cyber-bullying, including through education of parents. However the importance of dialogue and support for children, rather than simply prohibitions on Internet usage, should be part of this education.*

### **1.12 Protecting Children from Violence through Positive Parenting**

Ireland has taken a very progressive step in removing the defence of reasonable chastisement for parents accused of assaulting children, and consequently in effect banning physical punishment of children. This puts into effect a recommendation which has been strenuously made in my previous reports.<sup>92</sup> This is a victory for children's rights and protection and places Ireland as a leader amongst states in efforts to prevent violence against children (becoming the 47th state to ban physical punishment).<sup>93</sup> There is, however, much still to be done.

Legislating to prevent violence against children is the first step to eliminating such violence. However it must be recognised that it will still occur, and appropriate steps must be taken to prevent it and to support families who are struggling. I recommended in my Fifth Report that Ireland should implement CRC General Comment No. 13 on the right of the child to freedom from all forms of violence.<sup>94</sup> In this document, the Committee states that there must not be undue interference in family life, but that States have obligations to facilitate positive parenting, described by the Council of Europe as:

Parental behaviour based on the best interest of the child that is nurturing, empowering, non-violent and provides recognition and guidance which involves setting of boundaries to enable the full development of the child.<sup>95</sup>

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<sup>92</sup> Geoffrey Shannon, *Fifth Report of the Special Rapporteur on Child Protection* (2011), at section 1.7.4.

<sup>93</sup> See <http://untribune.com/ireland-becomes-47th-country-to-ban-corporal-punishment/> (last accessed 4 December 2015).

<sup>94</sup> Geoffrey Shannon, *Fifth Report of the Special Rapporteur on Child Protection* (2011), at section 1.7.5.

<sup>95</sup> Council of Europe Recommendation CM/Rec (2006)19 to support positive parenting.

Monitoring of efforts made to prevent violence against children is still crucial in the new legislative context. The Committee recommends that States parties must report on progress made in this regard, and that reporting should include information on measures for the prevention of violence, awareness-raising activities and the promotion of positive, non-violent relationships. Where intervention in families is required, it should be clear who has responsibility for the child and family at each stage of intervention, what those responsibilities are, and how different sectors work together.

In research conducted in 2014, two thirds of adults surveyed expressed the view that there is insufficient information for parents relating to methods of discipline, so clearly further progress is required in this area.<sup>96</sup> There are policy and practical efforts at European level to make progress on positive parenting. States are encouraged by the Council of Europe Recommendation CM/Rec (2006)19 to support positive parenting and urged to provide parents with support through, for example, education for parents about good parenting skills. The Council of Europe, in cooperation with the European Commission, is at present developing a repository of tools which assist education and awareness-raising to promote non-violent parenting. This will assist in educating parents and carers through audio-visual tools, campaigns and training materials, on good parenting practice.<sup>97</sup>

The adoption of the Recommendation Rec(2006)19 on policy to support positive parenting constitutes recognition that positive parenting is a legitimate public policy aim. States are urged to take all appropriate legislative, administrative and financial measures to facilitate positive parenting. The Recommendation is based on the CRC and treats both parents and children as subjects with rights and obligations, and therefore takes a rights-based approach to positive parenting. States are urged to ensure the creation of environments conducive to positive parenting through ensured dignified material conditions for families, and services to support parents such as counselling and helplines.

Efforts in Ireland to support positive parenting are apparent – for example there a number of resources (such as leaflets etc.) available on the Tusla website and some availability of

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<sup>96</sup> ISPCC and Children's Rights Alliance survey. See <http://www.childrensrights.ie/resources/ispc-and-children%E2%80%99s-rights-alliance> (last accessed 4 December 2015).

<sup>97</sup> See [https://www.coe.int/t/dg3/children/corporalpunishment/News/Call\\_for\\_good\\_practices\\_positive\\_parenting\\_en.aspx](https://www.coe.int/t/dg3/children/corporalpunishment/News/Call_for_good_practices_positive_parenting_en.aspx) (last accessed 4 December 2015).



parenting classes.<sup>98</sup> There is also a parenting helpline.<sup>99</sup> However given the high proportion of those who believe there is insufficient information on parenting techniques, this clearly is insufficient. The Council of Europe has reviewed progress in positive parenting in Europe and documents Ireland's 'Community Mothers Programme.'<sup>100</sup> This programme facilitates mothers in the community to voluntarily visit and support others who require such assistance. This is a scheme which is extremely beneficial for positive parenting and should be properly supported and resourced.

### **1.12.1 Recommendations**

*Measures for the prevention of violence, awareness-raising activities and the promotion of positive, non-violent relationships must be implemented in line with General Comment No. 13 on the prevention of violence against children. Monitoring of efforts is also vital.*

*Ireland should implement Council of Europe Recommendation CM/Rec (2006)19 to support positive parenting and engage with the resources available from the Council of Europe.*

*Efforts to ensure environments conducive to positive parenting, such as dignified material conditions for families, and services to support parents such as counselling and helplines should be increased.*

*Sufficient support and funding should be provided for well-evidenced parenting supports such as the Community Mothers Programme.*

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<sup>98</sup> See <http://www.tusla.ie/services/family-community-support/parenting-information/parenting-information-fsa> (last accessed 21 December 2015).

<sup>99</sup> See <http://www.parentline.ie/> (last accessed 21 December 2015).

<sup>100</sup> Council of Europe, *Overview of Progress in Positive Parenting in Council of Europe Member States* (Council of Europe, 2009).

## **SECTION 2:**

### **DOMESTIC DEVELOPMENTS**

#### **2.1 Introduction**

This section considers the written decisions of the Irish Courts from 2015 which have issues pertaining to children's rights. The various legal topics which these cases traverse are adoption; Care Orders granted in the District Court pursuant to the Child Care Act 1991; costs in Child Care cases; immigration; surrogacy; the jurisdiction of the Irish Courts to hear Child Care cases where the child the subject of the proceedings has a connection with another country; whether child protection case conferences are subject to Judicial Review; whether parents are entitled to legal representation at child protection case conferences; developments in Hague Convention Cases; High Court Secure Care cases; including issues arising where a child in secure care comes of age; as well as general issues arising in the area of Judicial Separation, Divorce and Maintenance applications.

#### **2.2 Care Orders Granted Pursuant to the Child Care Act 1991**

##### **2.2.1 Threshold for Care Orders**

The case of *CFA v ND & Anor* considered the proportionality in the length of a full care order being made pursuant to section 18 of the Child Care Act 1991.<sup>101</sup>

In this case, the Child and Family Agency (CFA) successfully brought an application for full care orders pursuant to section 18 of the Child Care Act. The respondent mother was 19, the father 22. The respondent was 15 at the time when the child, A, the subject of the proceedings, was born. At the time of hearing, the child was four years old and was residing with her maternal grandmother. The mother had been in voluntary care herself for about a one year period. At the time of the hearing, the parents were in a committed relationship. The respondent mother conceded that the criteria for making an order under section 18 (1) (c) of the Child Care Act 1991 had been met, however she disputed whether it was proportionate to make an order until her child was 18 and therefore contended that a shorter period would provide a suitable opportunity for her to access supports. The Guardian *ad Litem* and the

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<sup>101</sup> [2015] IEDC 2.

CFA contended that the parents had shown no capacity to change and all the supports which had been in place were terminated due to non-engagement.

A psychologist carried out an assessment of child A and the respondent mother. The psychologist found that the child's attachment to her grandmother was secure and she also had a secure attachment to her mother. The psychologist found that the mother had speech and language, communication and learning needs and significant emotional needs. The judge accepted that as of the date of assessment in 2013, that the first named respondent did not have the skills required to provide good enough parenting for child A but that with sufficient support, supervision and direction she might develop those skills.

A Parenting Capacity Assessment for the second named respondent/father was carried out by the allocated social worker. It identified that the second named respondent had significant parenting capacity but also recognised some concerns and weaknesses. In July 2013 consent was given to a 12 month interim care order in order to allow recommendations made in the assessments to be carried out.

For a few months the mother engaged well with the parenting tasks which were set. The respondent mother's own mother was the foster carer to the child and there was increasing tension between the respondent mother and her own mother. Ultimately the respondent mother found basic care tasks for the child quite overwhelming. The judge found that she was pre-occupied with her relationship with the respondent father and was not prioritising her child. The plan was amended to withdraw the parenting tasks from the first named respondent which were overwhelming her. She was encouraged to re-engage with education and counselling. Ultimately in February 2014 it was decided to withdraw from the 12 month plan and once this decision was communicated to the parents, they withdrew from engagement with the care plan. The respondent mother continued to have informal contact with her daughter on an almost daily basis with the agreement of the foster carer. It was found that she had a close and loving relationship with the child, but was not responsible for care tasks.

The judge in this case found that the threshold under section 18 of the Child Care Act 1991 had been met, but went on to consider the proportionality of the length of any order that may be made under section 18(2) of that Act. The CFA argued that the default provision for the duration of a care order must be until the child is 18. The judge commented:-

Having regard to the constitutional imperative that interference in the rights of the Family is only in “exceptional” circumstances where there has been parental failure and that the interference must be necessary to protect the children, I do not accept that that is the correct legal position. The onus remains on the applicant to establish on the evidence that the period of duration of the Care Order is appropriate, proportionate and necessary and that the criteria under s 18(1) will continue for the period set out in the Care Order. There can be no default position and certainly nothing akin to a presumption that the care order should be until the child reaches the age of 18. The necessity for such a period must be established by the Child and Family Agency.

...

It is clear that the Court must apply a test as to the proportionality of any order made to assure the welfare of the child; the Court must go no further than is strictly necessary to assure the welfare of the child.

It is clear from the comments of the judge that the more far-reaching and severe the interference proposed the stronger the reasons required to justify it. The Court recognised that it must attach a particular importance to the best interests of the child which may override the rights of the parents. There should not be a presumption in favour of permanent separation, and there is an obligation to ensure that measures taken are proportionate to the risk. The judge continued:

Notwithstanding the lack of certainty in child A’s long term care to date, she has not been adversely affected by the interim nature of the orders to date and she is as yet unaware of and unaffected by her status as a child in care. Her situation is stable. At this time she does not require certainty as to her legal status and I am not satisfied that there would be any adverse impact on child A’s welfare at this time in making an order for a shorter duration than to her 18th birthday. However, child A is now in school and will soon become aware that her circumstances are different to other children. As expressed by the Guardian, her welfare cannot be paused to allow the parents an indefinite period in which to decide to engage.

In the circumstances the judge regarded two years as a proportionate period to enable the parents to develop the skills necessary to provide good enough parenting while not adversely impacting on child A’s welfare.

### **2.2.2 Foster Carers Taking Children on Holidays**

This case of *CFA v M & J* considered a parents right to refuse to provide permission for their children in interim care to travel abroad.<sup>102</sup>

This was an application under section 47 of the Child Care Act 1991, for directions in respect of A and B. Section 47 provides:-

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<sup>102</sup> [2015] IEDC 03.

Where a child is in the care of the Child and Family Agency, the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order.

The direction sought in respect of each child was “that [the child] be permitted to travel outside of the jurisdiction for the purposes of taking a holiday with [the child’s] foster carers to [country X] from the 30 May 2015 to the 6 June 2015”.

A and B were the subject of interim care orders pursuant to section 17 of the Child Care Act 1991, and those orders had been extended on several occasions. During the period that the children had been in care, they had been on holidays, including abroad, and the parents had consented to such holidays. They were not however, consenting to this holiday with the foster carers. The foster carers informed the CFA of the proposed holiday some 3 to 4 weeks before it was due to take place. When the parent’s consent was sought, approximately 3 weeks before the proposed holiday, they immediately refused to give consent. The children were informed of the proposed holiday in considerable detail by the foster carers without consultation with the CFA. The children were told of the holiday either at the same time as, or before the parents. The children had been informed that their parents were not consenting to the holiday. Five days before the holiday, one of the children asked the parents to consent to the proposed holiday. The Court noted:-

It is accepted that where children are in the care of the CFA on interim care orders (as these children are) then parental consent is required for the children to travel out of the jurisdiction, and that if that parental consent is not forthcoming or available, then an order must be obtained from this court dispensing with that consent.

The court inquired as to whether there was any protocol or procedure in place regarding foster carers taking children on holiday, and no party was aware of such protocol. As neither the private foster care agency that sourced the foster carers, nor the foster carers themselves were giving evidence, the Court could not ascertain whether there was any such procedure in place within the private agency.

The evidence of the GAL and the social worker was that, in their opinion, it would be in the interests of the welfare of the children that they would be permitted to travel on the proposed holiday. Their evidence was that children placed with foster carers should have the benefit of being placed with a family including being included in family holidays, and that being

excluded from such a holiday would promote a sense of not belonging, to the detriment of the children. Specifically, in circumstances where the children already knew of the proposed holiday, and were looking forward to it with great excitement, it would be detrimental to their interest and welfare to exclude them from it.

Both parents gave evidence as to their reasons for not consenting to the proposed holiday. Their expressed reasons must be understood in the context of what is a long running, highly contested application, involving very serious allegations which are vigorously denied, and which was slowly but inexorably proceeding to a hearing of an application to take their children in to the care of the State until they reach the age of 18 years. They felt that while the process was ongoing, whether it led to a full care order or otherwise, that they were losing their relationship with their children (in particular B who was not attending access), and that in effect they were losing their children.

The Judge accepted that there was a disparity between the means and lifestyle of the parents and the foster carers and noted that the foster carers had considerable financial resources. The parents were of the opinion that this disparity of means and lifestyle was affecting the children and influencing them (particularly B) to favour remaining in the care of the foster carers. Furthermore, the parents were of the opinion that the foster carers were also influencing B against contact with them, that this influence was succeeding, and that the intention of the holiday was to ensure that B remained with the foster carers. The parents viewed this particular holiday as further establishing in the minds of the children the disparity of lifestyle thereby causing the children to be less favourable to returning to their care. The parents specifically and strongly expressed the opinion that if the children did not travel on the proposed holiday, that in the period that they were consequently not in the care of the foster carers, the influence of the foster carers on the children would wane to the extent that B would immediately resume attending access. The Judge commented:-

I accept that the evidence of the parents is to ground their contention that it is not in the interests of the welfare of the children to be exposed to the “passive material influence” arising from the disparity of lifestyle, and that it is not in the interests of the welfare of the children to be exposed to the “active” influence of the foster carers during the holiday against contact with the parents (particularly B). Rather it is in the interests of the welfare of the children not to go on the holiday, and absent the influences of the foster carers, resume contact.

He continued:-

Interim care orders do not have the effect of vesting parental responsibility in the CFA or its agents. The rights of parents must be respected by the CFA at all times in the context of whatever type of order (or none) which requires that their children be in the care of the CFA. The court in reaching its decision in this matter acknowledges those parental rights and has regard to them as directed by section 24.

The judge went on to note that the children's welfare had not been served in this case as they should never have been told about the holiday in advance of the parent's consent being obtained. The judge found it surprising that the Social Worker was unaware of any protocol in relation to planning a holiday abroad for a child in care. The judge noted that if there is no such protocol, then such a protocol is urgently required in order to avoid unnecessary adverse effects on the welfare of children. The judge stated:-

I do not regard it as a sufficient response to the above to simply say "*we are where we are*", or "*lessons must be learned*". It is reprehensible that the situation has arisen where the children have become involved as set out above. In the absence of evidence of any intent on the part of anyone involved, what has occurred is a systemic failure and / or a failure of professional standards which is unacceptable and ought to be addressed forthwith.

The judge accepted that the views and opinions held by the parents were genuinely held, however he found that there was no evidence to support their contentions regarding any active influence of the foster carers. With regard to the passive influence which the lifestyle of the foster carers may have on the children he stated:-

It may ultimately be impossible to come to any decision as to the affect that this may have on the children; certainly I do believe that the idea that the disparity in lifestyle might have such an affect cannot be automatically dismissed.

The judge noted that perhaps disparity of lifestyle may merit consideration when selecting foster placements, but noted it is unlikely to dictate the actual placement. The judge was not satisfied, that the contention of the parents that if the children did not go on the proposed holiday, that all the children would engage more meaningfully with the parents at access, and that it would assist in breaking the influence the foster carers had over the children. In fact the judge found that it was more likely the children would resent the parents and it would not support the resumption of access. As such, he found there was nothing identified as to why the proposed holiday would not be in the interests of the children and therefore he granted the order dispensing with the parent's consent.

### 2.2.3 Child Care and Brussels II bis

In *CFA v JN (deceased) & Anor* the District Court gave consideration as to whether it had jurisdiction to hear a child care case pursuant to Council Regulation (EC) No. 2201/2003 of the 27th November, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.<sup>103</sup>

The CFA successfully made an application for a care order in respect of three children pursuant to section 18 of the Child Care Act 1991. The children's mother was east African and came to live in Ireland in 1999. The children's father was West African and was a German Citizen and has been living in Europe for 18 years, most recently, Germany. The father had a partner and child in Germany. The children's mother died in December 2009 and the children remained in the care of a family friend until their father came to Ireland in January 2010 to take up his parental responsibilities, however prior to this, the children appeared to only have had intermittent contact with their father.

The children were taken into care in April 2010 when the father was extradited to another European country. On foot of that arrest, he was in prison until 2012. The children were the subject of Interim Care Order applications and Full Care Order applications in which orders were granted for six months and then eighteen months. In December 2013 the CFA sought a full Care Order until the children turned 18. The District Court Judge first satisfied herself that the Court was properly seised in accordance with Article 13 of Council Regulation (EC) No 2201/2003. She noted:-

The relevant jurisprudence is clear that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his or her parents. The test adopted by the European Court is the place which reflects some degree of integration by the child in a social and family environment in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question etc.

The mother's ordinary residence was in Ireland and Child A and Child B were born in Ireland and the family unit resided within the Dublin Metropolitan District. The father had been appointed by this Court as their Legal Guardian in 2013. The parents lived apart with intermittent contact by the father until the mother's death in 2009. The father expressed a wish to care for his children but this desire was frustrated by his arrest in Ireland and incarceration in another European country until 2012 and since his release from prison by other events. His interaction with the children has been of a

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<sup>103</sup> [2015] IEDC 4.



very limited nature. Child A is fifteen years old and is a mature minor who desires no contact or access with her father. All of the children remain in the care of the Child and Family Agency (CFA) placed in a foster placement since April 2010. I am therefore satisfied that the Dublin Metropolitan District has jurisdiction to hear this application.

### **2.3 Children in Secure Care Pursuant to the Inherent Jurisdiction of the High Court and Matters Arising When Those Children Reach the Age of Majority**

The case of *HSE v K.W. & Ors* concerns a young woman (K.W.) who had recently turned 18 and had been in secure care in the UK.<sup>104</sup> In 2013, the then Minor “K.W.” had been removed from this jurisdiction to St Andrews Healthcare, England, pursuant to an order of the High Court. K.W. reached the age of majority on 25 January 2015 and therefore the orders obtained removing her from the jurisdiction expired and ceased to have effect from that date. A particular difficulty arose in K.W.’s case by virtue of the fact that as an adult, her underlying diagnosis was that of personality disorder but that is expressly excluded from the ambit of the Mental Health Act 2001 for the purposes of involuntary detention, *i.e.* she could not be involuntarily detained under that Act.

A forensic psychiatrist conducted an assessment on K.W. as to the issue of her capacity to make decisions regarding her placement and treatment. The issues to be determined in the case were whether K.W. had capacity to make decisions regarding her future care and treatment, and in turn, if the Court held that K.W. holds or lacks capacity, did it have jurisdiction to detain her further at Saint Andrews to protect her personal rights under Article 40 of the Constitution. The Court noted that in *Fitzpatrick v. F.K.*,<sup>105</sup> Laffoy J. set out the principles which the Court must consider in determining whether an individual has capacity. She stated at para 84:-

- (1) There is a presumption that an adult patient has the capacity, that is to say, the cognitive ability, to make a decision to refuse medical treatment, but that presumption can be rebutted.
- (2) In determining whether a patient is deprived of capacity to make a decision to refuse medical treatment whether-
  - (a) by reason of permanent cognitive impairment, or
  - (b) temporary factors, for example, factors of the type referred to by Lord Donaldson in *In re T. (Adult: refusal of medical treatment)*<sup>106</sup>the test is whether the patient's cognitive ability has been impaired to the extent that he or she does not sufficiently understand the nature, purpose and effect of

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<sup>104</sup> [2015] IEHC 215.

<sup>105</sup> [2009] 2 I.R. 7.

<sup>106</sup> [1993] Fam. 95.

the proffered treatment and the consequences of accepting or rejecting it in the context of the choices available (including any alternative treatment) at the time the decision is made.

- (3) The three stage approach to the patient's decision making process adopted in *In re C. (Adult: refusal of medical treatment)* is a helpful tool in applying that test.<sup>107</sup> The patient's cognitive ability will have been impaired to the extent that he or she is incapable of making the decision to refuse the proffered treatment if the patient-
  - (a) has not comprehended and retained the treatment information and, in particular, has not assimilated the information as to the consequences likely to ensue from not accepting the treatment,
  - (b) has not believed the treatment information and, in particular, if it is the case that not accepting the treatment is likely to result in the patient's death, has not believed that outcome is likely, and
  - (c) has not weighed the treatment information, in particular, the alternative choices and the likely outcomes, in the balance in arriving at the decision.
- (4) The treatment information by reference to which the patient's capacity is to be assessed is the information which the clinician is under a duty to impart information as to what is the appropriate treatment, that is to say, what treatment is medically indicated, at the time of the decision and the risk and consequences likely to flow from the choices available to the patient in making the decision.
- (5) In assessing capacity it is necessary to distinguish between misunderstanding or misperception of the treatment information in the decision making process (which may sometimes be referred to colloquially as irrationality), on the one hand, and an irrational decision or a decision made for irrational reasons, on the other. The former may be evidence of a lack of capacity. The latter is irrelevant to the assessment.
- (6) In assessing capacity, whether at the bedside in a high dependency unit or in court, the assessment must have regard to the gravity of the decision, in terms of the consequences which are likely to ensue from the acceptance or rejection of the proffered treatment. In the private law context this means that, in applying the civil law standard of proof, the weight to be attached to the evidence should have regard to the gravity of the decision, whether that is characterised as the necessity for "clear and convincing proof" or an enjoiner that the court "should not draw its conclusions lightly".

The Judge in *Fitzpatrick v F.K.* noted that there was no statutory test for capacity in this jurisdiction. Section 56 of the Mental Health Act 2001 defines "consent" in the context of consenting to treatment under the provisions of the Act of 2001, but, at the time of the hearing of the case, there was no definition of capacity. She further noted that the Mental Health Act 2001 regulated the circumstances and manner of detention, psychiatric assessment and medical treatment of persons with a mental disorder, however, in circumstances where a person suffers from a mental impairment, which does not come within the scope of the Mental Health Act 2001 for the purposes of involuntary admission, there was, at the time, no statutory scheme in force that regulated the circumstances and manner in which therapeutic

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<sup>107</sup> [1994] 1 W.L.R 290.

intervention was imposed. It was submitted by the applicant that, as K.W. was a vulnerable adult and falls outside the protective regime of the Mental Health Act 2001, the court should exercise its inherent jurisdiction to detain K.W. so as to vindicate her personal rights under the Constitution and relied on *HSE v J O'B*<sup>108</sup> and *Health Service Executive v V.E. (A person of unsound mind, not so found)*<sup>109</sup> in support of that argument.

The Court also considered the case of *Winterwerp v Netherlands*,<sup>110</sup> where the applicant, who had been compulsorily detained under the relevant Dutch mental health legislation, complained that his rights under Article 5 and Article 6 of the Convention were violated. The Court held that where a person of unsound mind is deprived of his liberty, there must be no question of arbitrariness, and there must be clear medical evidence supporting the detention. The Court fully agreed with this line of reasoning and stated that “except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of ‘unsound mind’.”

It was submitted by the respondent that the medical evidence in the K.W. case did not support a finding that K.W. lacked capacity. The Court ruled that the criterion that the Court must consider in determining whether an individual has capacity is that outlined by Laffoy J. in *Fitzpatrick v F.K* as set out above.

Based on this test, O’Hanlon J. held as follows:-

This Court holds that “K.W.” lacks capacity, which goes to her failure to appreciate the seriousness of her condition as set out by Prof. Kennedy. In addition, “K.W.” lacks the capacity to appreciate the benefits of others taking decisions on her own behalf and limiting her freedom to harm herself at such times as are necessary. “K.W.” further lacks capacity to express a decision that is the product of understanding relevant information, reasoning and appreciating the importance of the decision for herself. This Court hopes that over time “K.W.’s” situation will improve.

The Court concluded that the foregoing finding rendered it necessary for the Court to intervene in order to vindicate K.W.’s constitutional rights, but that such intervention should be in a proportionate manner. Such a proportionate response required that K.W. be allowed, in accordance with her wishes, to return to this jurisdiction. The Court went on to say:

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<sup>108</sup> Unreported, Birmingham J., 3 March, 2011.

<sup>109</sup> Unreported, Feeney J., 26th July, 2012.

<sup>110</sup> 24th October, 1979, App No. 6301/73, (1979-80) 2 E.H.R.R. 387.

...A proportionate response therefore requires that “K.W” be allowed, in accordance with her wishes, to return to this jurisdiction. The transitioning of this patient must be done in a safe and secure way, and it is for that reason, it is deemed appropriate that such a transition happen within a three month time span, but it could happen earlier if the medical teams treating her agree on such a course.

Following the judgment of O’Hanlon J. the HSE then applied for a stay on the Order. On balance the Court found that it was not in the best interests of K.W. to grant a stay and therefore refused the application.<sup>111</sup>

Subsequently the case of K.W. came before Noonan J., following an incident where K.W. had considered taking her own life. The medical opinion was that K.W. required treatment in a specialist personality disorder women’s treatment centre and that there was no such facility in Ireland.<sup>112</sup>

Given the change in the circumstances of K.W. and having regard to the new medical advice, the HSE sought an Order that it was no longer obliged to return K.W. to the jurisdiction. In short therefore, the HSE’s application to the Court was that it should effectively reverse and discharge the Order previously made by O’Hanlon J. As the Order had been an interlocutory Order, it was held that it was possible to review the Order.

Noonan J. noted that on 4 June 2015, the Court of Appeal granted leave to amend the notice of appeal so as to appeal against the substantive part of the High Court order directing that K.W. be returned to Ireland, and placed a stay on the return of K.W. to this jurisdiction pending further Order of the High Court, on foot of the hearing of the notice of motion seeking a review of O’Hanlon J’s order, which was the very matter before the Court in this judgment.

That said, when the matter came on for hearing before Noonan J., the HSE was no longer seeking an Order that it was no longer obliged to return “K.W.”. Having heard all the medical evidence in the case the learned Judge found that K.W. presented at that point in time as an adult who had capacity in the legal sense, to make decisions about her own care and

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<sup>111</sup> *HSE v K.W.* [2015] IEHC 526.

<sup>112</sup> *HSE v K.W.* [2015] IEHC 741.

treatment. Having noted that as K.W. did not have a mental illness as recognised under the Mental Health Act 2001, and had capacity, the Court was satisfied that it no longer possessed continuing jurisdiction in involuntarily detaining K.W. on an ongoing and indefinite basis.

Noonan J. stated:-

However, I am satisfied on the authorities that the Court has a jurisdiction to transition K.W. from a detained environment to being a voluntary patient. Accordingly, in *N v. HSE* [2006] 4 I.R. 374, Murray C.J. said as follows (at paras. 1-5):

‘In this case there are special circumstances, namely the welfare of an infant of tender years, to be taken into account when determining the manner in which effect may be given to the order of this court pursuant to Article 40 ... In my view the court has jurisdiction, in the circumstances of a case such as this, involving as it does a minor of very tender age, to make ancillary or interim orders concerning the immediate custody of such infant which are necessary in order to protect her rights and welfare pending effect being given to the substantive order of the court.’

The learned Judge continued:-

The approach of Murray C.J. in that case was endorsed by Denham C.J. in the case of *F.X. v. Clinical Director of the Central Mental Hospital* [2014] IESC 1. In that case, Denham C.J. said as follows (at para. 77):

‘In coming to this view, Murray C.J. referred to the constitutional duty upon the courts to, as far as practicable, vindicate the personal rights of the child. He held that where there is a transfer of custody of the infant, such as in *N. v. HSE*, the interests of the child required that the transfer takes place “in a manner and circumstances which, as far as practicable, protects that welfare so that any adverse effects on the child are obviated or minimised.” In the interests of the child, therefore, this Court in *N. v. HSE* made an interim order authorising the child to remain in the custody of the second and third named respondents.’

She went on to say (at para. 79):

There is no provision in the Constitution for a stay. Consequently, any order, such as was made in *N. v. HSE*, is made in the process of controlling the release, for the purpose of protecting the person who is incapable of protecting themselves.

Noonan J. was satisfied that the previous Order of O’Hanlon J. was made without the benefit of all the evidence that had since been made available and therefore the Court was entitled and obliged to ensure that the discharge occurred in a controlled and safe manner so that K.W.’s constitutional rights, and above all, her right to life, were properly and fully vindicated.

Accordingly the previous Order for detention was discharged and substituted with an Order directing the Staff in the Care Unit in the UK to return K.W. to Ireland within one day together with further ancillary directions.

#### **2.4 The Jurisdiction of the Irish Courts in Child Care Proceedings where the Child, the Subject of the Proceedings, has a Particular Connection to Another Member State**

The case of *CFA v CC & DT* was an application by the Child and Family Agency to move the proceedings from the Irish Courts to the Courts of England and Wales on the basis that the child had a particular connection with England within the meaning of Article 15(3) of the Council Regulation (EC) No. 2201/2003 of the 27th November, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (“Brussels II *bis* Regulation”).<sup>113</sup>

The respondents were British citizens who moved to Ireland from the United Kingdom in advance of the birth of their daughter L.T., a minor. The court accepted that the motivation for the respondent’s relocation was to ensure their daughter was born in this jurisdiction so as to avoid imminent care proceedings in the United Kingdom. The child was born in Ireland, access took place with the child for a few months and then ceased entirely.

Both of the respondents had been habitually resident in England. The Child and Family Agency submitted that the child had effectively been abandoned in this jurisdiction and that matters dealing with her future care should be transferred to the Courts of England and Wales. The legal issues which arose in this case concerned the general jurisdiction of the Court pursuant to Article 8 of the Brussels II *bis* Regulation which sets out:-

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.
2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

Article 15 of the Brussels II *bis* Regulation deals with a transfer to a court better placed to hear the case. It provides, that by way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another

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<sup>113</sup> [2015] IEHC 213.

Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

- (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
- (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

Article 15 (3) sets out when a child shall be considered to have a particular connection to a Member State. These considerations are if that Member State:

- (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
- (b) is the former habitual residence of the child; or
- (c) is the place of the child's nationality; or
- (d) is the habitual residence of a holder of parental responsibility; or
- (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

The child in this case satisfied (c) as the Court had cognisance of the fact that pursuant to section 2 (1) (a) of the British Nationality Act 1981, the child was a British Citizen by virtue of parentage. The judge noted that notwithstanding the fact that the child in question may be habitually resident in Ireland, this did not prevent a transfer of the child from this jurisdiction to England under Article 15. Article 15 operates as an exception to Article 8.

The Court cited *HSE v W & Anor*<sup>114</sup> and *Re T (Care proceedings: Request to assume jurisdiction)*<sup>115</sup> with approval, the latter of which had set out that in order to allow proceedings to be transferred to another jurisdiction, by way of exception to section 17, the court must be satisfied of a number of things *inter alia*, that the child has a particular connection with the other Member State and that the other court would be best placed to hear the case. Of note, in assessing these factors, the court in *Re T* stated that the best interests of the child is an important, but not the paramount consideration. Based on the fact that the child

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<sup>114</sup> [2013] 2 I.L.R.M 225.

<sup>115</sup> [2013] EWHC at 521 (Fam).

was of British nationality, the court took the view that the child's interest were best served by transferring the proceedings to the Courts of England and Wales.

This case of *CFA v GH & Anor*<sup>116</sup> was an application similar to that in *CFA v CC & DT*<sup>117</sup>. The child in this case was born in Ireland, however his parents had only just moved to Ireland. The respondent parents had an older child who was in the care of the State in the England. The respondents admitted that they moved to Ireland in order to avoid the English social services. The case involved an application by the Child and Family Agency to move the proceedings from the Irish Courts to the Courts of England and Wales on the basis that the child had a particular connection with the England within the meaning of Article 15(3) of the Brussels II *bis* Regulation. As this particular connection existed, it was submitted that the UK was best placed to hear any further proceedings concerning the child being placed in public care.

The Court recognised that Article 15(1) of Brussels II *bis* provides an exception to the general rule that jurisdiction derives from habitual residence, and that the court can transfer a case to a different member state if the court considers that a court of another Member State (a) has a particular connection and (b) would be better placed to hear the case, and (c) where this is in the best interests of the child.

The Child and Family Agency argued that a particular connection to England could be established pursuant to Article 15 by the fact of the infant's nationality. Under English law, the child is a national by birth right. Article 15 (c) sets out that nationality can be used to show a "particular connection" to another Member State. This does not take away from the fact that such a child may also be entitled to Irish citizenship. Therefore the particular connection "is clearly established" as being sufficient for the purpose of Article 15(3) (c) of the Regulation.

The court then moved on to consider the "best placed court test" and found based on the extensive history which the first named respondent had with English social services, that this was the best placed court.

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<sup>116</sup> [2015] IEHC 181.

<sup>117</sup> [2015] IEHC 213.



The last test applied by the court was the “best interest” test. The court found that based on the judgment of McMenamin J. in *HSE v. MW & GL*,<sup>118</sup> that the best interest test contained in Article 15 is not a substantive welfare question, but rather a question of appropriate forum. The court found therefore, that it was in this infant’s best interests that his eventual care status be determined in the jurisdiction, which has a long and multidisciplinary history of engagement with the respondents. The court found that the “best interest test” and the “court best placed test” were overlapping, and accepted the submissions made on behalf of the Child and Family Agency that it was overwhelmingly in the best interests of the infant that his care proceedings be conducted in England.

It was argued on behalf of the respondent that the child in question had never resided anywhere else. That said, the Child and Family Agency submitted, and it was accepted, that habitual residence was irrelevant for the application under Article 15, as Article 15 provided exceptions to the regular rule that habitual residence dictated jurisdiction.

The case of *CFA v JD* had similar facts to the above case. Although the child was born in this jurisdiction, the Child and Family Agency argued that the child had a particular connection with England within the meaning of Article 15(3) of the Brussels II *bis* Regulation.<sup>119</sup>

The respondent in this case did not deny that she had informed social workers on several occasions that she would travel from England to Ireland in order to frustrate the intention of the English Social Services to take her unborn child into care. The child was born within three weeks of the respondent arriving in Ireland, and was taken into care in this jurisdiction within three weeks of the child’s birth.

As in the previous case discussed, the court accepted that Article 15(1) of the Brussels II *bis* Regulation provides an exception to the general rule that jurisdiction derives from habitual residence. The Court was referred to the cases of *HSE v MW & GL*,<sup>120</sup> *Re T (a child) (Care Proceedings: Request to Assume Jurisdiction)*<sup>121</sup> and *B v B* (Brussels II revisited: Article 15)<sup>122</sup>. The judge quoted from the latter case:-

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<sup>118</sup> [2013] IESC 38, [2013] 2 I.L.R.M 225.

<sup>119</sup> [2015] IEHC 214.

<sup>120</sup> [2013] 2 I.L.R.M. 225.

<sup>121</sup> [2013] EWCA Civ 895 [2014] Fam 130.

<sup>122</sup> [2009] 1 F.L.R 517.

...as Article 15(1) makes clear that there are three questions to be considered by the court...in deciding whether to exercise its powers under Article 15(1):

(i) First, it must determine whether the child has, within the meaning of Article 15(3), “a particular connection” with the relevant other member State...Given the various matters set out in Article 15(3) as bearing on this question, that is, in essence, a simple question of fact. For example, is the other Member State the former habitual residence of the child (See Article 15(3)(b)) or the place of the child’s nationality (see Article 15 (3) )?

(ii) Secondly, it must determine whether the court of the other Member State “would be better placed to hear the case, or a specific part thereof”. This involves an exercise in evaluation, to be undertaken in the light of all the circumstances of the particular case.

(iii) Thirdly, it must determine if a transfer to the other court “is in the best interests of the child”. This again involves an evaluation undertaken in the light of all the circumstances of the particular child.

The court considered the criteria of what establishes a particular connection as set out in Article 15(3), including, *inter alia* the place of the child’s nationality. The Child and Family Agency submitted that the child had a particular connection to England based on the fact that the child had British Nationality pursuant to the British Nationality Act 1981. It was however an issue of contention as to whether the child satisfied the criteria in section 15(3) (c) on nationality, by virtue of the fact that the child also was an Irish National pursuant to the Irish Nationality and Citizenship Act 2004, but the court found that having British Citizenship, notwithstanding the fact that it was dual citizenship, still satisfied the test.

In relation to the “better placed court test”, the court found that given the deep history of involvement which the English Social Services had with the family, that the English Courts would be best placed to deal with the child’s future care status.

Counsel for the respondent submitted that the application to transfer the proceedings to England and Wales pursuant to Article 15, had the end goal or result of forcing the respondent to move to that jurisdiction and therefore interfered with her freedom of movement within the European Union. Relying on the authority of *HSE v MW & GL*<sup>123</sup> and the comments of MacMenamin J., the court found that the provisions contained in Article 15

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<sup>123</sup> [2013] 2 I.L.R.M 225.

of the Brussels II *bis* Regulation do not interfere with the freedom of movement within the European Union.

Lastly the court considered whether it was in the child's best interest for the proceedings to be transferred to the Courts of England and Wales. It was decided that best interest in this situation simply meant whether it is in the child's interests for the case to be determined in the courts of this country rather than elsewhere. It did not mean what outcome to these proceedings will be in the best interests of the child? It is quite clear from the authorities opened to the Court that the "best interest" test contained in Article 15 is not a substantive welfare question but rather a question of appropriate forum

In *CFA v CJ and JS*,<sup>124</sup> Finlay Geoghegan J. delivered judgment in an appeal by the mother of a child in care of Orders of O'Hanlon J. that the child *K* was habitually resident in Scotland at all material times, that the High Court was the appropriate venue to discharge the functions under Articles 15 and 17 of the Brussels II *bis* Regulation and that the District Court did not have the power to make declarations under the said Articles and did not have jurisdiction to carry out any inquiries as to which Member State had/did not have jurisdiction in matters of parental possibility.

The Court of Appeal held that the High Court judge had correctly made a finding in accordance with the appropriate principles in relation to the habitual residence of the child. On the jurisdictions of the District and High Courts under Brussels II *bis*, the Court stated that the District Court had jurisdiction to make declarations pursuant to Article 17 of the Regulation and that this power was not limited to the Superior Courts. Finlay Geoghegan J. stated:-

Ireland has decided in the Child Care Act 1991, that child care proceedings are to be brought in the District Court. Those are proceedings relating to parental responsibility to which the Regulation applies. The Regulation does not interfere with that decision or attribution of jurisdiction between the courts in Ireland. Article 17 does not establish any new form of application. Rather, it imposes an obligation on all courts in all Member States to be satisfied that it and not a Court in another Member State has jurisdiction pursuant to the Regulation in a case in which the Regulation applied brought before it.

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<sup>124</sup> Court of Appeal, 29 April 2015.

Alluding to the case of *CFA v RD*<sup>125</sup> and distinguishing that case, Finlay Geoghegan J. stated as follows:

1. The jurisdiction retained by the Irish High Court is a jurisdiction pursuant to Article 20.
2. Article 20 permits the High Court, in such circumstances, to grant provisional and protective measures in aid of foreign proceedings, but it remains an issue in each case as to whether it is appropriate to do so.
3. As appears from para. 16 in a case where a child is in the care of the CFA in this jurisdiction, and there are pending care proceedings in the other jurisdiction, the question as to whether the care of the child and his best interests means that he should be returned to care in the other jurisdiction, either in the short or longer term, is a matter within the jurisdiction of the other court.
4. If it is unclear whether the other court does require the child to be returned in the short term, it may be appropriate to adjourn and seek clarification from that court before deciding whether or not to make an order for the transfer of the child.
5. If the other court determines that it is appropriate that the child be returned to care in its jurisdiction, then the High Court has jurisdiction to make an order which would achieve or facilitate the transfer or return.

## **2.5 Costs in Child Care Cases**

In *Child & Family Agency v OA*,<sup>126</sup> the Supreme Court, by way of case stated from the Circuit Court, determined a) that costs should only be awarded to parents against the Child and Family Agency in District Court child care proceedings in certain limited cases, as set out in the judgment, b) that the Circuit Court on appeal should only interfere with such an order from the District Court if there was a departure from the principles outlined and c) remitted the instant case to the Circuit Court to apply the principles to the application for costs.

## **2.6 Immigration**

The Supreme Court in *WT & ors v Minister for Justice and Equality & Ors*<sup>127</sup> ruled that an order for the deportation of a Nigerian family was valid despite the family's contention that the order had not been "personally directed" by the Minister for Justice and Equality but instead by a senior official at the Irish Naturalisation and Immigration Service. The Supreme Court decision arose from judicial review proceedings in the High Court challenging the Minister's decision to deport a Nigerian family. Hogan J. granted leave to appeal the matter to the Supreme Court on the basis that the derogation of Ministerial power to senior officials presented an exceptional point of law of public importance.

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<sup>125</sup> [2014] IESC 47..

<sup>126</sup> [2015] IESC 52.

<sup>127</sup> [2015] IESC 73.

## 2.7 Surrogacy

In *G v The Department of Social Protection*,<sup>128</sup> the High Court refused maternity benefit to a woman whose child was born as a result of a surrogacy arrangement, rejecting arguments that she was discriminated against under the Equal Status Acts.

This case of *E.P. (An infant suing by her father and next friend Z.P.) v AG & Ors* was an appeal of an order of the Circuit Court refusing the appointment of the next friend as guardian to the infant applicant and refusing orders enabling a passport to be obtained for the infant.<sup>129</sup>

The infant had been born subsequent to a surrogacy arrangement in India. The child was born by IVF using the sperm of a next friend and an anonymous egg donor undertaken pursuant to a gestational surrogacy agreement between PZ, the intended mother, the next friend, who was the intended father and T.F. who was the surrogate mother. The next friend and PZ are named as father and mother of the applicant on the infant's birth certificate, issued by India.

Genetic testing had proven the next friend to be the biological father of the applicant. The applicant contended that by reason of her aforementioned parentage, she was, pursuant to the Irish Nationality and Citizenship Act 1956, an Irish citizen and entitled to recognition of such. The passport office had indicated that they would not issue a passport until the applicant obtained a declaration as to parentage. The surrogate mother T.F. was consenting to all orders being sought.

The court was satisfied from genetic testing that the next friend was the biological father of the applicant to a very high level of proof. The court was satisfied that the next friend and the said P.Z. were the persons who had at all material times since the birth of the infant applicant occupied the role of holders of parental responsibility for the applicant within the meaning of the Brussels II *bis* Regulation. The Court found that it was a matter of considerable urgency and in the best interests of the infant applicant that the infant applicant would obtain an Irish passport. Taking the interests of the infant applicant as being of paramount importance under the Guardianship of Infants Act 1964, as amended, the Court was satisfied that it was in the

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<sup>128</sup> [2015] IEHC 419.

<sup>129</sup> [2011] IEHC 556.

best interests of the child in this case to be cared for and reared as a child in the so called *de facto* family of the applicant and the said P.Z.

## **2.8 Whether Child Protection Case Conferences are Subject to Judicial Review and Whether Parents at Those Conferences are Entitled to Legal Representation**

In *JG & Ors v CFA*,<sup>130</sup> the High Court considered whether a case conference was amenable to judicial review. The CFA had argued that it was not so amenable in that the decision made at this stage was not adverse to the person and had no legal consequences. Therefore no infringement of the person's constitutional rights occurred. O'Malley J. stated that the case conference was not a statutory procedure notwithstanding the fact that it performs a pivotal role in the CFA's operations. She noted that the primary purpose of the conference is the exchange of information although the Agency had the discretion to place a child on the Child Protection Notification System without any Court order. O'Malley J. stated as follows:

In my view, a finding by a statutory body charged with the protection of children in the State that a child is at risk to the extent of justifying this measure cannot be described simply as part of an investigation process. It may be that access to the system is restricted to a small number of professional persons – however, it is, in my view an interference with the autonomy of a family and something that very few parents would welcome. It cannot be said to be without legal effect, since it gives access to private information about the family to persons who would not otherwise be entitled to that information. I am not sure if the information leaflet is correct in stating that a child's name will remain on the system up to the age of 18, whether as "active" or "inactive", but if it is correct that emphasises the seriousness of the matter.

It must, I believe, follow the parents must be afforded proper fair procedures in relation to the holding of such conferences. I do not regard the letter and information leaflet given to the parents in advance of the June conference as remotely adequate in this respect. Both are generic documents with no indication given to the parents as to what factual matters are to be discussed.

On the issue of providing a social work report, O'Malley J. alluded to "sufficient disclosure of the parents to make the case."

The case of *A & X & Y (suing through their mother and next friend Ms A) v CFA* involved an application for Judicial Review taken by the applicants in respect of various decisions and actions taken on behalf of the Child and Family Agency.<sup>131</sup> Ms A was in a long term, non-marital relationship with her partner and they had two children. Various allegations were

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<sup>130</sup> [2015] IEHC 172.

<sup>131</sup> [2015] IEHC 679.

made against Ms A's partner which purportedly placed her children's welfare at risk. CFA staff attended at Ms A's home with members of An Garda Síochána and the CFA staff recommended that MS A leave the home and obtain safe accommodation and was advised that if she did not bring the children to a place of safety, the Gardaí would consider making application for Child X and Child Y to be placed in care. Ms A had felt that the departure from her home would be short term, but it turned out to be much longer.

A child protection case conference took place about four weeks after Ms A had moved to safe accommodation. At that conference a decision was made to place the children's names on the Child Protection Notification System (CPNS).

The applicant sought various reliefs including an order of certiorari in respect of the decision at two child protection case conferences to continue to keep the family separated, and the decision to place the children on the CPNS. Further declaratory relief was sought that Ms A's rights were violated by not allowing her bring a lawyer to the child protection case conference.

In considering the question of whether the actions of a child protection conference are judicially reviewable, Barret J. disagreed with the judgment of O'Malley J. in *J.G. v Child and Family Agency and Others*<sup>132</sup>. The Court cited O'Malley J.'s view previously alluded to in this report that a

finding by the statutory body charged with the protection of children in the State that a child is at risk to the extent justifying this measure cannot be described simply as part of an investigation process. It may be that access to the system is restricted to a small number of professional persons – however, it is, in my view, an interference with the autonomy of the family and something that very few parents would welcome. It cannot be said to be without legal effect, since it gives access to private information about the family to persons who would not otherwise be entitled to that information.

Barret J. stated at paragraphs 15 and 16:

This Court finds itself in the uncomfortable position that, with all due respect, it cannot agree with this particular finding of the court in *J.G.* Why so? Take, for example – the example is not drawn from the facts of this case – a child who goes today to the Gardaí and says 'Last night I saw my father punch my mother'. That complaint will be entered into the Gardaí's PULSE system and, the court understands from counsel for the CFA, will always remain on that system, even when the event is later fully dealt with. Is the retention of such detail an "*interference with the*

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<sup>132</sup> [2015] IEHC 172.

*autonomy of the family*”? No. It is the expected action of a competent police force. Why then is the CFA’s maintenance of the CPNS any different? If anything, the CPNS seems to be something that is highly desirable, enabling the CFA, and the limited categories of person who are able to access the CPNS, to bring an informed and refined response to any interactions with a particular child, instead of coming afresh to that child each time s/he comes under the radar of, *e.g.*, the CFA and/or the Gardaí. Contrary to the view expressed by O’Malley J., this Court respectfully considers that most parents *would* consider it to be – sadly – both necessary and desirable that to prevent ‘damage’ occurring to vulnerable children, the State, acting through the medium of the CFA, should maintain a confidential list of vulnerable children whom it encounters, provided that access to such list is suitably restricted. After all, the great risk with an entity as large as the State is that a child could come to the attention respectively of, *e.g.*, the Gardaí and the CFA, giving them cumulative knowledge that the child is highly vulnerable but not giving them individually enough knowledge to recognise that this is so.

It also does not appear to this Court, again with all due respect, that inclusion of a child’s name “*gives access to private information about the family to persons who would not otherwise be entitled to that information.*” At the moment in time that the child is included on the register, the CFA is undoubtedly entitled to that information. Provided the CFA shares that information, and legally it is entitled to share that information, in a manner consistent with the obligations incumbent upon it under the Data Protection Acts, it is not sharing that information with people who are unentitled to that information.

The Court did not consider that the investigatory matters at issue in the within application were properly the subject of judicial review and the court declined to grant the relief sought.

The Court then went on to consider the claim that Ms A’s rights were violated by not allowing her bring a lawyer to the child protection case conference. The court expressed considerable unease with the CFA’s request to Ms A not to bring a legal representative to the Child Protection Conference. With respect to the facts of this case, the court commented:-

(i) Ms A is, with all respect to her, a vulnerable person facing a traumatic situation; and (ii) she comes from a so-called ‘ordinary’ background and so, rightly or wrongly, may feel herself to be, and may be, at a considerable disadvantage when in the presence of a number of qualified professionals. It is in precisely such circumstances that a person like Ms A would naturally turn to a solicitor and want that solicitor to attend a Child Protection Conference with her.

In citing *Corcoran v Minister for Social Welfare*<sup>133</sup> and *Barry v Review Group*<sup>134</sup> the court noted that there is no absolute right to have a legal adviser attend at administrative meetings, and noted that the CFA has no obligation to provide or pay for one. However the court held:-

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<sup>133</sup> [1991] 2 I.R. 175.



All of this suggests to this Court that in the particular context of CFA Child Protection Conferences – and this judgment does not speak to any wider reality – fairness of procedures requires that if a party wishes to bring her own solicitor, for whose services she is herself paying, to a CFA Child Protection Conference, she should be neither stopped nor dissuaded from doing so.

Notwithstanding the above comments, the Court did not grant the relief sought for a declaration that the CFA acted in violation of Ms's constitutional rights in not allowing her to bring legal representation to the Child Protection Conferences as the court found that it was not the case that the CFA did not allow Ms A to bring legal representation, but re-iterated its comments that fairness of procedure requires that if a party wishes to bring her own solicitor, for whose services she is paying, to a CFA Child Protection Conference, she should be neither stopped nor dissuaded from so doing.

## **2.9 Developments in Hague Convention / Child Abduction Cases**

In *F.F. v C.B.*,<sup>135</sup> F.F. was seeking the return of his child to the United States pursuant to Article 12 of the Hague Convention on the Civil Aspects of Child Abduction 1980. The Court considered the various grounds on which it had jurisdiction to refuse an order for return under the Convention. Firstly, the Court found that the applicant did not consent to the child moving permanently to Ireland. The court also found that F.F. did not acquiesce in the move either.

The Court then considered the issue of the child's objections to a prospective return. In this regard, Article 13 of the Convention states:

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

The child was interviewed by a psychologist for the purpose of the proceedings and to ascertain the child's views and wishes as to a prospective return to the US. The Court considered that the child was mature enough to have his voice heard and considered that not only is it important to attach weight to his voice but also to the view of the assessor. The child in question was described as a bright child with an underlying ADHD problem and an

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<sup>134</sup> [2001] 4 I.R. 167.

<sup>135</sup> [2015] IEHC 541.

emotional fixation. He objected to being returned to the United States, and it was quite clear from the assessment and report that the child had clear psychological difficulties arising from his experiences in early life. The Court was of the view that this was a child who was sufficiently mature to give his view and that account should be taken of this view in the complex circumstances of his make-up given his underlying condition of ADHD and his previous experiences.

The respondent also raised the defence to an order for return of grave risk and or intolerable situation under Article 13(b) of the Convention. Article 13(b) of the Convention states as follows:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

- (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

On this point the court had regard to the psychologist's evidence of whether any prospective return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The court stated:

In carrying out this analysis, this Court must refrain from embarking on a custody and access hearing.

The Court then noted that it placed great weight on the opinion of the doctor that the child was likely to react badly to changes in environment and that the child's hard won progress, and future potential, could be at grave risk. The court commented:-

While it might be argued that it may be possible to obtain a special needs assistant for L.F. on a one to one basis as he has in Ireland, the difficulty this Court sees is not with the fact that it would not be possible to do this in the USA, which of course it would be, but it is the grave risk which, on the balance of probabilities would prevail given the child's view and given his complex needs at this time.

The Court continued:-

If the Court concludes that there is a grave risk and/or intolerable situation, the Court has to look at the adequacy of such protective measures which might be put in place to vitiate any grave risk and/or intolerable situation on the child's return.

The Court held, taking the advice of the psychologist that even undertakings which were being offered by the applicant if an order for return was granted, were not enough to protect this child from the grave risk that would otherwise occur given the child's complex needs and difficulties, and this would place the child in an intolerable situation.

The Court concluded:-

Thus, on the basis that LF is well settled in this jurisdiction for the purposes of Article 12 of the Convention, along with his complex needs and consistent objections to being returned to the United States, this Court concludes that a return of LF to the United States, notwithstanding the great respect this Court places on the comity of courts doctrine, would place the child in an intolerable situation for the purposes of Article 13(b) of the Convention. Accordingly, this Court refuses the order sought.

The Applicant in *D.E. v E.B.* was a French father and the Respondent an Irish Mother.<sup>136</sup> The French father was seeking the return of his child to France and the Irish mother argued (a) that the child's habitual residence had changed to Ireland and (b) that the child would be placed at risk if returned to France by virtue of the alleged domestic violence behaviour of the Applicant.

The Respondent submitted that the return of the child to France without the security of separate accommodation (with the respondent), with no financial support from the applicant, along with the risk of being exposed to an environment of domestic violence amounted to an "intolerable situation" within the meaning of Article 13(b) of the Hague Convention.

In respect of the first argument of the respondent, the Court found that the child's habitual residence had not changed. In considering the second argument, the court had regard to *G. v R.*<sup>137</sup> where intolerable was deemed to mean "unbearable" or "other than what the child should reasonably expected to endure". The respondent submitted that the Court could refuse to make an order for return under the Convention if the applicant failed pursuant to Article

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<sup>136</sup> [2015] IEHC 180.

<sup>137</sup> Unreported, High Court, Peart J., 12th January, 2012.

11(4) of the Hague Convention, to make adequate arrangements which alleviate the alleged “grave risk” to the child.

The respondent claimed that, with regard to all the evidence, the adequate arrangements necessitated in this case would be as follows:

- (i) The provision of secure accommodation for the respondent and the child in France to the exclusion of the applicant;
- (ii) The provision of financial support by the applicant to the respondent for the benefit of the child by way of initial lump sum and periodic payments thereafter;
- (iii) Relief akin to the forms of relief available under the Domestic Violence Act 1996, e.g. an undertaking in the terms of a safety order or barring order;
- (iv) An undertaking on the part of the applicant to take such steps as are necessary and to bring the appropriate application before the French Court to ensure the enforceability of any “adequate arrangements” as directed by this Honourable Court pending further order of the French Courts, except for the issue of accommodation which ought to remain permanent save at the election of the respondent;
- (v) All the above arrangements to be put in place (including the requisite orders of the French Courts) before the child is returned to France, if that was to be the ultimate decision of the Court.

Notwithstanding these arguments of the respondent, the Court found as is clear from the decision of Finlay Geoghegan J. in *C.A v C.A. (otherwise C. Mc.C.)*,<sup>138</sup> that the type of evidence which the respondent must adduce in order to avail of a defence of grave risk under Article 13(b) of the Convention is “clear and compelling” evidence and that no such evidence of grave risk had been given. The Court also recognised that it was obliged to consider its obligations under Article 11(4) of the Regulation, but found that given the undertakings (listed below) offered by the applicant, adequate arrangements could be made to secure the protection of the child after her return. The applicant had offered the following arrangements;

- (i). He would provide secure accommodation for the applicant in the form of vacating the apartment in which he resides, for six months.
- (ii). He would not enter the apartment or present himself on the surrounding grounds or environs of said apartment.

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<sup>138</sup> [2010] 2 I.R. 162.

- (iii). He would not harass or threaten the respondent.
- (iv). He would pay the rent and utilities of the aforesaid apartment during the respondent's six months residence.
- (v). He would pay the sum of €600 per month in maintenance to the respondent for the upkeep of both herself and “N”.
- (vi). He would undertake to keep “N” on his health care policy.
- (vii). He would not initiate or pursue any criminal prosecution against the applicant if there was an issue arising from an alleged wrongful retention.
- (vii). He would undertake to swear that there was no firearm in the aforementioned apartment and would obtain a judicial officer to conduct a search of the apartment to ensure same, and said search would be confirmed by certification.

*In McN v R*, the applicant mother and respondent father in this action had been involved in proceedings pursuant to Article 12 of the 1980 Hague Convention in the High Court of Justice, Family Division, in the jurisdiction of England and Wales.<sup>139</sup> The English High Court had granted an order that the children be summarily returned to this jurisdiction, to their father. Within that Order, there were terms pertaining to proposed access and reference was also made to a penal notice. The English Order was then enforced in this jurisdiction by the Master of the High Court. There was no application to appeal the Order of enforcement of the Master, however the mother, who was the applicant in these proceedings (but the respondent in the Child Abduction proceedings in England), came before the Irish Courts seeking to vary the order of the English Court.

The applicant mother made an ex parte application to the President of the Irish High Court, and was granted an order giving her liberty to serve a notice of motion seeking the attachment and committal of the defendant for failure to comply with the enforcement order of the Master, which mirrored the original Hague Convention Order from England. Whilst Abbott J. noted that the order under the Hague Convention from England was drafted in such a way as to give legitimate cause for confusion on the part of the applicant, he stressed:-

the order of the High Court of Justice, Family Division, in the jurisdiction of the United Kingdom, under the Hague Convention on the Civil Aspects of International Child Abduction 1980, concerned the return of the children to the Republic of Ireland. It does not contain an order pertaining to access.

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<sup>139</sup> [2015] IEHC 70.

What it did contain was a record indicating that the respondent father was content for the applicant mother to have access on certain terms, but that lacked the clarity required for enforcement and therefore was not binding in the form of an order for access. The appropriate jurisdiction for the determination of access is the jurisdiction of the Republic of Ireland. That said, it was noted that such a determination did not have to be made in the High Court. He found that matters may be more appropriately addressed in the District Court, and he therefore vacated the Order regarding the attachment of the respondent.

This case of *CG v MG* concerned a dispute between a French father and a British mother over whether the Irish Courts should grant an order for the return of their child from Ireland to France, pursuant to Article 12 of the 1980 Hague Convention.<sup>140</sup>

The High Court Judge had found that the child in question had established habitual residence in Ireland and therefore refused to grant an Order returning the child to France. In this appeal, the issue arose as to whether, under the Regulation, the Irish courts had jurisdiction to determine the issue of habitual residence in the light of a prior determination by the French appeal courts that H's habitual residence was in France. The Court referred the question to the Court of Justice for its preliminary opinion under Article 267 TFEU.

The facts of this case were that on 2 April 2012, the French court of first instance granted an Order for divorce, that both parents should exercise parental authority, that the child's habitual residence was to be with the mother, and that the mother was permitted to set up residence in Ireland. The fact that the child's habitual residence was in France prior to the date of this Order, was not in dispute. On 5 July 2012, the French appeal court dismissed the fathers' request for a stay on the enforceability of the judgment and on 12 July 2012, the mother travelled to Ireland with the child. The Appeal of the French Order of 2 April 2012 was heard on 5 March 2013, and the appeal court overturned the decision of the court of first instance, and ordered that the child should live with the father. The Court also held that the child's habitual residence, at the time of her removal, continued to be in France.

The father's application pursuant to Article 12 of the 1980 Hague Convention, seeking orders that the child had been wrongfully retained in Ireland, and for her to return to France, was

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<sup>140</sup> [2015] IESC 12.

dismissed on 13 August 2014. The High Court held that the removal of the child to Ireland was lawful on the ground that it took place on the basis of a judgment of the French court of first instance, and that there was no stay on that Order.

The High Court Judge concluded that the habitual residence of a child was not conditional on the fact that the father had appealed against the original Order. The High Court judge found that the child was habitually resident in Ireland from the day that her mother brought her to this State.

In the Supreme Court, the father argued, that the fact that the child had been lawfully moved to Ireland, did not mean that her habitual residence had changed. Against this background, the Supreme Court referred three questions for preliminary ruling to the Court of Justice as to whether

(1) ... the existence of the French proceedings relating to the custody of the child preclude[d], in the circumstances of this case, the establishment of habitual residence of the child in Ireland?

and whether the fact that:

(2) ... either the father, or the French courts, continue[d] to maintain custody rights in relation to the child, (were such) as to render wrongful the retention of the child in Ireland?

and whether:

(3) ... the Irish courts [were] entitled to consider the question of habitual residence of the child in the circumstances where she has resided in Ireland since July, 2012, at which time her removal to Ireland was not in breach of French law?

The questions arose in the context of whether the Irish courts were bound by the determination of the French appeal court that H's place of habitual residence was France. On the face of things, the French courts had been engaged in hearing matrimonial and custody proceedings since the year 2008, and were, therefore, it was submitted, the courts first seised under Article 16 of the Regulation to which reference is made below. Should the Irish courts, therefore, under Article 16 of the Regulation "*cede jurisdiction*" to the French courts? The ECJ determined that under the Regulation the Irish courts were entitled in European law to determine the question of habitual residence.

The Court of Justice, therefore, responded, in answer to questions (1) and (3) contained in the reference:

(1) Articles 2(11) and 11 of Council Regulation (EC) No. 2201/2003 of 27 November, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters, and in matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, must be interpreted as meaning that where the removal of a child has taken place in accordance with a judgment which is provisionally enforceable, and which was thereafter overturned by a judgment which fixed the residence of the child at the home of the parent living in the Member State of Origin, the court of the Member State to which the child was removed, seised of an application for the return of the child, must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the Member State of Origin immediately before the alleged wrongful retention. As part of that assessment it is important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it.

In answer to question 2 the Court of Justice responded:

(2) Regulation No. 2201/2003 must be interpreted as meaning that, in circumstances where the removal of a child has taken place in accordance with a court judgment which is provisionally enforceable and which was thereafter overturned by a court judgment fixing the child's residence at the home of the parent living in the Member State of Origin, the failure to return the child to that Member State following the latter judgment is wrongful, and Article 11 of the Regulation is applicable, if it is held that the child was still habitually resident in that Member State immediately before the retention. If it is held, conversely, that the child was, at that time, no longer habitually resident in the Member State of Origin, a decision dismissing the application for return based on that provision is without prejudice to the application of the Rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State.

Having regard to these answers, the Supreme Court noted, that in refusing the order for return, the High Court judge had noted that while some of the earlier Orders in the French proceedings were temporary, and frequently expressed to be provisional, the terms of the April 2012 Order were not temporary, and were a final order. Given that it was final Order, the High Court judge found the removal to be lawful. Taking the opinion of the Court of Justice into account, the Supreme Court upheld the Order of the High Court.

## **2.10 Judicial Separation / Divorce / Relocation / Maintenance**

The joint judgment of Clarke and McMenamin JJ. in *D v. D* set out suggested good practice to apply in matrimonial cases which involve financial issues of at least some level of



controversy or complexity.<sup>141</sup> They noted that these types of cases can present a wide range of different types of scenarios including disputes as to the actual existence of certain assets, the ownership of assets and of course the valuation of assets or other financial resources. I discuss this case in my report in the hope that it may assist in ensuring ample resources family litigation is dealt with in a manner that will reduce the trauma for children in such cases.

The Court of Appeal in *RL v Judge Heneghan*<sup>142</sup> found that the Circuit Court should not have determined the custody of a child on an application for relocation. The Court of Appeal allowed an appeal from the High Court and granted judicial review of a Circuit Court decision to transfer primary residence of a child to the father, when the matter before the court was an application by the mother to relocate the child to the UK, on the grounds that 1), the Circuit Court did not have the jurisdiction to determine the custody of the child where the only issue before the court was the relocation issue and 2), fair procedures were breached when the court granted reliefs that materially strayed beyond the scope of the pleadings and in respect of which the mother had no proper advance notice.

The case of *S.M. v N.M.* was an appeal of a judgment of the High Court wherein it was ordered that the non-marital father of four dependent children was to pay interim maintenance in the sum of €5,000 per week for the purpose of allowing his partner, the mother of the children, discharge her legal fees.<sup>143</sup> This figure of €5,000 was in addition to an already existing maintenance order.

On the facts of the case the High Court judge determined that it was necessary and appropriate to make an order primarily to enable the mother secure her effective right of access to justice in order that the disputes which related to the welfare of both herself and the children in the two sets of proceedings could be fairly progressed and disposed of. Of significance the High Court reserved its judgment as to whether it could make the order pursuant to section 11(2) of the Guardianship of Infants Act but recognised it could make the order pursuant to section 7 of the Family Law (Maintenance of Spouses and Children) Act 1976.

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<sup>141</sup> [2015] IESC 16.

<sup>142</sup> [2015] IECA 120.

<sup>143</sup> [2015] IECA 258.

The father appealed to the Court of Appeal on the basis that (a) there is no jurisdiction to make a maintenance order against him under section 11(2) and (b) an interim maintenance Order under section 7 of the Family Law (Maintenance of Spouses and Children) Act 1976, cannot be made for the purpose of discharging legal fees.

The Court of Appeal found that a maintenance order can be made under section 11(2) in circumstances where the person against whom the order is made is a statutorily defined “father” within the meaning of the Guardianship of Infants Act. As the father in this case did not meet that definition, no maintenance order could be made under that legislation. The Court did find that an interim maintenance Order could be made under section 7 of the Family Law (Maintenance of Spouses and Children) Act 1976, and that the maintenance could be used for the discharge of legal fees. Finlay Geoghegan J. held:

31. Accordingly, whilst the trial judge incorrectly identified s. 11 of the 1964 Act, as the statutory provision which gave her jurisdiction, nevertheless she did have jurisdiction under s. 7 of the 1976 Act, as amended. Further the mother had included in her notice of motion an alternative claim for relief under that section. This Court is of the view that on the exceptional facts and circumstances of these proceedings that the trial judge correctly concluded that the needs of the dependent children for whom the maintenance orders are being sought in the proceedings did require the making of an interim order for the payment of periodic sums specifically directed to enabling the mother retain lawyers and discharge fees to necessary experts given the scale and complexity of the father’s financial affairs.

32. The Court wishes simply to add that this is a jurisdiction which it appears should only be exceptionally exercised. Further, where it is exercised it appears incumbent on a court to very carefully case manage the proceedings, including encouraging the parties to attempt to resolve matters by use of alternative dispute resolution mechanisms. In making such an order a court is effectively requiring payment out of a fund which might otherwise be available to provide different benefits for dependent children. It is, therefore, essential even where a court takes the view that it is necessary to make such an order so that the mother or other person making the claim for the maintenance order for the benefit of the dependent children may be able to effectively pursue necessary proceedings on their behalf, nevertheless great care should be taken to ensure that such proceedings are pursued in the most cost effective manner feasible.

## **SECTION 3: CHILD PROTECTION AND THE CRIMINAL JUSTICE SYSTEM**

### **3.1 The Criminal Law (Sexual Offences) Bill 2015**

In November 2014, the Heads and General Scheme of the Criminal Law (Sexual Offences) Bill 2014 was published after a lengthy wait for significant development in this integral area of child protection.<sup>144</sup> Since then, the momentum for progress has been maintained and the Criminal Law (Sexual Offences) Bill 2015 was published by Minister Frances Fitzgerald in September 2015. With technological advances continuing and internet usage amongst children in Ireland exceeding the European average, the requirement for legislation to be introduced to protect children online has been highlighted as being a crucial and pressing concern.<sup>145</sup> The Criminal Law (Sexual Offences) Bill 2015 is very much to be welcomed for creating a wide range of new criminal offences in relation to child pornography and the grooming of children for sexual exploitation and in particular for addressing the role of Information and Communication Technology (ICT) in committing such offences. As stated by the Minister for Justice and Equality, Frances Fitzgerald; “The Bill provides for a more effective response to sexual offending within our criminal justice system and responds to new and emerging threats such as predatory activity which target children via the internet and social media.”<sup>146</sup>

The 2015 Bill broadly replicates the Heads contained in its 2014 General Scheme. It introduces important reforms of current legislation, including providing for a proximity clause with regard to consensual sexual activity amongst teenagers and it creates a specific offence, with a lengthy sentence, to deal with those who abuse their authority over a child for sexual purposes. In some ways, however, further clarifications are still required if the legislation is to meet the highest international standards. One area particularly lacking clarity is Part 5 dealing with Children’s Evidence. Prior to the implementation of what appears to be an overall very promising step toward better tackling the sexual exploitation of children, therefore, it is recommended that certain amendments be made to ensure that the Bill, in its final form, realises its full potential.

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<sup>144</sup> See Geoffrey Shannon, *Eighth Report of the Special Rapporteur on Child Protection* (2015) for a discussion in relation to the General Scheme of the Criminal Law (Sexual Offences) Bill 2014, section 3.

<sup>145</sup> See Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014), section 3.

<sup>146</sup> Department of Justice and Equality Press Release, Minister Fitzgerald published the Criminal Law (Sexual Offences) Bill 2015, 23 September 2015.

### 3.1.1 Sexual Exploitation of Children

In recent years, there have been a number of developments internationally aimed to combat the sexual exploitation of children. The Convention on Cybercrime (the Budapest Convention) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) both seek to provide a coherent approach to the protection of children within Europe. Similarly, the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography obliges Member States to criminalise certain conduct, requires minimum penalties to be set and deals specifically with the use of ICT to exploit children. Ireland, however, has been slow to take action with regard to these international standards and at present, we have neither ratified the aforementioned Conventions nor transposed the Directive into Irish law. The new Criminal Law (Sexual Offences) Bill 2015 is designed to alter this unsatisfactory position. Minister Fitzgerald, upon the publication of the 2015 Bill, stated that the Bill will bring Irish law in line with a number of international instruments, including the 2011 EU Directive and declared it to be a further step towards the ratification of the Lanzarote Convention.

Major reform is thus required in Ireland regarding the solicitation of children and grooming offences. Currently, Irish legislation is limited in its reach and fails to deal with sexual exploitation carried out through social media, the internet and other such technology. The 2015 Bill seeks to radically overhaul these offences. In the area of child pornography, the growth of ICT has made what was once regarded as a somewhat remote crime more accessible. Technology has allowed child pornography to be disseminated in a manner that allows much of the offending behaviour to be hidden.<sup>147</sup> While Irish legislation is already in place to deal with these offences, there are notable gaps in child pornography offences and significant amendments to the existing legislation are made in the Bill to address these weaknesses. Part 2 of the 2015 Bill, therefore, concerns the sexual exploitation of children and its provisions are designed to target acts of sexual grooming and enhance the protection of children from sexual exploitation, including exploitation through child prostitution and child pornography.<sup>148</sup>

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<sup>147</sup> Gillespie, *Sexual Exploitation of Children* (2008) at p.121.

<sup>148</sup> See Criminal Law (Sexual Offences) Bill 2015, *Explanatory and Financial Memorandum*.

### 3.1.2 Solicitation and Grooming Offences

Enclosed within sections 3 to 8 of the Criminal Law (Sexual Offences) Bill 2015 are a number of new offences designed to tackle the solicitation and grooming of children. With regard to solicitation, section 3 of the Bill vastly expands upon existing legislation of this kind. Currently in Ireland, soliciting a child is governed by section 6 of the Criminal Law (Sexual Offences) Act 1993, as amended. This provision states that a person who solicits or importunes a child, being a person under 17, for the purpose of committing sexual assault or a defilement offence (namely sexual intercourse, buggery, section 4 rape and aggravated sexual assault) is guilty of an offence, punishable by a maximum sentence of 5 years' imprisonment following conviction on indictment.

In section 3, not only is it a crime to solicit or importune a child, it is also an offence to pay, give, offer or promise to pay or give, a child or another person money or any other form of remuneration or consideration; to provide, offer or promise to provide, a child to another person; or to obtain a child for oneself or for another person, for the purpose of the sexual exploitation of a child by that person or any other person. This, therefore, greatly increases the circumstances that may come under the offence of solicitation and deals with situations where a child is given rewards or presents by the exploiting adult. Furthermore, it provides that the offender does not have to carry out one of the aforementioned acts for either the purpose of committing a defilement offence or sexually assaulting the child. If he does so for the purpose of the *sexual exploitation* of a child, he shall be criminally liable. Given the broad definition of "sexual exploitation" under Part 1 of the Bill,<sup>149</sup> which encompasses and expands upon those offences named above and includes a range of acts such as "inviting, inducing or coercing the child to engage in prostitution or the production of child pornography", the proposed amendment will serve to cover more eventualities, thereby better protecting children. With this proposal, a loophole that has been long since recognised will be addressed. Gillespie noted that where an offender's intention is for the child to touch him or herself, then this would be outside the scope of the soliciting offence as provided for in section 6 of the 1993 Act.<sup>150</sup> Such behaviour would not come under sexual assault, as a child cannot assault itself, and certainly does not come within the defilement offences. With the

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<sup>149</sup> The definition of "sexual exploitation" contained in the Bill is broadly the same as the existing definition of "sexual exploitation" contained in section 3(5) of the Child Trafficking and Pornography Act 1998 Act, as amended, with minor amendments. Indeed, section 10 of the Bill amends section 3(5) of the 1998 Act to bring it in line with the definition in section 2 of the 2015 Bill.

<sup>150</sup> Gillespie, *Sexual Exploitation of Children* (2008) at p.121. The Law Commission similarly recognised this loophole in its 1990 Report on Child Abuse.

development of the solicitation offence in the Bill, however, encouraging a child to touch him or herself would presumably come within part (d) of the definition of sexual exploitation, namely “inducing or coercing the child to engage or participate in any sexual, indecent or obscene act” and thus will be within the scope the soliciting offence.<sup>151</sup> Further appropriate amendments to the existing offence include raising the age limit of a child for the purposes of this offence from 17 to 18, as set out in section 3(6), and increasing the maximum penalty that can be imposed on conviction on indictment to 10 years.

Entirely new offences are created in sections 4, 5 and 6 of the Bill. They criminalise the invitation of a child to sexual touching, sexual activity in the presence of a child and causing a child to watch sexual activity. These offences closely follow those contained in sections 10, 11 and 12 of the UK Sexual Offences Act 2003 respectively and serve to criminalise behaviour that has previously gone unpunished in Ireland. Section 4, for instance, similarly closes the loophole discussed above whereby a person cannot be convicted of sexual assault where he/she causes the child to touch him/her as discussed above, specifically making it an offence to invite a child to sexually touch the offender, themselves or a third party. It is worth noting, however, that a child for the purpose of section 4 of the Bill is defined as a person under the age of 15 years. While under the corresponding Head 3 of the General Scheme of the Bill, an offence could be committed under this provision against a child under 18, the Explanatory Memorandum of the Bill states that a child is defined for the purposes of this section as being under 15 years of ages as this offence is effectively a passive form of sexual assault, to which a child under the age of 15 years cannot consent.

While these new sections contribute towards the ultimate goal of curbing the sexual exploitation of children and fill noticeable voids in current legislation, it might be suggested that further consideration be given to the use of ICT in the context of these offences. Section 8 discussed below, specifically deals with the use of ICT to facilitate the sexual exploitation of children and it might be prudent to ensure a coherent approach to ICT throughout the Bill to counter information and communication technology being used to commit crime. In this way, for the purpose of certainty, ICT should be specifically referenced in sections 4, 5 and 6. For instance, in section 6, it is an offence for a person to intentionally cause a child (i) to watch another person engaging in any sexual activity or (ii) to look at an image of that person

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<sup>151</sup>In any event section 4 of the Bill explicitly creates a new offence of inviting a child to sexually touch the offender, themselves or a third party.

or another person engaging in any sexual activity. To recognise the possible role of the internet and other technology in such an offence, adding the phrase “through information and communication technology or otherwise” at the end of part (ii) may be a prudent step. While the word “image” would obviously cover photographs and magazines, to definitively prohibit a situation where a child is being shown streamed pornographic videos online or sent the links to such videos by an offender, specifying ICT in the section itself would provide further certainty as to the scope of the offence and protect a child from a situation where an offender is attempting to familiarise a child with sexually explicit online material with a view to ultimately developing an exploitative relationship with the child. Again in section 4, clarifying that inciting a child to touch his or herself through ICT or otherwise would likewise criminalise a situation where a child, through online chatting, is being coerced to sexually touch him or herself by a predator.

At present, the two offences created by the Criminal Law (Sexual Offences) (Amendment) Act 2007 which ostensibly deal with “grooming” remain far removed from the international standards outlined in the Conventions and the Directive. The 2007 Act makes it an offence for any person to intentionally meet or travel with the intention of meeting a child, within the State, having met or communicated with that child on two or more previous occasions, and does so for the purpose of sexually exploiting that child. It also criminalises the same behaviour taking place outside the State, by a citizen or someone who is ordinarily resident in the State. As recognised previously, these provisions do not adhere to international requirements.<sup>152</sup> Both the Lanzarote Convention and the Directive demand that Member States criminalise a proposal to meet a child, made through ICT, where that proposal was followed by material acts leading to such a meeting, for example arranging a place to meet.<sup>153</sup> This essentially prohibits the act of grooming itself, once preparatory acts are taken following initial communication with a child. The criminal conduct is not dependent on the offender actually meeting or travelling to meet the child, as is currently the case in this jurisdiction. Existing legislation in Ireland fails to adequately protect children as only the effects of grooming are criminalised and not the act of grooming itself. In addition, there is no requirement under international standards for at least two separate contacts as are mandated by the 2007 Act. Indeed no minimum is set in the Convention or Directive.

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<sup>152</sup> See Geoffrey Shannon, Seventh Report of the Special Rapporteur on Child Protection (2014) at p.137.

<sup>153</sup> This provision is contained in Article 23 of the Lanzarote Convention and Article 6(1) of the Directive.

Section 7 of the Bill ameliorates the existing situation in Ireland, repealing the offences introduced by the 2007 Act. It provides that any person who “intentionally meets, or travels with the intention of meeting, a child, or makes arrangements with the intention of meeting a child or for a child to travel...having communicated by any means with that child on at least one previous occasion and does so for the purpose of doing anything that would constitute sexual exploitation of the child” shall be guilty of an offence. First, by providing that the communication with the child may have taken place “by any means” explicitly allows for such communication to have been made through the internet, mobile phones and social media. This amendment is beneficial for the purposes of child protection as it can be understood as including offline contact as well as contact through ICT, thereby covering both eventualities. Secondly, the section provides that it is not solely the offender who must travel to meet the child or make such arrangements. If the offender makes arrangements for the child to travel, for example sending the child money for a taxi, the offence is satisfied – strengthening a weakness of the current legislation. Thirdly, the addition of the phrase “makes arrangements with the intention of meeting a child” can be seen as incorporating the requirements of the Directive. No longer is the commission of the offence only complete upon the person actually meeting the child or travelling to do so, making arrangements to meet is sufficient. This does not have to be predicated on two previous contacts, as is presently the case. If the offender has communicated with the child by any means once prior to meeting, travelling to meet or making arrangements to meet, he falls within the offence. Again, therefore this development is to be welcomed as it strengthens the existing offence in Irish law.

One potential prosecutorial difficulty regarding this offence however, could be the burden imposed in proving that the offender was meeting the child or making arrangements to meet him or her for the purpose of doing anything that would constitute sexual exploitation. The grooming process may be different in each case, but it often involves the attempt to establish a relationship with a child, one more in the realm of friendship than a sexual relationship at the outset. The contact leading to the meeting may appear innocent, though sexual intentions lie behind this seemingly innocuous communication. Without something concrete, such as sexually explicit text messages, proving that the offender’s intention was to meet the child for the purposes of sexually exploiting him or her could be difficult, particularly if he or she denies same and all the contact between the offender and child has been seemingly harmless



or friendly. Consideration should therefore be given to amending section 7 of the 2015 Bill to address this lacuna in so far as is practicable.

A notable gap in existing Irish legislation has been rectified by section 8 of the Bill. At present, sexual exploitation that takes place entirely online is not prohibited in criminal legislation. As discussed above, an offline meeting is required for an offence to take place under section 3(2A) and 3(2B) of the 1998 Act, as inserted by the 2007 Act. A situation where a child is encouraged by a predator to send pornographic images of themselves online or through their mobile phones is not explicitly dealt with in current statutes and Irish law has until now been silent with regard to a situation where an offender exposes themselves through ICT to a child without attempting to solicit reciprocal behaviour from the child. Specific offences addressing the sexual exploitation of children carried out solely through the use of information and communication technology have not yet been introduced in Ireland and are greatly needed. Section 8(1) of the Bill addresses this lacuna in the law and provides that it is an offence for a person to communicate with another person, including a child, through ICT where the purpose of the communication is to facilitate the sexual exploitation of a child by that person or another person. In addition, section 8(2) provides that sending sexually explicit material to a child under 17 by means of ICT is criminalised. Given the real danger of online sexual exploitation, the developments that seek to be implemented by section 8 of the Bill demonstrate a practical and stringent approach to criminalising predatory behaviour using the internet and other communication technologies.

Mobile devices are now very powerful computers with the memory capacity to contain many thousands of images, text and video files that constitute child pornography, along with ICT evidence of grooming, solicitation, sexual exploitation and important evidence relating to contact sexual offences (e.g. images, ir chat/SMS messages discussing the incident). To reflect this development, An Garda Síochána should be provided with a power to search a suspect of such crime in a place other than the home - either a power similar to section 23 of the Misuse of Drugs Acts or a category of warrant to allow a search of a specific person in a public place.

Facebook, Google, Yahoo, Adobe, Microsoft are some of the many non-Irish companies with offices in this country. Many of them store their Irish data in Ireland but some of them claim it is stored in the US, etc. For the investigation of child pornography cases and sexual

offences against children where ICT is involved An Garda Síochána need a production order that can be served on any such company registered in Ireland requiring production of ICT evidence – photos, chat, account information, IP Addresses. An order similar to that provided for in section 15 of the Criminal Justice Act 2011 for fraud and banking is worthy of consideration. It seems anomalous that powers introduced to deal with the banking crisis should not be available to protect vulnerable children.

### **3.1.2 Recommendations**

*A coherent and comprehensive approach should be adopted throughout the Criminal Law (Sexual Offences) Bill 2015 in combatting the use of Information and Communication Technology (ICT) in perpetrating sexual offences against children. Whilst the 2015 Bill addresses this in parts, there are other parts where ICT is not expressly addressed. For example, it is recommended that ICT be expressly referenced in section 4, 5 and 6 of the 2015 Bill which create new offences inviting a child to sexual touching, sexual activity in the presence of a child and causing a child to watch sexual activity.*

*Section 7 of the 2015 Bill addresses the offence of “grooming”. There remains a possible prosecutorial difficulty regarding this offence in proving that an offender was meeting the child or making arrangements to meet the child for the purpose of doing anything that would constitute sexual exploitation. Consideration should therefore be given to amending section 7 of the 2015 Bill to address this lacuna in so far as is practicable.*

*Mobile devices are now very powerful computers with the memory capacity to contain many thousands of images, text and video files that constitute child pornography, along with ICT evidence of grooming, solicitation, sexual exploitation and important evidence relating to contact sexual offences (e.g. images, ir chat/SMS messages discussing the incident). To reflect this development, An Garda Síochána should be provided with a power to search a suspect of such crime in a place other than the home - either a power similar to section 23 of the Misuse of Drugs Acts or a category of warrant to allow a search of a specific person in a public place.*

*Facebook, Google, Yahoo, Adobe, Microsoft are some of the many non-Irish companies with offices in this country. Many of them store their Irish data in Ireland but some of them claim it is stored in the US, etc. For the investigation of child pornography cases and sexual*

*offences against children where ICT is involved An Garda Síochána need a production order that can be served on any such company registered in Ireland requiring production of ICT evidence – photos, chat, account information, IP Addresses. An order similar to that provided for in section 15 of the Criminal Justice Act 2011 for fraud and banking is worthy of consideration. It seems anomalous that powers introduced to deal with the banking crisis should not be available to protect vulnerable children.*

### **3.1.3 Child Pornography Offences**

Sections 9 to 14 inclusive of the Criminal Law (Sexual Offences) Bill 2015 address the particular concern of child pornography, described by Minister Fitzgerald as “a heinous crime which is a global problem”.<sup>154</sup> Under the current legislation dealing with child pornography, the Child Trafficking and Pornography Act 1998, a child is defined as a person under the age of 17 years. Section 9 of the Bill amends section 2 of the 1998 Act to define a child as a person under the age of 18 years. Neither the Lanzarote Convention nor the Directive permit Member States to select an age lower than 18, thus at the outset this amendment appropriately brings Irish law into compliance with these international conventions and further protects young people.

In section 9 of the 2015 Bill, the definition of “child pornography” set out in section 2 of the 1998 Act is updated. It now includes any visual representation showing or depicting a child engaged in simulated sexual activity. One further expansion of the definition of “child pornography” contained in section 9 is suggested. Section 2(2) of the 1998 Act confirms that imagery which conveys the predominant impression that it represents a child will be considered to be child pornography, catering specifically for situations where adult images are modified to make it look like that of a child. Though it is arguable that computer-generated images of abuse and images of fictitious children already come within the remit of the existing legislation, for the purposes of absolute certainty, this section ought to be clarified by adding that computer generated images of children or realistic images of non-existent children come within the definition of child pornography. Given the present opportunity to effect change, an effort to clarify any grey areas such as this should be made.

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<sup>154</sup> Department of Justice and Equality Press Release, Minister Fitzgerald publishes the Criminal Law (Sexual Offences) Bill 2015, 23 September 2015.

One item to note is that the Bill does not include an exemption from criminal liability for self-generated pornography involving children who have reached the age of consent where that material is produced and possessed with the consent of those children and only for the private use of the persons involved. The Directive provides that a Member State may, in its discretion, include such an exemption. At present, none is provided for in the Bill but this may warrant further consideration. The aim of the 1998 Act is not to criminalise young people falling within this category, thus while the production of such material ought not to be encouraged; the reality of it should be incorporated into the new Bill.

A major gap in the 1998 Act that has been addressed by the 2015 Bill is the inclusion of an offence of *viewing* child pornography. Section 6 of the 1998 Act merely provides that it is an offence to be knowingly in possession of child pornography. Unfortunately, the legal concept of “possession” does not cover situations where persons view this type of material, for example by streaming videos or accessing videos or images stored in clouds or virtual storage devices that can be watched without actively downloading the data in question. Nor might material that has been downloaded but deleted be regarded as being within the defendant’s possession.<sup>155</sup> In computer terms, therefore, section 6 only covers instances where child pornography is downloaded. This impractical and nonsensical lacuna has been recognised as a significant failing of the current legislation. Section 14 of the Bill seeks to improve the current situation providing that any person who knowingly acquires or possesses child pornography or who knowingly obtains access to pornography by means of information and communication technology shall be guilty of an offence. This provision vastly expands upon the existing Irish law on child pornography and strengthens the protection of children. Offenders who view child pornography are punished in the same way as those who traditionally came under the concept of possession, with a maximum term of imprisonment of five years if convicted on indictment. In addition, an amendment of this nature ensures Ireland’s compliance with Directive 2011/93/EU and international instruments which require the viewing of such material to be criminalised.

### **3.1.3 Recommendations**

*The definition of “child pornography” as contained in section 9 ought to be expanded so as to expressly include computer-generated images of abuse and images of fictitious children.*

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<sup>155</sup> See *DPP v Power* [2007] IESC 31.

### **3.1.4 Jurisdiction of child sex offences**

Part 6 of the Sexual Offences Bill 2015 vastly extends Ireland's jurisdiction over offences committed outside the State. At present, the Sexual Offences (Jurisdiction) Act 1996, as amended, provides that the State has jurisdiction over offences committed outside the State if certain criteria are fulfilled, namely that the behaviour constitutes an offence in the place in which it is committed and would constitute an offence in Ireland if it had been committed here. Furthermore, the offence must be one listed in the Schedule to that Act and notably, the production, distribution or possession of child pornography is not included in said Schedule.

A number of amendments are made to the 1996 Act by Part 6 of the Bill. Firstly, section 35 of the Bill increases the upper age threshold for the purposes of the 1996 Act from 17 to 18 years of age, ensuring that Irish legislation conforms to the general international standard of protecting persons under 18 against exploitative sexual acts. In addition, the offences listed in the Schedule to the Act are expanded to include offences updated and created by the 2015 Bill, such as possession of child pornography and the offences contained in section 5, 6, 7 and 8 of the Sexual Offences Bill 2015. It is therefore an offence for a citizen of the State, or person ordinarily resident in the State, to do an act, in a place other than the State, against or involving a child which would constitute an offence under the law of that place, and if done within the State, would constitute an offence under or referred to in an enactment specified in the Schedule to the 1996 Act.

Pursuant to section 36 of the Bill, for certain child sexual offences, the dual criminality rule, applicable under section 35, will not apply. Where a person who is an Irish citizen or ordinary resident in the State does an act against a child abroad that if done in Ireland would constitute rape, sexual assault, any of the defilement offences or child prostitution offences, he is guilty of an offence. This behaviour no longer has to constitute an offence in the place in which it is committed – thereby signalling a relaxation of the dual-criminality rule. The Bill therefore ensures that Ireland will permit the exercise of jurisdiction based both on the territoriality principle and based on nationality or ordinary residence. The number of offences referenced in section 36 of the Bill, however, is greatly reduced in comparison to those included in the corresponding Head 54 of the General Scheme of the Bill and the reasoning for narrowing this category of offences in the 2015 Bill is unclear.

Despite the aforementioned developments, a victim-centred jurisdiction rule is still absent from Irish legislation, with no provision for same being included in the Bill. Article 17(2) of the 2011 Directive permits Member States to establish jurisdiction where the offence is committed against one of its nationals or a person who is a habitual resident in its territory. This would close certain jurisdictional loopholes that may arise. For example, in relation to the grooming offence in section 7 of the Bill, a situation may arise where a foreign national residing abroad grooms an Irish child and makes a proposal to meet the child abroad. Section 35 of the Bill may not apply if foreign national's actions would not constitute an offence under the law of his or her country. Allowing a victim-centred jurisdictional rule would protect Irish children against foreign predators and bring Irish law in line with Article 25(2) of the Lanzarote Convention which provides that each convention State shall endeavour to establish jurisdiction over an offence whether that offence is committed against one of its nationals or a person habitually resident in its territory. In addition, further consideration might be given to Article 17(3) of the Directive, whereby offences committed using ICT are regarded as coming within the jurisdiction of the State where the technology is accessed, thereby preventing a situation where material is accessed from within the EU, but it hosted on a server located outside the EU. As in the Seventh Report, it is again submitted that the broadest possible approach should be taken towards the matter of jurisdiction, in order to ensure the prosecution of those who commit these offences regardless of the location of their internet server.<sup>156</sup>

### **3.1.4 Recommendations**

*Consideration should be given to amending the jurisdictional remit of the Irish Courts so as to adopt a victim-centred approach, thereby establishing jurisdiction over an offence if perpetrated against an Irish national or person habitually resident in Ireland.*

*In addition, further consideration might be given to Article 17(3) of the Directive, whereby offences committed using ICT are regarded as coming within the jurisdiction of the State where the technology is accessed, thereby preventing a situation where material is accessed from within the EU, but it hosted on a server located outside the EU.*

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<sup>156</sup> See Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014) at p.140.

### 3.1.5 Children Giving Evidence

Part 5 of the Criminal Law (Sexual Offences) Bill 2015 introduces new provisions regarding children giving evidence in criminal prosecutions, making amendments to the Criminal Evidence Act 1992. It is presented as introducing sensitive measures designed at minimising the trauma on victims of sexual offences and as giving effect to a number of recommendations in the Reports of the Joint Committee on the Constitutional Amendment on Children (May 2009) and the Joint Committee on Child Protection (November 2006). In relation to this Part of the Bill, Minister Fitzgerald stated the following; “These changes are intended to protect child victims of sexual offences from any additional trauma which may arise as a result of giving evidence during a criminal trial such as extending the use of video recorded evidence and limiting the circumstances in which the accused can personally cross examine a child witness.” I believe, however, that more far-reaching reform is required to aid children giving evidence at trial. In support of this recommendation, I refer to the Law Reform Commission’s Report on *Sexual Offences and Capacity to Consent* (2013).

At present in Ireland, certain provisions are already in place to protect vulnerable witnesses such as children. Section 13 of the Criminal Evidence Act 1992 provides that child witnesses under 18 in prosecutions for violent or sexual offences may give their evidence via live television link, unless the court sees good reason to the contrary. This allows TV link to be used for all children, whether they are the person in respect of whom the offence was committed or whether they witnessed same. Section 14 allows for the use of an intermediary to put questions to a witness under 18 who is giving evidence through TV link, if having regard to the age or mental condition of the witness, the interests of justice so require an intermediary. Section 16(1)(b)(i) makes further provision for children who are the victim of a crime. It states that a video recording of any statement made during an interview with a member of the Garda Síochána or any other competent person by a child under 14 in respect of whom a violent or sexual offence has been committed shall be admissible as examination-in-chief, provided they are available for cross-examination. At present, therefore, a recording taken in interview shall be admitted as a child’s evidence-in-chief where the child is under 14 and is the complainant, unless the court is of the opinion that in the interests of justice, this should not be done. Section 16(1)(b)(ii) allows such a video recording to be adduced in evidence taken from a person under 18, being any witness other than the accused, solely regarding certain offences under the Child Trafficking and Pornography Act 1998 and the Criminal Law (Human Trafficking)(Amendment) Act 2008. Section 31 of the new Sexual

Offences Bill expands upon this, extending section 16(1)(b)(ii) to all “sexual offences”, as defined under section 2 of the 1992 Act.

It is submitted, however, that this new amendment does not adequately protect all children who are required to give evidence in a criminal trial. Firstly, the definition of a “sexual offence” under section 2 of the Criminal Evidence Act 1992 is amended in section 28 of the Bill. In this amendment, attempts to commit a sexual offence are explicitly excluded. This means that a child who was a victim of or a witness to an attempted sexual offence cannot avail of section 16(1)(b)(ii). In addition, those aged between 14 and 17 in respect of whom an offence involving violence or the threat of violence has been committed cannot use a video-recording made in an interview as their direct evidence and neither may any child under 18 who witnessed such a violent crime, but was not the victim. The amendment proposed merely allows this special measure to be utilised regarding offences of a sexual nature and it is difficult to understand why violent crimes are excluded. It is respectfully submitted that the distinction is arbitrary and fails to give recognition to the difficulty that all children may have in coming into court and giving evidence. Giving an account of events for a child might be frightening and traumatic whether they were 16 and were the victim of a violent assault or aged 12 and witnessed a rape taking place. Expanding Irish law by permitting the admission of a video-recorded statement given in interview by *any* child under 18, whether complainant or not, in respect of a violent or sexual crime, may serve to better protect children. As Delahunt discusses, using the video-recording given in an interview as the child’s evidence-in-chief allows the child to give his or her account of the incident closer to the time when it occurred, aiding his or her recollection of events. It spares the child the trauma of waiting for the case to come to trial and alleviates the necessity for the child to have to repeat his or her version of events on a number of different occasions.<sup>157</sup>

Looking at the position in the UK could aid reform in this jurisdiction. In England and Wales, sections 21 and 22 of the Youth Justice and Criminal Evidence Act 1999 make special provisions for child witnesses. Phipson describes the primary rule for children under 17 as follows; the court *must* provide for the admission in evidence of any video recording of an interview with a child made for the purpose of adducing it as evidence-in-chief, and where no such video recording has been made, the court *must* provide for the child’s evidence to be

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<sup>157</sup> Delahunt, “Video Evidence and section 16(1)(b) of the Criminal Evidence Act 1992” (2011) *The Bar Review*, at pp. 1-2.



given by means of live link, unless under section 21(4), the court is satisfied that the special measures direction would not be likely to maximise the quality of the witness's evidence.<sup>158</sup> The caveat set out in section 21(4) does not apply to proceedings relating to sexual offences or offences of kidnapping or assault, thus here all child witnesses for these types of offences are automatically deemed to be in need of special protection. This may be a good model to look more closely at in order to address weaknesses in Ireland. In this jurisdiction, there are no different categories for children under 14 and under 18, all children under 17 are treated the same, whether a witness or complainant and the emphasis is on a video recording as the first port of call, before using a TV link.

A recent Law Reform Commission Report on *Sexual Offences and Capacity to Consent* (2013) discusses the special measures put in place to protect children and those with intellectual disabilities. It appears that while the Commission recognises that section 16(1)(b) of the Criminal Evidence Act 1992 represents a significant practical step towards making the testimony of vulnerable witnesses more easily heard within the criminal justice system, it is of the view that the benefits of same are undermined by the requirement that the witness be available for cross-examination. The Report states that; "the Commission considers that the law as it stands creates difficulties for witnesses by splitting their testimony in two and requiring the witness to be available for cross-examination at trial after such a lengthy period of time has elapsed."<sup>159</sup> It thus recommends that cross-examination of the complainant take place at the same time as the giving of evidence-in-chief and calls for the 1992 Act to be amended to allow for pre-trial cross-examination and re-examination if necessary, of complainants and witnesses who are eligible under the Act. This would serve to maximise the beneficial effects of pre-trial recording of examination-in-chief by reducing the delay between the giving of examination-in-chief and cross-examination and sparing the complainant the trauma of waiting for the trial to come to hearing. The recording of the cross-examination should be made in the absence of the accused but in circumstances where he or she can see and hear the witness being examined and communicate with his or her counsel (if represented) and the witness' legal representative. The pre-recording should not be admitted as evidence if certain safeguards have not been met and a Code of Practice outlining directions for the use of pre-recording should accompany this amendment. The 2015 Sexual Offences Bill, while protecting vulnerable witness against cross-examination by

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<sup>158</sup> Phipson, *The Law of Evidence* (2013), 18th ed., Sweet & Maxwell, at p. 328.

<sup>159</sup> Law Reform Commission *Report on Sexual Offences and Capacity to Consent* (2013) at paras. 5.62-5.65.

the accused personally in section 30 (introducing section 14C into the 1992 Act), is silent with regard to addressing the abovementioned proposals of the Law Reform Commission. Further consideration should be given to allowing pre-trial cross-examination take place in this recommended way in future drafts of the Bill.

Section 30 of the Bill introduces a new section 14A into Part 3 of the Criminal Evidence Act 1992. This provides that where a child under 18 is giving evidence other than through a live TV link, whether as a witness or victim regarding a violent or sexual offence, the judge may direct that the evidence be given in the courtroom from behind a screen so that the witness does not see the accused. This will only take place where the judge is satisfied that such a direction is necessary in the interests of justice. Though initially appearing as an attempt to protect a child, this section may prove problematic. The provision of a screen means that the child still has to attend the intimidating atmosphere of a courtroom and remain there for the duration of his or her evidence, knowing the accused is only a few feet away. This is hardly a desirable situation and should be employed only as a last resort. Yet, there is no real guidance in the Bill as to when a screen would be used, except vaguely stating that a screen may be used in circumstances where a child is to give evidence other than through a live television link. It is hard to imagine circumstances where a screen would be preferable to live TV link, except on the rare occasion that a child wishes to opt out of giving evidence by TV link. If, say for a technical reason, the TV link system was not operational on the day of a trial when the child is due to give evidence, using a screen should not be seen as a viable alternative – the child's evidence should be postponed until the problem is fixed. The uncertainty of the proposed section 14A could lead to situations where a screen is being used out of habit because it is the easier option. In all the circumstances, therefore, it is recommended that section 30 and its proposed insertion of section 14A into the 1992 Act requires further consideration. A possible alteration would be to state that a screen may be used only if the child witness opts out of giving his or her evidence by television link, subject to the approval of the court, having regard to the child's wishes. A review of the provision in the Youth Justice and Criminal Evidence Act 1999 in the UK may be of some assistance in framing an amendment in line with that proposed above. This would allow a measure of protection for children where they choose to be present in court, but would not allow screens or other such devices to become the norm.

### **3.1.5 Recommendations**

*It is recommended that Irish law be expanded so as to permit the admission of a video-recorded statement given in an interview by any child under 18, whether complainant or not, in respect of a violent or sexual crime, including an attempt to commit such an offence. The scheme as set out in sections 21 and 22 of the Youth Justice and Criminal Evidence Act 1999 in England and Wales provide a useful template for future reform in Ireland on this issue.*

*Consideration should be given to allowing pre-trial cross-examination of a child witness to take place immediately after the examination-in-chief, all of which is to be recorded to be used in the subsequent trial.*

*The lack of clarity in section 30 of the 2015 Bill is problematic. Section 30 enables a Judge direct that a child give evidence in Court behind a screen where the child is giving evidence other than through a live television link. The presence of a child in a Courtroom is to be avoided where possible. It is feared that section 30 might cause children to attend Court. The specific circumstances in which this may happen need to be set out clearly and debated upon before any such provision might be enacted.*

### **3.1.6 Statutory Definition of Consent**

The vague nature of the current rules on consent is unsatisfactory. I believe the Criminal Law (Sexual Offences) Bill 2015 provides a unique opportunity to set out a positive statutory definition of consent. Other jurisdictions, with a similar common law tradition to that in Ireland, have provided a legislative definition of consent. The model of consent elaborated on in sections 75 and 76 of the Sexual Offences Act 2003 in England and Wales is worthy of particular attention. The creation of a definition of consent would obviate the need for the presence or absence of consent being determined by the judge and jury having regard to the particular circumstances of the case.

### **3.1.6 Recommendation**

*Consideration should be given to providing a statutory definition of consent in the 2015 Bill. The vague nature of the current rules on consent is unsatisfactory. The model of consent set out in sections 75 and 76 of the Sexual Offences Act 2003 in England and Wales provides a useful platform from which to work.*

### 3.1.7 Two Year Proximity Clause

In the aftermath of the seminal *CC v Ireland*<sup>160</sup> decision, the age of consent to sexual activity was at the forefront of media attention and prior to the introduction of the Criminal Law (Sexual Offences) Act 2006 Act, it was proposed that consensual sexual activity between teenagers of a proximate age should not be criminalised. No such exemption was introduced under that statute, however, and as the law currently stands prosecutorial discretion alone is relied upon to prevent the prosecution of teenagers who engage in non-exploitative consensual sexual activity. In my Third Report, the absence of such a provision in the legislation was highlighted and a call was made for this to be addressed, particularly having regard to the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse 2007.<sup>161</sup> Similarly, in the 2007 Report of the Criminal Law Rapporteur for the Legal Protection of Children, Professor Finbarr McAuley states that it seems entirely inappropriate that sexual experimentation between children could result in prosecution and conviction for a serious criminal offence nor is it right that we should have to rely on prosecutorial discretion as the only means of avoiding such an outcome.<sup>162</sup> He submits that where a particular activity does not fit the pattern of wrongdoing contemplated by the legislature, it should not have been criminalised in the first place.

Under the Sexual Offences Bill 2015, a proximity clause will now be introduced into Irish law. Minister Fitzgerald stated; “This simply recognises the reality that young persons can engage in consensual acts.” Section 17 of the Bill affirms the present age of 17 to consent to sexual activity and specifically provides that it will be a defence for an accused charged with an offence against a complainant who is 15 but under 17, that the sexual activity was consensual where the accused is younger or less than two years older than the child, where the accused was not a person in authority in respect of the child at the time of the alleged commission of the offence and where the accused was not, at the time of the offence, in a relationship with the child that was intimidatory or exploitative of the child. This allows for sexual relationships between peers where the accused is no more than two years older than the child in question. This clear legislative provision is preferable than placing any reliance on the uncertainty of prosecutorial discretion and brings the position in Ireland in line with

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<sup>160</sup> [2006] IESC 33.

<sup>161</sup> See Geoffrey Shannon, *Third Report of the Special Rapporteur on Child Protection* (2009), section 2.5.

<sup>162</sup> Professor Finbarr McAuley, *Report of the Criminal Law Rapporteur for the Legal Protection of Children* (2007) at paras. 4.14-4.15.

the United States and the majority of Council of Europe States which only criminalise sexual conduct between minors where the age-gap is greater than two years.

### **3.1.8 Abuse of Position of Trust**

Following a number of calls for the link between child sex offending and the abuse of a position of trust to be addressed, the 2015 Bill changes the way Ireland deals with offenders who use their position of influence to perpetrate crimes upon children. In 2006, the Joint Committee on Child Protection noted that the Lanzarote Convention requires the criminalisation of the abuse of a recognised position of trust, authority or influence over the child, including within the family. It therefore recommended that a specific offence to cover sexual abuse in such situations be introduced, carrying a maximum sentence of life imprisonment.<sup>163</sup> The Joint Committee also advised that this offence criminalise situations where the child is over the ordinary age of consent of 17, due to the fact that the abuse of trust remains regardless of the child's age.

The Criminal Law (Sexual Offences) Bill 2015 follows the recommendations that have been long since made with regard to persons of authority, inserting harsher sentences in section 17 of the Bill and a new stand-alone offence in section 18. Now not only is the abuse of the child penalised in an offence, legislation will specifically criminalise the abuse of the trust that has been placed on the offender. A very broad definition of "person in authority" is contained in section 15 of the Bill. A person in authority means;

- (a) a parent, grandparent, uncle or aunt whether of the whole blood, of the half blood or by affinity of the child,
- (b) a current or former guardian or foster parent of the child,
- (c) a current or former step-parent of the child,
- (d) a current or former partner of a parent of the child who lives or has lived in an enduring family relationship with the parent,
- (e) any person who is for the first time being, or has been, *in loco parentis* to the child, or
- (f) any other person who is or has been responsible for the education, supervision, training, care or welfare of the child.

This is a wide definition, encompassing many different relationships of authority between an adult and child and section 15(f) in particular is to be welcomed for its broad remit. In Head

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<sup>163</sup> Joint Committee, *Report on Child Protection*, at para. 7.6.1.

18 of the General Scheme of the Bill, however, examples of the types of relationships that would fall under the this definition were clearly enumerated, including a teacher, youth worker, sports coach, school transport driver and counsellor, among others. Consideration might be given to inserting these examples into section 15 of the Bill to aid in its interpretation. In this way, the types of relationships of authority covered by the definition are clearly demonstrated. One position that was not specifically referenced in the Bill was a priest and perhaps for the sake of certainty it should also be included in the Bill.

In section 17 of the Sexual Offences Bill, heftier sentences are introduced for persons who defile a child under 17 where he or she is a person in authority. In comparison with the normal 7 year sentence for a person found guilty under this section, a maximum of 15 years can be imposed on a person in authority. In section 18 of the Bill, a new offence is introduced. This criminalises a situation where a person in authority engages in a sexual act with a child who has attained the age of 17 years but is under the age of 18. In terms of sentence, a person found guilty of an offence under this new section shall be liable to a maximum term of imprisonment of 10 years. This will serve to act as a serious deterrent to persons in authority abusing their relationship of trust with a child.

### **3.1.8 Recommendation**

*The definition of “person in authority” set out in section 15 of the 2015 Bill should specifically enumerate examples of relationships that fall within subsection (f), including a priest.*

### **3.1.9 Defilement Offences**

Following the Supreme Court decision in *CC v Ireland*, the old offence of statutory rape was replaced by two new offences of defilement of a child introduced in the Criminal Law (Sexual Offences) Act 2006. Section 2(1) criminalises defilement of a child under the age of 15, providing that a person who engages in a sexual act with a child under 15 shall be guilty of an offence. In similar terms, section 3(1) prohibits defilement of a child under 17. Both offences of defilement cover sexual intercourse, buggery, aggravated sexual assault and the penetration of the mouth and anus by the penis and by other objects, and are gender neutral in respect of both offenders and victims. Proving that the child against whom the offence is alleged to have been committed consented to the sexual act in question is no defence to a prosecution for defilement. The Sexual Offences Bill 2015, in sections 16 and 17, amends

sections 2 and 3 of the 2006 Act. On the one hand the Bill takes an important step towards better protecting children by restricting the currently subjective defence of mistaken age, however on the other hand harsher penalties for subsequent offences are no longer provided for in the Bill.

In relation to each offence, as a result of the Supreme Court decision in *CC*, in section 2(3) and section 3(5) respectively, there exists a defence of mistake of fact as to the victim's age; thereby providing the perpetrator with a defence if he or she can prove on the balance of probabilities that he or she *honestly believed* that his or her victim had attained the relevant age at the time of the alleged offence. As Professor McAuley recognises, the question of whether the defendant honestly believed his or her victim had attained the relevant age is to be judged subjectively, although the Act specifically provides that the court shall have regard to the presence or absence of reasonable grounds for the alleged belief when deciding this issue.<sup>164</sup> This defence has attracted criticism. In the 2007 Report of the Criminal Law Rapporteur for the Legal Protection of Children, Professor McAuley commented that; "it is regretted that the [legislature] saw fit to tether the new defence to the doctrine that mistakes need only be honest in order to excuse."<sup>165</sup> He went on to state that the requirement of reasonable belief would have afforded a higher level of protection to victims rather than the subjective criterion. Gillespie noted that there does not appear to have been any discussion in either House of the Oireachtas as to whether the defence to be introduced should be one of honest belief or reasonable belief. While in *CC*, the Supreme Court dismissed the State's submission to limit any defence of mistaken age to one of reasonable belief, it did so to not blur the line between the judiciary and the legislature and not because a defence of reasonable belief would be unconstitutional.<sup>166</sup>

Having faced much criticism, therefore, the defence of honest belief is amended in the Sexual Offences Bill 2015. The Bill provides that it will be a defence for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of

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<sup>164</sup> Professor Finbarr McAuley, Report of the Criminal Law Rapporteur for the Legal Protection of Children (2007) at para. 4.09.

<sup>165</sup> Professor Finbarr McAuley, Report of the Criminal Law Rapporteur for the Legal Protection of Children (2007) at para. 4.23.

<sup>166</sup> Gillespie, *Sexual Exploitation of Children* (2008) at p. 66.

15 or 17 (whichever is the case depending on the section).<sup>167</sup> Where the court has to decide whether the offender was reasonably mistaken as to the age of the victim, the court is required to consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the said age. No longer is the standard a subjective one and it is submitted this change will bring additional protection for children. The tribunal of fact will now be able to consider whether the defendant was acting reasonably in believing the child was aged 17 or over, rather than being required to focus on whether his or her belief, reasonable or not, was honestly held. As there are situations where an honest belief may be unreasonable, absurdities can arise. Introducing the objective standard prevents such situations from arising, protects victims of abuse and is a welcome strengthening of the defilement offences.

At present, defilement of a child under the age of 15 carries with it a maximum penalty of life imprisonment. Section 3(1) of the 2006 Act, defilement of a child under 17, provides for a maximum penalty of 5 years, with the same penalty for an attempt under section 3(2). Where a person has been convicted of an offence under section 3(1), he or she faces a possible sentence of up to 10 years imprisonment in respect of any subsequent conviction of an offence under that subsection. Similarly, where an offender is charged with an attempted offence under section 3(2) and has previously been convicted for attempted defilement, the maximum sentence is increased to 10 years. This has been recognised as a loophole in the current legislation – whereby the maximum sentence is only raised where the offender has been previously convicted of the *same* offence as that which he or she is later charged. For example if his or her first conviction is for defilement regarding a 16 year old under section 3(1) and he or she is convicted a number of years later for an attempt under section 3(2), he or she is not liable for the increased sanction. Nor does the existing legislation increase the maximum sentence where the offender's previous conviction is one under section 2 of the Act. Increasing the maximum sentence available in only these limited circumstances seems illogical, according to Gillespie, given that the reasoning behind heavier sentencing is to recognise the potential danger that a repeat offender poses to children.<sup>168</sup>

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<sup>167</sup> Head 19 inserts a new section 2 into the 2006 Act and Head 20 inserts a new section 3 into the Act. This defence is contained in subsection 3 of each section.

<sup>168</sup> Gillespie, *Sexual Exploitation of Children* (2008) at p. 72.



Rather than close the aforementioned gaps, however, the Sexual Offences Bill 2015 removes entirely the sections of the 2006 Act that provide for these increased sanctions.<sup>169</sup> Instead, section 17 provides that a person who engages in a sexual act with a child under 17 or attempts to do so shall be liable for a term of 7 years imprisonment. While the offence itself now attracts a heavier penalty than the 5 years originally provided for in the existing legislation, there no longer appears to be any harsher sanction for those persons committing subsequent offences of a similar nature. Rather than a deletion of the increased penalty provisions, it is submitted that an extension and clarification of these measures ought to have been introduced in the Bill. Including a provision in section 3 to impose a lengthier prison sentence on a person who has been previously convicted of any offence under section 2 or section 3 and is subsequently charged with any offence under section 3 would act as a deterrent to offenders. The Bill in its current form appears to be silent on the issue of subsequent offences and it is submitted that this ought not to be the case given the threat posed to children by those who repeatedly offend in this manner.

### **3.1.9 Recommendation**

*Increased penalties for those who commit subsequent offences against children ought to be provided for in the 2015 Bill.*

### **3.1.10 Child Prostitution and Trafficking**

In a number of my previous reports, the issues of child trafficking and prostitution have been discussed at length.<sup>170</sup> The sexual exploitation of children is one of the main purposes of child trafficking and stringent legislation has been called for to attempt to eliminate the demand for this. In particular, my Fourth Report specifically recommended that consideration be given to the position in Sweden and Norway, in which the purchase of sexual services has been penalised, with a view to introducing a similar system in this country.<sup>171</sup> The Criminal Law (Sexual Offences) Bill 2015 does just this – creating new offences regarding the purchase of sexual services and addressing recommendations of the Joint Committee on Justice, Defence and Equality in its Report on the Review of Legislation on Prostitution (June 2013). These new offences target the persons who are purchasing rather

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<sup>169</sup> This may be due to the recommendations made by the Law Reform Commission's *Report on Mandatory Sentences* (2013).

<sup>170</sup> See Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010), section 4; and Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2012), section 5.

<sup>171</sup> Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010) at p. 114.

than those who are selling the sexual services and are described by Minister Fitzgerald as sending “a clear message that purchasing sexual services contributes to exploitation.”

Section 20 of the Bill introduces a new section 7A into the Criminal Law (Sexual Offences) Act 1993, criminalising paying for sexual activity with a prostitute. This provides that it shall be an offence where, in the context of prostitution, a person pays money or any other form of remuneration or consideration for the purpose of engaging in a sexual activity with a prostitute. It also is an offence to promise payment for sexual activity with a prostitute. This section expands existing law whereby it is only an offence to solicit or importune another person for the purposes of prostitution in a street or public place.<sup>172</sup> Section 21 amends section 5 of the Criminal Law (Human Trafficking) Act 2008, making it an offence to pay money or any other form of remuneration or consideration in exchange for sexual activity with a person, for the purpose of prostitution, where it is known that person was trafficked. These provisions are to be welcomed as a positive development. In comparison with the equivalent Heads 10 and 11 of the General Scheme of the Sexual Offences Bill 2014, their content is greater in detail. In Heads 10 and 11, the “purchasing of sexual services” was criminalised, but there was a failure to enumerate what exactly is meant by “purchases” and arguably situations where a person is providing some other form of remuneration in return for sexual services could have been excluded from their remit. Sections 20 and 21 have clarified that any form of consideration provided in exchange for sexual services falls under these sections. This presumably includes the provision of drugs.

For a person to be found guilty of an offence under section 5 of the 2008 Act (as amended by section 21 of the 2015 Bill) that person must knowingly purchase a sexual service from a trafficked person for the purposes of prostitution. It is a defence for the defendant to prove that he or she did not know and had no reasonable grounds for believing, that the person in respect of whom the offence was committed was a trafficked person. This provision provides for tougher sentences for those who purchase these services from trafficked persons as opposed to non-trafficked persons. Users are threatened with terms of imprisonment, compared with section 20 of the 2015 Bill where fines are proposed as the penalty. This is designed to address the trafficking and exploitation associated with prostitution, reducing demand. One problem which may arise in the course of prosecutions under section 5 of the

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<sup>172</sup> Criminal Law (Sexual Offences) Act, section 7.

2008 Act, as amended by the Sexual Offences Bill, however, is that it a defence to the offence for the accused to prove that he or she did not know and had no reasonable grounds for believing that he or she had purchased the sexual service from a trafficked person. While the onus is on the defendant to prove that he or she did not have knowledge, a purchaser is likely to avoid making any enquiries as to whether trafficking has taken place and direct knowledge of trafficking is unlikely. Instead, as discussed in my Sixth Report, consideration should be given to criminalising the purchasing of sexual services from trafficking victims where a user ought to have known or had a reasonable suspicion that it involved trafficking.<sup>173</sup> This may be a more practical way to achieve the aims sought by the implementation of these provisions and to fulfil the purpose of Article 18 of the Trafficking Co-operation Directive.<sup>174</sup> It is worth noting, however, that in England, Wales and Northern Ireland, strict liability is imposed for these types of offences. In the Policing and Crime Act 2009, where a person purchases sexual services from a prostitute who is subjected to exploitative conduct from a third person (i.e. force, threats, coercion, deception), it is irrelevant whether the purchaser is aware that the third party has engaged in exploitative conduct, he or she is still guilty of an offence. To ensure the best protection for those trafficked and exploited persons, further consideration should be given to the stance taken in the UK regarding such offences.

Finally, perhaps an opportunity should be taken at this point in time to clarify the definition of “trafficked person” under the Criminal Law (Human Trafficking) Act 2008. A “trafficked person” is defined as a person in respect of whom a trafficking offence has been committed or a child who has been trafficked for the purpose of exploitation. There is concern that someone needs to have been convicted for a trafficking offence before a user can be prosecuted for soliciting a trafficked person for the purposes of prostitution. It might now be clarified in the new Bill that no such requirement is needed. This prevents situations arising where users of sexual services from trafficked persons cannot be prosecuted or convicted under section 5 of the 2008 Act because, for whatever reason, a conviction for trafficking offences in respect of that person has not first been obtained.

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<sup>173</sup> Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2012) at pp. 226-227.

<sup>174</sup> Council Directive 2004/81/EC; Article 18 sets out the obligation of Member States to prevent trafficking and obliges them to consider taking measures to criminalise the use of services where there is knowledge that the person is a victim of a trafficking offence.

### **3.1.10 Recommendations**

*Section 21 addresses the purchase of sexual services from persons who are trafficked. At present it allows a defence for the defendant to prove that he or she did not know and had no reasonable grounds for believing that the person was trafficked. That will give rise to prosecutorial difficulties as a purchaser is likely to avoid making any enquiries as to whether trafficking has taken place and direct knowledge of trafficking is unlikely. Instead it is recommended that the mens rea be amended so as to capture an offender who ought to have known or had a reasonable suspicion that the person was trafficked. That said, in order to provide the best protection from human trafficking, a strict liability approach might be taken as is the case in England, Wales and Northern Ireland.*

*The 2015 Bill ought to be clarified so that it is made clear that a person need not be convicted for a trafficking offence before a user can be prosecuted for soliciting a trafficked person for the purposes of prostitution.*

## **3.2 General Scheme of the Criminal Justice (Victims of Crime) Bill 2015**

In July 2015 the Heads and General Scheme of the Criminal Justice (Victims of Crime) Bill 2015 was published. Hailed as a landmark new Bill, Minister Frances Fitzgerald stated that it has been introduced to “strengthen the rights of victims of crime and their families, to ensure that victims and their needs are at the heart of the justice process and that rights to information, advice and other appropriate assistance are met effectively and efficiently.” For the first time in Ireland, the Bill seeks to put the rights of victims of crime on a statutory footing and the place of victims in the criminal justice system is being explicitly recognised. This welcome development follows a definite movement on the part of the State in recent years towards greater acknowledgement of the victim within the criminal process and mirrors significant developments in this regard at EU level.

In criminal prosecutions, it is the State who assumes the role of the victim – crimes being viewed as wrongs against the State. The effect of this is that the person against whom the crime is perpetrated is often reduced to being a mere witness in the case. While this long-standing position remains in place, the Victims of Crime Bill aims to assist in promoting the involvement of victims at all stages of the criminal process, thereby preventing the victim from becoming lost through the course of criminal proceedings. At present, victims’ rights in Ireland are governed by the Victims Charter. This is not legally binding and it provides no

legal entitlements or rights to victims. There are some special provisions for vulnerable witnesses, including victims, in existing criminal legislation which go some way toward protecting victims of crime at a trial, but their remit is currently quite limited. The General Scheme and Heads of the Criminal Justice (Victims of Crime) Bill 2015 is therefore to be welcomed for its progress in the area of victims' rights. Some recommendations, however, might be made in respect of the Bill, most notably in relation to children as a category of particularly vulnerable victims. In addition, recommendations made in my previous reports must at this stage be reiterated if greater protection for victims is to occur.

### **3.2.1 International Developments**

Recent decades have seen increasing developments with regard to victims as a class of persons within the criminal process.<sup>175</sup> In 1985, the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* was adopted by the UN General Assembly. While not a legally binding document, it sets out the basic principles of treatment for crime victims, urging access to judicial and administrative processes and restitution, compensation and assistance for victims. The emphasis on victim's rights continued and in 2001, the Council of the European Union adopted a *Framework Decision on the standing of victims in criminal proceedings*.<sup>176</sup> Designed to give victims the best legal protection and defence of their interests regardless of the EU Member State they are in, this Decision required all Member States to align their legislation to guarantee victims certain defined rights and supports. European developments culminated with Directive 2012/29/EU (Victims' Directive) of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime. The Victims' Directive replaces Council Framework Decision 2001/220/JHA and was adopted on October 25, 2012.

### **3.2.2 Victims' Directive**

Directive 2012/29/EU provides extensive rights for crime victims within the criminal process, seeking to ensure that all victims benefit from minimum standards, support and protection throughout the EU. A "victim" is defined as a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss directly caused by a criminal offence. Family members of a person whose death has been caused by a

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<sup>175</sup>See Geoffrey Shannon, *Fifth Report of the Special Rapporteur on Child Protection* (2012), section 3; and Geoffrey Shannon, *Second Report of the Special Rapporteur on Child Protection* (2008), section 1.4 for discussions in relation to victims' rights internationally and in the EU.

<sup>176</sup>2001/220/JHA.

criminal offence also come within the definition of a victim. It is worth noting that Article 1 of the Directive makes specific reference to children as a special category of victims. It states as follows; “Member States shall ensure that in the application of this Directive, where the victim is a child, the child’s best interests shall be a primary consideration and shall be assessed on an individual basis. A child-sensitive approach, taking due account of the child’s age, maturity, views, needs and concerns, shall prevail. The child and the holder of parental responsibility or other legal representative, if any, shall be informed of any measures or rights specifically focused on the child.”

Chapter 2 of the Directive governs the provision of information and support to victims. In relation to the provision of information, certain rights of victims are set out, including the right to understand and be understood (Article 3), the right to receive information from the first contact with a competent authority (Article 4), the right to receive written acknowledgment of their complaint (Article 5) and the right to receive information about their case (Article 6). The purpose of these Articles is to ensure that victims obtain sufficient information in a form which is easy for them to understand and enables them to fully access their rights. Member States are to ensure that communications with victims are given in simple and accessible language and such communications should take into account the personal characteristics of the victim, including any disability which may affect the ability to understand or be understood. Articles 8 and 9 require Member States to ensure that victims have access to support services, including specialist support services, free of charge, acting in the interests of victims before, during and for an appropriate time after criminal proceedings.

These victim support services must provide information, advice and support relevant to the rights of victims. This includes information and advice on accessing national compensation schemes for criminal injuries and on the role of victims in criminal proceedings including preparation for a trial.

In relation to the participation of victims in criminal proceedings, Chapter 3 of the Directive identifies a number of important rights for victims. This includes the right to be heard during criminal proceedings (Article 10), rights in the event that a decision is taken not to prosecute (Article 11) and rights directed towards safeguarding the victim in the context of restorative justice services (Article 12). Chapter 4 of the Directive concerns the protection of victims and recognises that certain victims have specific protection needs. Article 18 requires

Member States to endeavour to ensure that measures are available to protect victims and their family members from secondary and repeat victimisation and on a practical level, Article 19 requires necessary conditions to be established to enable the avoidance of contact between victims and the offender. In particular, new court premises are required to have separate waiting areas for victims.

During the course of criminal investigations, victims must be protected. In this regard, Article 20 requires interviews with victims to be conducted without unjustified delay after the complaint has been made and it mandates that the number of interviews with victims be kept to a minimum. To identify the specific protection needs of persons, Article 22 denotes that Member States ensure that victims receive a timely and individual assessment, in accordance with national procedures. This assessment is to determine whether they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24 of the Directive, due to their particular vulnerability to further victimisation or intimidation. The Directive presumes that child victims have specific protection needs, but still requires children to be subject to an assessment to determine whether and to what extent they would benefit from the special measures in Articles 23 and 24.

In Article 23, pre-trial special measures require interviews with victims to be carried out in premises designed for that purpose, by or through professionals trained for that purpose. All victim interviews should be conducted by the same person, where possible, and all interviews with victims of sexual violence, gender-based violence or violence in close relationships must be conducted by a person of the same sex of the victim, where the victim so wishes. During court proceedings, measures must be taken to avoid visual contact between victims and offenders by appropriate means including the use of communications technology and measures are to be taken to ensure that the victim may be heard in the courtroom without being present, also through the use of communication technology. Other means of protecting victims required by the Directive include measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence and measures to allow a hearing to take place without the presence of the public. While Article 23 is general in nature, Article 24 deals specifically with child victims. In addition to the aforementioned measures provided for in Article 23, it states that where the victim is a child, in criminal investigations all interviews with the child victim may be audio visually recorded and such recorded interviews may be used as evidence in criminal proceedings. Furthermore, it

provides that a special representative may be appointed for a child victim where the holders of parental responsibility are precluded from representing the child victim or where the child victim is unaccompanied or separated from his or her family.

Finally, Chapter 5 of the Directive concerns the training of practitioners. Its purpose is to ensure that public officials who are likely to come into contact with victims receive both general and specialist training to a level appropriate to their contact with victims. This training aims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner. The detailed content of the Victims' Directive with its specific recognition of the vulnerability of child victims is to be welcomed. It provides a clear means of addressing the justice needs of child victims, rather than simply increasing the range of criminal offences and the severity of penalties. Overall, it represents an important move toward the emphasis on victims as opposed to conventional legal responses which have often focused solely on "symbolic justice" by way of increased convictions.<sup>177</sup>

### **3.2.3 Irish position**

In Ireland, at present, victims of crime have few statutory rights. A number of voluntary and government agencies instead have been established to assist individuals through the criminal justice process and to support those enduring any financial or emotional difficulties arising from criminal behaviour, such as the Commission for the Support of Victims of Crime and the Victims of Crime Office. In 2010, the *Victims Charter and Guide to the Criminal Justice System* was published by the Victims of Crime Office. The Charter describes the criminal justice system from a crime victim's point of view. It sets out victims' rights and entitlements to the services given by the various state agencies working with crime victims. The Victims' Charter, however, is not a legally binding document and it provides no legal entitlements or rights to victims. There have been increasing calls, therefore, for victims' rights to be reflected in legislation and the need for reform has long since been recognised.

Victims' rights are currently protected in existing statutes only to a limited extent. Part 3 of the Criminal Evidence Act 1992, for example, allows certain vulnerable persons to give evidence in criminal proceedings via video-link, through the use of an intermediary or by

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<sup>177</sup> See Geoffrey Shannon, *Fifth Report of the Special Rapporteur on Child Protection* (2012), section 3.



having a pre-recorded statement submitted as their evidence-in-chief. At the sentencing stage of the criminal process, section 5 of the Criminal Justice Act 1993, provides for Victim Impact Statements to be given to the court in respect of certain serious offences. This allows the injured party to explain the effect that the crime has had on him or her. Other pieces of legislation designed to protect victims include section 3 of the Criminal Law (Rape) Act 1981 which restricts the cross-examination of complainants with regard to their previous sexual history, save with the leave of the trial judge, and section 6 of the Criminal Justice Act 1993, which permits courts to make orders for the compensation of victims.

Despite the piecemeal protection for victims already in place, widespread reform is necessary in this jurisdiction as Ireland is required to transpose Directive 2012/29/EU into domestic law. The Directive is expected to have a significant effect on how the Irish criminal justice system approaches the treatment of crime victims. In accordance with Article 27 of the Directive, Member States must have brought into force the laws, regulations and administrative provisions necessary to comply with the Directive by 16 November 2015. Ireland has generally been slow to take action with regard to these international standards. In particular, a 2004 Report from the European Commission in relation to the implementation of the 2001 Framework Decision criticised Ireland for failing to put any of the provisions in the Victims' Charter into statute.<sup>178</sup> The new Criminal Justice (Victims of Crime) Bill 2015 is designed to alter this unsatisfactory position. While the Directive is directly effective in Irish law as of 16 November 2015, its implementation is to be carried out through the Victims of Crime Bill and Minister Fitzgerald, upon the publication of the Heads and General Scheme confirmed that the Bill is designed to transpose the Victims' Directive into Irish law.

### **3.2.4 General Scheme of the Victims of Crime Bill 2015**

The overriding objective of the General Scheme and Heads of the Criminal Justice (Victims of Crime) Bill is to put in place a rights-based approach to victims, as envisaged by both the Directive and the Commitment in the Programme for Government. It sets out the rights of victims to information on the criminal justice process generally and specifically in relation to their own case, it guarantees an individual assessment of needs of victims and it gives victims certain entitlements in relation to a decision not to prosecute in their case. The 2015 Bill affects each stage of the criminal process, from the making of the complaint and the

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<sup>178</sup> Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings – Brussels, 16.02. 2004 (COM92004) 54 final/2.

beginning of the investigation to the criminal trial and outcome of prosecutions, and its broad scope is undeniably a very positive development for victims in this country.

Head 2 of the Bill contains a broad definition of a victim. It means:

- (a) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence perpetrated against him or her, or
  - (b) a family member of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death;
- whether or not, in either case, a complaint alleging the commission of an offence has been made or any offender has been identified, apprehended, charged or convicted in relation to the offence.

This definition indicates that the status of a victim will not be dependent upon a complaint having been made to the appropriate authority in relation to the offence or whether the offender has been apprehended and prosecuted. The Bill takes a similarly wide approach to the definition of a "family member". It means, in relation to a person whose death was directly caused by a criminal offence, that person's spouse, partner, child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece. It also includes a person who is or was acting *in loco parentis* to the deceased, an adult (whether of the same or opposite sex) who lived with the deceased in an intimate and committed relationship or any other person who the court or member of An Garda Síochána considers to have had a sufficiently close connection with the deceased. Any person who is under investigation for or has been charged with an offence in connection with the death of the deceased shall not, however, be regarded as a "family member".

### **3.2.5 Provision of Information**

Part 2 of the General Scheme covers the provision of information to victims. Head 4 ensures that victims receive comprehensive information on the criminal justice system and their role within it. It also ensures that victims of crime are made aware of the range of services and entitlements that they may access from their first contact with An Garda Síochána. It provides that a person who contacts a member of the Garda Síochána stating that he or she or another person has been the victim of a criminal offence shall be offered information regarding the procedures for making a complaint, services which provide support for victims of crime, protection measures available for victims, services which provide legal advice and legal aid and information concerning the Criminal Injuries Compensation Tribunal, including the power of the court to make a compensation order. Victims of a criminal offence are to be

made aware of their entitlement to interpretation, translation or other linguistic assistance, their entitlement to expenses arising from participation in the criminal justice process and their entitlement to inform the trial court of how they have been affected by the offence. Information shall also be offered on the procedures for victims who are resident outside the State, the procedure to obtain information from the Irish Prison Service on the release of a prisoner and the available grievance procedures.

Heads 7 and 8 are also important provisions with regard to ensuring victims are given sufficient information. Pursuant to Head 7 of the Bill, where a complaint has been made by a victim of crime, the appropriate member of the Garda Síochána is required to issue the victim with a written acknowledgment of the making of the complaint. This acknowledgment is to include the particulars of the offence alleged to have been committed and must contain information for the victim on where to address any enquiries concerning the complaint. As the investigation progresses, Head 8 confers an obligation on the appropriate member of the Garda Síochána to inform the victim that, upon his or her request, certain information will be provided to him or her, as soon as practicable, as and when it arises. The victim, therefore, may request information on the following:

- (a) significant developments in the investigation of the offence alleged;
- (b) any decision not to proceed with, or to discontinue an investigation into the offence alleged and the reasons or a brief summary of the reasons for same;
- (c) if it is proposed to deal with an alleged offender in relation to the offence alleged in the complaint otherwise than by prosecution before a court;
- (d) any decision not to prosecute an alleged offender and the reasons for same;
- (e) the date and place of the trial of, and the nature of the charges against, any alleged offender;
- (f) the date and place of any appeal by an alleged offender or by the Director of Public Prosecutions against any decision in the trial of the alleged offender;
- (g) the final decision in any trial of an alleged offender and the outcome of any appeal against that decision;
- (h) the release or escape from custody of any alleged offender, at any time prior to the final decision in his or her trial for the offence in any case where it has been assessed under section 6 that the victim may require protection;
- (i) a copy of any statement made by the victim.

The provision of such information as set out in Heads 4, 7 and 8 will serve to address the common complaint that victims are not kept up-to-date with regard to the progress of their investigation and will ensure that victims are properly apprised of their role within the system from the outset and throughout. While Family Liaison Officers (FLOs) are currently assigned to cases to deal with such issues, these officers are only involved in certain serious cases. At present, there are 474 trained FLOs who are appointed to victims and their families in relation to crimes such as murder and false imprisonment with the principal role of keeping victims informed during the investigation and to provide them with support information.<sup>179</sup> The duty to provide information in Head 4 of the Bill is not limited to serious cases and the aforementioned information must be offered once a person contacts a member of An Garda Síochána stating that he or she or someone else has been the victim of a criminal offence. Similarly, where a victim requests certain information regarding the progress of an investigation or prosecution, Head 8 obliges the appropriate Garda to provide him or her with that information as and when it arises, irrespective of the type of offence alleged or the severity of same. In this way, Part 2 of the Bill ensures all victims are given corresponding statutory rights to information for the first time in Irish law and it is anticipated that these provisions will significantly strengthen the position of victims within our criminal justice system.

It is worth noting that where the victim is a child victim, Head 17 of the Bill provides that the information shall also, where practicable, be furnished to a parent or guardian of the child. Furthermore, Head 19 of the Bill requires that any person who provides information to a victim under the Bill must ensure that the victim understands the information, providing it in clear and concise language. These provisions not only ensure that the information is provided, but ensure that it is understood – reflecting the tenor of the Directive and enhancing the practical benefits of Part 2 of the Bill.

### **3.2.6 Decision not to Prosecute and Right to Review**

As set out above, Head 8 of the Victims of Crime Bill creates a statutory right for victims to be informed, where they request, of any decision not to proceed with or to discontinue an investigation into the offence alleged and any decision not to prosecute an alleged offender. Furthermore, it states that the victim is to be given the reasons for said decision, or a brief

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<sup>179</sup> See <http://www.garda.ie/Controller.aspx?Page=1662>.

summary of the reasons. Part 4 of the 2015 Bill provides for the procedure that is to be put in place with respect to these rights. Head 13(1) reiterates that where a decision is made by a member of the Garda Síochána, or the DPP as the case may be, not to prosecute an alleged offender in relation to the offence and the victim has requested to be informed of such a decision in accordance with section 8, the member, or the Director as the case may be, must inform, or cause to be informed, the victim of the reasons, or a brief summary of the reasons, for the decision. Sub-head (2) clarifies that a decision to admit a person to a Diversion Programme or to administer an adult caution will not be regarded as a decision not to prosecute.

This is a wide-ranging development that will serve to bring considerable transparency to all prosecutorial decisions. Traditionally, where the DPP decided not to prosecute, the reasons for making this decision were only given to the gardaí who investigated the case. This changed in 2008, when a new policy was adopted by the DPP creating an exception to the general rule in relation to homicide cases only. In such fatalities, where the death took place on or after 22 October 2008, the DPP gave her reasons for a decision not to prosecute to the deceased's family. In all other cases, no reasons for such a prosecutorial decision were provided. Due to the directly effective nature of the Victims' Directive in Irish law as of 16 November 2015, however, a new stance has recently been taken on this issue. To avoid being in breach of EU law by awaiting the enactment of the Victims of Crime Bill, in July 2015 the DPP established a new Communications and Victim Liaison Unit.<sup>180</sup> This Unit is responsible for developing the structures and procedures required to ensure that the rights of victims and their families, as set out in the Directive, are implemented. In particular, it will process requests for reasons for decisions in line with Head 13. For all crimes, including District Court prosecutions, therefore, reasons are now available upon request. The approach taken by the office of the DPP in advance of the enactment of domestic legislation is appropriate given the direct effect of the Directive.

Head 14 permits a victim to review a decision not to prosecute. It states that where a victim is informed of a decision not to prosecute an alleged offender on foot of the complaint made, the victim must also be informed that he or she may request a review of that decision. Where the original decision not to prosecute was made by a member of the Garda Síochána, the

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<sup>180</sup> Barry Donoghue, Deputy Director, Public Accounts Committee Meeting 12 November 2015.

review is to be carried out by a member of higher rank who is independent of the original investigation. Where it was made by the DPP or by one of the Director's professional officers, the review may be carried out by the Director or by one of the Director's professional officers nominated by the Director, and who is independent of the original decision not to prosecute. The developments in Heads 13 and 14 creating a statutory right for all crime victims to be given reasons for a decision not to prosecute and enabling them to review such a decision is a significant departure from the existing position in Irish law as set out in *State (McCormack) v Curran*,<sup>181</sup> where it was held that the DPP was under no obligation to give reasons in respect of a decision not to prosecute. The reform proposed in the 2015 Bill ensures that victims are given an explanation for the prosecutorial decision in their case and in this way, prevents them from being left in the dark - unaware as to the potential difficulties in prosecution or other realities that may have informed the DPP's decision. While at present, decisions of the DPP are judicially reviewable in principle, the court will only review same if it can be demonstrated that a decision was made *mala fide* or influenced by an improper motive or policy. There are no such restrictions placed on the review procedure provided for in Head 14 which permits a review to be carried out by a Garda of higher rank or professional officer appointed by the DPP. Indeed no limitations whatsoever are attached to the right to review in the Bill. Whether judicial review of this process will become a regular occurrence is a matter which will become apparent in time.<sup>182</sup>

### **3.2.7 Support for Victims in Criminal Investigations**

Certain provisions are set out in the General Scheme of the Victims of Crime Bill which serve to give support for victims of crime through the investigation stage of the criminal process. Head 5, for example, states that a victim, when making a complaint to a member of the Garda Síochána, may be accompanied by a person of his or her choice. Having a familiar person present will undoubtedly give emotional support to the victim in this difficult situation for them. That person will not be allowed accompany the victim, however, where the member taking the complaint reasonably believes his or her presence would hinder the taking of the complaint, could prejudice the investigation or criminal proceedings, or would not be in the best interests of the victim.

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<sup>181</sup> [1987] I.L.R.M. 225.

<sup>182</sup> See Brendan Grehan SC "Balancing Rights in the Sentencing Process: Recent Developments in EU and ECHR Law".

Part 3 of the Bill covers the conduct of interviews with victims. It provides that the member in charge of the investigation must ensure that any further interview with the victim is conducted as soon as is practicable after the making of the complaint and that the number of interviews with the victim is no more than is strictly necessary for the proper investigation of the complaint.<sup>183</sup> In addition, medical examinations of the victim for the purposes of the investigation of the offence alleged are only to be carried out where strictly necessary for the proper investigation of the complaint. Where the victim is being interviewed by Gardaí in relation to a complaint, he or she may also be accompanied by a person of his or her choice *and* by his or her legal representative. Again, the presence of a person of his or her choice or the legal representative may not be permitted where the Garda reasonably believes that his or her presence would hinder the conduct of the interview or would prejudice the investigation or the criminal proceedings.

In order to ensure that persons involved with victims are properly qualified in this area, Head 20 of the Bill places an obligation on the Garda Síochána, the Director of Public Prosecutions, the Irish Prison Service, the Courts Service and the Garda Ombudsman to provide training to their staff members who have contact with victims in the course of the official duties to a level appropriate to that contact. The aim of such training is to “...increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.” This provision is in line with Ireland’s obligations under the Directive and appropriately trained officers will help to ensure victims obtain proper support during the criminal process.

### **3.2.8 Assessment of Victims and Special Measures for Certain Victims**

In line with Article 22 of the Victims’ Directive, Head 6 of the Victims of Crime Bill places a duty on the member of the Garda Síochána taking a complaint to carry out an assessment of the victim. The objective of this assessment is to determine the measures, if any, that may be necessary to protect the victim from any secondary or repeat victimisation, intimidation or retaliation. Such protection measures may include advice as to personal safety, protection of property, availability of protection or barring orders, seeking to remand an offender in custody or requiring particular bail conditions to prevent contact with the victim, or any other measures to prevent secondary victimisation, retaliation or intimidation. It also serves to

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<sup>183</sup> Head 11(1) and (2).

establish if the victim would benefit from any of the special measures set out in Head 15 or 16 of the Bill – namely special measures that may be implemented during the course of an investigation and during the course of a criminal trial. In carrying out this assessment, regard should be had to the following:

- the personal characteristics of the victim, including his or her age, gender and gender identity or expression, ethnicity, race, religion, sexual orientation, physical or mental health issues and ability to communicate;
- the type and nature of the offence alleged;
- the severity of the offence;
- the degree of harm suffered by the victim;
- the circumstances of the commission of the offence alleged;
- the relationship, if any, between the victim and the alleged offender.

The mandatory assessment that is required by Head 6 is a novel provision in Irish law. It obliges members of An Garda Síochána to consider the specific needs of the individual victim, ensuring that from the outset of the criminal process, the victim is given due consideration. The sole focus is thereby moved away from apprehending and successfully prosecuting the offender and the importance of protecting the victims of crime is promoted. As discussed above, the purpose of the assessment is, *inter alia*, to ascertain whether the victim as a person would benefit from any of the special measures contained in Heads 15 and 16 of the Bill. Of particular relevance from a child protection perspective is Head 17. This provides for a presumption that child victims are entitled to the special measures set out in Heads 15 and 16. A child means a person under the age of 18. Despite the aforementioned presumption, Sub-Head (2) nonetheless requires an assessment to be carried out on children in accordance with Head 16. Whether, and the extent to which, the special measures are required will be determined in the best interests of the child, having regard to his or her age, level of maturity and needs as identified by this assessment. Head 17 therefore appropriately recognises the vulnerable status of children within the criminal justice system and echoes the sentiments set out in the Preamble of the Bill; “...it is appropriate to provide that the best interests of a child who is a victim of a crime are regarded as a primary consideration by the criminal justice system.”

Head 15 relates to special measures for certain victims during the investigation stage of the criminal process. Where a victim has been assessed and identified as someone who would benefit from the measures in Head 15, the Garda in charge of the investigation must ensure



insofar as practicable that certain measures as are appropriate are applied in the course of the investigation. These measures predominantly concern the procedures in place for interviews with the victim, namely that the interview be conducted by the same Garda each time; that the interview be carried out by a member of the same gender as the victim if the offence alleged is a sexual or domestic violence offence and the victim so requests; that the interview is conducted by a member who is a specialist in interviewing in relation to the particular type of offence or class of victim; and that the interview be conducted in a premises designed or adapted for use in relation to the particular type of offence or particular class of victim. The special measures will not apply, however, where there is an urgent need to interview the victim to prevent harm to him or her or another person or where the application of the measure would hinder the proper investigation of the offence alleged or prejudice the criminal proceedings. Surprisingly, these measures will similarly not apply where a specific measure is required at a particular time and it is not possible “for operational or practical reasons” to apply that measure at that time.<sup>184</sup> It is submitted that this exception raises some concern, given that there is no explanation in the Bill as to what “operational or practical reasons” might entail. Such a provision might encourage a relaxed attitude to the implementation of special interview measures and allow small practical problems, easily remedied, to circumvent the benefits envisaged by Head 15. Clarification as to what these “operational or practical reasons” might be is therefore required.

Where the offence alleged by the victim is a sexual offence or a domestic violence offence, the victim may request that a member of the Garda Síochána of his or her gender conduct the interview. “Domestic violence offence” is defined under this Head as: (a) an offence committed against a partner under sections 2 to 15 of the Non-Fatal Offences Against the Person Act, 1997; (b) any other offence committed against a partner involving violence or the threat of violence. While this incorporates a relatively broad category of criminal behaviour, it is suggested that a third category of offences should be included here, namely (c) an offence under section 17 of the Domestic Violence Act 1996, as amended. This would ensure that where the offence alleged is one in relation to breaching a safety order, barring order, interim barring order or protection order, the victim must similarly have the benefit of being interviewed by a member of the same gender. The existing definition of “domestic violence” under the Bill, while broad, does not encompass breaches of such orders and to

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<sup>184</sup> Head 15(2)(c).

properly protect victims of such crimes, it is submitted the definition needs to be widened accordingly.

Head 16 of the Victims of Crime Bill sets out the special measures that may be put in place during the trial process for victims who require such protection. In relation to victims giving evidence, it provides:

In any proceedings for an offence where a victim is required to give evidence, the Court may, on the application of the prosecutor, where it is satisfied that the victim by reason of any of the following:

- (a) his or her personal characteristics;
- (b) the type and nature of the offence alleged;
- (c) the degree of harm suffered by him or her as a result of the offence alleged;
- (d) the relationship, if any, between him or her and the accused;
- (e) the nature of the evidence he or she is to give;
- (f) any behaviour towards him or her on the part of - (i) the accused or (ii) member of the family or associates of the accused;

should be permitted to give evidence other than *viva voce* in open court and, if it is further satisfied that no injustice would thereby be caused to the defendant, shall direct that the evidence be given under such provision as it considers appropriate of Part III of the Criminal Evidence Act 1992, as amended.

This provision significantly expands existing legislation which deals with vulnerable witnesses giving evidence at trial. As previously stated in section 3.1.5, the Criminal Evidence Act 1992, in its current form, only applies to sexual offences, offences involving violence or the threat of violence to a person, and certain specific offences under the Child Trafficking and Pornography Act 1998 and the Criminal Law (Human Trafficking) Act 2008.

In allowing the court to direct that evidence be given under one of the provisions of Part III of the 1992 Act once it is satisfied that the victim should be permitted to give evidence other than *viva voce* in open court and that no injustice would thereby be caused to the defendant, Head 16 creates a whole new category of persons who may avail of the provisions in Part III. Notably, the Bill puts no restriction on the type of offence that this provision is applicable to and there is no distinct age requirement in this Head. All that is required is for the court to be satisfied that by reason of *any* of the abovementioned matters (i.e. personal characteristics, the type and nature of the offence alleged and so on) the victim should be allowed to avoid giving evidence in court. For children, therefore, it is important to recognise that this provision makes it very likely that any child under 18 who is the victim of any offence will have the option of these alternative methods of giving evidence, thereby reducing the possibility of secondary trauma. The limitations of section 16(1)(b)(i) that the child be under

14 and the offence be one of a violent or sexual nature are not applicable, once the circumstances under Head 16 are met. In this way, and having regard to the presumption in Head 17, it is likely that Head 16 will reduce the necessity for child victims to give evidence in open court and enable further reliance on the special measures in Part III of the 1992 Act for children. In any event, Head 26 of the Bill specifically amends the abovementioned section 16(1)(b) of the 1992 Act, raising the age limit for this section from 14 to 18. The new section 16(1)(b) therefore provides that a video-recording of any statement made by any person under 18 during interview may be admissible in evidence, where the offence alleged is an offence to which Part III of the Act applies. No longer is there a distinction as to whether the child is a victim or a witness in the case and the differentiation between persons under 14 and under 18 outlined above is removed. These developments will serve to significantly benefit children who are required to give evidence at trial and give explicit recognition to their vulnerabilities.

An issue of concern, however, relates to the fact that Head 16 requires the court to be satisfied that no injustice would be caused to the accused by the victim being permitted to give evidence other than *viva voce* evidence in open court. While the presence of this provision is not a problem, its lack of clarity creates confusion. There are no guidelines as to when a measure in Part III of the 1992 Act will not be utilised due to injustice to the accused or specifically, examples of instances in which it is not in the interests of justice to allow these alternate methods of giving evidence. Greater clarity is required in the Bill to address the aforementioned concerns.

Furthermore, Head 16 of the Victims of Crime Bill only grants the court power to direct that evidence be given under Part III of the 1992 Act upon the application of a prosecutor in proceedings for an offence.<sup>185</sup> There appears to be no jurisdiction for the court to make such a direction of its own motion, through the use of its discretion. In addition, there is nothing in the provision which allows the victim to make an application to court to give evidence through one of the special measures. Consideration might be given to amend Head 16 to give the court jurisdiction to direct the use of these measures of its own volition and to allow a victim seek the assistance of same, where the prosecutor fails or refuses to make an application on his or her behalf.

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<sup>185</sup> See Brendan Grehan SC “Balancing Rights in the Sentencing Process: Recent Developments in EU and ECHR Law”.

One further special measure with regard to victims giving evidence at trial is introduced in Head 26 of the Bill. This Head proposes the insertion of section 14A into the Criminal Evidence Act 1992 to allow for evidence to be given in court from behind a “screen or other arrangement” to prevent the victim from being able to see the accused. This provision is applicable only where the offence is one to which Part III of the 1992 Act applies and where a finding has been made by the court under Head 16 or in any other case with the leave of the court. It will only be used where the court has not made an order providing for evidence to be given by live television link. While a screen or equivalent arrangement may be a viable alternative for adults giving evidence at trial, the implementation of the proposed section 14A for children may prove problematic. A similar proposal has been made in section 30 of the Criminal Law (Sexual Offences) Bill 2015 and corresponding concerns must be raised.

### **3.2.8 Recommendations**

*Clarification should be provided on the “operational or practical reasons” that must exist that will justify the special measures in Head 15 not applying for certain victims during the investigation stage of the criminal process.*

*“Domestic Violence offence” in Head 15 should include an offence under section 17 of the Domestic Violence Act 1996, as amended.*

*Head 16 should be amended to clarify when a measure in Part III of the 1992 Act will not be utilised due to injustice to the accused. It should also be amended to give the court jurisdiction to direct the use of special measures of its own volition and to allow a victim seek the assistance of such measures, where the prosecutor fails or refuses to make an application on his or her behalf.*

*Head 26 should be revised. A possible alteration would be to state that a screen may be used only in relation to child witnesses where the child specifically opts out of giving his or her evidence by a television link, subject to the approval of the court, having regard to the child’s wishes. A review of the provision in the Youth Justice and Criminal Evidence Act 1999 in the UK may be of some assistance in framing an amendment in line with that proposed above. This would allow a measure of protection for a child where he or she chooses to be present in court, but would not allow screens or other such devices to become the norm.*

### **3.2.9 Victim Personal Statement**

At the sentencing stage of the criminal process, section 5 of the Criminal Justice Act 1993, provides for Victim Impact Statements to be given to the court. This section only applies to certain criminal offences; sexual offences, offences involving violence or a threat of violence to a person, offences under the Non-Fatal Offences Against the Person Act 1997 and offences under section 2, 3 or 4 of the Criminal Justice (Female Genital Mutilation) Act 2012. Section 5(2) provides that when imposing sentence on a person for such an offence, the court shall take into account, and may, where necessary, receive evidence or submissions concerning, any effect (whether long-term or otherwise) of the offence on the person in respect of whom the offence was committed. Where, as a result of the offence, the victim has died, is ill or is otherwise incapacitated, the “person in respect of whom the offence was committed” includes a family member of that person. In sentencing the offender, a court must, upon application by the victim, hear the evidence of the victim, or family member as applicable, as to the effect of the offence on him or her. At present, therefore, section 5 of the 1993 Act is utilised to ensure that the victim of certain serious offences is heard prior to the determination of the appropriate sentence.

Head 9 of the Victims of Crime Bill continues in this vein and addresses the right of a victim to be heard in criminal proceedings as emphasised in the Victims’ Directive. It provides for a new Victim Personal Statement. Head 9(1) states that where a complaint has been made in relation to an offence, other than an offence specified in section 5 of the Criminal Justice Act 1993, the victim may provide a statement in writing, if he or she so wishes. This Victim Personal Statement must set out how the victim has been affected by the offence, be it physically, emotionally, financially or in any other way, but no prejudicial comment on the offender or comment in relation to the appropriate sentence to be imposed on the offender may be included. The Personal Statement must be submitted by the prosecutor to the court prior to sentence when either a guilty plea is entered or the accused is convicted and the court must take it into account when determining the sentence to be imposed.

This aspect of the Victims of Crime Bill is a welcome development which seeks to ensure that victims in respect of other types of crimes also have an opportunity to put before the court an account of how the offence in question has affected them. Victim Impact Statements may only be compiled by persons in respect of whom a violent or sexual offence has been committed or an offence contrary to the Non-Fatal Offences Against the Person Act 1997 or

the Criminal Justice (Female Genital Mutilation) Act 2012. Other offences, such as those involving dishonesty or fraud, may have significant effects on a victim but there is currently no provision to demonstrate this to the court as such crimes do not come within the category of offences set out in section 5 of the 1993 Act. Head 9 of the Bill therefore closes a lacuna in current legislation and creates a new type of statement to be given to the court for offences other than those specified in section 5, thereby considerably strengthening the voice of victims at the sentencing stage. It is disappointing, however, that there is nothing in this section specifically dealing with the situation where the victim is a young child, unable to prepare a Personal Statement. Where the child is capable of writing such a statement, he or she should be afforded every opportunity to do so. Where a child is not capable, however, the Bill should cater for this situation and include a provision allowing a parent, guardian or other appropriate person compile a statement on behalf of the child victim. In this way, the impact of the crime on the child will be before the court, written by a person who has been able to see and discern the effect the offence has had on his or her young life.

### **3.2.9 Recommendation**

*Head 19 of the Bill does not deal with the situation where the victim is a young child, unable to prepare a Personal Statement. Where the child is capable of writing such a statement, he or she should be afforded every opportunity to do so. Where a child is not capable, however, the Bill should cater for this situation and include a provision allowing a parent, guardian or other appropriate person compile a statement on behalf of the child victim. In this way, the impact of the crime on the child will be before the court, written by a person who has been able to see and discern the effect the offence has had on his or her young life.*

### **3.2.10 Continued Protection for Victims**

While the publication of the General Scheme and Heads of the Victims of Crime Bill is a significant development in the area of victims' rights, other possible avenues of reform previously recommended should be reviewed if the emphasis on the importance of victims within our criminal justice system is to continue. As discussed in my Second Report, delay in criminal cases involving children is a significant problem and research shows that the prosecution of violent and sexual offences can last for two years or more.<sup>186</sup> There are a number of reasons for delays, including a lack of judges and adjournment applications being

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<sup>186</sup> See Geoffrey Shannon, *Second Report of the Special Rapporteur on Child Protection* (2008), section 5.3.

made by either the prosecution or defence on the day the trial is listed to commence. Whatever the reason, such delay in criminal cases can have a detrimental effect on the minor complainant, as the child is essentially being asked to “hold onto” his or her trauma until the case is completed. One or two years can see significant changes take place in a child’s life. Thus any method to ensure trials would proceed efficiently and promptly would help to create as little disruption to a child’s life and development as possible. Given the accused’s right to a speedy trial, it is therefore in the interests of both the prosecution and defence to ensure cases are heard in an efficient manner.

In my Second Report, the establishment of a system of case management on a statutory basis was recommended to deal with the issue of delays in criminal trials and regard was had to such systems in place in other jurisdictions.<sup>187</sup> Case management is a well-known concept in Irish law, having been introduced both in relation to High Court family law cases and within the commercial court in recent years. Now, it is again submitted that a case management system in relation to criminal cases involving children should be introduced by way of a statutory instrument amending the rules of court. This process should be judge-led and it should have a considerable focus on time-limits for processing the case. To ensure that all parties adhere to the system, sanctions should be introduced to penalise any party who does not comply with the directions of the court.

A further recommendation, also previously made, is that greater cooperation takes place between the different professionals involved in the criminal process in order to ensure better protection for child victims. As discussed above, the Victims of Crime Bill takes certain steps to guarantee that those involved in the criminal justice system receive training in relation to victims to a level appropriate to their contact with victims. In addition, it provides that interviews with children must be carried out with specialist interviewers trained for this purpose. While these provisions are beneficial for children, there is nothing in the Bill mandating a joint agency response to crimes committed against minors. A child will have to interact with a number of different professionals throughout the investigation and prosecution process, such as gardaí, social workers, psychologists, solicitors, barristers, members of the courts service and judges. It is therefore recommended that to assist children throughout this process, a specialist interdisciplinary team, consisting of gardaí, social workers and

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<sup>187</sup>*Ibid.*

psychologists should be formed. These teams would travel immediately to the site of a crime involving children as victims and work together in respect of taking the complaint, conducting interviews, undergoing investigations and bringing prosecutions. Ensuring that a consistent, skilled team support the child throughout the process would undoubtedly make the entire process easier for the child and prevent further harm from being caused to him or her.

### **3.2.10 Recommendation**

*A case management system in relation to criminal cases involving children should be introduced by way of a statutory instrument amending the rules of court. This process should be judge-led and it should have a considerable focus on time-limits for processing the case. To ensure that all parties adhere to the system, sanctions should be introduced to penalise any party who does not comply with the directions of the court.*

## **3.3 Probation Reports and Minors: Section 99 of the Children Act 2001**

The importance of protecting the welfare of young offenders has long since been recognised in international law and the age-appropriate treatment of children who commit criminal offences is widely prioritised. Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) states that “in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law or administrative bodies, the best interests of the child shall be the paramount consideration.” Specifically in relation to children within the criminal justice system, Article 37(b) UNCRC provides that the arrest, detention or imprisonment of a child shall be in conformity with the law and shall only be used as a measure of last resort and for the shortest appropriate period of time. The principle that the detention of a child should be only a measure of last resort is a well-established one, emphasised further in Rules 13.1 and 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 and Rules 1 and 2 of the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990.

### **3.3.1 Irish Position**

In Ireland, the Children Act 2001 adopts the position of the aforementioned international instruments. Section 143 of the 2001 Act, as amended by section 158 and Schedule 4 of the Criminal Justice Act 2006, provides that detention cannot be imposed unless the court is satisfied that it is the only suitable manner of dealing with the child and a place in a children detention school is available. Similarly, section 99(2) of the Act provides:



Because it is desirable wherever possible –

- (a) to allow the education, training or employment of children to proceed without interruption,
- (b) to preserve and strengthen the relationship between children and their parents and other family members,
- (c) to foster the ability of families to develop their own means of dealing with offending by their children, and
- (d) to allow children reside in their own homes,

any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.

Supporting these provisions, the 2001 Act gives the court ten non-custodial options to consider upon the conviction of a child, including community service orders, probation orders, day centre orders, mentoring orders and family support orders. It is clear, therefore, that detention is to be the last option for an Irish court in sentencing a child.

### **3.3.2 Bail**

In line with the overall aim of avoiding the detention of young persons, the vast majority of child offenders are remanded on bail, rather than in custody, while they await the outcome of their case. Usually, however, a number of conditions are attached to their bail, such as restrictions on movement, signing on requirements and curfews. Where these conditions are breached, the accused offender may consequently be remanded in custody. As the majority of crimes committed by children are relatively minor, namely offences under the Public Order Act 1994 and the Criminal Justice (Theft and Fraud) Act 2001, to have young people in detention pending the determination of their case is worrying.<sup>188</sup> The prison environment can enhance negative behaviour and have a damaging effect on the child and as discussed above, the detention of children should always be a measure of last resort.

To avoid young offenders being detained pending the hearing of their case, in my Fourth Report, I proposed that a Bail Supervision Scheme be introduced in Ireland.<sup>189</sup> This scheme would provide a method of engaging with young offenders who are on bail, thereby ameliorating the current position in which no assistance or support is available for young persons who are remanded on bail. The Bail Supervision Scheme would give child offenders practical supports based on their specific needs in order to assist them during the court

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<sup>188</sup> See Barnardos, Submission into the Court Service Statement of Strategy 2012-2014, August 2011

<sup>189</sup> See Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010), section 3.1.5.

process and to aid them in complying with their bail conditions. It was suggested that the Bail Supervision Scheme involve the supervision of an offender's court attendance, work with the child's family and monitor any substance use treatment required. Having regard to Bail Supervision Schemes in place in other jurisdictions, it appears that such schemes have the capability to reduce the number of young people re-offending while on bail and the number detained on remand. It is a welcome development, therefore, that the Department of Children and Youth Affairs has recently indicated its intention to implement a Bail Supervision Scheme in line with my recommendations previously made. This is a positive step toward achieving better outcomes for young people in the youth justice system and as a result, better outcomes for society as a whole.

### **3.3.3 Section 99 of the Children Act 2001**

Section 99 of the 2001 Act places a statutory obligation upon the court to order a probation and welfare report in certain circumstances prior to sentencing a young offender. The relevant subsections are as follows:

- Subject to subsections (2) and (3), where a court is satisfied of the guilt of a child, it –
- (a) may in any case, and
  - (b) shall, where it is of the opinion that the appropriate decision would be to impose a community sanction, detention (whether or not deferred under section 144) or detention and supervision,
- adjourn the proceedings, remand the child and request a probation and welfare officer to prepare a report in writing (a “probation officer’s report”) which –
- (i) would assist the court in determining a suitable community sanction (if any) or another way of dealing with the child, and
  - (ii) would contain information on such matters as may be prescribed, including any information specifically requested by the court.

There are two exceptions to this obligation to order a probation and welfare report, both of which are included in subsection 4. The court may decide not to order a probation report where the penalty for the offence of which the child is guilty is fixed by law. It may also refrain from ordering such a report where the child was the subject of a probation report prepared not more than 2 years previously. This pre-existing report will only be sufficient where the attitude of the child to, and the circumstances of, the offence or offences to which that report relates are similar to his or her attitude to, and the circumstances of, the offence to which the child has been found guilty. In addition, the previous report must be available to the court and the court must be satisfied that the material in it is sufficient to enable it to deal with the case.

The obligation set out in section 99 is of crucial importance in order to protect the interests of a young offender and to support the principle that detention should only be imposed as a last resort. If the court is considering detention, therefore, it must adjourn the case to allow for the preparation of such a report, thereby preventing any sentence being imposed without the court receiving the assistance of a probation officer's report. This pre-sanction report enables the probation service to assess the offender's suitability for a non-custodial sentence and outlines proposals for the safe management of the young person, whether by means of a community sanction or an alternative programme. Building on the outcome of structured risk assessment, a report discusses the underlying causes of the young person's offending behaviour, his or her attitude to the crime and motivation to change. It is an important tool to aid a court in sentencing and its significance in promoting the rehabilitation of a young offender cannot be underestimated. The duty placed on a court in section 99 of the 2001 Act has been considered in a number of recent cases. Of particular note are the decisions of Peart J. in *Mooney v Governor of St Patrick's Institution*<sup>190</sup> and Finlay-Geoghegan J. in *Robert Allen v Governor of St Patrick's Institution*<sup>191</sup>.

In *Mooney v Governor of St Patrick's Institution*, the quality of a probation report ordered pursuant to section 99 of the 2001 Act was at issue.<sup>192</sup> The applicant was 16 years of age and pleaded guilty to possession of a screwdriver at Tallaght District Court in September, 2009. The District Judge directed that a probation and welfare report be prepared and remanded the applicant on bail until October 2009. The applicant failed to attend court in October as he was in hospital. On this date, a probation officer's report was produced to the court. It was one paragraph in length and simply referred to the officer's two failed attempts to meet the applicant and his mother due to their non-attendance. The applicant was remanded in his absence on bail until November 2009 whereupon the court imposed a sentence of 30 days' detention.

An Article 40 application was instituted on behalf of the applicant. It was submitted, *inter alia*, that the sentence imposed was unlawful as the District Judge did not have a probation and welfare report which satisfied the requirements for such a report as provided for in section 99 of the 2001 Act. The applicant argued that the probation report which was before

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<sup>190</sup> [2009] IEHC 522.

<sup>191</sup> [2013] 1 I.L.R.M. 181.

<sup>192</sup> [2009] IEHC 522.

the court was incapable of fulfilling the function and objective of section 99. Furthermore, it was pointed out that the report which was before the District Judge did not suggest a wilful lack of cooperation by the applicant such that the probation officer could never envisage being in a position to prepare a full report, or at least one which could assist the District Judge in performing his function in relation to an appropriate penalty.

On the issue of whether the probation officer's report which was before the District Judge was a report that fulfilled the requirements of section 99 of the Act, Peart J. considered the provisions of section 99. The court noted that it imposes an obligation to adjourn and remand to allow the preparation of a probation and welfare report where the District Judge is of the opinion that the appropriate decision would be to impose a community sanction, detention order or a detention and supervision order. Such a report contains "information on such matters as may be prescribed, including any information specifically requested by the court" and it is described in section 99(1)(i) as a report "which would assist the court in determining a suitable community sanction (if any) or another way of dealing with the child...". Peart J. noted that the section is silent as to what consequence should flow from a failure of a child to cooperate in the preparation a report, but recognised that; "It nowhere states that further opportunities should be provided for the child's cooperation if there has been a failure to cooperate in the preparation of such report, although clearly a judge has a discretion to adjourn the matter further."

In the present case, Peart J. stated that there was a failure to cooperate for reasons which were insufficient to satisfy the District Judge. The question of whether or not to adjourn the case again in November 2009 was a matter for the exercise of the court's discretion. Peart J. noted that the report which was before the court was one requested pursuant to the provisions of section 99 of the Act. He went on to state; "While that section provides for the purpose and content of such a report, there will always be situations where by reason of a lack of cooperation by the child or parent(s) the probation officer cannot complete a full report such as would have been contemplated by the District Judge and the Act." Where this occurs, it is for the particular judge in such circumstances to exercise a discretion as to whether it is reasonable to adjourn the case further and acceding to an application for a further adjournment is not dependent upon the probation officer stating in the report available that there is no chance of ever being in a position to assist the court, though such a statement would be relevant.

The court concluded that the report in question was one which the District Judge was entitled to regard as completed in accordance with his request under section 99 despite the fact that the report itself did not address the matters referred to in section 99. Overall, Peart J. held that there was nothing to suggest that the District Judge had failed to have regard to the broad principles provided for in the 2001 Act and the applicant was held to be lawfully detained.

In *Robert Allen v Governor of St Patrick's Institution*, the High Court considered the lawfulness of the detention of a minor.<sup>193</sup> The applicant in this inquiry under Article 40.4.2 of the Constitution was serving a four-month sentence. His detention was challenged on the ground that there was a mandatory requirement on the District Court to request a probation report before imposing a period of detention on an underage individual. It is necessary to first set out the facts of the case.

The applicant was 17 years of age. He appeared in Limerick Children's Court in November, 2012, where he pleaded guilty to a number of offences relating to burglary and section 112 of the Road Traffic Acts. A plea in mitigation was delivered to the court by the applicant's solicitor and a doctor's letter was handed into court, indicating that the applicant had a diagnosis of Autistic Spectrum Disorder, Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. At this point, the District Court Judge stated that he was minded to request a report from the Probation and Welfare Service. The solicitor for the applicant, however, informed the court that the applicant had instructed that he would not cooperate or liaise with the Probation Service and told the court that on the basis of his instructions, there was no value in the court directing the preparation of a report. Proceeding to sentence, therefore, the District Court Judge imposed four months' detention on the applicant.

An application was then brought pursuant to Article 40.4.2 of the Constitution. It was claimed by the applicant that he was in unlawful detention as he had been sentenced without a probation report having been ordered and the District Court Judge, being under a statutory duty to order such a report, was therefore in breach of section 99 of the Children Act 2001. The respondent argued that the detention was lawful despite the obligation on the court under section 99 to order a probation report, in circumstances where the applicant had discouraged

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<sup>193</sup> [2013] 1 I.L.R.M. 181.

the preparation of a report. As the purpose of probation reports is to assist the court in determining the appropriate sentence to be imposed on an offender, the applicant's intention not to engage with the Probation and Welfare Service would have defeated this purpose and therefore it was unnecessary for the District Court Judge to order its preparation. Furthermore, the respondent contended that the applicant had lost his right to object to the court's failure to order a probation report where he failed to request one and actually frustrated the formation of a report. The respondent relied upon the principles enunciated by Henchy J. in *State (Byrne) v Frawley* to emphasise the submission that the applicant had lost his right to make this objection now, having failed to do so in the District Court at the time of sentencing.<sup>194</sup>

In response, it was argued on behalf of the applicant that the obligation imposed on the court by section 99 of the Act must be construed in the context of its purpose and having regard to other sections of the 2001 Act, in particular sections 96 and 143 which emphasise that detention of a child is to be the last resort. It was contended that the District Court Judge failed to comply with the statutory obligation placed upon him under section 99 and given the statutory scheme of the 2001 Act, and in particular the aforementioned provisions, this was a default of fundamental requirements. The applicant submitted that a court cannot be lawfully dissuaded by a child or his solicitor from requesting a report prior to making a decision on sentence and that section 99, properly interpreted, requires a judge to request a report, irrespective of the child's wishes.

Finlay-Geoghegan J. held that the applicant was not lawfully detained in St Patrick's Institution. The court stated that section 99 of the Children Act 2001 imposes a mandatory obligation on a court to obtain a probation report in respect of child prior to imposing a sentence which involves, *inter alia*, a period of detention. In the absence of a probation report, a court does not have jurisdiction to impose a sentence which involves a period of imprisonment. The court stated:

...it does not appear to me, having regard to the statutory scheme, and in particular, the purpose of a report as a tool in formulating an appropriate sentence in accordance with the requirements of s.96, that "a period of detention should be imposed only as a measure of last resort", and the prohibition in s.143 against making an order imposing a period of detention unless it is "the only suitable way of dealing with the child", that a court may be lawfully dissuaded from requesting a probation report. Section 99, in

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<sup>194</sup> [1978] I.R. 326.

my judgment, mandates the requesting of a report irrespective of the attitude or wishes of a child or his solicitor.

The court recognised that where a person freely and knowingly elected not to make a particular objection at trial, he might subsequently be considered to have lost his right to make the objection. Where it is alleged that a free election frustrated the making of an objection of jurisdiction or equivalent, the court is to look at whether the evidence supports that the election was “freely and knowingly” made. As the applicant in this case was a minor and a vulnerable person given his diagnosis, Finlay-Geoghegan J. was not satisfied that the applicant had waived his statutory right under section 99, such that the right could not be raised.

Ultimately, the court determined that the failure of the District Judge to order a probation report prior to imposing a sentence of detention was a default of a fundamental requirement in the statutory scheme enacted by the Oireachtas regarding the sentencing of children as provided in sections 96, 99 and 143 of the 2001 Act. The sentence was not imposed in accordance with law and it did not constitute a *bona fide* exercise of the court’s jurisdiction. Pursuant to Article 40.4.2, therefore, the court ordered the applicant’s release.

### **3.3.4 Implications of *Robert Allen* case**

From a child protection perspective, the decision in *Robert Allen* is to be welcomed. The High Court has clearly recognised that the obligation to order a probation and welfare report under section 99 of the 2001 Act is a mandatory one and young offenders who could face a period of detention must be given the opportunity to engage with the Probation Service. Even in a situation where a child is informing the court that he or she will not cooperate with a probation officer in the preparation of a pre-sanction report, the court is mandated to make an order under section 99. In this way, the interests of young offenders are protected and their misguided refusal to cooperate, whether as a result of their youth, inexperience or vulnerability, will not deprive them of the chance to address their criminal activity with an experienced probation officer.

The High Court judgment in *Robert Allen* is of increased importance in light of the decision in *Mooney v Governor of St Patrick’s Institution*. In that case, as discussed above, it was made clear that where a probation report is ordered and a child fails to cooperate with its preparation, whether through non-attendance at appointments or otherwise, there is no

obligation on the court to further adjourn the case to give the young offender another opportunity to engage with the Probation Service. A pre-sanction report which simply lists the probation officer's failed attempts at meeting the child was regarded as completed for the purposes of section 99 of the 2001 Act, despite the lack of any substance in the report. This decision emphasises that a court may adjourn a case to enable a child a further opportunity to meet with his or her probation officer but that it has a discretion not to where the offender's explanation for his or her previous lack of cooperation is not accepted by the court.

Regarding such a scant report as that provided to the court in *Mooney* as sufficient to meet the obligation in section 99 is worrying. Clearly the purpose of a probation report ordered under section 99 is to aid a court in determining the appropriate sentence and to assist it in determining an alternative way of dealing with the child to imposing a period of detention. Whether a report which contains almost no content really fulfils this purpose is questionable, however it is evident from this decision that where a child does not take the opportunity to engage with the Probation Service, the court may legitimately refuse to give him or her more time to do so and may solely have regard to the brief report prepared. In light of the *Mooney* decision, Finlay-Geoghegan J's judgment in *Robert Allen* is helpful in that it makes clear that a probation report must be ordered by the court where the circumstances in section 99 apply regardless of the wishes of the child. A court cannot properly be persuaded to refrain from ordering a pre-sanction report and a child's indication that he or she will not cooperate in the preparation of such a report will be disregarded as irrelevant. Notwithstanding the child's aversion to a report, the decision in *Robert Allen* gives the young offender a chance to engage with the Probation Service and potentially address his or her criminal behaviour to his or her benefit, whether he or she desires the report or not. In essence, while *Mooney* has demonstrated the negative consequences that may flow from a young person's lack of cooperation in the preparation of a probation report, *Robert Allen* prevents any harmful effects stemming from an indication by a young offender that he or she will not cooperate with the Probation Service – it cannot affect the decision of the court to order a report under section 99.

One recommendation regarding the decision in *Robert Allen* might be made. The court stated that where the offender "freely and knowingly" elected not to make a particular objection at trial, he might subsequently be considered to have lost his right to make the objection. This leaves it open to a court to consider the circumstances in which a young offender did not take



issue with the trial judge's failure to order a probation report and assess whether he or she freely and knowingly decided not to object to the court's decision. It is submitted that no juvenile should be regarded as capable of waiving his or her statutory right under section 99 and whether he or she freely and knowingly refrained from objecting to the court's course of action should be irrelevant. In this regard, section 99 might be amended to include a provision in which it is emphasised that a minor cannot, under any circumstances, waive his or her right to have a probation report compiled under section 99 of the 2001 Act.

### **3.3.4 Recommendation**

*Section 99 of the Children Act 2001 should be amended to include a provision to the effect that a child cannot, under any circumstances, waive, or be deemed to have waived, his or her right to have a probation report compiled under section 99 of the 2001 Act.*

### **3.3.5 Section 100 of the 2001 Act**

Section 100 of the Children Act 2001 enables the court, where it is satisfied of the guilt of the child, to defer making a decision as to sentence in order to permit the preparation of any report, including pre-sanction reports ordered under section 99 of the Children Act 2001. The child may be remanded for this purpose, whether on bail or in custody, but only for 28 days. A probation report, therefore, must be completed within this 28 day period. Where a child in respect of whom any such report is being prepared has been remanded on bail, the court may allow one extension of not more than 14 days for its preparation if satisfied, on application by the person preparing the report, that it is proper to do so. This provision is in line with another important principle in the realm of youth criminal justice – cases involving children are to be dealt with as expeditiously as possible. This was discussed in the Supreme Court decision of *B.F. v. D.P.P.*,<sup>195</sup> where the court held that in the case of a criminal offence alleged to have been committed by a child, there was a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial. The recent High Court decision of Kearns P. in *R(R)(a minor) v DPP*,<sup>196</sup> affirmed on appeal to the Court of Appeal, considers section 100 of the 2001 Act and demonstrates the impact of the decision in *Robert Allen v Governor of St Patrick Institution*.

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<sup>195</sup> [2001] 1 I.R. 656.

<sup>196</sup> [2015] I.E.H.C.116.

In *R(R)(a minor) v DPP*, the applicant child pleaded guilty to two robbery offences before His Honour Judge Nolan in Dublin Circuit Court in October 2014. Judge Nolan remanded him in custody with consent to bail to 14 February 2015 for sentence and ordered a probation report. Neither the defence nor the prosecution made any reference to the provisions of section 100 of the Children Act 2001 which only permits a remand of 28 days in custody with the possibility of a further extension of 14 days if the accused is admitted to bail. At some point later, the DPP became aware of the potential issue arising by reason of the operation of section 100 and on 25 November 2014, an application was made to Her Honour Judge Ring to vacate the February date for sentence and for the sentencing to be brought forward to 28 November 2014. The applicant resisted this application, arguing that the effect of section 100 was that the Circuit Court could no longer proceed to sentence once the statutory time limits had expired. Judge Ring rejected that argument. She vacated the order which had been made by Judge Nolan, remanded the applicant on bail for sentence on 28 November 2014 and directed that a probation report be available. It is worth noting that the applicant was in custody at this time serving a sentence regarding an unrelated matter. On 26 November 2014, the applicant was granted leave to seek certiorari of the orders of 17 October 2014 and 25 November 2014. The DPP consented to the quashing of both orders, but the issue was whether or not the matter should be remitted to the Circuit Court for sentencing. The net question therefore was - do the provisions of section 100 of the Children Act 2001, requiring judges to adhere to a twenty eight day (or, in some instances, forty two day) time limit when imposing sentence on minors, have the effect that once these time limits have been exceeded, there is no longer a power to impose a sentence?

In a reserved judgment delivered in March 2015, Kearns P. held that the Circuit Court retained jurisdiction to impose sentence, the expiry of the statutory time limits notwithstanding. The court stated that the relevant legislation did not oust or limit the jurisdiction of the Circuit Court to hear the case, despite the special onus on the State to deal with cases involving children as expeditiously as possible. The purpose of section 100, namely to enable the court to exercise a supervisory jurisdiction over the prompt preparation of a report, was emphasised as important in this regard. Kearns P. referred to the decision in *Robert Allen v Governor of St Patricks Institution*, where it was held that the court must order a probation report before imposing a sentence of detention on a child. He noted that the duty to order probation reports in section 99 is mandatory, but stated that in some cases, for whatever reason, the report might not be available within the statutory time limit. To argue

that the court must proceed to sentence in a situation where a probation report is not before it or it will consequently lose its jurisdiction would be inconsistent with the ruling in *Robert Allen* and would deprive a child of an opportunity to engage with the probation services. The court held that while there is a duty for children to be dealt with expeditiously, on certain rare occasions, the court might be required to go beyond the time limit set out in section 100. He concluded; “I am satisfied on all the circumstances of this case, having regard to the nature of the delay, the reasons for the delay and the fact that the applicant spent no additional time in detention as a result of the delay, that this is one such case.”

On appeal to the Court of Appeal, Hogan J. upheld the decision of Kearns P. The court agreed that while the general objective of the time limits set out in section 100 was the speedy determination of cases involving young offenders, the more specific objective of section 100 appeared to have been to ensure that those charged with the preparation of a report concerning the welfare of the offending child did so in a timely and effective fashion. This purpose was underscored by subsection (3) which sought to encourage those responsible for the preparation of a probation report to complete same at least four working days before the end of the remand period. While Hogan J. held that the time limits imposed by section 100 are in principle mandatory, and clearly the Circuit Court lacked jurisdiction to remand the accused in November 2014 until February 2015 for sentence, the court noted that the DPP did not seek to stand over the making of a remand order of that duration. The issue in this appeal was what the consequences (if any) of the failure to observe those time limits should be. Hogan J. was of the view that the Oireachtas did not intend or contemplate that the court would lose its jurisdiction to impose sentence solely due to the failure to honour the time limits under the 2001 Act. Nothing in section 100 of the 2001 Act indicates that the court should somehow ultimately abstain from pronouncing sentence or that it should be precluded from doing so where these time limits have not been honoured. The court recalled the judgment of Finlay-Geoghegan J. in *Robert Allen* and the determination that section 99(1)(b) of the 2001 Act imposes a mandatory obligation on the sentencing court to adjourn sentence pending receipt of a probation report in those cases where a custodial sentence is considered to be the most appropriate sentence. Hogan J. stated, therefore; “It would be strange if a subsequent delay on the part of a third party in providing a copy of that report had the effect of precluding the court from imposing sentence. This is especially so when it is borne in mind that it is possible that any such delays have been brought about by the unwillingness of the young offender in question to engage with the probation service or other outside expert

responsible for preparing the report requested by the sentencing court.” It could have hardly been the intention of the Oireachtas to deprive the court of its sentencing jurisdiction where a probation officer, due to illness, has failed to provide his or her report within the requisite time period. Hogan J. therefore held that the decision of Kearns P. was correct and that the appeal should be dismissed.

While predominantly dealing with the jurisdiction of the court to impose sentence after the expiration of the statutory time limits set out in section 100, the decision in *R(R)* is significant in that the Court of Appeal gave explicit recognition to the judgment in *Robert Allen*. Referencing Finlay-Geoghegan J’s determination, the court noted the mandatory obligation on the sentencing court to adjourn the sentencing of a young offender pending receipt of a probation report in those cases where a custodial sentence is being considered by the court. It is, however, somewhat concerning that failure to abide by the statutory time limits as set out in section 100 does not deprive a court of its jurisdiction to sentence a minor, especially in circumstances where the expiration of the time limit was not the fault of the juvenile.

### **3.4 Sentencing for Children**

In respect of child offenders, where a child pleads or is found guilty of a criminal offence, there are a number of sentencing options available to the trial judge. The Children Act 2001 in particular vastly expanded the options that the court may use, without prejudice to its general powers.<sup>197</sup> It is open to the court to simply reprimand a child, thereby imposing no formal penalty. In the alternative, the court may make any of a number of orders, such as an order of detention, a deferred detention order, a conditional discharge order, an order that the child pay a fine, a compensation order or an order that the child’s parent or guardian pay compensation. For the purposes of this Report, the use of two specific sentencing options requires consideration – community service orders and suspended sentences. In addition, the detention of children and the reforms introduced by the recent Children (Amendment) Act 2015 will be considered.

#### **3.4.1 Community Sanctions**

Section 115 of the Children Act 2001 provides for community-based sanctions which greatly increase the non-custodial options available to the court and assist in ensuring that custodial

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<sup>197</sup> See Walsh, *Juvenile Justice*, (2005) Thomson Round Hall.

sentencing is treated as a measure of last resort. A community sanction means that the child will receive an order from the court to do some service in his or her community or attend a particular programme, thereby permitting the child to stay both at home and in his or her school.

There are ten community sanctions set out in section 115;

- (a) a community service order for a child of 16 or 17 years of age,
- (b) a day care centre order,
- (c) a probation order,
- (d) a probation (training or activities) order,
- (e) a probation (intensive supervision) order,
- (f) a probation (residential supervision) order,
- (g) a suitable person (care and supervision) order,
- (h) a mentor (family support) order,
- (i) a restriction on movement order, and
- (j) a dual order.

Pursuant to section 116 of the 2001 Act, prior to making an order imposing a community sanction, the court must have considered a probation or other report and have heard the evidence of any person whose attendance it may have requested, including any person who prepared such a report. In addition, the court must give the child's parent, guardian or spouse, if present in court, or other adult relative, an opportunity to give evidence. Only then may it impose on the child a community sanction, if it considers this sanction as the most suitable way of dealing with the case. Given that the nature of a community sanction requires a level of co-operation from the child, the court must explain to the child why the order is being made, what it entails and what is expected from the child. Where the child does not express a willingness to comply with the sanction, the court is given the option of dealing with the case in another way, but as always in relation to children – detention is to be the last resort. Section 117 of the Act enables the court to attach general conditions to a community sanction order, such as requirements relating to school attendance, limiting the child's presence at children premises and prohibiting the consumption of alcohol.

### **3.4.2 Community Service Orders**

Community service orders are one of the community sanctions which the court has jurisdiction to impose on a juvenile offender. As discussed by O'Malley, community service orders have a number of clear advantages. They have the capacity to save offenders from the experience of detention; they allow for some measure of reparation to the community; and

they are far more cost-effective than imprisonment.<sup>198</sup> The cost of imposing a community service order is at least 66% cheaper than imprisonment and in some cases this escalates to approximately 89% cheaper.<sup>199</sup> A community service order may be imposed on children aged 16 and 17 who have been convicted of an offence, only where the court is of the opinion that the appropriate sentence would otherwise be one of detention in either a children detention centre or a children detention school. A community service report is presented to court outlining the child's suitability for this community sanction and it will also detail any proposed conditions of the community service order. It will outline if the child is fit and able to carry out a community service order and if he or she consents to complete the proposed order. Once made, this order may require the offender to work, unpaid, for a minimum of 40 hours up to a maximum of 240 hours in any 12 month period. It is thought that the imposition of these orders will help juvenile offenders to understand the impact of their actions on others, give back to the communities they have harmed, develop their skills, and raise awareness of their own self-worth.

Unfortunately, the use of community service orders in the sentencing of juvenile offenders in Ireland is relatively limited. According to the 2014 Annual Report of the Probation Service and its statistics in relation to young persons, in 2014 there were 775 new referrals made by the courts to the Probation Service for probation (pre-sanction reports). Only 9 of these pre-sanction reports were specifically directed to consider community service as a possible sentencing option and there were only 15 referrals for community service reports in that year. In light of the lack of emphasis on community service by the courts when ordering reports to guide them in their decision making, it is unsurprising that only 20 community service orders were made in respect of young offenders in 2014, down from 35 in 2012.

The Irish Youth Justice Service (IYJS) is responsible for reform in the area of youth justice and has been very effective to date. It focuses on diversion and rehabilitation, emphasising greater use of community-based interventions and promoting initiatives to deal with young people who offend. Community sanctions are operated by the Young Persons Probation (YPP) division of the Probation Service. Its work is supported by a network of Community-Based Organisations (CBOs) and programmes funded directly through the IYJS, in addition to a range of collaborative initiatives and arrangements with the criminal justice sector, child

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<sup>198</sup> O'Malley, *Sentencing Law and Practice* (2nd ed., Thomson Round Hall, 2006) at p.478.

<sup>199</sup> Irish Probation Service (2011) Annual Report 2010.

welfare services, and the community and voluntary sector. It is submitted that the full potential of community service as a possible sentencing option is not being fully exploited at present and that the IYJS and the YPP should carry out research in this area in order to ascertain how best to promote community service as a viable alternative to detention for children.

### **3.4.2 Recommendation**

*Promote community service as a viable alternative to detention for children.*

### **3.4.3 Imaginative New Programmes**

In general, community service work can include: ground clearance work and general gardening projects; graffiti removal; environmental work; recycling projects; basic building maintenance and landscaping; improvements to park and community facilities; painting and decorating in community centres; assisting voluntary and community clubs, facilities and bodies; working with individuals or groups in need; and supporting local initiatives. In respect of juveniles, it is recommended that more imaginative community service programmes be introduced specifically designed to develop the skills and interests of each individual young offender, while simultaneously benefiting his or her local community. Community service needs to interest and engage young persons if they are to be found willing to partake in such programmes.

Consideration might be given towards allowing young offenders carry out their community service by directing them to engage in an area of specific interest to them. This may include volunteering with their local GAA or soccer club, assisting with a mixed martial arts (MMA) or boxing organisation in their area or helping in a youth club, dance or drama school or musical society. Each programme should be catered to the individual offender. Whatever their chosen area of interest, the community service programme might include an element of learning – to help the young person improve his or her knowledge and skill with respect to his or her area of interest, an element of work – to ensure the offender appreciates the hard work involved in the organisation of activities, whether by preparing gyms or cleaning changing rooms, and an element of teaching – by allowing the juvenile offender become involved with younger members of the club/organisation, teaching and assisting them in their training and development. Such innovative programmes may increase the court's reliance on community service as an alternative to detention and may increase the willingness of young

offenders to partake in such community service. Involvement with such activities may also improve the employability of juvenile offenders and assist in breaking the cycle of offending, providing them with valuable structure and routine. Innovation in this area is undoubtedly required if community service for young persons is to be readily regarded as a viable alternative to detention.

### **3.4.3 Recommendation**

*In respect of juveniles, it is recommended that more imaginative community service programmes be introduced specifically designed to develop the skills and interests of each individual young offender, while simultaneously benefiting his or her local community.*

### **3.4.4 Suspended Sentences**

Section 99 of the Criminal Justice Act 2006 places the common law mechanism of the suspended sentence on a statutory footing for the first time. While the introduction of this legislation almost a decade ago was a welcome development, a number of difficulties in relation to its operation have caused problems for adult and juvenile offenders alike.<sup>200</sup> In light of these difficulties and given the increasing amount of litigation in respect of section 99, a review of this provision by the legislature is undoubtedly necessary in order to clarify and give certainty to this integral sentencing tool. Notwithstanding its utility as a sentencing option, a suspended sentence granted in respect of a juvenile offender leaves him or her with a criminal conviction. It is suggested, therefore, that should the court decide to allow the offender a further opportunity to be of good behaviour thereby avoiding detention, judicial emphasis should be on the use of probation orders as opposed to the suspended sentence regime as the appropriate course of action, leaving children without a criminal conviction where at all possible.

At common law, a suspended sentence was imposed only where the sentencing court was satisfied that a custodial sentence was merited. Having so decided and determined what length was appropriate, only then would the judge proceed to consider whether there were

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<sup>200</sup> Regard may be had to Dwyer, “99|9: Nine Issues with Section Ninety-Nine” (2015) 5 *The Bar Review* 105 for a comprehensive account of the different issues that have plagued section 99 since its introduction, some of which are discussed in this chapter of my report.



reasons to justify suspending the sentence imposed.<sup>201</sup> Sections 99(1) and (2) of the 2006 Act now govern the imposition of suspended sentences:

(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

(2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during-

(a) the period of suspension of the sentence concerned, or

(b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,

and that condition shall be specified in the order concerned.

The court may impose any other condition it considers appropriate having regard to the nature of the offence, including conditions that may reduce the likelihood of the offender committing any further offences. Such conditions may, for example, be to undergo drug treatment, an anger management programme or to cooperate with the Probation Service.

At common law, where there was a breach of a suspended sentence, the court was required to revoke it once the breach was not *de minimus*. The court was not permitted to exercise any discretion in this regard. Similarly, there was no provision allowing the court to revoke only part of the sentence imposed. Section 99 of the 2006 Act ameliorates this unsatisfactory position and promotes fairness in the use of suspended sentences. Pursuant to subsections (10) and (17), the court has discretion not to revoke the suspended sentence where to do so would be “unjust in all the circumstances of the case”. This allows the court to determine whether revocation would be unjust and it is not strictly bound as it was at common law. Furthermore, the court may decide to revoke the custodial sentence in part only, thereby preventing any disproportionate reactivations of sentences.

Amendments were made to the 2006 Act by two subsequent statutes, the Criminal Justice Act 2007 and the Criminal Justice (Miscellaneous Provisions) Act 2009. The Criminal Justice Act 2007 altered the procedure for the revocation of the suspended sentence as set out in section 99. Initially, it was only after conviction and sentencing for an offence in breach of a bond would the offender be remanded to the court which passed the suspended sentence for revocation. The 2007 Act changed this procedure, instead providing that the revocation take

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<sup>201</sup> Smith & Dwyer, “Suspended sentences following the 2006 and 2007 Criminal Justice Acts”, (2009) *The Bar Review*, 2, 32-36.

place after conviction, but prior to sentencing for the triggering offence. This new ordering of events serves to ensure that the sentence for the offence committed in breach of the bond will be imposed after the decision has been made in relation to the revocation, thereby meaning that the sentences are imposed in a chronological order.<sup>202</sup> A further clarification of this procedure was introduced by the 2009 Criminal Justice (Miscellaneous Provisions) Act. Section 51 thereof amended section 99, providing that only offences *committed* during the currency of a bond would trigger the revocation procedure. This amendment makes it clear that where an offender is convicted of an offence during the currency of a suspended sentence which was committed prior to the imposition of the suspended sentence, the revocation procedure will not be activated.

As mentioned above, a number of issues have arisen in recent years concerning the operation of section 99 of the 2006 Act, as amended. Given the need for certainty, it is recommended that further legislative intervention take place to ensure that one comprehensive statutory regime is enacted to govern effectively the use of suspended sentences. Reform would serve to remove doubt over the operation of problematic aspects of the 2006 Act and consolidate an Act which, in a short time span, has already been the subject of amendments. The matters discussed below are in particular need of clarification.

Section 99 of the 2006 Act allows the court to revoke only part of the suspended sentence imposed. If a 5 year suspended sentence is imposed on an offender who later commits a subsequent offence in breach of the conditions of his or her suspension, the court is not obliged to reactivate the entirety of that sentence without reflection. Where it is of the opinion that it is unjust to revoke the sentence in full, such as where a relatively minor offence has been committed triggering the revocation, the court may decide, for example, to reactivate only 2 years of the 5 year sentence. What remains questionable is whether the remaining 3 year part of the original sentence continues to be suspended or whether the reactivation of the 2 year part of the sentence prevents any subsequent revocation of the remaining part. Dwyer notes that this issue has yet to be determined by the Superior Courts and takes the view that the wording of section 99(1) suggests that the remaining part which has not been reactivated does not continue to be suspended.<sup>203</sup> The exact legal position with respect to this matter however requires urgent clarification. Sentencing judges often use their

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<sup>202</sup> See Dwyer, “99|9: Nine Issues with Section Ninety-Nine” (2015) 5 *The Bar Review* 105 at p.105.

<sup>203</sup> *Ibid.*, at p.108.

discretion not to re-impose the suspended sentence in its entirety. Therefore, for the purposes of all involved, this matter ought to be promptly addressed.

Section 99 is silent as to whether the court may suspend a sentence for a period of time in excess of the sentence itself. Dwyer asserts that this is possible given the wording of section 99(2) – in that it refers to a “period of suspension” without linking it to the length of the sentence so suspended.<sup>204</sup> This was at issue in the decision of Peart J. in *DPP v Vajeuskis*.<sup>205</sup> In that case, a four month sentence of imprisonment was imposed on the defendant. This was suspended for a period of two years. Peart J. stated, *obiter*, that the sentencing judge was not restricted as to the length of time for which he could suspend the defendant’s four month sentence, noting that the Act was silent on this matter and as to the maximum length of any such suspension. He declared as follows:

...nowhere within the provisions of section 99 of the Act of 2006 has any provision been made for any maximum length of sentence which may be suspended, or any limit to the length of any such suspension. Subsequently the Oireachtas has twice enacted amendments to section 99 of the Act of 2006, and on neither occasion did it take the opportunity to include any limitation on the maximum length of sentence which may be suspended, nor the length of any such suspension. In such circumstances, it seems to me necessary to conclude that the intention of the Oireachtas is clear, namely that there should be no such limitations imposed by statute.

Notwithstanding this indication that sentencing in such a manner is permissible, clarification for the purpose of certainty would be welcome. This would ensure that all juveniles are aware that their sentence of detention may be suspended for a length of time in excess of the actual sentence imposed.

Whether or not the original sentence can be revisited on a revocation application is another question that requires definitive clarification. Two contrasting approaches have been indicated by the courts. In *Kiely v DPP*,<sup>206</sup> the trial judge imposed on the accused a sentence of two years for the offences committed on 16 April 2005, a two year sentence for the offences committed on 23 April 2005, and a two year sentence for the offences committed on 26 May 2005 – all of which related to dangerous driving and driving while intoxicated. The sentences were consecutive, thus the applicant was sentenced to a total of six years imprisonment, and disqualified from driving for twelve years. The court, however, suspended

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<sup>204</sup> *Ibid.*

<sup>205</sup> [2014] IEHC 265.

<sup>206</sup> Unreported Court of Criminal Appeal, 19 February 2008.

the sentence of six years imprisonment for six years, on condition that the applicant complete a course in Coolmine Therapeutic Community, notify the gardaí of his address, remain sober, provide urine analysis every three months to the gardaí, keep the peace and be of good behaviour for six years. Subsequently, the applicant was convicted of public order offences in the District Court and at the revocation hearing, the Circuit Court reactivated four of the six year sentence, suspending the final two years. The applicant appealed this decision. While his appeal was dismissed, Denham J., in the course of her *ex tempore* decision, made *obiter* comments stating that in a revocation hearing, the court has a right to vary the original sentences.

These remarks are in direct contravention with the subsequent decision of Peart J. in *DPP v Vajeuskis*.<sup>207</sup> In that case, the applicant received a four month sentence in the District Court arising out of road traffic matters. It was suspended for two years. Following his conviction for subsequent offences, at the revocation hearing the applicant argued that his original sentence was invalid because the period of suspension exceeded the length of the sentence and in addition, the maximum sentence that could be imposed for that offence. A case was stated to the High Court by District Court Judge Hughes in relation to this issue. Peart J. held that at the revocation hearing, it is not open to the court which imposed the suspended sentence to enter into an enquiry as to whether the sentence imposed was a lawful one. He went on to state; “As far as the sentence itself is concerned, there could be no question of the judge reconsidering the sentence.” This decision makes it clear that the original sentence cannot be revisited at the revocation hearing as the only question before the court is whether or not to revoke the suspension. While it is likely that this decision is unaffected by the previous comments of Denham J. in *Kiely* as argued by Dwyer, legislative clarification of the exact position would be welcome to avoid any future doubt.

Numerous other difficulties with the operation of section 99 of the 2006 have given rise to an expanding body of case-law, discussed fully by Dwyer in his recent article. What remains evident is that section 99 as a sentencing option is confusing, problematic and in need of clarification. It is recommended that consolidating legislation be introduced to address the aforementioned concerns and to bring the suspended sentence regime out from under its grey cloud of uncertainty.

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<sup>207</sup> [2014] I.E.H.C. 265.

#### **3.4.4 Recommendation**

*Further legislative intervention is required to ensure that one comprehensive statutory regime is enacted to govern effectively the use of suspended sentences.*

#### **3.4.5 Detention**

For child offenders, the imposition of a sentence of detention is a measure of last resort. Despite this guiding principle, however, a number of young persons are detained in this jurisdiction. It is imperative, therefore, that they are properly treated therein. Until recently, a child could be ordered to be detained by the court in either a detention school or in Saint Patrick's Institution in Dublin. In my Fifth Report, I repeated my concerns about children being detained in Saint Patrick's Institution - an adult facility alongside adult offenders.<sup>208</sup> Those aged 15 years and under were sent to the detention schools, where a model of care, education and rehabilitation was adopted. For 16 and 17 year olds, however, their detention took place in Saint Patrick's Institution, with its "penal model" and environment wholly inappropriate to their needs.

Legislation has now been introduced to rectify this unsatisfactory position. The Children (Amendment) Act 2015 was enacted in July of 2015. It provides the legal framework to facilitate the amalgamation of the children detention schools to create a single campus. This new children detention facility has been completed at the existing campus in Oberstown, (County Dublin). Therefore, the 2015 Act and the completion of this facility have accordingly ended the detention of 16 and 17 year olds in Saint Patrick's Institution. All legal options on the statute book which allow for the detention of children in adult facilities have been repealed and these developments are undoubtedly to be welcomed as a very positive step for the protection of children who have been sentenced to detention.

In addition, the Children (Amendment) Act introduces further welcome reform. It provides for a system of remission in the children detention schools. This development follows on from the High Court decision of Hogan J. in *Byrne v Director of Oberstown School*.<sup>209</sup> In that case, as discussed in my Seventh Report,<sup>210</sup> the failure to provide such child offenders detained in detention schools with the benefit of remission rules was held to be a breach of

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<sup>208</sup> See Geoffrey Shannon, *Fifth Report of the Special Rapporteur on Child Protection* (2011), section 1.6.3.

<sup>209</sup> [2013] I.E.H.C. 562.

<sup>210</sup> See Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014), section 2.7

Article 40.1 of the Constitution, requiring equality before the law. Enabling children to benefit from remission as provided for in the 2015 Act is a positive move towards encouraging good behaviour in detention facilities.