

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

**A Report Submitted to the Oireachtas**

**Geoffrey Shannon**

**2011 Report**

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## **ACKNOWLEDGEMENTS**

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

Ross Aylward

Aoife Daly

Ciara Fitzgerald

Edel Kennedy

Cara Rossney

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

## EXECUTIVE SUMMARY

### Section 1: Child Protection and Developments in International Law

The protection of children is not a uniquely Irish concern. It is a concern of the international community as a whole. A uniform approach must be taken to the protection of children so as to ensure their welfare. In that regard it is imperative to monitor, and, if necessary, incorporate, developments in international child protection.

Throughout Europe there are a variety of legal systems and conventions relating to the protection of children. Within the EU the recent decision of the Court of Justice of the European Union in the case of *Zambrano v. Office National de L'Emploi* establishing that non-EU parents of a dependent child who is an EU citizen are permitted to reside and work in the EU country of which the child is a citizen will have, and indeed has had already, a considerable impact in Ireland. It is now necessary to reassess state policy on this issue so as to ensure that the rights of such children are protected.

In recent years the rights of children have been brought to the forefront of EU law, most notably by the express recognition of those rights in Article 24 of the Charter of Fundamental Rights of the EU. Also, in an effort to ensure adequate protection and respect for these rights, the European Commission has recently published a document entitled *An EU Agenda on the Rights of the Child*. This seeks to outline measures that Member States ought to implement for the purpose of child-friendly justice, the protection of vulnerable children, the participation of children in matters affecting them and the raising of children's awareness of their rights.

Developments in respect of the European Convention on Human Rights have also taken place. For example, questions need to be asked of the recent increase in the number of children taken into the care of the State. Is enough being done to protect the rights of families at an early stage so as to prevent the necessity of taking a child into care? Support services and pre-proceedings work in Ireland need to be improved. This is not simply a funding issue but also one that needs to be addressed by management. Where a request arises under s.47 of

the Child Care Act 1991 to provide family services for parents as well as for children to ensure that “marte meo attachment” help or advocacy services for parents with mental health problems, or that parenting classes are made available for the parents of the children, there is anecdotal evidence to suggest that such applications are resisted by the HSE on the basis that s.47 is confined to the child.

The decision of the European Court of Human Rights in the case of *Neulinger and Shuruk v. Switzerland* reminds us of the need to ensure that Hague Convention cases on child abduction are processed and determined expeditiously so as to ensure that the rights of all parties, including the child or children, are properly upheld.

The Convention on the Rights of the Child, albeit that it has been signed and ratified by Ireland, has yet to be incorporated into Irish law. The failure to incorporate it is disappointing for it would have a positive impact on Irish law. The manner in which Wales has incorporated the convention is an example to consider, although a more comprehensive incorporation of the Convention on the Rights of the Child by legislation would surely be more desirable. This question of incorporation forms only a part of the general debate on proposals to amend the Constitution in respect of the rights of children; for rights-based child law is imperative, if for no other reason than that rights bring accountability with them, a fact highlighted by the recent decision of the UN Human Rights Council to adopt a text of an individual’s complaints mechanism for the convention. Incorporation of such a mechanism in Ireland would bring with it the enforceability of substantive rights in favour of children.

In 2011 the UN Committee Against Torture conducted its first examination of the implementation in Ireland of the UN Convention Against Torture. Disappointingly, it expressed some concerns, particularly at the lack of follow-up to the *Report of the Commission to Inquire into Child Abuse* (the ‘Ryan Report’). The UN Committee also urged Ireland to ensure all victims of abuse obtain redress and highlighted the seriousness of the failure of the State in respect of the survivors of the Magdalene laundries, who were once children, a failure at all levels. There has been a failure to properly investigate complaints, to provide redress for victims and to hold perpetrators accountable for the abuse and cruelty

suffered by their victims. The seriousness of this cannot be underestimated. Other issues highlighted by the UN Committee that require consideration include the use of detention facilities for children and the physical punishment, including chastisement, of children.

Article 19 of the Convention on the Rights of the Child sets out measures that states ought to adopt for the protection of children and the Committee on the Rights of the Child published a General Comment this year on the interpretation and application of that article. It provides a thorough analysis of the level of protection that states ought to provide for children. What is most noteworthy is the level of detail which Article 19 contains and the scope of protection which it seeks to impose. The failure to date to incorporate the Convention on the Rights of the Child into Irish law needs to be addressed to ensure that the same level of protection is afforded to children in Ireland as in states that have incorporated the convention.

## **Section 2: Child Protection Developments in the United Kingdom**

Comparisons are often drawn between the systems and services provided in Ireland and those of our nearest neighbours, and it is no different in the context of child protection. There have been numerous reports and initiatives commissioned in the UK in recent times, particularly since the beginning of the current Conservative/Liberal Democrats coalition.

The most wide-ranging of the reports commissioned by that government is the *Munro Review of Child Protection*, which was published in three parts. The first part analysed child protection systems and in essence asks the question, why have previous initiatives and reforms not produced the expected results? The second part of the report then tracks the position of the child in the child protection system from the point of needing help to the point of receiving it. This concludes that the child protection system is not always child-centred. The third part of the report then sets out a comprehensive list of recommendations aimed at creating a child-centred system. Many of these recommendations could be adopted in Ireland and if adopted would ensure that our child protection system is also more child-centred.

The coalition government has also invested heavily in researching early intervention strategies, and while it has not yet published a formal response to all reports commissioned on this issue, it has made a commitment to grant over £2 billion for early intervention programmes in both 2011–2012 and 2012–2013. Three reviews have been published within the last number of months. Each lays heavy emphasis on the effectiveness and economic benefits of using early intervention strategies and strongly encourages a move towards investment in early rather than late intervention.

A report on the commercialisation and sexualisation of children, *Letting Children be Children*, was published in June 2011, and received strong backing from the government. There have been calls for its findings to be assessed and acted upon in the Irish context.

Two relevant pieces of draft legislation have been published in recent months: The Protection of Freedoms Bill 2011 and The Sexual Offences Act 2003 (Remedial) Order 2011. The Protection of Freedoms Bill contains wide-ranging changes to the vetting and barring system and to the freedom to obtain the biometric data of children in schools. The Sexual Offences Act 2003 (Remedial) Order 2011 provides for a review mechanism for sex offenders who have been placed for life on the sexual offenders register.

A comprehensive review of both the public and private law family justice system was also published by the UK government. An initiative called ‘the Family Drug and Alcohol Court’, described as a new approach to care proceedings, is being piloted at present and is showing early signs of success.

The UK government published a new strategy relating to human trafficking, including a part devoted to the issue of child trafficking, in July 2011.

The issue of child detention for immigration purposes has also been highlighted in recent months. The UK government published a review of the question of ending child detention in



immigration centres in December 2010, and subsequently promised to end such detention by May 2011. A High Court case in which it was ruled that detention of children in an immigration centre had been unlawful drew further attention to the issue.

The Coroners and Justice Act 2009 came into force in June 2011, providing greater rights for children in court for their protection when giving evidence. Similar provisions should be introduced in this jurisdiction.

### **Section 3: Criminal Justice System**

The criminal justice system has often been characterised as an attempt to balance the need to protect society with the obligation to provide the accused with a fair trial. However, in recent times, the status of the victim of a crime has become an increasing topic of debate. This is particularly the case with vulnerable groups such as the victims of sexual offences, disabled persons and children. The protection of the rights of victims is a matter of international and domestic concern.

The EU has recently adopted a package of legislative proposals aimed at consolidating victims' rights in the EU. This package not only seeks to establish minimum standards in respect of rights, protection and supports for victims, but also seeks to establish a system of mutual recognition of protection measures in civil matters across the EU so as to protect victims who might travel from one Member State to another.

Ireland has declared that it will 'opt in' to the draft 2011 EU Directive establishing minimum standards on the rights, support and protection of victims of crime. This is to be welcomed because whilst Ireland provides some support and protection there is still room for improvement, most notably to the manner in which we treat child offenders, which requires significant improvement. To this day, children are still being detained in St Patrick's Institution. Whilst there were plans to redevelop the Oberstown Juvenile Centre these have not yet materialised.

An important development in the last year has been the publication of the Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill. This arose from the fallout from the Cloyne Report published in July 2011. The Bill proposes to make it an offence to be aware of a crime subject to arrest having been committed against a child, and having information that would be of material assistance to an investigation and failing to disclose the same, without reasonable excuse, to An Garda Síochána as soon as practicable.

The prevention of sexual abuse and sexual exploitation of children is a continuing battle. New forms and means of such abuse and exploitation constantly emerge and the law must be prepared to combat them. To assist in this, the EU Parliament has drafted a proposed Directive. Whilst a number of the matters covered in this proposed Directive are already subject to safeguards in Irish law there is still a need for reforms which can provide even better protection against the sexual abuse and exploitation of children in Ireland.

Draft Heads of the National Vetting Bureau Bill 2011 have been published. In my first *Report of the Special Rapporteur on Child Protection* published in 2007 new vetting legislation was called for as a matter of urgency. The publication of the heads of a Bill in 2011 is to be welcomed. The matter is still in the process of gestation and improvements are required so as to ensure a robust and effective vetting system is put in place.

#### **Section 4: A Re-evaluation of Mandatory Reporting and Other Miscellaneous Issues**

Three reports into the abuse of children within the Catholic Church in Ireland and my *Third Report of the Special Rapporteur for Child Protection* have called for the introduction by statute of the mandatory reporting of child abuse. The government has recently given a commitment to do so. This issue cannot be considered in isolation. An effective system of mandatory reporting also demands consideration of other policy documents such as the *Children First Guidelines*. It is noted that the government has also made a commitment to place the *Children First Guidelines* on a statutory footing.

An effective system is one by which all persons in society abide. To ensure that they abide, sanctions must be imposed on those who fail to do so. The systems in place in other jurisdictions should also be analysed, a need highlighted in my *Third Report of the Special Rapporteur for Child Protection*.

It is also proposed to amend the Child Care Act 1991 so as to allow any person, subject to limitations, to apply to a court for an order or direction in respect of a child believed to be receiving inadequate care and protection. Identification and detection of risks to children is the basis upon which any effective child protection system must operate. There is a fear that the HSE may not always identify such children, or that even if it does it may not detect a risk to such a child.

In some cases the actions of the HSE cannot be the end of the matter and court supervision of its decisions may be required. HSE care must be monitored as otherwise the case may become “ unallocated” for lengthy periods after the child comes into care, or due to multiple moves in placement because of placement breakdown (for example, caused by a lack of support for the foster placement by the HSE). Moreover, planning for after care does not appear to occur unless there is a formal court review.

The court placed the child into care. It therefore has an ongoing obligation to ensure that the State care provided is superior to what was available within the family. The reality is that the State has a poor record as a good parent.

At present the only option open to a person with concerns who is not the guardian of a child is to institute judicial review proceedings or make a complaint to the Children’s Ombudsman. These avenues are not suitable to meet the needs of children and reform is required.

The recent majority decision of the Supreme Court in *Nottinghamshire County Council v. B.* provides some clarification on the adoption of children from a marital family. Whilst that was

not the central issue in the case, nonetheless it was raised, and we will have to await a relevant High Court judgment to measure the effect, if any, this judgment may have on the regulation of the law of adoption in Ireland.

## RECOMMENDATIONS

### Section 1: Child Protection and Developments in International Law

#### 1 The Zambrano Judgment

Non-Irish national parents of Irish citizen children should be given permission to reside and remain in Ireland and this should be recognised as giving effect to the *Zambrano* judgment, not as a matter of discretion.

All non-Irish national parents of Irish citizen children who have been deported and any Irish children who left the state with parents who were deported should be promptly informed that they will now be given permission to return, reside and remain in Ireland, and be provided with assistance to do so.

#### 2 Developments Relating to the European Convention on Human Rights

Research is needed on the matter of the various bases on which children are taken into care and whether adequate levels of family support at an early stage are currently being provided to prevent the taking of children into care.

Research is also needed on the specific vulnerability of children accommodated in the system of Direct Provision and the potential or actual harm which is being created by the particular circumstances of their residence including the inability of parents to properly care for and protect their children and the damage that may be done by living for a lengthy period of time in an institutionalised setting which was not designed for long term residence.

The matter of whether greater family support is now needed, because of the current economic climate, should be considered. This should include a review of the system of support for families in Direct Provision. The HSE should be obliged to establish what it did to provide

support and assistance for the family in advance of proceedings under the Child Care Act 1991.

Hague Convention cases should always be handled with the utmost expedition.

Training is needed on the Convention on the Rights of the Child for all judges in Ireland involved in decision-making relating to the rights and interests of children, particularly in Hague Convention cases, where the matter of the best interests of the child is somewhat fraught. Direct communication between judges in such cases should follow the Hague Protocol recommendations.

In particular the appropriate judges need a heightened awareness of the difficulties associated with Hague Convention cases because of the potential for conflict between the principles pertaining to the presumption in favour of return and the best interests of the child.

### 3 EU Agenda for the Rights of the Child

An approach based on children's rights should be taken to data collection on child well-being in Ireland. It should be achieved by working within the framework of the Convention on the Rights of the Child. 'Child well-being indicators' in Ireland should become 'children's rights indicators'. These indicators should be regularly updated in order to effectively monitor the situation of children's rights in Ireland. All children present in the state, regardless of immigration status, should be included in the collection of data.

The role of a lay advocate on behalf of the child at family welfare conferences should be considered because of the vulnerable position of children. Such a person should be independent and be guided by a code of conduct.

The use of the guardian *ad litem* facility should be revised and made more widely available as a form of legal representation for children.

Children should be given better information about proceedings affecting them and kept informed at all stages of such proceedings in an age appropriate and child focussed manner. Children should be consulted in all proceedings affecting them (bearing in mind the age and maturity of the child). This should include children in the asylum process, particularly separated children and those in families who are reaching adulthood.

Children should have access to free legal aid provided by lawyers trained specifically in representing children.

A comprehensive and compulsory programme should be integrated into existing school curricula to teach all children about human rights, particularly their own rights under the Convention on the Rights of the Child.

#### 4 Convention on the Rights of the Child

The convention should be incorporated into Irish law. This would ensure that children's rights are considered when policy is being drafted. It would also permit individuals to invoke the convention in the court system and permit the courts to apply it as a matter of Irish law.

A referendum to include children's rights in the Constitution should be held as soon as possible.

The third draft of the wording of the amendment should include reference to the right of children to be heard in all judicial and administrative proceedings affecting them.

The rights of the child should be expressly recognised in Article 40 of the Constitution in order to demonstrate that the child is an individual constitutional persona entitled to rights and protections by virtue of its being. Alternatively, provision for children's rights and interests in Article 42 could also encompass personal rights enshrined in Article 40.3.

Ireland should sign and ratify the third optional protocol to the Convention on the Rights of the Child.

Ireland should also make a declaration submitting itself to the inter-state communication mechanism under that optional protocol.

Ireland should refrain from making a declaration to the effect that the State will not be subject to the inquiry procedure under the optional protocol.

Ireland should make widely known the existence of the third optional protocol to the convention, and should disseminate information to both children and adults in accordance with Article 17 of that instrument.

The principle of the "best interests of the child" should be incorporated into Irish immigration and asylum law so that every decision should be taken to conform with that principle.

The state should consider implementing into Irish law a requirement to safeguard and promote the welfare of the child when all immigration and asylum decisions are being taken, possibly in the form similar to section 55 of the UK's Borders, Citizenship and Immigration Act 2009.



## 5 Report of the UN Committee Against Torture

It is recommended that the opinions and recommendations expressed by the Committee Against Torture in its 2011 report be used in the drafting of law and policy to ensure that Ireland conforms with the Convention Against Torture to the greatest extent possible.

In particular, Ireland should ensure adequate implementation of the plan for the Ryan Report recommendations, ensure there are prosecutions where appropriate and provide adequate compensation to abuse survivors.

It is a positive step that an investigation has now been initiated into the treatment of women and girls in the Magdalene laundries. Criminal behaviour associated with the laundries should be investigated immediately and followed by prosecutions where appropriate.

The Irish government needs to create the services for which the courts are at present being asked to send children abroad for. We need a holistic approach to the problem in this jurisdiction. It is submitted that it would be infinitely more cost effective in the long run if all forms of care- secure care, special care, step down, and small units with more freedom – were available in a therapeutic setting on the one campus.

The Irish government needs to take immediate steps to devise interim measures for the treatment of 16 and 17 year olds who would otherwise be detained at St Patrick's Institution, and to expedite the building of a new Child Detention Facility. A date for its completion should be announced as soon as possible. The Ombudsman for Children should also have her remit extended to permit her to accept individual complaints from children in prison and detention.

It is very positive that Ireland has taken steps to deal with the legality of female genital mutilation through the Female Genital Mutilation Bill. It would be preferable, however, if the

Bill were to explicitly state that the practice constitutes torture, as recommended by the Committee Against Torture. The State should also follow-up the recommendations made by the Committee in respect of appropriate programmes, education and awareness-raising on the matter.

The State should also implement the recommendations of the Committee to ban all physical punishment of children and to take measures to protect separated and unaccompanied minors, including the collection of relevant data.

The particular needs of children in the Direct Provision system should be examined with a view to establishing whether the system itself is detrimental to their welfare and development and, if appropriate, an alternative form of support and accommodation adopted which is more suitable for families and particularly children.

In the interim, the state should implement without delay an independent complaints mechanism and independent inspections of Direct Provision centres and give consideration to these being undertaken through either HIQA (inspections) or the Ombudsman for Children (complaints).

## 6 General Comment No. 13

The UN Committee on the Rights of the Child, General Comment No. 13 highlights a large number of areas where State practice in Ireland needs improvement and reform. Many areas have already been highlighted and analysed in previous reports and will be again in the current report. For the purposes of this section, I have selected a number of points for recommendation. The list of recommendations is not necessarily exhaustive.

Ireland should move to a position of prohibiting all physical punishment of children through legislative change. Although proportionate responses can be taken to tackle the matter, the law should be clear and explicit that, as the Committee has outlined, all violence against children is unacceptable. Prior to the implementation of this recommendation, an extensive pre-implementation training and educational programme will be needed.

Ireland should reinforce the human rights imperative in attempts to eliminate violence against children. This requires consideration of the general principles of the Convention on the Rights of the Child in drafting all policies and laws concerning violence against children.

A national framework coordinating all efforts to prevent violence against children should be devised. The measures of General Comment No. 13 should be used to shape the framework.

This strategy should attempt to tackle the root causes of violence in all contexts – tackling the issue with children, perpetrators and communities, and from many other perspectives. This will require social and financial assistance as appropriate.

Educational measures should be implemented to change attitudes to violence against children.

There needs to be a renewed prioritisation of mental health services for children and young people. This is vital to tackle the psychological effects of violence by others against children, as well as the complex problem of self-harm.

The media should be a particular focus of the national coordinating framework. The matter of the undue use of negative images and the perpetuation of negative perceptions of children and young people in the media should be tackled, particularly those which associate children and young people with violence.

Such measures must be participative, allowing children themselves to be involved in both planning and evaluation.

The total financial provision for children, including measures to tackle violence against children, should be provided in every budget.

The current shortage in foster placements should be dealt with without delay. At present, private providers are being used to fill gaps in the system. However, when HSE foster placements become available the child is moved or the funding for private placement is only available for 3 months forcing multiple moves in placement which could not be described as child centred. It appears from anecdotal evidence that it is not uncommon for a child to

remain in institutional care for up to 2 years because a “suitable” foster family cannot be found. Research on this issue is vital.

The matter of the low prosecution rate in Ireland for reported incidents of violence against children must be examined. This should be part of an effort to achieve greater accountability in the area of violence against children.

The State should make reference to General Comment No. 13, and measures taken to implement it, in its report to the Committee on the Rights of the Child, due in 2012.

## **Section 2: Child Protection Developments in the United Kingdom**

The developments in the neighbouring jurisdiction considered in Chapter 2 should be examined and mirror recommendations should be introduced in this country on early intervention.

The new policy framework for young people to be published in 2012 should include guidelines reflecting the recommendations of the report *Letting Children be Children* discussed in Chapter 2.

The National Vetting Bureau Bill 2011 should be reviewed having regard to the wide range of measures relating to child protection in the Protection of Freedoms legislation in the UK.

The recommendations of the *Family Justice Review* on hearing the voice of the child, the Family Justice Service, case management in child care cases, the relationship between courts and local authorities and alternatives to court proceedings should be implemented in this jurisdiction.

In particular, a time limit for the completion of care proceedings should be stipulated. Exemptions to the time limit should be allowed only by exception.

Alternatives to court in child care cases should be further developed, including Family Group Conferences and the use of mediation in child protection issues.

The Child Care Act 1991 should be amended to reinforce that in commissioning an expert's report, regard must be had to the impact of delay on the welfare of the child.

The Coroners and Justice Act 2009 came into force in the neighbouring jurisdiction in June 2011, providing a greater degree of choice for children in court for their protection when giving evidence. Similar provisions should be introduced in this jurisdiction.

The 2011 guidelines regarding female genital mutilation published in the UK should be considered as a template for guidelines to compliment new legislation in this area in this jurisdiction.

The national guidance for child protection in Scotland should be considered in the context of the new legislation on mandatory reporting and any guidance that might issue when this legislation is commenced.

### **Section 3: Criminal Justice System**

#### **1 The Proposal on the Mutual Recognition of Protection Measures in Civil Matters**

Domestic violence against children is widespread and studies have revealed the link between domestic violence against women and physical abuse of children, as well as the trauma that witnessing violence in the home causes to children. The proposal should be fully implemented in Ireland in that it provides effective measures for the protection of victims of violence, in particular, domestic violence, stalking and violence against children. In domestic violence cases in this jurisdiction access is often set up without ever consulting children on the proposals and domestic violence is not always taken into consideration when fixing access arrangements.

## 2 The Draft European Directive on Establishing Minimum Standards of Rights, Support and Protection for the Victims of Crime 2011

The Directive identifies the particular risk to children created by their personal characteristics. Child victims are acknowledged to be vulnerable and in need of special measures of protection. The Irish data highlights a need for victim protection measures to focus upon the provision of assistance to child victims. Article 7 of the Directive, regarding access to information and advice, emotional and psychological support and practical assistance, should be the focus of such protective measures in Ireland.

The Directive should be recommended as a clear means of addressing the justice needs of child victims. This particularly vulnerable category of victim requires measures additional to increasing criminalisation and penalisation. The Directive should be welcomed as an important move in the trend towards the emphasis on victims as opposed to conventional legal responses which have focused solely upon ‘symbolic justice’ by way of increased convictions.

## 3 Child Offenders

The stated grounds for the continued exclusion of children in St Patrick’s Institution from the Ombudsman for Children’s complaints remit are unsustainable. Children held in Children Detention Schools, which come under the inspections regime of HIQA, can access the Ombudsman for Children complaints function: children held in St Patrick’s Institution, which comes under the inspections regime of the Inspector of Prisons, however, have no access to an independent complaints mechanism.

Children are accommodated separately from adults within St Patrick’s Institution. Therefore, claims that the facility accommodates both children and adults are no longer a valid reason to exclude children held there from the Ombudsman for Children’s complaints remit. The extension of the remit of the Ombudsman for Children to St Patrick’s Institution represents an essential safeguard which should be implemented immediately, particularly in light of the deferral of the Oberstown proposal.

#### 4 Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011

Mandatory reporting is likely to result in the improved reporting of welfare concerns. That said, to equate child protection solely with the reporting, investigation and prosecution of cases falls short of addressing children's justice needs. An innovative response to child protection should seek to attain a balance between censuring wrongs, vindicating victims and protecting society. We must also provide supports and services for offenders (who may also be children) and victims. The draft 2011 European Directive on establishing minimum standards of rights, support and protection for the victims of crime does not support a position of compelling victims to report crime. Article 7 of that Directive proposes instead a right to access victim support services that will apply whether the crime has been reported or not.

#### 5 Draft Heads of National Vetting Bureau Bill 2011

##### *Definitions*

Terms such as 'ad hoc', 'occasional' and 'voluntary' should be clearly defined. It is recommended that the proposed vetting obligations need to include all those employees whose work places them in settings where there are children with whom they could come into contact, regardless of whether that contact is "regular or on-going unsupervised contact" or not.

##### *Safeguards*

Careful consideration should be afforded to the constitutional rights of those being vetted. My *2007 Report of the Special Rapporteur on Child Protection* highlighted certain safeguards for consideration, specifically the importance of clear, concise legislation which would be limited in application, provide for procedural safeguards and take account of the constitutional doctrine of proportionality. To that end, the following suggestions were offered:

- Only consider information that has led to investigations into alleged abuses or crimes;
- Consider the circumstances surrounding the offence;

- Clearly stipulate the class of persons who will be subject to such disclosure;
- Strictly limit the number of persons to whom such disclosure can be made to the basis of necessity;
- Put in place appropriate safeguards for such information to be furnished to vetted persons and corrected if this is appropriate;
- Provide the vetted person with the reasons if the opportunity to employ is declined;
- Ensure that the entire process is transparent and reasonable, attributing due weight to each charge considered;
- Provide a mechanism through which a person can appeal his/her entry on to a soft information register to an independent third party;
- Conduct periodic reviews of the status of those included on a soft information register.

### *Exchanges of Vetting Information between the State and Foreign Institutions*

Whilst the existence of cooperation between Ireland and Britain is commendable, the fact that some European countries do not provide information should be addressed. Consideration should also be afforded to legal and cultural differences in different jurisdictions.

## 6 Child Witnesses: Recent Developments

Legislative amendment is recommended to clarify when a recording will not be admitted, specifically, examples of instances in which it is not in the interests of justice to do so.

Training should be provided to the judiciary, Gardaí and social workers on the most progressive method of interviewing young children. What is vitally important is that the interviewer is trained in the appropriate manner to conduct the interview.



## **Section 4: A Re-evaluation of Mandatory Reporting and Other Miscellaneous Matters**

### 1 Amendment to Child Care Act 1991

If the HSE applies for an Interim Care Order or a Care Order and then decides to return the child to a parent both the court and the guardian *ad litem* have only a very limited opportunity to challenge the decision. The guardian can attempt to institute judicial review proceedings – but the costs may be prohibitive and *locus standi* may be an issue.

The Child Care Act 1991 should be amended so as to enable any person to apply to the court seeking an order or direction in respect of a child who is not the subject of proceedings under the Child Care Act 1991 or the Guardianship of Infants Act 1964 but who has been brought to the attention of the HSE, where there are reasonable grounds for believing that the child in question is not receiving adequate care and protection.

## **SECTION 1:**

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

### **1.1 Introduction**

It is often said that the best indicator of future conduct is past conduct, and indeed that may be correct. However, when it comes to formulating policy in respect of the protection of children it is often necessary to shake off the shackles of the past and look further afield and consider the approaches taken by others so as to provide the best protection for children in Ireland. In this regard it is of fundamental importance to keep apace with international developments in relation to the protection of children. And it is also one of the fundamental requirements of this report and indeed of the role of the Special Rapporteur on Child Protection. As set out hereunder some developments have a direct impact on Ireland whereas others do not. That said, simply because a development does not have a direct impact on Ireland does not mean that it can be discounted. On the contrary, it is imperative to give due consideration to all developments and incorporate those which bolster the current system of child protection in Ireland.

### **1.2 The *Zambrano* Judgment: Non-EU Parents of Citizen Children and Entitlement to Residency**

The Court of Justice of the European Union (hereinafter referred to as the ‘CJEU’) delivered its judgment in the case of *Zambrano v. Office National de L’Emploi*<sup>1</sup> in March 2011. The ruling in *Zambrano*, which arose in response to a question from a Belgian tribunal concerning the interpretation of EU law, established that non-EU parents of a child who is an EU citizen must be permitted to live and work in the EU country of which the child is a citizen and in which the child resides. The Court held that Article 20 of the Treaty on the Functioning of the European Union (the Lisbon Treaty, also referred to as the TFEU) prevents a Member State

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<sup>1</sup> Case C-34/09, judgment of 8 March 2011.

of the EU from refusing a third country national<sup>2</sup> upon whom an EU citizen child is dependent the right to reside in the state of the nationality of the child. It also prevents the state from refusing to grant a work permit to that third country national, where this would deprive the child “of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen”.<sup>3</sup>

The earlier case of *Zhu and Chen v. Secretary of State for the Home Department*<sup>4</sup> linked the rights of parents to the exercise of the right to residence and to freedom of movement by EU citizen children. The *Zambrano* ruling now affirms that derivative rights for third country national parents of an EU citizen child also apply in the country which granted citizenship to the child. The ruling has major implications for policy in Ireland as it is binding on all Member States when decisions are being made in similar cases.<sup>5</sup>

The *Zambrano* judgment represents a major departure from previous understandings of European law and a move towards a conception of EU citizenship rights. As noted above, the judgment has major implications for policy in Ireland. In the *Lobe* case,<sup>6</sup> the Supreme Court established that non-Irish national parents of Irish citizen children did not have an automatic right to remain in Ireland. Despite the fact that a deportation order in respect of such parents could well result in the removal of the Irish citizen child from the country, the Court held that the right of the State to orderly administration of the immigration and asylum system prevailed.<sup>7</sup> Whilst the Irish Nationality and Citizenship Act 2004 removed the right to Irish citizenship through birth on Irish soil alone,<sup>8</sup> there remain many children who were born in Ireland to non-Irish national parents before the 2004 Act came into force on 1 January 2005. The parents of all such children were not, however, subject to deportation orders after *Lobe*.

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<sup>2</sup> A ‘third country national’ is a national of neither the EU nor the state in question.

<sup>3</sup> Case C-34/09, judgment of 8 March 2011, at para. 45. The Advocate-General had provided a preliminary ruling in September 2010 which contained a more detailed reasoning for reaching the same conclusion. See Case C-34/09, judgment of 30 September 2010.

<sup>4</sup> Case C-200/02, judgment of 18 May 2004.

<sup>5</sup> Ireland was one of a number of governments which made submissions to the Court that as a situation such as that in *Zambrano* does not relate to freedoms of movement and residence provided for by EU law these provisions of EU law were not applicable. See *Zambrano*, at para. 37. The decision in *Zambrano* has yet to be applied in an Irish court.

<sup>6</sup> *Lobe & ors v. Minister for Justice, Equality & Law Reform* [2003] IESC 3; *Osayande & anor v. Minister for Justice, Equality & Law Reform and ors* [2003] IESC 3.

<sup>7</sup> In dissenting judgments, McGuinness J. and Fennelly J. argued against this contention, referring to the strength of the rights of the family in the Constitution. McGuinness J., for example, made reference to “the repeated emphasis by this Court in its decisions over the years on the nature, weight and importance of the rights of the family set out in Articles 41 and 42 of the Constitution.”

<sup>8</sup> Currently, for a child born in Ireland to attain Irish citizenship, the child requires at least one parent to be an Irish or British citizen.

Instead, the IBC/05 Scheme was introduced by the Department of Justice, Equality and Law Reform, which enabled non-national parents with an Irish citizen child to apply to the Department for permission to remain in the State. As of 31 January 2006, of 17,917 applications 1,119 had been refused.<sup>9</sup>

*Bode*<sup>10</sup> involved a challenge by a number of non-Irish national parents of Irish citizen children who had been refused leave to remain under the IBC/05 Scheme. They invoked constitutional rights as well as Article 8, the right to family life, under the European Convention on Human Rights (hereinafter referred to as the ‘ECHR’). The Supreme Court held that as the scheme constituted an exercise in discretionary executive power by the Minister constitutional and Convention rights did not apply. EU law was not considered in *Bode*, or in *Lobe* for that matter. Nevertheless, the *Zambrano* judgment provides clear direction from the CJEU that non-Irish national parents of Irish citizen children should be permitted to live and work in Ireland. The group to which this applies most clearly is children born to non-Irish national parents before the coming into force of the Irish Nationality and Citizenship Act 2004 on 1 January 2005.<sup>11</sup>

After the *Zambrano* judgment, the Minister for Justice, Equality and Defence, Alan Shatter, TD, released a statement on the implications of the case for practice in Ireland.<sup>12</sup> He stated that consideration was being given to the (approximately 120) pending cases relating to Irish citizen children who are minor dependants of non-national third country parent/s and that rather than waiting for the courts to interpret and apply the ruling of the CJEU in pending cases, the government would “carry out an urgent examination” of all such cases before the courts. The Minister also stated that he had initiated an examination of cases in which deportation had occurred, or where deportation was being considered, for the purpose of identifying cases in which the *Zambrano* judgment might be relevant. The Minister emphasised that:

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<sup>9</sup> As outlined in *Bode (A Minor) v. Minister for Justice, Equality & Law Reform & ors* [2007] IESC 62; [2008] 3 I.R. 663, para. 7.

<sup>10</sup> *Ibid.*

<sup>11</sup> The judgment does not have implications, for example, where a child of non-Irish national parents was born in Ireland after this date as such children are not automatically Irish citizens. Therefore the judgment has no bearing on Irish citizenship law per se.

<sup>12</sup> ‘Statement by Minister for Justice, Equality and Defence, Mr Alan Shatter, TD, on the implications of the recent ruling of the Court of Justice of the European Union in the case of Ruiz Zambrano’ 21 March 2011. Available at <http://www.merriionstreet.ie>.

This initiative is being taken in the best interests of the welfare of eligible minor Irish citizen children and to ensure that the taxpayer is not exposed to any unnecessary additional legal costs.

The state has been urged to take a “formal position” on the judgment as soon as possible.<sup>13</sup> There have been calls from interest groups in Ireland to apply the ruling in the *Zambrano* case appropriately. The Immigrant Council of Ireland, for example, has stated that the practice of refusing in some cases to give permission to parents of Irish children to live and work in Ireland must cease, and that parents who have been deported in such circumstances must now be allowed to return.<sup>14</sup>

For the sake of the welfare of Irish citizen children with non-Irish citizen parents, it is important that the government take a broad view of the matter and grant full residency rights for those parents, as opposed to dealing with the matter through the process of discretion. It should be recognised that the issue of a residence permit is simply confirming the right of residency which derives directly from EU law<sup>15</sup>. It is also important that parents of Irish citizen children who have been deported because they are not Irish citizens (with or without their Irish citizen children) are promptly informed of the development in the law and provided with the necessary assistance to return to Ireland if they wish to do so and given clear residency rights on return.

Given the clear ruling from the CJEU on the matter, and the binding nature of that judgment, state policy in the area needs to undergo a major revision.

### **1.2.1 Recommendations**

*Non-Irish parents of Irish citizen children should be given permission to reside and remain in Ireland and this should be recognised as giving effect to the Zambrano judgment, not as a matter of discretion.*

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<sup>13</sup> High Court judge John Cooke was reported to be urging that a formal position be taken. Jamie Smyth, ‘Judge Calls on State to Consider Ruling’ *The Irish Times*, 10 March 2011.

<sup>14</sup> Carol Coulter, ‘Non-EU Parents of Citizens Entitled to Residency, Court Rules’ *The Irish Times*, 9 March 2011. See also the monthly newsletter of the National Asylum Seeker Centre, ‘European Court says non EU-Parents of Irish Citizen Children Have the Right to Live and Work in Ireland’ 21 March 2011, available at [www.nascireland.org](http://www.nascireland.org).

<sup>15</sup> Article 20 of the Treaty of the Functioning of the European Union (TFEU).

*The state should take a broad view of the matter and grant full residency rights for non-Irish parents of Irish citizen children.*

*All non-Irish parents of Irish citizen children who have been deported and any Irish citizen child who left the state with parents who were deported should be promptly informed that they will now be given permission to return, reside and remain in Ireland and be provided with assistance to do so.*

### **1.3 Developments Relating to the European Convention on Human Rights**

#### **1.3.1 The Right to Family and Private Life and Family Support**

It was reported recently that the number of children taken into the care of the HSE has risen significantly in the past year. The number of children taken into care in the first four months of 2011 rose by three times the rise in 2010.<sup>16</sup> It has also been reported by Inclusion Ireland (an advocacy group for people with an intellectual disability) that in the past two years there has been an increase in the number of parents seeking advice after children have been taken into care.<sup>17</sup> The organisation states that there is “little or no effort being made to support these people as parents”.<sup>18</sup> Both reports raise questions about current levels of family support available to families in crisis in Ireland.

Perhaps the general increase in the number of children being taken into care can be explained by the comparable increase internationally (as the HSE itself recently suggested<sup>19</sup>). On the other hand, it could be caused by a number of other factors which would point to a need for improvement in family support in Ireland. An obvious possibility is that the current economic climate has created greater difficulties for families and has affected their capacity to provide for children’s needs. This raises the question whether the current economic climate

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<sup>16</sup> Jamie Smyth, ‘Number of Children in Care rises to over 6,000’ *The Irish Times*, 20 June 2011. The figures were given to *The Irish Times* by the HSE.

<sup>17</sup> Kitty Holland, ‘Disabled Parents’ Children Removed with “No Support”’ *The Irish Times*, 1 June 2011.

<sup>18</sup> *Ibid.*

<sup>19</sup> The HSE National Director of Children and Family Services is quoted as stating that “There is an international trend over recent years in terms of the increasing numbers of children in care, so it is important to recognise that this is not a uniquely Irish situation.” Smyth, ‘Number of Children in Care rises to over 6,000’ *The Irish Times*, 20 June 2011.

necessitates greater levels of family support. It certainly affects vulnerable families disproportionately in terms of reduction of service provision.

There are undoubtedly some very good examples of family support practice in Ireland.<sup>20</sup> However, (as noted in my second report), there were, even a number of years ago, a number of issues arising from the approach to families which need support. For example, it was noted that

in Ireland, as many as 54% of possible abuse cases are deemed not to reach the level of abuse on investigation, and these cases do not, then, get the assistance that they may well need.<sup>21</sup>

There is a possibility that without appropriate assistance these types of cases may then worsen in severity to a point where children need to be taken into care.

The system of support for those claiming asylum in Ireland known as Direct Provision has also been criticised for giving rise to concerns about the detrimental effect on children growing up in a form of institutionalised poverty with parents unable to adequately care for their children.

In September 2011, there were 40 accommodation centres spread across 18 counties in Ireland. Only three of them were built for the purpose of accommodating asylum seekers. The majority are former hotels, hostels, guesthouses, convents, nursing homes, holiday or mobile home camps which were never intended as places of long term residence. They accommodated just over 5,500 people in September 2011, over 2,000 of which were under the age of 18, more than 30% of all residents<sup>22</sup>. Since the introduction of the system in 2000, the weekly allowance paid to residents has not changed. Adults receive €19.10 per week and an allowance of €9.60 for each child. The lengthy delays in the asylum system, calculated as an average of three years, is giving rise to concerns about the welfare and development of

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<sup>20</sup> See for example, Department of Health and Children, *Working for Children and Families: Good Practice* (Department of Health and Children, 2004), which highlights examples of provision of effective and relevant services.

<sup>21</sup> Geoffrey Shannon, *Second Report of the Rapporteur on Child Protection* (2008), at p. 59. The report cited Department of Health and Children, *Analysis of Interim Data Set 2001*, cited in Helen Buckley, 'Reviewing Children First: Some Issues for Considerations', 8(3), *IJFL*, 3, 2005, 2–8. The report also made recommendations relating to assistance of children who are 'in need' of assistance and protection, but not 'at risk' of abuse (at p. 60).

<sup>22</sup> Reception and Integration Agency Monthly Statistics Report September 2011 [http://www.ria.gov.ie/en/RIA/RIASep\(A4\)2011.pdf/Files/RIASep\(A4\)2011.pdf](http://www.ria.gov.ie/en/RIA/RIASep(A4)2011.pdf/Files/RIASep(A4)2011.pdf).

children. The number of child protection referrals relating to children in Direct Provision is itself a cause for concern requiring the government's attention<sup>23</sup>.

Given the wide variation amongst residents in such centres, with single parents sometimes required to share with strangers and families with teenage children of opposite gender sharing one room<sup>24</sup>, and in the absence of appropriate supervision and support, there is a real risk of child abuse. In September 2011, news came to light of a 14 year old girl in a centre in Mayo who became pregnant by a male resident in the same hostel<sup>25</sup>.

There are, of course, human rights implications in taking children into care. Article 8 of the ECHR, the right to family and private life, states that interference in family life must be proportionate to the legitimate aim of protecting children and their rights. In the case of *Moser v. Austria*<sup>26</sup> the European Court of Human Rights (hereinafter referred to as the 'ECtHR') held that alternatives to taking a child into care must be considered where there are concerns about the material conditions in which the child lives: for example, where there are low finances and poor housing. In a number of other recent cases (*Wallová and Walla v. the Czech Republic*; *Havelka and others v. the Czech Republic*; and *Saviny v. Ukraine*)<sup>27</sup> the ECtHR further held that the respective states had breached Article 8 by placing children in care without a proportionate response to the need for adequate provision of financial and therapeutic assistance to the families involved. Where a request arises under s.47 of the Child Care Act 1991 to provide family services for parents as well as for children to ensure that "marital attachment" help or advocacy services for parents with mental health problems, or that parenting classes are made available for the parents of the children, there is anecdotal evidence to suggest that such applications are resisted by the HSE on the basis that s.47 is confined to the child.

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<sup>23</sup> See for example Jennifer Hough, '423 referrals over child asylum seekers', Irish Examiner, 30 June 2011 <http://www.examiner.ie/archives/2011/0630/ireland/423-referrals-over-child-asylum-seekers-159468.html>.

<sup>24</sup> <http://www.irishexaminer.com/archives/2012/0201/opinion/draconian-asylum-and-immigration-system-needs-reform-mr-shatter-182175.html>.

<sup>25</sup> <http://www.irishexaminer.com/archives/2011/0913/ireland/asylum-seeker-rape-case-raises-security-fears-167285.html>.

<sup>26</sup> Application No. 12643/02, 21 September 2006.

<sup>27</sup> Application No. 23848/04, 26 October 2006; Application No. 23499/06, 21 June 2007; Application No. 39948/06, 18 December 2008 respectively. The *Moser* and *Saviny* cases are referred to in *Kurochin v. Ukraine*, Application No. 42276/08, a case that refers to the breach of Article 8 rights in the situation of adoption rather than the placement of a child in care. The unusual facts of the case involve the annulment of an adoption order in the interests of a child against the express wishes of that child. On the application of the child's adopted father to overturn the annulment, the Court noted that the relationships in an adopting family are protected under Article 8 and the decision to annul the adoption had been an unwarranted interference with those rights which had not been rectified by the appointment of the applicant as guardian of the child.



In order to comply with Article 8 of the ECHR it must be ensured that appropriate assistance is provided in Ireland for families in need. It must be ensured that children are not taken into care because help was not provided at an earlier stage. In the absence of relevant research, it is difficult to establish a definite reason for the increase in the number of children being taken into care.<sup>28</sup>

### **1.3.2 The Hague Convention on Child Abduction and the Best Interests of the Child: *Neulinger and Shuruk v. Switzerland***

The Hague Convention on Civil Aspects of International Child Abduction (1980) (hereinafter referred to as the ‘Hague Convention’) applies where a child has been wrongfully removed from the jurisdiction of one State party to the Hague Convention to that of another.<sup>29</sup> The main aim of the Convention is to secure the prompt return of the child in such circumstances,<sup>30</sup> so that the substance of the case can be heard in the state from which the child was taken. There is, therefore, a powerful presumption in favour of return of the child or children involved. There are a number of limited defences against this presumption, contained in Articles 12 and 13 of the Convention.

The defences are as follows: that the child has resided for at least one year and is settled in the new environment (Article 12); or that the individual deprived of custody of the child has consented or has not objected to the removal (Article 13(a)); or that there is a grave risk to the child constituting harm that could not be dealt with by the state from which the child was removed (Article 13(b)); or the child objects to a return and is of the age and maturity at which it is appropriate to take his/her views into account. If any of the defences are successful, the court still retains discretion to order the return of the child. The defences are significantly limited by the strength of the presumption in favour of return. Where the defence of grave harm is raised, for example, the Irish courts have frequently cited the notably high threshold suggested in the US case of *Friedrich v. Friedrich*,<sup>31</sup> and it appears that judges rarely exercise discretion in favour of the objections to return of children younger

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<sup>28</sup> This is suggested, for example, by Senator Jillian van Turnhout, Chief Executive of the Children’s Rights Alliance. Smyth, ‘Number of Children in Care rises to over 6,000’ *The Irish Times*, 20 June 2011.

<sup>29</sup> The removal must affect a person with rights of custody (Article 3) and the child must have been habitually resident in the state from which he/she was removed (Article 3).

<sup>30</sup> Hague Convention, Article 1(a).

<sup>31</sup> 78 F 3d 1060; CA, (6th Cir, 1996).

than the age of approximately 12 years, even where they have been in Ireland for a considerable time and hold strong views on the matter.<sup>32</sup>

One of the significant points about the Hague Convention is that, whilst it makes reference to the “interests of children”, this refers to children in general and to the assumption that it is not in the interests of children to be abducted.<sup>33</sup> The Hague Convention prohibits, however, express consideration of the merits of the best interests of an individual child by the courts of the country to which he/she has been removed.<sup>34</sup> It is considered that this is a matter for the courts in the country from which the child has been removed. A Hague Convention case, then, is a determination of the forum in which a dispute about child custody is to be heard and not of the substance of the dispute. This raises questions about the rights of individual children to have their best interests considered in all matters affecting them, because the matter of the forum to be used often has significant consequences for the child. Article 3 of the Convention on the Rights of the Child (hereafter ‘the CRC’) states that

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The question arises, of course, of when the best interests of the child will be ‘a primary’ or ‘the paramount’ consideration and the answer differs according to the matter in question<sup>35</sup> within the CRC and domestic law.<sup>36</sup> However, the fact that the Hague Convention precludes express consideration of the best interests of the individual child undoubtedly raises questions about the treatment of the rights of individual children. The matter was explicitly considered

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<sup>32</sup> Daly opines that, in cases where the defence of the child’s objections is raised, the case law in Ireland indicates that discretion is seldom used by judges in favour of an objection to return by a younger child and questions the extent to which the wishes of young children are given weight. Aoife Daly, ‘Considered or Merely Heard? The Views of Young Children in Hague Convention Cases in Ireland’, 12 *Irish Journal of Family Law*, 2009, 16.

<sup>33</sup> As Baroness Hale noted “In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another’s judicial processes.” *Re M.* [2008] 1 AC 1, 288, at para. 42. This was cited with approval by Finlay-Geoghegan J. in *A. v A. aka Mc C.* [2009] IEHC 460, at para. 32.

<sup>34</sup> Hague Convention, Article 16.

<sup>35</sup> The best interests of the child is to be ‘a primary’ consideration for the purpose of Article 3 of the CRC, but ‘the paramount’ consideration for purposes of adoption under Article 21 of the CRC.

<sup>36</sup> In Ireland, s.3 of the Guardianship of Infants Act 1964 states that in decision-making regarding the “custody, guardianship or upbringing of an infant” the welfare of the child will be “the first and paramount consideration”.

in Australia in the case of *In the Marriage of Murray and Tam*.<sup>37</sup> Interestingly, the Australian Court rejected the charge that the Hague Convention was incompatible with the CRC in this regard, because Article 11 of the CRC obliges states to “take measures to combat the illicit transfer and non-return of children abroad”.<sup>38</sup> It must be noted that the existence of the defences, limited as they are in practice, has also been cited by commentators as sufficient vindication of the best interests principle as they open the possibility of considering individual circumstances.<sup>39</sup> It must be noted, however, that the matter of whether a child’s circumstances will be examined is determined by the defences raised by the respondent parent (i.e. the parent alleged to have abducted the child) in court, which is quite different from the court having the discretion to examine any matter relating to the best interests of the individual child. It is arguable that this is ultimately a lesser standard of consideration for the best interests of individual children in such cases.

In the case of *Neulinger and Shuruk v. Switzerland*<sup>40</sup> the Grand Chamber of the ECtHR considered the fundamental issue of the positioning of the best interests of the child in Hague Convention cases. The case concerned the applicant mother’s removal to Switzerland of her son, who had been habitually resident in Israel. The mother had become concerned about the involvement of the father with an extremist religious sect and in 2005 had abducted the child and returned to the couple’s original location in Switzerland. The Israeli Court declared in 2006 that the child had been habitually resident in Israel and extensive litigation began in the Swiss courts. The Swiss courts originally refused to order the return of the child on the basis that the ‘grave risk’ defence (Article 13(1)(b)) had been made out. On appeal by the father, the Swiss courts ordered the return of the child in 2007, and the mother then appealed to the ECtHR. Having considered the complex factors in the case (including, most notably, the considerable duration which the child had lived in Switzerland by the time the case had reached the ECtHR), the ECtHR decided that it would constitute a disproportionate interference with the Article 8 right to family life of the mother, who would not be returning to Israel, to order the return of the child to that country.

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<sup>37</sup> 16 *Fam LR* [1993] 982. Cited in Nigel Lowe and Gillian Douglas, *Bromley’s Family Law* (Oxford University Press, 10<sup>th</sup> edn., 2007), at p. 632. Lowe and Douglas cite Peter Nygh, ‘The International Abduction of Children’, in Jaap Doek et al. (eds.), *Children on The Move* (The Hague: Martinus Nijhoff, 1996), at pp. 40–41.

<sup>38</sup> *Ibid.*

<sup>39</sup> Lowe and Douglas, *Bromley’s Family Law*, at p. 632.

<sup>40</sup> Application No. 41615/07, judgment 6 July 2010.

The ECtHR emphasised that the best interests of the child was “an underlying principle of the Hague Convention”.<sup>41</sup> It also emphasised that the ECtHR has the power to review the decisions of domestic courts to ensure that Article 8 of the ECHR has been respected. The Court continued that, when balancing competing interests, the best interests of the child is to be a primary consideration, and “It follows from Article 8 that a child’s return cannot be ordered automatically or mechanically when the Hague Convention is applicable.”<sup>42</sup> The ECtHR emphasised that each child’s needs will depend on a variety of different factors, and, “[f]or that reason, those best interests must be assessed in each individual case”.<sup>43</sup>

The decision was controversial, as it appears to retreat somewhat from the long-established principle that the substance of such cases are best decided in the country from which the child has been taken. Some commentators have stated that the decision renders the law unclear as regards the position of the best interests consideration in Hague Convention cases.<sup>44</sup> In particular, the perception has been that the case decreases the threshold for successful use of the ‘grave risk’ defence. Hodson has stated that the judgment asserts furthermore that the ECHR, and Article 8 in particular, “overcomes the Hague Abduction Convention”.<sup>45</sup> Commentary by those outside states parties to the ECHR has focused on the concern that the decision will lead to a divergence of approach between those states which are party to the ECHR and those which are not.<sup>46</sup>

In England and Wales, the most recent Supreme Court case on the implications of *Neulinger*, *In re E (Children)*,<sup>47</sup> was awaited with much anticipation, as it was to clarify whether or not there was to be a significant departure from previous Hague Convention jurisprudence in the light of *Neulinger*. The applicant mother, who had abducted the children from Norway to the UK, argued that the outcome of *Neulinger*, as per paragraph 139, necessitated a change in approach to Hague Convention cases involving the Article 13(b) defence in England and Wales (in this case it related to allegations of domestic violence). The current approach, it

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<sup>41</sup> *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, judgment 6 July 2010, at para. 137.

<sup>42</sup> *Ibid.*, at para. 138.

<sup>43</sup> *Ibid.*

<sup>44</sup> See for example, Lara Walker, ‘The Impact of the Hague Abduction Convention on the rights of the Family in the Case-Law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of *Neulinger*’, 6(3) *Journal of Private International Law*, 2010, 649.

<sup>45</sup> See David Hodson, *Swiss clockmakers fail to tell the time: ECHR allows abduction after many delays*, 12 August 2010, available at <http://www.familylaw.co.uk/articles/DavidHodsonIFL090810>.

<sup>46</sup> *Ibid.*

<sup>47</sup> [2011] UKSC 27.

was argued, did not “properly respect the requirement that the best interests of the child be a primary consideration”.<sup>48</sup> The UK Supreme Court appears to have made use of the case to temper the possible effects of the approach to the best interests of the child perceived to have been adopted in *Neulinger*. It noted that, in holding that a child’s “best interests must be assessed in each individual case”,<sup>49</sup> the ECtHR

gives the appearance of turning the swift, summary decision making which is envisaged by the Hague Convention into the full-blown examination of the child’s future in the requested state which it was the very object of the Hague Convention to avoid.<sup>50</sup>

The UK Supreme Court opined, however, that paragraph 139 of *Neulinger* is set in the context of *Maumousseau and Washington v. France*,<sup>51</sup> in which the ECtHR stated that the positive obligation to reunite parents and children must be interpreted in the light of the provisions of both the Hague Convention and the CRC, and that a fair balance must be struck between the competing interests of the child, parents, and public order. The UK Supreme Court opined that the ECtHR was entirely in agreement in *Maumousseau* with the philosophy (regarding the best interests of the child) underlying the Hague Convention. The Court concluded that in *Neulinger* it was the length of time that the child had spent in Switzerland, caused by delays in the processing of the case before the ECtHR, which would have made a forced return without the mother to Israel a breach of Article 8 and not the application of the Hague Convention.<sup>52</sup>

The UK Supreme Court also noted that the Brussels II Revised Regulation<sup>53</sup> positions the best interests of children as a paramount consideration in Hague Convention cases. Recital (12) of that instrument states that “the grounds of jurisdiction in matters of parental responsibility...are shaped in light of the best interests of the child” and provides for hearing the wishes of children.<sup>54</sup> The Court also made reference to the fact that

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<sup>48</sup> *Ibid.*, at para. 3.

<sup>49</sup> *Neulinger and Shuruk v. Switzerland*, Application No. 41615/07, judgment 6 July 2010, at para. 138.

<sup>50</sup> *In re E(Children)* [2011] UKSC 27, at para. 22.

<sup>51</sup> Application No. 39388/05, judgment 6 December 2007.

<sup>52</sup> *In re E(Children)* [2011] UKSC 27, at para. 26.

<sup>53</sup> Council Regulation (EC) 2201/2003.

<sup>54</sup> *Ibid.*, Article 11(4).

article 11.6 to 11.8 contains a procedure whereby the courts of the requesting state may nevertheless make a decision about the custody of the child, which decision will be enforceable in the requested state.<sup>55</sup>

It also emphasised that vindication of Article 8 of the ECHR is already inherent in the Hague Convention, although obviously there will be exceptions to this. Therefore it is not the case that the ECHR necessarily ‘trumps’ the Hague Convention. The Court also made reference to the extra-judicial comment of the President of the ECtHR<sup>56</sup> that it would be “over-broad” to abandon the summary approach envisaged by the Hague Convention and to move towards an assessment of the merits of each Hague Convention case. The UK Supreme Court cites the President as stating that *Neulinger* does not constitute a significant departure by the ECtHR from the summary approach to return under the Hague Convention, but that

The logic of the Hague Convention is that a child who has been abducted should be returned to the jurisdiction best-placed to protect his interests and welfare, and it is only there that his situation should be reviewed in full.<sup>57</sup>

The outcome of *In re E (Children)* appears to indicate that domestic courts may not modify their approach to the best interests of the child in Hague Convention cases in light of *Neulinger*. However, both cases highlight the difficulties associated with observing the presumption in favour of return whilst according sufficient regard to the best interests of the child via the defences provided under the Hague Convention, particularly where significant time has passed between the removal of the child and the order for return.<sup>58</sup> The judgment of *In re E (Children)* notwithstanding, *Neulinger* raises a number of pertinent points in an Irish context. First it points to the need to deal with Hague Convention cases expeditiously. This is crucial, not least because of the potential disruption to the lives of children who may be returned after considerable lengths of time, and often against their wishes,<sup>59</sup> to the country from which they were taken. It is noted that Article 11(3) of the Brussels II Revised Regulation<sup>60</sup> seeks to impose a six week time period within which child abduction cases

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<sup>55</sup> *In re E(Children)* [2011] UKSC 27, at para. 17.

<sup>56</sup> The comments were made in a conference paper at the Franco-British-Irish Colloque on Family Law, Dublin, 14 May 2011.

<sup>57</sup> *In re E(Children)* [2011] UKSC 27, at para. 25.

<sup>58</sup> Albeit if a period in excess of one year has passed, the defence of settlement under Article 12 of the Hague Convention may apply.

<sup>59</sup> See for example, *R. v. R.* [2008] IEHC 162 and *D. v. D.* [2008] IEHC 176.

<sup>60</sup> Council Regulation (EC) 2201/2003.

within the EU (with the exception of Denmark) are to be determined. The case management system currently employed in the High Court under the auspices of Finlay-Geoghegan J. seeks to work within that time frame; however, contested cases appear to exceed the six week period. The need to progress cases concerning children expeditiously is not limited to child abduction cases. Recently the High Court struck out an appeal from the Circuit Court concerning the welfare of a child owing to the delay and failure of the appellant to prosecute her appeal. It was held that it is in the interests of children to determine litigation concerning them expeditiously.

*Neulinger* also highlights the need for regard for the position of the best interests of the child in Hague Convention cases. Whilst judges have a wealth of experience in the area of balancing competing interests, states have an obligation to provide training for judges in the area of children's rights and interests. States must do this in order to ensure that there is a full understanding of those rights and interests, and that they are given an appropriate position in such complex cases. The Committee on the Rights of the Child has consistently emphasised the obligation of states to provide training in children's rights to judges presiding over cases which involve the rights and interests of children. The Committee holds, in particular, that states should "provide all relevant professional categories involved in judicial and administrative proceedings with mandatory training on the implications of article 12 of the Convention"<sup>61</sup> (the right of children to be heard and have their views accorded priority). Although *Neulinger* did not touch on the matter of the child's views, this matter is particularly significant where children have resided for a number of years in the country to which they have been abducted. They have often formed clear opinions on what their own interests are. *Neulinger* highlights the fact that further consideration is needed of the issues involved in balancing the assumption in favour of return, the interests of all those involved in Hague Convention cases and granting adequate weight to the best interests of the child principle.

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<sup>61</sup> Committee on the Rights of the Child, *Day of Discussion on the Right to be Heard*, Forty-Third Session, 11–29 September 2006, at para. 41.

### 1.3.3 The Right to Family and Private Life and Appeals for those on the Sex Offenders Register

In Ireland, those convicted of a limited range of sex offences are obliged to provide certain information to the Gardaí for a specified period of time. Currently, however, in England and Wales a person who has been convicted of a sexual offence against a child or adult and has been sentenced to at least 30 months in prison will be placed on a sexual offenders register for life. Such an offender will then be obliged indefinitely to notify the police of a change of address or of other personal details, as well as any intention to travel abroad.<sup>62</sup>

In the case of *R (on the application of F and Angus Aubrey Thompson) v. Secretary of State for the Home Department*,<sup>63</sup> however, there was a legal challenge in England and Wales to the fact that notification requirements for sexual offenders with sentences of at least 30 months in prison are indefinite. Two convicted sex offenders, one of whom had committed the act which was the subject of the conviction at the age of 11 (and who was still a minor at the time of *R*), brought the case on the ground that the indefinite nature of the notification requirements coupled with the absence of a right of appeal was a breach of Article 8 of the ECHR. In the case of the minor applicant, the registration requirements had meant that he was unable to take a family holiday abroad. He had also been unable to play rugby league.

In April 2010, the UK Supreme Court considered whether the fact that offenders did not have the right to request a review of the indefinite notification requirements was proportionate to the aims (i.e. to prevent sexual offending) pursued by the policy behind this law. The Court considered domestic and ECtHR jurisprudence. It noted that the Court of Appeal of England and Wales, when asked to consider the case, had opined that “No purpose is served by keeping on the Sexual Offences Register a person of whom it can confidently be said that there is no risk that he will commit a sexual offence.”

The Supreme Court held that the fact that the requirements of the registry lasted indefinitely, with no opportunity for review, was incompatible with Article 8. A declaration of

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<sup>62</sup> Under Part 2 of the Sexual Offences Act 2003.

<sup>63</sup> *R (on the application of F and Angus Aubrey Thompson) v. Secretary of State for the Home Department* [2010] UKSC 17.



incompatibility was made in respect of the relevant legislation, which means it must now be considered by the UK Parliament. The Court concluded that

it must be open to Parliament to take the view that, as a precaution against the risk of them committing serious sexual offences in future, even such young offenders should be required to comply with the notification regime indefinitely. But that makes it all the more important for the legislation to include some provision for reviewing the position and ending the requirement if the time comes when that is appropriate.<sup>64</sup>

The draft of a proposed order (Sexual Offences Act 2003 (Remedial Order) 2011, discussed later in Chapter 2.5 of this report) to introduce a review mechanism was published in June 2011 by the UK Home Office. It proposes that sex offenders currently on the register may apply to be considered for removal from the register fifteen years after their release from prison.<sup>65</sup> Those who are convicted for a sex offence as a juvenile may apply eight years after release from prison. Offenders who fail in their first application to be taken off the register will have to wait another eight years before re-applying for their name to be removed.

The draft of the proposed order was considered by the Joint Select Committee on Human Rights.<sup>66</sup> It recommended that the draft order should not be introduced in its current form as it does not address the Supreme Court's decision in the *R* case. The Committee also recommended that any review of an entry on the register should be by way of an application to an independent and impartial tribunal with an accompanying requirement to notify the Chief Police Officer and other MAPPAs institutions so that they could make representations. This was as an alternative to the full statutory appeal from the decision of the Chief Officer proposed in the draft order, which the committee were also prepared to endorse. Finally, the committee advised that the draft order should be amended so that the review would include a test with a requirement of proportionality and a consideration of the impact of the review on the particular offender. Up until the point of the submission of this report there have been no further cases on the sex offenders register and the draft order has not been transposed into a statutory instrument.

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<sup>64</sup> Ibid., at para. 66.

<sup>65</sup> Draft Sexual Offences Act 2003 (Remedial) Order 2011, laid before Houses of Parliament on 14 June 2011.

<sup>66</sup> Human Rights Joint Committee, *Nineteenth Report, Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011* (TSO, 2011).

Thus the judgment in the *R* case indicates the manner in which the ECHR encourages evolution of the law at domestic level. It is useful for such developments to be noted in Ireland. However, practice in Ireland does not have the potential to breach Article 8 in this way. Although a limited range of sexual offenders are required to provide Gardaí with certain information on release from prison,<sup>67</sup> there are limitations placed on this in accordance with the length of the prison term served.<sup>68</sup> Moreover, the period of time for which an offender must provide information is halved if the individual is under 18 years of age.<sup>69</sup> Those who receive a life sentence or a term of 2 years must report indefinitely. Crucially, however, after 10 years from release from prison offenders have the option of application to the Circuit Court to terminate that obligation.

#### **1.3.4 Recommendations**

*Research is needed on the matter of the various bases on which children are taken into care and whether current levels of family support at an early stage are adequate to prevent the taking of children into care.*

*Research is also needed on the specific vulnerability of children accommodated in the system of Direct Provision and the potential or actual harm which is being created by the particular circumstances of their residence including the inability of parents to properly care for and protect their children and the damage that may be done by living for a lengthy period of time in an institutionalised setting which was not designed for long term residence.*

*The matter of whether greater family support is now needed because of the current economic climate should be considered. This should include a review of the system of support for*

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<sup>67</sup> Although the term ‘sex offenders register’ is often used in Ireland, there is no ‘register’ as such. Centralised data relating to sex offenders in Ireland is retained by the Domestic Violence and Sexual Assault Unit of the Garda Síochána. See the National Crime Council website, available at [http://www.crimecouncil.gov.ie/sex\\_offenders\\_register.html](http://www.crimecouncil.gov.ie/sex_offenders_register.html).

<sup>68</sup> Sex Offenders Act, 2001, s.8.

<sup>69</sup> For offenders who receive a suspended sentence or no prison sentence, the reporting requirement lasts 5 years, or 2.5 years for offenders under the age of 18. The offender must report for 7 years if he/she receives a sentence of less than 6 months duration; however, the requirement is 3.5 years for an offending minor. The offender must report for 10 years if he/she receives a term of 6 months to 2 years. However, the reporting requirement is reduced to 5 years for an offending minor. An offender must report indefinitely if he/she receives a prison term of over 2 years, with the possibility of an appeal after 10 years.

*families in Direct Provision. The HSE should be obliged to establish the steps taken to provide support and assistance for the family in advance of proceedings.*

*Hague Convention cases should always be dealt with the utmost expedition.*

*Training is needed on the CRC for all judges in Ireland involved in decision-making relating to the rights and interests of children, particularly in Hague Convention cases where the matter of the best interest of the child is somewhat fraught. Direct communication between judges in such cases should follow the Hague Protocol recommendations.*

*In particular, the awareness of the relevant judges needs to be raised of the difficulties associated with Hague Convention because of the potential conflict between the principles of the presumption in favour of return and the best interests of the child.*

## **1.4 EU Agenda for the Rights of the Child**

### **1.4.1 The EU and Children's Rights**

Children's rights have been accorded increasing prominence by the institutions of the EU. The European Commission identified children's rights as a priority area in its *Communication on Strategic Objectives 2005–2009*, which stated that a “particular priority must be effective protection of the rights of children, both against economic exploitation and all forms of abuse, with the Union acting as a beacon to the rest of the world.”<sup>70</sup> The Treaty on European Union, which was amended by the Lisbon Treaty, contains in Article 3(3) a commitment to promote the “protection of the rights of the child”. The Lisbon Treaty also made the EU Charter on Fundamental Rights binding, which further strengthens the rights of children within the EU. Article 24, entitled ‘The rights of the child’ states

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<sup>70</sup> European Commission, *Communication on Strategic Objectives 2005–2009* (Brussels, 26.1.2005) COM(2005) 12, at p. 9.

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.<sup>71</sup>

The provisions of this article closely reflect those of the CRC, which has been signed and ratified by all 27 EU Member States. Article 24.1 of the EU Charter contains the same principle of protection as that in the CRC which stipulates that states must “ensure the child such protection and care as is necessary for his or her well-being”.<sup>72</sup> The second part of Article 24.1 reflects the right of children to be heard in matters affecting them, as enshrined in the CRC.<sup>73</sup> Part 2 of Article 24 mirrors the best interests principle enshrined in the CRC, reflecting almost exactly the language used in that UN instrument.<sup>74</sup> Part 3 of Article 24 parallels the CRC right of the child to know and be cared for by his or her parents.<sup>75</sup>

Although the Charter does not necessarily establish new powers or tasks for the EU, it could be said to provide a clear political mandate for action in the area of children's rights.<sup>76</sup> In the Irish legal context, Article 24.1 of the EU Charter has already been considered, in the case of *N. v. N. [hearing a child]*.<sup>77</sup> The applicant father of a six year old boy sought his return from Ireland under the Hague Convention on Civil Aspects of International Child Abduction. Finlay-Geoghegan J. opined that it was permissible to have regard to Article 12 of the CRC (the right of children to be heard), although it is not directly applicable in Irish courts,<sup>78</sup> because of a similar provision within the EU Charter of Fundamental Rights.<sup>79</sup> Article 12 and

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<sup>71</sup> The Charter of Fundamental Rights of the European Union, OJ (C 364) 1, adopted 7 December 2000, Article 24.

<sup>72</sup> CRC, Article 3.2.

<sup>73</sup> *Ibid.*, Article 12.1. See my first report, which recommended that the guardian *ad litem* system in Ireland (whereby an independent professional represents the views and interests of children in court) be revised and made more widely available as a form of legal representation for children. Geoffrey Shannon, *First Report of the Rapporteur on Child Protection* (2007) at p. 69.

<sup>74</sup> *Ibid.*, Article 3.1.

<sup>75</sup> *Ibid.*, Article 7.

<sup>76</sup> European Commission: Justice Website, available at <http://ec.europa.eu>.

<sup>77</sup> [2008] IEHC 382.

<sup>78</sup> Ireland has a ‘dualist system’ of law which means that international treaties are not considered part of domestic law without enacting legislation.

<sup>79</sup> Finlay-Geoghegan J. stated that this was because Recital (33) of Council Regulation (EC) 2201/2003 refers to ensuring respect for children’s rights “as set out in Article 24 of the Charter of Fundamental Rights”, and the language of the relevant Charter provision is based on Article 12 of the CRC, which enshrines the right of children to be heard.

Article 24 rights were also considered in *Bu (A) v. Be (J)*.<sup>80</sup> In this case the Supreme Court upheld the earlier decision of the High Court in a Hague Abduction Convention case that it was inappropriate given the age and maturity of a five year old child to hear that child's views. However, at the same time the Court stated that in its view Article 12 and Article 24 guaranteed a similar right to be heard to children. These cases highlight the fact that EU law is having a direct impact on children's rights in Irish law.

In 2006, the European Commission released a document entitled *Towards an EU Strategy on the Rights of the Child* in which it launched a "long-term strategy"<sup>81</sup> which aimed to achieve adequate promotion and safeguarding of children's rights in the EU and amongst Member States of the EU. In a more recent development, in February 2011, a Communication was released by the European Commission entitled *An Agenda for the Rights of the Child*.<sup>82</sup> The Agenda states that in all EU policies and legislation the EU will take the best interests of children into account. It also contains proposals relating to support for the authorities of EU Member States concerning children's rights.

The earlier document, *Towards an EU Strategy on the Rights of the Child*,<sup>83</sup> proposed a strategy to protect children's rights within the EU's policy framework. The specific objectives established in the document were

- Capitalising on existing activities while addressing urgent needs
- Identifying priorities for future EU action
- Mainstreaming children's rights in EU actions
- Establishing efficient coordination and consultation mechanisms
- Enhancing capacity and expertise on children's rights
- Designing a communication strategy on children's rights.<sup>84</sup>

In order to achieve these aims, a number of measures were implemented, including those relating to child abduction and child sexual abuse. Joint poverty indicators for Member States were established, and the European Forum for the Rights of the Child was created in order to

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<sup>80</sup> [2010] IESC 38.

<sup>81</sup> European Commission, *Towards an EU Strategy on the Rights of the Child* (Brussels, 4.7. 2006) COM(2006) 367, at p. 7.

<sup>82</sup> European Commission, *An Agenda for the Rights of the Child* (Brussels, 15.2.2011) COM(2006) 367.

<sup>83</sup> European Commission, *Towards an EU Strategy on the Rights of the Child* (Brussels, 4.7.2006) COM(2006) 367.

<sup>84</sup> As summarised by the European Commission: Justice Website, available at <http://ec.europa.eu>.

give prominence to children's rights in the EU.<sup>85</sup> A wide-ranging consultation was also held which led to the drafting and publication of the Agenda.

### **1.4.2 The EU Agenda for the Rights of the Child**

In the Agenda, the European Commission states that

The EU Agenda for the Rights of the Child presents general principles that should ensure that EU action is exemplary in ensuring the respect of the provisions of the Charter and of the UNCRC with regard to the rights of children. In addition, it focuses on a number of concrete actions in areas where the EU can bring real added value, such as child-friendly justice, protecting children in vulnerable situations and fighting violence against children both inside the European Union and externally.<sup>86</sup>

As well as aiming to ensure that EU legislative proposals are in compliance with the EU Charter on Fundamental Rights, the Agenda also aims to ensure that Member States comply with the Charter when they implement EU law in their own national systems. The Agenda gives the undertaking that the departments of the Commission will examine the child-rights impact of initiatives, that basic data will be collected for developing evidence-based policies and that both the European Forum for the Rights of the Child and Member States will be consulted when policy on children is being drafted.<sup>87</sup> Moreover, it gives details of the measures which will be taken to ensure child-friendly justice, particularly for vulnerable children, and beyond the activity of EU Member States. Finally, the Agenda considers the issue of the participation of children in matters affecting them, as well as the need to raise children's awareness of their rights. The Agenda is certainly mindful of the principle of subsidiarity.<sup>88</sup> However, the need for Member States to take action is emphasised throughout the document:

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<sup>85</sup> EU Business Website, 'EU Strategy on the Rights of the Child – Update', 10 April 2008, available at: <http://www.eubusiness.com/topics/social/rights-of-the-child/>.

<sup>86</sup> European Commission, *An Agenda for the Rights of the Child*, at p. 4.

<sup>87</sup> *Ibid.*, at p. 5.

<sup>88</sup> The Agenda, at page five states, for example, that "In full respect of the principle of subsidiarity the Commission will continue to support Member States' efforts by promoting exchange of best practice, cooperation and communication with and among national authorities responsible for protecting and promoting the rights of the child." The principle of subsidiarity is defined in Article 5 of the Treaty on European Union: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

With this EU Agenda for the Rights of the Child, the Commission calls on the EU institutions and on the Member States to renew their commitment to step up efforts in protecting and promoting the rights of children...Many of these policies require determined action by the Member States.<sup>89</sup>

### 1.4.3 Child Rights-Based Indicators

A number of areas covered in the Agenda are particularly pertinent to Ireland. One area in which Ireland could contribute to the implementation of the Agenda is on the question of indicators. One of the Agenda's stated aims is to improve monitoring of the impact of various policies on children's rights. The need for the production of basic data for evidence-based policies was identified by the Agenda as part of this aim.<sup>90</sup> In 2009, indicators for measuring the protection, respect and promotion of children's rights were established on behalf of EU Member States by the EU Agency for Fundamental Rights, and the document containing them remains a useful resource for both EU institutions and Member States.<sup>91</sup> The document is intended to be "an initial toolkit to evaluate the impact of EU law and policy on children's status and experience across various fields".<sup>92</sup> It works precisely within the framework of reporting advocated by the Committee on the Rights of the Child under the following headings: 'Family Environment and Alternative Care', 'Protection from Exploitation and Violence', 'Education, Citizenship and Cultural Activities' and 'Adequate Standard of Living'. The process, then, aims to take a children's rights approach to data collection, by having significant regard for the CRC. This method permits the Fundamental Rights Agency to

develop evidence based opinions that will support EU institutions and Member States in further developing and strengthening legal and policy measures to protect, respect and promote child rights within their respective spheres of competence.<sup>93</sup>

In recent years, Ireland has implemented comprehensive measures to create indicators which map children's well-being. In 2005, the publication of the *Report on the Development of a National Set of Child Well-Being Indicators* represented the culmination of an extensive

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<sup>89</sup> European Commission, *An Agenda for the Rights of the Child*, at p. 14.

<sup>90</sup> *Ibid.*, at p. 5.

<sup>91</sup> EU Agency for Fundamental Rights, *Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European Union* (Brussels: EU Agency for Fundamental Rights, 2009).

<sup>92</sup> *Ibid.*, at p. 4.

<sup>93</sup> *Ibid.*, at p. 7.

project to establish well-being indicators for children in Ireland.<sup>94</sup> This project has since formed the basis of all current work on child well-being indicators in Ireland. In December 2010, the then Minister for Children and Youth Affairs, Barry Andrews, TD, launched the *State of the Nation's Children Report: Ireland 2010*.<sup>95</sup> This Report, which was drafted by the Office of the Minister for Children and Youth Affairs, was the third of its kind.<sup>96</sup> It presents data on children's lives, with a specific focus on outcomes for children (e.g., health, social, and educational outcomes), data on children's relationships with family and friends, as well as data on children's services.

These initiatives reflect the increased recognition in Ireland of the need to base policy-making for children on the best possible evidence. However, to ensure that the indicators take into account all children within Ireland, it is important that all children are included regardless of their immigration status. Furthermore, to take a rights-based approach to measuring children's experiences requires rights to be considered in the measuring process. In the past such measurements have been concerned with child well-being rather than with an explicit consideration of children's rights. Without such a focus, vital information on children's needs and experiences will be lost. In the *State of the Nation's Children Report: Ireland 2010*, for example, reference is made under the heading of 'Participation in Decision-Making' to the contribution of children to school rules.<sup>97</sup> However, the participation of children in decision-making in other vital areas (e.g. the family, the legal system, the medical arena, the political sphere and so on) is not referred to. The added value of taking a children's rights-based approach to indicators is made clear by the EU Fundamental Rights Agency, which makes reference to the indicators developed by that Agency

The UN CRC is the starting point and the normative framework for this project. The comprehensiveness of a holistic child rights perspective, with concepts and principles of empowerment and accountability, non-discrimination and participation, compensates for some current limitations of EU law to provide a comprehensive regulatory basis for indicator development.<sup>98</sup>

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<sup>94</sup> National Children's Office, *Report on the Development of a National Set of Child Well-Being Indicators* (Dublin: National Children's Office, 2005).

<sup>95</sup> Office of the Minister for Children and Youth Affairs, *State of the Nation's Children Report: Ireland 2010* (Dublin: Office of the Minister for Children and Youth Affairs, 2010).

<sup>96</sup> It was drafted in conjunction with the Central Statistics Office as well as the Health Promotion Research Centre at the National University of Ireland, Galway.

<sup>97</sup> Office of the Minister for Children and Youth Affairs, *State of the Nation's Children Report: Ireland 2010* (Dublin: Office of the Minister for Children and Youth Affairs, 2010), at p. 116.

<sup>98</sup> EU Agency for Fundamental Rights, *Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European Union*, at p. 8.



The adoption in Ireland of an approach to indicators based on children's rights, as in the CRC, would create a far more comprehensive approach to data collection about children, which would in turn play a part in the improvement of their rights and indeed of their general well-being.

#### 1.4.4 Child-Friendly Justice

Another area covered in the EU Agenda for the Rights of the Child is child-friendly justice, which the document refers to as "a key action item".<sup>99</sup> A large part of the focus of the Agenda is on the participation rights of children in the legal arena. The document notes that access to justice for children, as well as effective participation in legal matters affecting them, is a basic precondition of the protection of their legal interests. The first point noted in the Agenda is that "children can face obstacles with regard to legal representation or being heard by judges."<sup>100</sup>

In my first report, I itemised serious shortcomings in regard to child-friendly justice in Ireland. I also recommended that children should be represented in family welfare conferences. These conferences are convened by the HSE to plan for the future care of a child where orders under Part IVA of the Child Care Act 1991 may have to be made in respect of that child. Family welfare conferences are a means of allowing the family of the child in question to play a significant role in matters of care and criminal justice concerning the child. As noted in my first report, the legislation currently permits the child in question to attend the relevant conference, and to have a guardian *ad litem* present if that is appropriate; however, I recommended consideration of the role of a lay advocate on behalf of the child at such conferences because of the vulnerable position of children.<sup>101</sup>

There are many other areas of child law in Ireland where justice must be made more child-friendly.<sup>102</sup> I highlighted in my first report that the guardian *ad litem* system in Ireland (whereby an independent professional represents the views and interests of children in court)

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<sup>99</sup> European Commission, *An Agenda for the Rights of the Child*, at p. 6.

<sup>100</sup> *Ibid.*

<sup>101</sup> Shannon, *First Report of the Rapporteur on Child Protection*, at p. 54.

<sup>102</sup> See also the 'Children and the Criminal Law' section in last year's report for consideration of the need to make the law more child-friendly for children in criminal matters; namely by including young offenders in a constitutional amendment and by greater inter-agency cooperation. See also consideration of the needs of child victims in my second and third reports (2008 and 2009).

is not available to the majority of children in civil law cases in Ireland.<sup>103</sup> The Irish courts have recognised the constitutional right of children to have their views taken into account in proceedings concerning them (in accordance with their age and understanding).<sup>104</sup> However, children are not helped systematically by the Irish legal system to do this. The use of the guardian *ad litem* facility should be revised and made more widely available as a form of legal representation for children.<sup>105</sup>

The document *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*<sup>106</sup> was published in December 2010. The Guidelines provide a very useful tool for furthering children’s rights in the sphere of judicial and administrative proceedings, and complement the EU Agenda for the Rights of the Child, as the focus of both documents is firmly on children’s rights and in particular children’s rights in proceedings affecting them. The Guidelines acknowledge the progress made internationally and within Member States of the Council of Europe towards implementing child-friendly justice, but notes that obstacles such as problems in accessing justice and the complexity of procedures still obstruct children in the legal arena. Therefore the Guidelines aim to serve as

a practical tool for member states in adapting their judicial and non-judicial systems to the specific rights, interests and needs of children and invites member states to ensure that they are widely disseminated among all authorities responsible for or otherwise involved with children’s rights in justice.<sup>107</sup>

The Guidelines contain extensive reference to the matter of representation for children, referring in forthright terms to the right of children to be “consulted and heard in proceedings involving or affecting them”, including the right to have due weight given to their views, in accordance with their maturity. They also state that any communication difficulties which children may have must also be considered in order to make participation meaningful;<sup>108</sup> and the Guidelines then refer to the role of judges, who, they state, should not refuse to hear children and should “respect the right of children to be heard in all matters affecting them”– a

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<sup>103</sup> Shannon, *First Report of the Rapporteur on Child Protection*, at p. 69.

<sup>104</sup> *F.N. and E.B. v. C.O., H.O. and E.K.* [2004] 4 I.R. 311. See Geoffrey Shannon, *Third Report of the Rapporteur on Child Protection* (2009), at p. 69.

<sup>105</sup> Shannon, *First Report of the Rapporteur on Child Protection*, at p. 69.

<sup>106</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, adopted by the Committee of Ministers at the 1,098th meeting of the Ministers’ Deputies, 17 November 2010. Guidelines and Explanatory memorandum version published 31 May 2011.

<sup>107</sup> See Preamble of the Guidelines.

<sup>108</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, at p. 4.

broad approach when one considers the range of cases which can involve children's interests: for example, custody or access or even matters relating to maintenance. They also emphasise that the right of children to be heard is a child's right, and is not to be seen as the duty of the child.<sup>109</sup>

The Guidelines also provide some very specific guidance on children's rights in relation to representation. It states that children

should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.<sup>110</sup>

Although there is no further description of the scope of proceedings which this could cover, the interests of children are not impartially represented where parents are litigating against each other or where parents and the State are opposing parties. This could, therefore, be taken to mean all family law and child care proceedings.<sup>111</sup> It is further stated in the document that children should be able to access free legal aid as "fully-fledged clients" from lawyers trained specifically for representing children and the conditions under which they should be able to do this should be the same as, or more lenient than, the conditions under which adults have access to that resource.<sup>112</sup>

The Agenda further highlights the matter that inadequate information on defending rights and interests can be provided to children and their representatives in judicial proceedings. It is emphasised in the Agenda that

The adequate provision of information to children and parents about their rights under EU law and national law is a prerequisite to enable them to defend their rights in family law litigation. Information should be easily accessible and provide clear guidance on the relevant procedures.<sup>113</sup>

The Guidelines also give detailed instruction on the matter of information for children in proceedings affecting them, and therefore are very helpful in this area. They refer to "[t]he right of all children to be informed about their rights" and "to be given appropriate ways to

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<sup>109</sup> Ibid., at p. 9.

<sup>110</sup> Ibid., at para. 37.

<sup>111</sup> Ibid., at p. 9.

<sup>112</sup> Ibid.

<sup>113</sup> European Commission, *An Agenda for the Rights of the Child*, at p. 6.

access justice”.<sup>114</sup> The document emphasises the need to provide information to children about proceedings affecting them as a separate exercise from the provision of such information to parents and legal representatives. They state that giving information to parents should not be seen as an alternative to providing the information to the child involved. Therefore, child-friendly materials should be available for children, and “special information services” appropriate to the capacities of children should be established for this purpose (e.g., websites and helplines). Importantly, the outcome of decisions need to be explained to children, and children must also be informed in advance that, while they have a right to be heard, their wishes will not necessarily determine the outcome of proceedings.<sup>115</sup>

#### **1.4.5 Awareness of Children’s Rights**

The matter of information for children on rights in judicial proceedings anticipates the final point raised in the Agenda: the need to ensure that in general better and more effective information is provided to children about their rights.<sup>116</sup> The Agenda makes reference to material available on the websites of EU institutions, and the intention to establish a single entry point for children for access of information about rights on the EU’s web portal *EUROPA*. However, there is clearly a need for Member States themselves to engage in human rights education for children. In fact there is an obligation under Article 42 of the CRC to engage in awareness-raising about the Convention domestically. It obliges states to “make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike”.

In its Concluding Observations on Ireland’s report under the CRC in 1998, the Committee on the Rights of the Child recommended that the Irish government promote human rights education.<sup>117</sup> In its observations on Ireland’s second report the Committee again encouraged the Irish government to

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<sup>114</sup> *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, at p. 4.

<sup>115</sup> *Ibid.*, at pp. 8–9.

<sup>116</sup> European Commission, *An Agenda for the Rights of the Child*, at p. 14.

<sup>117</sup> Committee on the Rights of the Child, *Concluding Recommendations on Ireland’s First Periodic Report*, 1998.

further strengthen its efforts to ensure that the provisions of the Convention are widely known and understood by both adults and children, including through periodic and nation-wide public awareness-raising campaigns that include also child-friendly material, and through targeted campaigns and necessary training for professionals working with children, in particular within schools and health and social services, and legal professionals and law enforcement officials.<sup>118</sup>

As pointed out in the *Shadow Report to the Committee on the Rights of the Child* in 2006, “there has been no national awareness-raising campaign to inform children of their rights.”<sup>119</sup> The report also emphasised that it is unclear which government agency is responsible for the task of promoting awareness of the CRC, and called for a comprehensive programme to teach all children about their rights under the CRC.<sup>120</sup> Because of CRC obligations and the new emphasis at EU level on teaching children about human rights, there should be renewed emphasis on human rights education, particularly in schools where all children can receive such information.

#### **1.4.6 Recommendations**

*An approach based on children’s rights should be taken to data collection on child well-being in Ireland, one that works within the framework of the CRC. ‘Child well-being indicators’ in Ireland should become ‘children’s rights indicators’. These indicators should be regularly updated in order to effectively monitor the situation of children’s rights in Ireland. All children present in the state, regardless of immigration status, should be included in the collection of data.*

*The role of a lay advocate on behalf of the child at family welfare conferences should be considered because of the vulnerable position of children.*

*The use of the guardian ad litem facility should be revised and made more widely available as a form of legal representation for children.*

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<sup>118</sup> Committee on the Rights of the Child, *Concluding Recommendations on Ireland’s Second Periodic Report*, 2006, at para. 19.

<sup>119</sup> *Ibid.*, at para. 71.

<sup>120</sup> *Ibid.*, at para. 74.

*Children should be given better information about proceedings affecting them and kept informed at all stages of such proceedings. Children should be consulted in all proceedings affecting them (bearing in mind the age and maturity of the child).*

*Children should be able to access free legal aid from lawyers trained specifically in representing children.*

*A comprehensive and compulsory programme should be integrated into existing school curricula to teach all children about human rights, particularly their own rights under the CRC.*

## **1.5 Convention on the Rights of the Child**

### **1.5.1 Failure to Incorporate Convention on the Rights of the Child into Domestic Law**

#### 1.5.1.1 Ireland and the Convention on the Rights of the Child

Ireland has signed and ratified the Convention on the Rights of the Child.<sup>121</sup> However, for the instrument to have force, enacting legislation would have to be passed giving the CRC direct effect in Irish law. Ireland has a dualist system of law, which means that international treaties must be incorporated into domestic law before they have effect. Until incorporation of the CRC, it is not possible for Irish courts to apply CRC provisions as a matter of law.<sup>122</sup> In *N. v. N. [hearing a child]*, for example, the High Court emphasised that, although Ireland had ratified the CRC, it does not constitute domestic law “because of the fact that it has not been given the force of law in Ireland by the Oireachtas”.<sup>123</sup> Also, specifically referring to Article 3 of the CRC, Edwards J. in *Minister for Justice, Equality and Law Reform v. Bednarczyk*<sup>124</sup> held that the High Court was constitutionally prohibited from applying the said provision as it had not been incorporated into Irish law.

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<sup>121</sup> Ireland signed the CRC on 30 September 1990 and ratified the instrument on 21 September 1992.

<sup>122</sup> Although it has been referred to on occasion by counsel; see for example, *N. v. N. [hearing a child]* [2008] IEHC 382.

<sup>123</sup> *Ibid.* And this fact was also noted in the Supreme Court’s decision in *Bu (A) v. Be (J)* [2010] IESC 38.

<sup>124</sup> [2011] IEHC 136.

Article 4 of the CRC enshrines the obligation of states to incorporate all provisions of that instrument into national law, stating that

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

There is a clear understanding that states – including those with dualist systems – will implement the provisions of the treaty, whether this occurs through incorporation of the CRC ‘en bloc’ (as has been done, for example, by Norway<sup>125</sup>) or through gradual law reform. The fact that Ireland has not yet passed enacting legislation to incorporate the CRC has been criticised by the Committee on the Rights of the Child (the monitoring body for the CRC). Although the Committee notes the fact that there have been a number of steps taken to improve the legal framework for children, the Committee expresses regret “that the Convention has not been incorporated into domestic law”.<sup>126</sup> As the Committee notes, there are some areas of Irish law and policy where one could argue that provisions of the CRC are complied with. For example, one of the three National Goals of the National Children’s Strategy is the objective that children “will have a voice in matters which affect them and their views will be given due weight in accordance with their age and maturity”.<sup>127</sup> This clearly mirrors Article 12 of the CRC, which states that children should be heard in all matters affecting them. Moreover, the Committee on the Rights of the Child has made reference to the appointment of an Ombudsman for Children in 2004 and the establishment of the Office of Minister for Children in 2005<sup>128</sup> as evidence of efforts to apply the CRC in Ireland.<sup>129</sup> The establishment of the Department of Children and Youth Affairs in 2011 is, perhaps, the most significant development in demonstrating our commitment to apply the CRC.

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<sup>125</sup> See the Norway government website: [www.norway.org](http://www.norway.org), which gives details of the incorporation of the CRC in 2003 through an amendment to the Norway Human Rights Act 1999.

<sup>126</sup> Committee on the Rights of the Child, *Concluding Observations: Ireland (CRC/C/IRL/CO/2)* 29 September, 2006, paras 8–9.

<sup>127</sup> Government of Ireland, *National Children’s Strategy: Our Children: Their Lives* (Dublin, Stationary Office, 2000), at p. 29. The *National Children’s Strategy* is a ten-year plan aimed at improving children’s lives. A new strategy is now being drafted.

<sup>128</sup> Committee on the Rights of the Child, *Concluding Observations: Ireland*, at para. 5.

<sup>129</sup> Such institutions are an important part of the implementation of the CRC. See Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (2003), UNCR/C/GC/2003/5, 27 November 2003.

Whilst these are positive developments, nevertheless CRC provisions, and therefore the rights and interests of children to which they pertain, have been notably lacking in the application of law and policy in Ireland. Individual members of the family possess personal rights under Article 40.3.1 of the Constitution, which has been held by the Irish courts to include unenumerated rights.<sup>130</sup> Indeed, there have been a handful of evolutionary judgments concerning children in this regard;<sup>131</sup> however, the extent to which the courts have recognised children as individual rights-holders remains unsatisfactory.<sup>132</sup> When matters are being considered which directly concern their interests, the children concerned have not always been given explicit recognition of their rights. In *N. & anor v. Health Service Executive & ors.*,<sup>133</sup> which involved a custody dispute between birth parents and prospective adopters, McGuinness J. observed that

It is perhaps striking that the one person whose particular rights and interests, constitutional and otherwise, were not separately represented, whether by solicitor and counsel or through a *guardian ad litem*, was the child herself.<sup>134</sup>

Baby Ann's birth parents originally placed her for adoption, but then married. As a consequence they became a "constitutional family"<sup>135</sup> and the lawfulness of the custody of baby Ann's prospective adopters became the legal issue, and not her best interests, despite the fact that she had resided with her prospective adopters for a significant period of time.<sup>136</sup>

Whilst, of course, statutory provision for children's interests is made, as well as a certain degree of provision under the Constitution,<sup>137</sup> it is clear that there is still scope for more

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<sup>130</sup> *Ryan v. Attorney General* [1965] I.R. 294.

<sup>131</sup> See for example, *F.N. and C.O.* [2004] 4 I.R. 311 in which the Court held that the right of the child to be heard could be derived from unenumerated rights under Article 40.3.

<sup>132</sup> Kilkelly describes the influence of *F.N. and C.O.* as "negligible". Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing, 2009) at p. 63.

<sup>133</sup> [2006] 4 I.R. 374 (known as the 'Baby Ann' case).

<sup>134</sup> *Ibid.*, at 10.

<sup>135</sup> *Ibid.*, as per Hardiman J., at para. 92.

<sup>136</sup> *Ibid.*, McGuinness J. opined in that case at para. 79 that, because of the marriage: "The central issue to be considered by the Court underwent a metamorphosis; it was no longer the best interests of the child but the lawfulness or otherwise of the Doyles' custody of her. When deciding whether the Doyles' custody of Ann is in accordance with law it is no longer possible for the Court to follow the original approach of Lynch J. in *Re J.H.* – 'to look at it through the eyes, or from the point of view of the child'. It is clear that the Court is bound by the decision in *Re J.H.*; the full rigour of the test established in that case must be applied."

In that case the test set by Finlay C.J. in his judgment was defined by McGuinness J. as follows: "compelling reasons why the child's welfare could not be achieved within the natural family" and described by him as "so exacting that it would be difficult to see it being met other than in the most extreme circumstances".

<sup>137</sup> The provisions are enshrined in Articles 42 and 40.3 as outlined below.



decisively enshrining children's rights and interests in the highest law in Ireland. The incorporation into immigration and asylum law of the principle that decisions should be taken in the "best interests" of the child would fill one gap. One example of domestic legislation which gives priority to safeguarding and promoting the welfare of children when their entry into and residence in the state is considered is section 55 of the Borders, Citizenship and Immigration Act 2009<sup>138</sup>. Furthermore, a constitutional amendment giving explicit recognition to the rights of children would certainly provide the judiciary with compelling reasons to recognise children as rights-holders when considering matters which affect them.

#### 1.5.1.2 Rights of Children and Young Persons (Wales) Measure

In March 2011, Wales became the first UK jurisdiction to incorporate the CRC into national law, when the National Assembly for Wales passed unanimously a 'measure' for this purpose. Under the new Rights of Children and Young Persons (Wales) Measure, government ministers must now consider, when drafting new laws, the rights of people under 25 years of age. It also imposes an obligation under section 2 to "make a scheme ('the children's scheme') setting out the arrangements they have made, or propose to make, for the purpose of securing compliance with the duty". The government of the Welsh Assembly must consult with external stakeholders including the Children's Commissioner for Wales, the voluntary sector, and children themselves, on the development of the children's scheme. There are also reporting requirements under the Measure. This is a landmark piece of legislation and has been widely praised as a very positive step for children's rights and implementation of the CRC.<sup>139</sup>

Under section 1(2) of the Measure, "due regard" must be had for the CRC and its protocols. The Welsh government, then, must balance considerations relating to the CRC with other important matters relevant to the policy decision to be made. It is open to Welsh Ministers to change existing laws and documents in order to ensure due conformity with the CRC.<sup>140</sup> A controversial aspect of the Measure is that a matter will be considered a "relevant function" only if Ministers have made an explicit decision to include it in the children's scheme. This is a lower standard than requiring due regard to be had for the CRC in *all* of the functions of government. The National Assembly for Wales decides what is to be included in the

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<sup>138</sup> See <http://www.legislation.gov.uk/ukpga/2009/11/section/55?view=plain>.

<sup>139</sup> See for example, UNICEF UK, 'Historic Day for Children's Rights in Wales', 17 March 2011, available at: [www.unicef.org.uk](http://www.unicef.org.uk).

<sup>140</sup> Rights of Children and Young Persons (Wales) Measure, s.6.

children's scheme as a "relevant function".<sup>141</sup> An additional obligation is that Ministers must also take steps "that are appropriate" to ensure awareness and understanding of the CRC.<sup>142</sup>

The impact of the measure is expected to be very positive for children's rights and interests, with an expectation that higher prominence will be accorded to the CRC. It is expected that there will be greater knowledge and understanding of the CRC, and more explicit references to that instrument in a variety of policy areas through planning and service rules and regulations. It is also envisaged that children's rights and interests will gain higher visibility in budgets. The CRC will also inform assessment of the impact of policy-making, as well as the evaluation and auditing of existing policies. The Measure does not, however, introduce any new legal claims, as the obligations created are largely administrative. On the other hand, it will provide a new ground on which the actions of Welsh Ministers can be challenged through judicial review where there exists a failure to observe the duties of the Measure.<sup>143</sup>

It would be preferable in Ireland for a more all-encompassing piece of legislation to be drafted and adopted in order to incorporate the CRC. There would remain the need to render the CRC capable of being invoked in the courts, a need which is arguably less pressing in England and Wales, and indeed Scotland, as noted below,<sup>144</sup> because far greater weight is accorded to the CRC in judicial matters concerning children there already than at present in Ireland (though both Ireland and the UK have dualist systems). MacDonald states that the central message of his 2011 book on children's rights in England and Wales is that "the UN Convention on the Rights of the Child...can be relied upon before the domestic courts, tribunals and decision making bodies of this jurisdiction notwithstanding that it has not been formally incorporated into domestic law."<sup>145</sup>

The Welsh Measure provides an excellent example of how to create an obligation to have regard to the CRC when policy-making (with the possible exception of the shortcoming of

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<sup>141</sup> Wales National Assembly, *Proposed Rights of Children and Young Persons (Wales) Measure: Explanatory Memorandum*, 14 June 2010, available at <http://www.assemblywales.org>.

<sup>142</sup> Rights of Children and Young Persons (Wales) Measure, s.5.

<sup>143</sup> See Children's Commissioner for Wales, *Proposed Rights of Children and Young Persons (Wales) Measure: Additional Paper for Legislation Committee 5* (2010). The document states that "If a public authority breaks a duty under public law, it may be amenable to judicial review. In theory, the Welsh Ministers could be held to account through judicial review if they failed to carry out their duty under Clause 1 of the draft Measure." At p. 4, available at: [www.assemblywales.org](http://www.assemblywales.org).

<sup>144</sup> See section 1.5.1.3 below.

<sup>145</sup> Alistair MacDonald, *The Rights of the Child: Law and Practice* (Bristol, Jordan Publishing Limited, 2011), at p. 1.

having to specify ‘functions’ to which the obligations pertain). A more general obligation would clearly be preferable from a children’s rights perspective. Nonetheless, such a ‘measure’ could be introduced in Ireland and could include both the obligation for the judiciary to consider the CRC and the right of individuals to assert their CRC rights.

### 1.5.1.3 Rights-Based Child Law in Ireland

A related issue is the fact that the Constitution of Ireland – the fundamental law of the State – does not contain detailed provision relating to children. This is a topic which, to date, I have written about at length. In this report I wish to provide an up-to-date assessment of the topic and to emphasise the importance of some points for the current situation. In the absence of incorporation of the CRC, amending the Constitution to include specific provisions on children’s rights and interests is even more important. Explicit inclusion of children’s rights in the Constitution would not be a panacea for all the problems facing children in Ireland, nor would it necessarily remedy the defects of the State in its dealings with children. However, it would undoubtedly ensure that a greater level of regard would be given to children’s rights in all matters, particularly in the legal arena. It would also ensure greater conformity with the CRC, which requires that children’s rights be included in domestic law.

The family as an institution is accorded significant prominence in the Constitution and it has long been argued that the Constitution fails to accord sufficient rights to children in independence of those of the family.<sup>146</sup> Children are referred to explicitly in Article 42.1 (which positions the family as the primary educator of the child), Article 42.2–4 (which includes other education provisions) and Article 42.5, which stipulates that the State will supply the place of parents in exceptional circumstances. However, an explicit positioning of children as rights holders, distinct from the family unit, is notably absent. As far back as 1993 it was stated that the emphasis of the Constitution on the rights of the family could appear to accord greater weight to parental rights than children’s rights.<sup>147</sup> The lack of emphasis on

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<sup>146</sup> See for example, Constitution Review Group, *The Report of the Constitution Review Group* (Dublin, Stationary Office, 1996), at p. 308; Law Society of Ireland, *Right-Based Child Law: The Case for Reform* (Law Society of Ireland, 2006), at p. 51; Ursula Kilkelly and Conor O’Mahony, ‘The Proposed Children’s Rights Amendment: Running to Stand Still?’, 10 *Irish Journal of Family Law*, 2007, 19; and Eoin Carolan, ‘The Constitutional Consequences of Reform: Best Interests after the Amendment’, 10 *Irish Journal of Family Law*, 2007, 9, at p. 10.

<sup>147</sup> Catherine McGuinness, *Report of the Kilkenny Incest Investigation* (Dublin: Stationary Office, 1993), at p. 96.

children's rights in Irish law has also been commented upon by the Committee on the Rights of the Child

[T]he Committee regrets that some of the concerns expressed and recommendations made have not yet been fully addressed, in particular those related [to] the status of the child as a rights-holder and the adoption of a child rights-based approach in policies and practices.<sup>148</sup>

As I emphasised in the consultation process for the second text of the proposed constitutional amendment on children, though the State guarantees the defence and vindication of personal rights in Article 40.3 of the Constitution, in the case of children this responsibility is delegated to a third party – parents. I concluded on the matter of personal rights in Article 40.3 that “It is thus perhaps too imprecise to be regarded as a reliably consistent constitutional commitment to the rights of the child.”<sup>149</sup> I also emphasised that, save in exceptional circumstances, married parents are to a large extent exempt from scrutiny of the extent to which they ensure vindication of the rights of their children.<sup>150</sup>

The sense that children's rights and interests as individuals are somewhat neglected in Irish law has been compounded by the recent investigations into institutional abuse of children.<sup>151</sup> This has led to calls for a referendum to explicitly recognise children's rights in the Constitution. (For example by the Children's Rights Alliance, who make the point that “Constitutional status for the key principles of the Convention would also place significant obligations on Government in relation to children, regardless of the ebb and flow of political will.”<sup>152</sup>)

A referendum on the question of specifically including children's rights in the Constitution has been proposed on a number of occasions. There have been two separate draft texts

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<sup>148</sup> Committee on the Rights of the Child, *Concluding Observations: Ireland*, at para. 6.

<sup>149</sup> Geoffrey Shannon, *Submission to the Joint Committee on the Constitutional Amendment on Children: The Child and the Irish Constitution* (2007), available at <http://www.oireachtas.ie>, at p. 4.

<sup>150</sup> See Joint Committee on the Constitutional Amendment on Children, *Twenty-eighth Amendment of the Constitution Bill 2007: Proposal for a Constitutional Amendment to Strengthen Children's Rights –Final Report* (Houses of the Oireachtas, February 2010), at p. 61.

<sup>151</sup> See for example, Commission to Inquire into Child Abuse, *Committee Investigation Report* (Commission to Inquire into Child Abuse, 2009) otherwise known as the ‘Ryan Report,’ and Commission of Investigation, *Report into the Catholic Archdiocese of Dublin* (Commission of Investigation, 2009), otherwise known as the ‘Murphy Report’ and Francis Murphy, Helen Buckley, and Larain Joyce, *The Ferns Report* (Dublin, Government Publications, 2005).

<sup>152</sup> Children's Rights Alliance, *From Rhetoric to Rights: Second Shadow Report to the UN Committee on the Rights of the Child*, at para 28.

prepared by the former Government and the Joint Committee on the Constitutional Amendment on Children respectively. Minister for Children, Frances Fitzgerald, TD, has recently stated her commitment to hold a children's referendum by the end of the year. She also stated that the process would reflect the text of the Joint Committee on the Constitutional Amendment on Children rather than that of the former Government.

The first text, the Twenty-Eighth Amendment of the Constitution Bill 2007, was primarily a reaction to the *A.*<sup>153</sup> and *C.C.*,<sup>154</sup> cases, which concerned sexual intercourse with girls under the age of consent. The Bill emphasised the principle of the best interests of children and made reference to their rights. The former Government emphasised that the reformulation of the best interests principle in that draft gave “fresh expression” to children’s rights.<sup>155</sup> While this did represent an advance on the current formulation of children’s interests in the Constitution, arguably it did not position children strongly enough as independent rights-holders.

The most recent text – that of the Joint Committee on the Constitutional Amendment on Children – is a clear improvement in this respect. The text encompasses many aspects of children’s interests, including an explicit reference to the right of children to have “their welfare regarded as a primary consideration,”<sup>156</sup> as well as the position of the best interests of the child as the paramount consideration in “the resolution of all disputes concerning the guardianship, adoption, custody, care or upbringing of a child”.<sup>157</sup> The text also provides for recognition of the rights of children as individuals,<sup>158</sup> for education,<sup>159</sup> and in adoption.<sup>160</sup> It recognises the responsibility of the State to intervene in a proportionate manner where the parents of a child have failed in their duties, regardless of the marital status of those parents.<sup>161</sup>

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<sup>153</sup> *A. v. The Governor of Arbour Hill Prison* [2006] IESC 45; [2006] 4 I.R. 88.

<sup>154</sup> *C.C. v. Ireland & ors* [2006] IESC 33; [2006] 4 I.R. 1.

<sup>155</sup> See Joint Committee on the Constitutional Amendment on Children, *Twenty-Eighth Amendment of the Constitution Bill 2007: Proposal for a Constitutional Amendment to Strengthen Children’s Rights – Final Report* (Houses of the Oireachtas, February 2010), Appendix, at p. v.

<sup>156</sup> Proposed Article 42(1)(2).

<sup>157</sup> *Ibid.*, 42(1)(3).

<sup>158</sup> *Ibid.*, 42.2.

<sup>159</sup> *Ibid.*, 42.2.ii, 42.3, 42.7 and 42.8.

<sup>160</sup> *Ibid.*, 42.5 and 42.6.

<sup>161</sup> *Ibid.*, 42.4.

Crucially, the amendment also includes the right of children to be heard in proceedings affecting them – a key right under the CRC. Article 42.2 of the proposed draft reads as follows:

The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including...iii) the right of the child's voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child's age and maturity.

This provision certainly furthers incorporation of the CRC, which holds as one of its four core principles (referred to as 'general' or 'guiding' principles) the right to be heard.<sup>162</sup> The Committee on the Rights of the Child proposes that these principles are to be taken into account when making decisions about children, for example in the area of government policy formulation or judicial decision-making.<sup>163</sup> The right to be heard is, therefore, a crucial component of children's rights, which, traditionally, has been overlooked in Ireland, some recent progress notwithstanding.<sup>164</sup> I argued in previous reports that there is a need to improve implementation of the right to be heard in the areas of, amongst others, legal proceedings<sup>165</sup> and mental health.<sup>166</sup> The myriad of reports relating to the neglect and abuse of children in Ireland also make reference to the failure to hear the views of children. If these views had been sought and children's expertise on their own lives valued, earlier intervention might have been enabled or even prevention of situations of severe abuse.

However, the proposed amendment's encapsulation of the right of children to be heard is modestly drawn, in that reference is made only to judicial and administrative proceedings and not to all matters affecting children as is the case with Article 12 of the CRC. One must be mindful of the legal context in which the Constitution operates, and the fact that it is the area of proceedings that are perhaps most relevant to the amendment. However, it has already been recognised by the Irish courts that children have a Constitutional right to be heard in

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<sup>162</sup> The other principles are non-discrimination, Article 2, the best interests of the child, Article 3(1) and the child's right to life, survival and development, Article 6.

<sup>163</sup> Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*, at para. 12.

<sup>164</sup> The establishment of the Office of the Ombudsman for Children and the prominence of the voice of the child in the National Children's Strategy are two examples.

<sup>165</sup> Shannon, *First Report of the Rapporteur on Child Protection*, at p. 69.

<sup>166</sup> Geoffrey Shannon, *Fourth Report of the Rapporteur on Child Protection* (2010), at pp. 44–68.

proceedings concerning them.<sup>167</sup> Moreover, it relates to the point I made in my *Submission to the Joint Committee on the Constitutional Amendment on Children* that

The crux of the present problem is the constitutional focus on the need to establish a failure on the part of parents of a child before the rights of the child are considered. This constitutes a negative approach in the quest to protect children in our Society.<sup>168</sup>

The rights of children need to be put in the forefront of all matters affecting them, aside from the context of judicial and administrative proceedings, where usually some failing of adults has led to the involvement of the courts in the family situation. A more general obligation to take account of the views of children in *all* matters affecting them would better reflect the obligations of the State under the CRC and constitute a more holistic approach to hearing children, creating a norm in the State for doing so. One example of the broader approach to creating obligations to hear children is included in the Children (Scotland) Act 1995. Section 6 of that Act ('Views of children'), amongst other provisions which outline that children must be heard, provides that

(1) A person shall, in reaching any major decision [in fulfilment of parental responsibility] have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity...

It should be noted that the obligation to consult refers to *major* decisions about the child, not minor ones. According to the evidence of the Scottish government, this provision has not resulted in inordinate interference in family life or a torrent of cases.<sup>169</sup> On the other hand, the government does report that the increased recognition of the need for respect for children's views is perhaps at least in part a consequence of the Children (Scotland) Act 1995.<sup>170</sup> Indeed, Article 12 of the CRC has been repeatedly referred to in Scottish courts in cases concerning children.<sup>171</sup> In *White v. White* the Scottish court went so far as to state that

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<sup>167</sup> *F.N. and E.B. v. C.O., H.O. and E.K.* [2004] 4 I.R. 311.

<sup>168</sup> Shannon, *Submission to the Joint Committee on the Constitutional Amendment on Children: The Child and the Irish Constitution*, at p. 41.

<sup>169</sup> Scottish Government, *Voice of the Child Under the Children (Scotland) Act 1995* (Scottish Government, 2002), Chapter 7, at para. 7.1.4, available at [www.scotland.gov.uk](http://www.scotland.gov.uk).

<sup>170</sup> *Ibid.*, at para. 7.1.2.

<sup>171</sup> See for example, *White v. White* [2001] SCLR 607; *Dosoo v. Dosoo* [1999] SLT (Sh Ct) 86; *S v. S* [2002] SC 246; and *C v. McM* [2005] Fam LR 36. See <http://www.scotland.gov.uk/Publications/2007/07/30114126/2>.

It will be satisfying to the drafters who laboured so long and hard on the United Nations Convention on the Rights of the Child (1989), which, although not part of the domestic law of Scotland, has been ratified by the United Kingdom, that the Lord President gives this Convention its place in interpreting the Children (S) Act 1995.

The notion that even parents may be required to have regard to children's views is an important one, and there are other areas outside of proceedings in which children should be heard. Local authorities and national planners regularly make decisions which may exclude the views and interests of children. The views of separated children<sup>172</sup> and those living in families in Direct Provision are rarely taken into account, despite the fact that decisions concerning their residence in Ireland and their dispersal across the country can have profound consequences for them. The Ombudsman for Children, Emily Logan, emphasises that in her work, "one observation arises again and again: the impact of civil and public administrative decision-making on the lives of children is rarely considered by the bodies concerned."<sup>173</sup> Not all such decision-making will involve 'proceedings' in the sense envisaged by the wording proposed by the Joint Committee, but many will constitute policy matters, and this should arguably be acknowledged in the Constitution.

Another vital area is that of child care. The Child Care Act 1991 requires that the HSE "in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child".<sup>174</sup> Emily Logan also states that "The failure to apply rigorously the 'best interests' principle and to ensure that children's voices are heard, as the Child Care Act 1991 requires, is of serious concern."<sup>175</sup> Although a legal basis for ensuring that the voices of children in care are heard already exists, this is not always exercised in practice. Moreover, such decision-making may not necessarily be overtly 'administrative'. A recent report of *The Irish Association for Young People in Care* (now called EPIC) gives details of the experiences of many children in care who felt that they had not been listened to when decisions were being made about them by the HSE. One example of this provided in the report related to emergency placements:

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<sup>172</sup> Separated children are children under the age of 18 who are outside their country of origin and separated from both parents and their previous/legal customary primary care giver.

<sup>173</sup> Emily Logan, 'Comment: Protecting the Rights of the Child' *The Sunday Business Post Online*, 5 June 2011, available at [www.sbpost.ie](http://www.sbpost.ie). See also Ombudsman for Children, *A Children's Rights Analysis of Investigations* (Ombudsman for Children, 2011).

<sup>174</sup> Child Care Act 1991, s.3(2)(b)(ii).

<sup>175</sup> Emily Logan, 'Comment: Protecting the Rights of the Child'.



Another one of our group talked of his experience of being placed in emergency hostels between placements. He felt that this was wrong and that young people should not be placed with other young people who may be using drugs.<sup>176</sup>

An overarching provision in the Constitution on the matter of regard for the views of children in this situation would undoubtedly place greater emphasis on the need to listen to the views of children in care and in other situations. Therefore, the third draft of the wording of the amendment should include as a minimum reference to the right of children to be heard in all judicial and administrative proceedings affecting them.

Another point on the wording proposed by the Joint Committee is that, whilst it is positive to make reference to children's rights and interests in Article 42, provision for children's rights and interests in Article 42 should also encompass the personal rights enshrined in Article 40.3. As I noted in my *Submission to the Joint Committee on the Constitutional Amendment on Children*, the broad terms of personal rights enshrined in the Constitution are capable of incorporating children's rights and interests, although the strength of other provisions mean that this is not a certainty in all instances.<sup>177</sup> In the 'Baby Ann' case,<sup>178</sup> for example, MacMenamin J. applied the right of children to have decisions taken in their best interests<sup>179</sup> when holding that custody of Ann would be granted to her prospective adopters, rather than her birth parents. However, this decision was reversed by the Supreme Court on appeal, the superior court favouring the more traditional approach that the interests and welfare of children are best protected within the child's constitutional (i.e. marital, birth) family. The inclusion of express reference to children's rights and interests in Article 42, as proposed, will certainly temper this effect. However, there still remains the fact that Article 40.3 contains unenumerated personal rights which hold great potential for developing rights for Irish children, both civil/political, and economic.<sup>180</sup> It is necessary to clarify that children are included in the scope of Article 40.3. The rights of the child, therefore, should be expressly recognised in Article 40 of the Constitution in order to demonstrate that the child is an individual constitutional persona entitled to rights and protections by virtue of its being.

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<sup>176</sup> The Irish Association for Young People in Care/HSE, *Our Side 2010: Forum for Young People in Care* (The Irish Association for Young People in Care/HSE, 2010), at p. 27.

<sup>177</sup> Shannon, *Submission to the Joint Committee on the Constitutional Amendment on Children: The Child and the Irish Constitution*, at p. 10.

<sup>178</sup> *N. v. Health Service Executive* [2006] 4 I.R. 374.

<sup>179</sup> Formulated by Finlay-Geoghegan J. in *F.N. v. C.O.* [2004] 4 I.R. 311, at 323.

<sup>180</sup> See for example, *F.N. v. C.O.* [2004] 4 I.R. 311.

Alternatively, provision for children's rights and interests in Article 42 could also encompass personal rights enshrined in Article 40.3.

It seems quite possible that the draft of the Joint Committee will be modified before a referendum on this matter is held. There are some ways in which the amendment could be improved. A number of additions/modifications which could be made are outlined in the recommendations detailed below.

#### 1.5.1.4 Recommendations

*The CRC should be incorporated into Irish law. This would ensure that children's rights are considered when policy is being drafted. It would also permit individuals to invoke the CRC in court and permit the courts to apply the CRC as a matter of Irish law.*

*A referendum to strengthen children's rights in the constitution should be held as soon as possible.*

*The third draft of the wording of the amendment should include reference to the right of children to be heard in all judicial and administrative proceedings affecting them.*

*Children in the asylum process, particularly separated children and those in families who are reaching adulthood should also have the right to be heard.*

*The rights of the child should be expressly recognised in Article 40 of the Constitution, in order to demonstrate that the child is an individual constitutional persona entitled to rights and protections by virtue of its being. Alternatively, provision for children's rights and interests in Article 42 could also encompass personal rights enshrined in Article 40.3.*

### **1.5.2 Convention on the Rights of the Child: Individual Complaints Mechanism**

The CRC was until 2011 the only major UN human rights treaty not to have a facility for an individual complaints mechanism. Such a mechanism permits individuals to take complaints

for adjudication to particular bodies in instances where they claim their treaty rights have been breached and the relevant state has agreed to be subject to that mechanism. For example, individuals in the Council of Europe may take an alleged breach of the ECHR to the ECtHR, as all Council of Europe members have signed and ratified the ECHR. In June of 2011 the UN Human Rights Council adopted the draft text of an individual complaints mechanism to the CRC,<sup>181</sup> to be included via an ‘optional protocol’ (an additional, annex treaty) to the CRC. On 19 December 2011 it was adopted by the UN General Assembly.<sup>182</sup>

An individual complaints mechanism is considered to be the most effective means of implementing human rights law. Therefore, the introduction in 2011 of such a mechanism under the CRC is a very welcome development for children’s rights. It is very widely acknowledged that complaints about the infraction of children’s rights internationally are seriously overlooked.<sup>183</sup> Perhaps most significantly for Ireland, the ECHR is weak on specific substantive rights for children, and where cases on children’s issues are taken, they are almost exclusively taken by adults. The adults are usually parents: therefore cases are taken from the perspective of the rights of those parents. The fact that such a mechanism has been drafted for CRC complaints will certainly increase the status of the CRC and bring greater equality between the CRC and instruments such as the International Covenant on Civil and Political Rights, which have long had the capacity to receive complaints.<sup>184</sup>

The Human Rights Council established a Working Group in 2010 to consider the drafting of an individual complaints mechanism through an optional protocol to the CRC.<sup>185</sup> The Working Group produced a draft additional protocol,<sup>186</sup> and the final drafting meeting was

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<sup>181</sup> NGO Group for CRC Complaints Mechanism Working Group, Press Release: ‘Human Rights Council adopts CRC Complaints Mechanism’, 17 June 2011, available at [www.crin.org](http://www.crin.org).

<sup>182</sup> Resolution 66/138.

<sup>183</sup> See for example, MacDonald, *The Rights of the Child: Law and Practice*.

<sup>184</sup> Indeed there was an explicit effort to base the CRC mechanism on existing complaints procedures and an effort not to lower the standards for the CRC mechanism in comparison with those procedures. See UN General Assembly Human Rights Council, *Report of the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a Communications Procedure* (A/HRC/17/36) (25 May 2011), at pp.5–6.

<sup>185</sup> See Children’s Rights Information Network, ‘Human Rights Council to Develop Communications Procedure for Violations of Children’s Rights’, 25 March 2010. Available at: [www.crin.org](http://www.crin.org).

<sup>186</sup> See UN General Assembly Human Rights Council, *Proposal for a Draft Optional Protocol prepared by the Chair-person Rapporteur of the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a Communications Procedure* (A/HRC/WG.7/2/2) (1 September 2010).

held in February 2011.<sup>187</sup> Ireland was represented at the working group meetings.<sup>188</sup> Children's rights groups and campaigners have praised the decision of the Human Rights Council in June 2011 to adopt the text of the complaints mechanism. Anita Goh, of the NGO Group for the CRC – the group which coordinated the international campaign for this new complaints mechanism – stated in June that

The new Protocol sends a strong signal from the international community that children, too, are rights holders, and that they have the right to complain internationally when no effective remedies are available to them in their country.<sup>189</sup>

It is useful to provide some context to the complaints mechanism in order to highlight the framework of the instrument. The attempt to standardise the CRC complaints mechanism to those of other UN human rights treaties was evident from the commencement of the drafting process. There was a robust attempt to avoid the creation of an instrument of lesser force than those already in existence. It was feared that otherwise a sense would be created that children's access to international justice is, or should be, of lower standard than that of adults. The chairperson of the working group meeting which finalised the draft emphasised that, in preparing the draft proposal for discussion, he had aimed for consistency with the communications procedures of other treaties, whilst at the same time remaining mindful of the specific needs of children and the particular situation of the CRC. He also explicitly stated that he had intended to achieve standards equivalent to those in existing complaints mechanisms.<sup>190</sup>

In the section on 'General provisions' (Part I), the optional protocol emphasises respect for Articles 3 and 12 of the CRC, stating that in fulfilling its functions under the protocol, the Committee on the Rights of the Child will be guided by the best interests principle, as well as by the need to have regard for children's rights and views. It also emphasises that children's views will be "given due weight in accordance with the age and maturity of the child".<sup>191</sup> The

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<sup>187</sup> See Children's Rights Information Network, *Complaints Mechanism: Summary of Final Drafting Meeting*, 9 February 2011. Available at: [www.crin.org](http://www.crin.org). See the Draft Additional Protocol in the Appendix of the *Report of the Open-ended Working Group*, at pp.26–34.

<sup>188</sup> UN General Assembly Human Rights Council, *Report of the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a Communications Procedure*, at p. 4.

<sup>189</sup> NGO Group for the CRC, 'News Release: Human Rights Council adopts CRC Complaints Mechanism' 17 June 2011. Available at: [www.crin.org](http://www.crin.org).

<sup>190</sup> UN General Assembly Human Rights Council, *Report of the Open-ended Working Group on an Optional Protocol to the Convention on the Rights of the Child to provide a Communications Procedure*, at pp.5–6.

<sup>191</sup> Draft Additional Protocol, Article 2.

optional protocol conveys the impression that when the Committee adopts rules of procedure to follow when a complaint is made, they will be “child-sensitive” and that safeguards will be created to prevent adults manipulating children’s interests under the procedure to suit their own objectives.<sup>192</sup> States parties are obliged to take appropriate steps under the optional protocol to protect individuals from any potential ill-treatment arising from the submission of a complaint under the instrument. It is also emphasised that the identity of individuals will not be divulged unless consent has been obtained.<sup>193</sup>

The substantive part of the text (Part II) stipulates that communications (i.e. complaints) can be submitted under the optional protocol by, or on behalf of, an individual or group. Such complainants must be within the jurisdiction of a State party to the optional protocol, and they must claim to be victims of a violation by that State party of rights under the CRC, or its first two optional protocols – the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography and the Optional Protocol to the Convention on the involvement of children in armed conflict. The state must be a party to the CRC (or Optional Protocols 1 or 2, if the complaint relates to a provision within one of those instruments) in order for an individual or group to take a complaint against that state. An individual or group must have given consent where a communication is submitted on their behalf, unless acting on their behalf without consent can be justified.<sup>194</sup> This is an important point, as there may exist a suspicion that individuals may use children’s rights to further their own ends. However, to use this as a reason to avoid permitting complaints on behalf of those who cannot make them personally is obviously to interfere significantly with the rights of that person.

Communications must be in writing and must not be anonymous and all remedies at state level must have been exhausted, unless “the application of the remedies is unreasonably prolonged or unlikely to bring effective relief”.<sup>195</sup> Communications must also be well-founded and sufficiently substantiated. The Committee will consider a communication to be inadmissible where the events which provoke the complaint have occurred before the date on which the optional protocol came into force in the state which is the subject of the complaint, unless the consequences continued after that date. Unless it can be shown to have been

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<sup>192</sup> Article 3.

<sup>193</sup> Ibid.

<sup>194</sup> Article 5.

<sup>195</sup> Ibid., Article 7.

unavoidable, the complaint must be submitted not longer than one year after the exhaustion of remedies at domestic level.<sup>196</sup>

Once the communication is submitted, the Committee will bring it to the attention of the relevant state, which will respond with a written explanation within six months.<sup>197</sup> An agreement on a friendly settlement may be reached between the parties involved.<sup>198</sup> The text makes reference to Article 4 of the CRC, which concerns the implementation of that instrument. Article 4 places obligations on states to take necessary measures to implement the CRC, but recognises that “With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources.” This reflects the principle of progressive realisation: that a state can only be expected to provide resources within its means, and it may take some time for all rights to be provided to an optimal standard. It is specified in the text of the optional protocol, therefore, that when communications are submitted which involve allegations concerning violations of economic, social or cultural rights, the Committee “shall bear in mind that the State party may adopt a range of possible policy measures for the implementation of the economic, social and cultural rights in the Convention”.<sup>199</sup> This does not mean to say that complaints regarding economic, social and cultural rights will not be successful, but rather that any complaints will be considered with the principle of progressive realisation in mind.

The Committee will transmit views and recommendations on the communication to parties, after it has examined a communication.<sup>200</sup> States then have particular obligations at this point:

The State party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee a written response, including information on any action taken and envisaged in the light of the views and recommendations of the Committee. The State party shall submit its response as soon as possible and within six months.<sup>201</sup>

The optional protocol also enshrines an inter-state communication mechanism which permits a state to submit a communication that another State party is violating obligations under the

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<sup>196</sup> Ibid.

<sup>197</sup> Ibid., Article 8.

<sup>198</sup> Ibid., Article 9.

<sup>199</sup> Ibid., Article 10.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid., Article 11.

CRC or its first two optional protocols. States must make explicit declarations, however, to permit the Committee to receive communications concerning themselves.<sup>202</sup>

The instrument also includes an inquiry procedure for “grave or systematic” violations of rights under the CRC. The Committee may receive information indicating such violations of CRC rights by a State party. It will invite the state to cooperate in examination of that information and to provide further information on the matter. A Committee member may conduct an inquiry on the matter (which may include a visit to the state, where permission is given) and report to the Committee accordingly. The Committee will then transmit findings and recommendations to the State party. The State party will then submit its own observations to the Committee within six months. The Committee may, after six months, invite the State party to provide information on any action taken in relation to the matter. It is possible that the Committee will include a report of the matter in a general report on its activities in relation to individual complaints, which it will submit to the UN General Assembly every two years under Article 16 of the optional protocol. States may, however, make a declaration at the time of signing or ratifying the Convention that it will not be subject to such an inquiry by the Committee.

It is also of note that, under Article 17 of the optional protocol, states agree to make the existence of the optional protocol widely known. States must undertake dissemination of the protocol and must also ensure access to information on any work of the Committee in this regard. Information must be made available “by appropriate and active means and in accessible formats” to both adults and children, and people with disabilities are cited as a particular group to which states must provide information.

Considering the importance of this new individual complaints mechanism, it is recommended that Ireland signs and ratifies the third optional protocol to the CRC as soon as it is open to the State to do so. The optional protocol constitutes a major advance in the recognition of the validity of children’s rights at international level and provides an important avenue for claimants at domestic level. It is certainly desirable that Ireland should set an example to other states by signing and ratifying the instrument. In order to fully respect the scope of the mechanism, it is recommended that Ireland makes a declaration in order to submit itself to the inter-state communication mechanism under that optional protocol. It is also recommended

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<sup>202</sup> Ibid., Article 12.

that Ireland does not make a declaration to the effect that it will not be subject to the inquiry procedure under the optional protocol as this would constitute an option for a lower standard of children's rights in Ireland than will have been made available at international level through this mechanism.

As stated above, the complaints mechanism was adopted by the UN General Assembly on 19 December 2011. A signing ceremony will take place in 2012 and at this point the treaty will open up for ratification. It will enter into force once the tenth ratification is achieved. It is crucial that as many states as possible commit to ratification of the additional protocol as soon as possible in order for the CRC complaints mechanism to be taken as seriously, and be considered as valid, as that of the other UN human rights treaties.

#### 1.5.2.1 Recommendations

*Ireland should sign and ratify the third optional protocol to the CRC.*

*Ireland should also make a declaration submitting itself to the inter-state communication mechanism under that optional protocol.*

*Ireland should refrain from making a declaration to the effect that it will not be subject to the inquiry procedure under the optional protocol.*

*Ireland should make the existence of the third optional protocol to the CRC widely known and should disseminate information to both children and adults, in accordance with Article 17 of that instrument.*

*The principle of the "best interests of the child" should be incorporated into Irish immigration and asylum law so that every decision should be taken to conform with that principle.*

*The state should consider implementing into Irish law a requirement to safeguard and promote the welfare of the child when all immigration and asylum decisions are being taken, possibly in the form similar to section 55 of the UK's Borders, Citizenship and Immigration Act 2009.*



## 1.6 Report of the UN Committee Against Torture

The UN Committee Against Torture, the body responsible for monitoring implementation of the UN Convention Against Torture, conducted its first examination of implementation of that Convention by the Irish State in 2011.<sup>203</sup> The State submitted a report to the Committee on implementation of the treaty in 2010.<sup>204</sup> A number of ‘shadow reports’ (i.e. reports from non-governmental organisations and other interested parties) were also received by the Committee. Shadow reports were submitted by Amnesty International, the Global Initiative to End All Corporal Punishment of Children, the International Disability Alliance, the Irish Council of Civil Liberties and the Irish Penal Reform Trust, the Irish Human Rights Commission, Justice for the Magdelenes, and the Spiritan Asylum Service Initiative, reflecting the wide breadth of matters relevant to that treaty.<sup>205</sup> A number of the areas covered concern children. The areas which affect children most directly are as follows.

### 1.6.1 Follow-Up to the Ryan Report

The Committee expresses concern at the lack of follow-up to the *Report of the Commission to Inquire into Child Abuse* (the “Ryan Report”).<sup>206</sup> I stated in my third report<sup>207</sup> that in the aftermath of the Ryan Report, one of the most pertinent issues was the absence of a statutory framework regulating all aspects of child welfare and protection. I advocated the establishment of such a regime of child welfare, and recommended that the aspects of the Implementation Plan for the Ryan Report which related directly to the protection of child welfare should be implemented by statute.<sup>208</sup>

Although the Ryan Report Implementation Plan was well funded<sup>209</sup> and contained some clear aims, the ‘First Progress Report’ was received with disappointment by children’s groups.<sup>210</sup>

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<sup>203</sup> Committee Against Torture, *Concluding Observations: Ireland* (CAT/C/IRL/CO/1) (17 June 2011).

<sup>204</sup> Ireland, *First Report to the Committee Against Torture* (CAT/C/IRL/1) (26 January 2010).

<sup>205</sup> Available at <http://www.ohchr.org/english/bodies/cat/cats46.htm>.

<sup>206</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 20.

<sup>207</sup> Shannon, *Third Report of the Rapporteur on Child Protection*.

<sup>208</sup> *Ibid.*, at p. 62.

<sup>209</sup> See Office of the Minister for Children, ‘€15 million for Ryan Report Implementation Plan’, 9 December 2009, available at <http://www.dcy.gov.ie>.

<sup>210</sup> See for example, Children’s Rights Alliance, Press Statement: “‘First Progress Report’ on Ryan Report Implementation Plan: “Words are cheap. Action is Priceless””, 2 September 2010, available at

The report highlighted a number of achievements, including the initiation of a consultation project with children in care, the improvement of equal care for separated asylum-seeker children and the establishment of a group by the HSE to accelerate implementation of the *Children First Guidelines*.<sup>211</sup> However, the Children’s Rights Alliance stated at the time that

This ‘First Progress Report’ fails to provide us with any real transparency or accountability on the level of progress achieved. In key areas, there is little evidence that demonstrates progress, which you would rightly expect one year on. As a result, the Alliance, with regret, is disappointed with the ‘First Progress Report’ on the Government’s Ryan Report Implementation Plan.<sup>212</sup>

The Report failed to provide some crucial information. There was a failure, for example, to outline how the €15m budget assigned to the Implementation Plan was being spent, and further confusion about this matter followed when the HSE provided conflicting figures to the Department of Health.<sup>213</sup> It was also notable that there was no reference to the State’s response to homeless children<sup>214</sup> or to the introduction of a mechanism to track whether services for children in care and in need of aftercare were improving.<sup>215</sup> Moreover, there were significant delays in provision of services promised under the Implementation Plan: for example, a wait of one and a half years for funds promised for counselling services for abuse victims.<sup>216</sup> The Ombudsman for Children observed:

Significant commitments under the plan have yet to be fulfilled. The Government should indicate how it proposes to implement the recommendations of the Commission to Inquire into Child Abuse and indicate the timelines for achieving this.<sup>217</sup>

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[www.childrensrights.ie](http://www.childrensrights.ie); and Pamela Newenham, “Government Criticised over Ryan Report Implementation” *The Irish Times*, 20 May 2010.

<sup>211</sup> Children’s Rights Alliance, Press Statement: “‘First Progress Report’ on Ryan Report Implementation Plan: “Words are cheap. Action is Priceless””.

<sup>212</sup> Ibid.

<sup>213</sup> See Jamie Smyth, ‘No Charges Two Years after Ryan Report into Child Abuse’ *The Irish Times*, 30 May 2011. It was reported that in 2010 the Department of Health was informed that €14.27 million of the €15 million budget had been spent, but that in 2011 the department was told that €4.68 million had been spent; apparently the differences between 2010 and 2011 arise from changes in decisions on what costs were to be considered as included in that figure.

<sup>214</sup> This point was emphasised by the Ombudsman for Children, *Submission for the 12<sup>th</sup> Session of the Working Group on Universal Periodic Review* (March 2011), at para. 14. See also the recommendations made in my previous report, Shannon, *Fourth Report of the Rapporteur on Child Protection*.

<sup>215</sup> Points noted by the Children’s Rights Alliance, Press Statement: “‘First Progress Report’ on Ryan Report Implementation Plan: “Words are cheap. Action is Priceless””.

<sup>216</sup> Smyth, ‘No Charges Two Years after Ryan Report into Child Abuse’ *The Irish Times*, 30 May 2011.

<sup>217</sup> Ombudsman for Children, *Submission for the 12<sup>th</sup> Session of the Working Group on Universal Periodic Review*, at para. 12.

The Committee Against Torture also noted this point,<sup>218</sup> and recommended that Ireland “Indicate how it proposes to implement all the recommendations of the Commission to Inquire into Child Abuse and indicate the time frame for doing so.”<sup>219</sup>

The Government’s published its ‘Second Progress Report’ on the Ryan Report Implementation Plan in July 2011. There was an improvement in the quality and accountability in the second report, including an identification of key priorities for 2011 and an assessment of the status of each of the 99 actions has been developed for the first time. That said, much work remains to ensure the full implementation of the 99 actions, to both support the victims of past abuses and to uphold the rights of children at risk and those in care.

The Ryan Report Oversight Group, which is in place to oversee progress of the Implementation Plan, now aims to include “the voices of children and civic society”<sup>220</sup> in its membership and this will undoubtedly renew the impetus to implement the Ryan Report recommendations. The fact that it includes non-governmental organisations will certainly ensure a more transparent process and hopefully a more effective one also.<sup>221</sup> This is also a positive step towards conforming to the recommendations of the Committee Against Torture for the better realisation of the Implementation Plan.

The Committee also expressed concern at the lack of prosecutions over matters dealt with in the Ryan Report. This point has been prominent in the Irish media.<sup>222</sup> The Convention Against Torture contains clear provisions for the right to redress for victims of torture. Article 13 stipulates that states which are parties to the Convention

shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.

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<sup>218</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 20.

<sup>219</sup> *Ibid.*

<sup>220</sup> See Children’s Rights Alliance, Press Statement: ‘Alliance Welcomes Invitation to Join Ryan Report Oversight Group’, 20 May 2011, available at [www.eurochild.org](http://www.eurochild.org).

<sup>221</sup> *Ibid.*

<sup>222</sup> Smyth, ‘No Charges Two Years after Ryan Report into Child Abuse’ *The Irish Times*, 30 May 2011.

The Committee noted that, despite the fact that the Commission had gathered extensive evidence, only eleven cases had been forwarded for prosecution, eight of which have so far been rejected. The Committee recommended that Ireland “Institute prompt, independent and thorough investigations into all cases of abuse as found by the report and, if appropriate, prosecute and punish perpetrators.”<sup>223</sup>

The Committee also made reference to the right to compensation for victims of torture. Article 14(1) stipulates that any state which is a party to the Convention

shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.

The Committee further recommended that Ireland “Ensure that all victims of abuse obtain redress and have an enforceable right to compensation, including the means for as full rehabilitation as possible.”<sup>224</sup>

### **1.6.2 Accountability and Redress for Survivors of the Magdalene Laundries**

The treatment of the survivors of the Magdalene laundries has been a topic of much debate in recent months. The Irish Human Rights Commission states that

during the twentieth century Magdalene Laundries operated as private-for-profit laundry enterprises in which the women and girls living in the institutions were expected to work in order to “earn their keep”.<sup>225</sup>

Some survivors were sent to the institutions by the courts, but most were detained there because they were unmarried mothers, had grown up in care, or were in a vulnerable position in other ways. Survivors report that they experienced violence, were made to work without pay, were kept behind locked doors, and returned by the Gardaí if they attempted to escape.<sup>226</sup> Many detainees in these institutions were children – at least 70 children were found

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<sup>223</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 20.

<sup>224</sup> *Ibid.*

<sup>225</sup> Irish Human Rights Commission, *Assessment of the Human Rights Issues Arising in Relation to the “Magdalene Laundries”* (November 2010), at para. 7.

<sup>226</sup> See Justice for Magdalenes Ireland, *Submission to the UN Committee Against Torture* (May 2011), at p. 24.

to be detained in such institutions in 1970.<sup>227</sup> The Irish Human Rights Commission states that “not only women, but girls as young as 13 years old, resided in these institutions”.<sup>228</sup> The Committee Against Torture has acknowledged the seriousness of the matter by considering in its recent report how the Irish State has, thus far, failed the survivors. The Committee focused on three issues in its recommendations: the need for investigations; redress for victims; and the accountability of perpetrators.<sup>229</sup>

The Committee did not hesitate to conclude that the State had failed in its duties to these women at the time of their detention (I refer to it as ‘detention’ because the Committee emphasises that it was indeed involuntary) because of its failure to inspect the institutions:

The Committee is gravely concerned at the failure by the State party to protect girls and women who were involuntarily confined between 1922 and 1996 in the Magdalene Laundries, by failing to regulate and inspect their operations, where it is alleged that physical, emotional abuses and other ill-treatment were committed, amounting to breaches of the Convention.<sup>230</sup>

The Committee went on to comment on the handling of the situation by the State after the closure of the laundries. The Committee expressed “grave concern at the failure by the State party to institute prompt, independent and thorough investigations into the allegations of ill-treatment”<sup>231</sup> of the victims, and recommended that the State do so promptly. The Committee Against Torture was in agreement with the Irish Human Rights Commission on this point. The Irish Human Rights Commission carried out a human rights assessment of State responsibility for the laundries in 2010.<sup>232</sup> It concluded that it was necessary for the government to establish a statutory inquiry into the treatment of detainees at the laundries.

The seriousness of the alleged abuses of the rights of these women and girls cannot be overstated. The allegations of forced labour in the laundries are of particular gravity and certainly require investigation and redress where appropriate. Although a thorough

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<sup>227</sup> Ibid., at para. 5.3.9. The submission report refers to Eire, Committee on Reformatory and Industrial Schools, *Reformatory and Industrial Schools Systems: Report, 1970* (Dublin, The Stationery Office, 1970) at p. 39.

<sup>228</sup> Irish Human Rights Commission, *Assessment of the Human Rights Issues Arising in Relation to the “Magdalene Laundries”*, at para. 4.

<sup>229</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 21.

<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> Irish Human Rights Commission, *Assessment of the Human Rights Issues Arising in Relation to the “Magdalene Laundries”*.

investigation is pending, there are already extensive accounts from the survivors of the laundries of how they were forced to work in difficult conditions, for long hours, with no payment. The detention and use of women and girls as workers without pay would amount to ‘forced labour’ under the 1930 Forced Labour Convention of the International Labour Organisation, which Ireland signed in 1931.<sup>233</sup> It appears from the reports provided by these women and girls that their treatment constituted slavery. The 1930 Forced Labour Convention stipulates that the definition of slavery includes forced or compulsory labour. Slavery is stated in Article 2.1 to include “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. It is clear that the testimonies of the survivors indicate that their treatment fits this definition: they were sent to institutions, in which women and girls were made to work without pay, where physical punishment was practised, doors were locked and escapees were likely to be returned by the police.

The prohibition of slavery is a ‘peremptory norm’ of international law: that is a norm of state practice which is so fundamental that no derogation from it is ever permitted. A violation of a peremptory norm is also a violation of customary international law: that is international law that derives from the customary behaviour of states which believe they are obliged to so act. The prohibition of slavery is enshrined in numerous human rights instruments; for example the International Covenant on Civil and Political Rights (Article 8) states that:

1. No one shall be held in slavery; slavery and the slave- trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour.

Even where the State was not overseeing slavery directly the right to redress and remedy still exists, not least under the ECHR, which also prohibits slavery. Therefore the need to deal with the matter of accountability and redress in relation to the Magdalene laundries is of vital importance to ensure compliance with international human rights law.

The provision of financial redress for the survivors was another step which was recommended by the Irish Human Rights Commission. The Committee Against Torture again

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<sup>233</sup> This point has been emphasised by Maeve O’Rourke, Harvard University Law School Global Human Rights Fellow. See Patsy McGarry, ‘Laundries Used “Forced Labour”’ *The Irish Times*, 6 July 2011.

concurred with the Commission on this point, and recommended that Ireland “ensure that all victims obtain redress and have an enforceable right to compensation, including the means for as full rehabilitation as possible”.<sup>234</sup> Unfortunately, until recently, the Irish government has denied outright that the State was in any way responsible for the abuses reported to have been perpetrated in and by the laundries. This is in spite of the various ways in which the State was involved with the matter: it failed to prevent the placement of innocent women and girls in the institutions; it did not monitor the treatment of those detained there; and various State entities used the services of the laundries.<sup>235</sup> The Justice for Magdalenes advocacy group report that in September 2009, the then Minister for Education and Science refused to apologise for the treatment of the survivors or to provide a redress scheme, stating

In terms of establishing a distinct scheme [of redress] for former employees<sup>236</sup> of the Magdalene Laundries, the situation in relation to children who were taken into the laundries privately or who entered the laundries as adults is quite different to persons who were resident in State run institutions. The Magdalene Laundries were privately owned and operated establishments and did not come within the responsibility of the State. The State did not refer individuals to Magdalene Laundries nor was it complicit in referring individuals to them.<sup>237</sup>

The State specifically excluded survivors of the Magdalene laundries from a statutory compensation scheme for those abused from the 1930s to 1970s in residential institutions which were State-funded and Church-run. The scheme was established under the Residential Institutions Redress Act 2002.<sup>238</sup> This refusal by the State to accept responsibility has served to deny the survivors the redress to which they are clearly entitled, a fact which has now been acknowledged by an international human rights monitoring body (i.e. the Committee Against Torture), the Irish Human Rights Commission and academic commentators.<sup>239</sup>

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<sup>234</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 21.

<sup>235</sup> See ‘State “Complicit” with Laundries’ *The Irish Times*, 4 July 2011 and Patsy McGarry, ‘Áras an Uachtaráin among Users of Magdalene Laundry’ *The Irish Times*, 22 June 2011, in which it is stated that “A ledger for a Magdalene laundry in Dublin’s Drumcondra reveals that its regular customers included Áras an Uachtaráin, Government departments...It discloses that, including those listed above, regular customers for the laundry, believed to be the one at High Park, included the Department of Justice, the Department of Agriculture, the Department of Fisheries and CIÉ.”

<sup>236</sup> The then Minister later apologised for referring to the survivors as “employees”, stating that “I fully acknowledge that the word ‘workers’ would have been more appropriate.” Patsy McGarry, ‘Officials do Few Favours for Magdalenes’ *The Irish Times*, 18 June 2011.

<sup>237</sup> Justice for Magdalenes Ireland, *Submission to the UN Committee Against Torture*, at para. 4.5.

<sup>238</sup> *Ibid.*, at para. 4.1.

<sup>239</sup> See for example, the work of Maeve O’Rourke, Harvard University Law School Global Human Rights Fellow.

There appears to have been a change in attitude towards the matter in recent months on the part of both religious organisations and the State, possibly because of increased public interest, as well as the recent report of the Committee Against Torture. It is very positive that in June 2011 separate statements (though no apologies)<sup>240</sup> were made by relevant religious organisations, who expressed “willingness” to “bring clarity, understanding, healing and justice in the interests of all the women involved”,<sup>241</sup> and the government, who pledged to establish an independently chaired inter-departmental committee with the purpose of clarifying “any State interaction with the Magdalene Laundries and to produce a narrative detailing such interaction”.<sup>242</sup> There was also a pledge to discuss with relevant congregations the matter of making relevant records available and the matter of any survivors of laundries still in their care, as well as “the putting in place of a restorative and reconciliation process and the structure that might be utilised to facilitate such process”.<sup>243</sup> It was established that the Minister for Justice, Equality and Defence, as well as the Minister of State for Disability, Mental Health and Older People, would be responsible for follow-up on the matter, and that an initial report would be made on the progress of the committee after three months.<sup>244</sup>

This is very welcome news. It is hoped that this process will provide the survivors of the Magdalene laundries with the acknowledgement, redress and accountability which they clearly deserve.

As regards an independent investigation, Senator Martin McAleese, the nominee of the Taoiseach to the Seanad, has been appointed as chair of the inter-departmental committee which has been established to investigate the treatment of detainees at the laundries. Advocacy group, Justice for Magdalenes, welcomed the appointment of Senator McAleese, who has been recognised for his positive work in Northern Ireland.<sup>245</sup> It is a very positive move that an individual deemed suitable by survivors has been appointed and it is to be hoped that a thorough, impartial and illuminating investigation will be conducted.

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<sup>240</sup> Patsy McGarry, ‘Magdalene Group Welcomes Inquiry but Disappointed at the Lack of Apology’ *The Irish Times*, 15 June 2011.

<sup>241</sup> Department of Justice and Equality, ‘Government Statement on the Magdalene Laundries’, 14 June 2011, available at [www.justice.ie](http://www.justice.ie); and Éanna Ó Caollaí, ‘Magdalene Move Welcomed’ *The Irish Times*, 11 June 2011.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

<sup>245</sup> Patsy McGarry, ‘McAleese Welcomed as Magdalene Chair’ *The Irish Times*, 2 July 2011.



There remains the matter of accountability for any criminality which may have occurred in relation to the activities of the Magdalene laundries. The Committee Against Torture recommended in its report that the State, “in appropriate cases, prosecute and punish the perpetrators with penalties commensurate with the gravity of the offences committed” in the laundries.<sup>246</sup> There has been no extensive discussion of the possibility of prosecutions for criminal activity at the laundry. Lengthy statements are extant, however, which refer to beatings at the institutions,<sup>247</sup> and even whippings,<sup>248</sup> with Justice for Magdalenes stating that “Some women recall severe physical punishment (including beatings and having one’s hair forcibly cut off) for infractions of the rules or as a general threat”.<sup>249</sup> Where the perpetrators of such violence on vulnerable adults and girls are still living, there is no reason, on the face of it, not to seek to prosecute them. The recommendations of the Committee should provide additional impetus to prosecute the perpetrators of such violence in the laundries.

The State has long resisted taking responsibility for its part in the horrendous treatment of these vulnerable members of Irish society. The initiation of an investigation is a very positive step, but it is crucial that this is accompanied by concrete provision for the survivors. The abuses which they experienced should also be investigated with a view to criminal prosecutions where appropriate. This should be a priority for the government because of the seriousness of the alleged abuses and in particular because of the slow and inadequate response over many years.

### **1.6.3 Other Recommendations of the Committee Against Torture Relating to Children**

The Committee Against Torture made a number of other recommendations relating to children and it is useful to note them here briefly. The Committee considered the issue of children in detention. The report of the Irish Human Rights Commission<sup>250</sup> and the joint

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<sup>246</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 21.

<sup>247</sup> See Justice for Magdalenes Ireland, *Submission to the UN Committee Against Torture*, at p. 34.

<sup>248</sup> *Ibid.*, at p. 25.

<sup>249</sup> *Ibid.*, at para. 5.2.6.

<sup>250</sup> Irish Human Rights Commission, *National Human Rights Institution Submission to the UN Committee Against Torture on the Examination of Ireland’s First Report* (1 April 2011).

report of the Irish Council for Civil Liberties and the Irish Penal Reform Trust<sup>251</sup> both contained information on the matter.

The joint report outlined the fact that children continue to be detained in St Patrick's Institution, which is a medium security prison that houses male offenders aged between 16 and 21 years. On 15 June 2011, there were 41 boys aged 16 and 17 years in St. Patrick's Institution in the Mountjoy Prison complex, Dublin; approximately 225 children are detained there annually on remand or serving a sentence."<sup>252</sup> Children aged 15 and under are detained in 'Children Detention Schools'; institutions which adopt a 'care mode'" and focus on education. Children of 16 and 17, however, are detained in St Patrick's which adopts a 'penal model'.<sup>253</sup> This remains the case, even though for legal purposes these are still children, and St Patrick's constitutes an environment "considered wholly inappropriate for their needs" according to the joint report.<sup>254</sup> The Irish Human Rights Commission pointed out in its report that the detention of children in prison with adults contravenes international human rights law.<sup>255</sup> It was noted also that, while the government has given a commitment to establish a new Child Detention Facility in Oberstown, there is no indication of when this will be built.<sup>256</sup> The Director General of the Irish Prison Service has stated that St Patrick's Institution would have to be used to detain 16 and 17 year olds until the new facility is built.<sup>257</sup> However, the Committee Against Torture noted with concern the failure to finalise the plans for the new facility, and stated that interim measures are required:

The Committee recommends that the State party proceed, without any delay, with the construction of the new national children detention facilities at Oberstown. In the meantime, the Committee

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<sup>251</sup> Irish Council for Civil Liberties/Irish Penal Reform Trust, *Joint Shadow Report to the First Periodic Review of Ireland under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (April 2011).

<sup>252</sup> This figure is quoted by the Irish Penal Reform Trust based on an analysis of the Irish Prison Service Annual Reports. Irish Penal Reform Trust (2011) *IPRT Briefing on Detention of Children in St. Patrick's Institution*, [www.iprt.ie](http://www.iprt.ie).

<sup>253</sup> *Ibid.*, at p. 37.

<sup>254</sup> *Ibid.*

<sup>255</sup> Irish Human Rights Commission, *National Human Rights Institution Submission to the UN Committee Against Torture on the Examination of Ireland's First Report*, at p. 47.

<sup>256</sup> See also Jamie Smyth, 'Ombudsman Calls for St Patrick's Detention Centre to be Closed' *The Irish Times*, 10 February 2011, in which it is written that "The Government has repeatedly committed to closing St Patrick's Institution and moving all 16 and 17 year olds to a new facility at Oberstown. However, a tender for the facility has not yet been published and groups such as the Irish Penal Reform Trust are concerned about the availability of funding."

<sup>257</sup> *Ibid.*

recommends that the State party take appropriate measures to end the detention of children in St Patrick's Institution and move them into appropriate facilities.<sup>258</sup>

The Irish government needs, therefore, to move immediately to devise interim measures for the treatment of 16 and 17 year olds who would otherwise be detained at St Patrick's, as well as to expedite the building of the new facility. The second matter on which the Committee commented was the fact that the remit of the Ombudsman for Children does not permit her to accept individual complaints from children in prison. Unlike children placed in detention, who do fall within her remit, children at St Patrick's do not have access to this independent complaints mechanism. The Committee therefore recommended that Ireland

review[s] its legislation on the establishment of the Ombudsman for Children with a view to including in the mandate the power to investigate complaints of torture and ill-treatment of children held at St Patrick's Institution.

This is a matter which has been highlighted for some time and the State should act immediately. It is discussed in greater detail in Chapter 3.

Another issue which the Committee Against Torture considered was female genital mutilation, defined by the World Health Organisation as "all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons." Such procedures are dangerous as they are usually carried out in a non-medical setting and they are discriminatory as they are aimed at the repression of female sexuality, and they may cause illness and debilitation for life. The Irish Human Rights Commission highlighted in its report that Ireland has no legislation specifically prohibiting the practice, nor has it undertaken strategies to deal with the issue though there is a high rate of migration to Ireland from countries where the practice is prevalent;<sup>259</sup> a matter which had already been commented on by the Committee on the Rights of the Child.<sup>260</sup> The Committee Against Torture recommended that the State party restore the Criminal Justice (Female Genital Mutilation) Bill, which was introduced in January 2011 but lapsed because of the change in government. The Committee also recommended that the law explicitly define

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<sup>258</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 22.

<sup>259</sup> Irish Human Rights Commission, *National Human Rights Institution Submission to the UN Committee Against Torture on the Examination of Ireland's First Report*, at p. 62.

<sup>260</sup> Committee on the Rights of the Child, *Concluding Recommendations on Ireland's Second Periodic Report*, at para. 54.

female genital mutilation as torture. The Committee further recommended that programmes be implemented to publicly highlight the “extremely harmful effects” of the practice.<sup>261</sup> A Bill has now been introduced which will create penalties, including prison, for those who practise female genital mutilation in the State, and for “bringing a girl or woman outside the State for that purpose”.<sup>262</sup> This is a constructive move; however, it is notable that the Bill does not follow the Committee’s recommendation by explicitly stating that female genital mutilation amounts to torture.

The other matters expressly concerning children<sup>263</sup> were physical punishment and separated and unaccompanied minors. The Global Initiative to End all Corporal Punishment of Children submitted a briefing to the Committee on the matter of physical punishment of children.<sup>264</sup> The Initiative noted that parents and others have open to them a common law defence of “reasonable and moderate chastisement” when they physically punish children. The Committee stated that it was “gravely concerned that such punishment is lawful in the home” and recommended that Ireland “prohibit all corporal punishment of children in all settings” and conduct public awareness campaigns for parents, as well as the general public, about the harmful effects of this type of punishment.<sup>265</sup> This is a very clear recommendation that Ireland should join the 22 other European countries that have banned the practice, a practice which has been shown to lead on average to poorer outcomes for those children who have experienced it.<sup>266</sup>

The Committee also noted serious issues in relation to the protection of separated and unaccompanied minors by the State. It referred to the fact that between 2000 and 2010 a total of 509 separated and unaccompanied minors went missing from State care, and only 58 had been accounted for. In recent years the State has ceased the abhorrent practice of providing a lesser standard of care for unaccompanied minors than Irish national children.

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<sup>261</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 25.

<sup>262</sup> Female Genital Mutilation Bill (2010), available at [www.oireachtas.ie](http://www.oireachtas.ie).

<sup>263</sup> The Committee also made a number of recommendations relating to domestic violence, including the recommendation that Ireland “strengthen its efforts to prevent violence against women” (at para. 27). This matter also affects children who may witness such violence and who may also experience it themselves.

<sup>264</sup> Global Initiative to End all Corporal Punishment of Children, *Briefing on Ireland for the Committee Against Torture State Examination* (May/June 2011). See Section 1.7.4 below.

<sup>265</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 24.

<sup>266</sup> See for example, Elizabeth Gershoff, *Report on Physical Punishment in the US: What Research Tells us About its Effects on Children* (Phoenix Children’s Hospital, 2008); and Elizabeth Gershoff, ‘Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review’ 128 (4) *Psychological Bulletin*, 2002, 539–579.

Unaccompanied minors were, until recently, housed in unsuitable hostels, whilst Irish children without parental care were cared for in foster care or residential units.

Fortunately unaccompanied minors are now cared for by the State in the same manner as Irish national children, and the high number of disappearances has been reduced. Eleven such children went missing from State care, however, in 2010, of whom six are still missing,<sup>267</sup> and unaccompanied minors remain a highly vulnerable group. The Committee recommended that Ireland “should take measures to protect separated and unaccompanied minors. It should also, in this regard, provide data on specific measures taken to protect separated and unaccompanied minors.”<sup>268</sup> The vulnerability of this group is another child protection issue which has been of concern for a number of years. Although steps have been taken to improve the situation of separated and unaccompanied minors, further work needs to be undertaken, particularly on the matter of missing children. Gaps in the protection of separated children have been noted in recent research<sup>269</sup>. Further research and information is needed on the experiences of such children in Ireland and the services which they require to provide for their protection and whether or not the transfer of children from hostels into foster care around the country as part of the ‘equity of care’ plan is working as intended. Furthermore, whether the practice of taking such children into ‘voluntary’ care rather than making them the subject of a care order is in their best interests<sup>270</sup>.

#### **1.6.4 Recommendations**

*It is recommended that the opinions and recommendations of the Committee Against Torture in its 2011 report be used in the drafting of law and policy to ensure that Ireland is in conformity with the Convention Against Torture to the greatest extent possible.*

*In particular, as regards children, Ireland should ensure adequate implementation of the plan to provide for the Ryan Report recommendations, ensure there are prosecutions where appropriate and provide adequate compensation to abuse survivors.*

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<sup>267</sup> Jamie Smyth, ‘Eleven Minors Pursuing Asylum go Missing’ *The Irish Times*, 10 January 2011.

<sup>268</sup> Committee Against Torture, *Concluding Observations: Ireland*, at para. 29.

<sup>269</sup> See ‘Closing a Protection Gap’, Irish Refugee Council, February 2011 <http://irc.fusio.net/wp-content/uploads/2011/08/Closing-a-Protection-Gap.pdf>.

<sup>270</sup> See ‘Closing a Protection Gap’, Irish Refugee Council.

*It is a positive step that an investigation has now been initiated into the treatment of women and girls in the Magdalene laundries. Criminal behaviour associated with the laundries should be investigated immediately and followed by prosecutions where appropriate.*

*The Irish government needs to take immediate steps to devise interim measures for the treatment of 16 and 17 year olds who would otherwise be detained at St Patrick's Institution, and to expedite the building of a new Child Detention Facility. A date for the facilities completion should be published as soon as possible. The Ombudsman for Children should also have her remit extended to permit her to accept individual complaints from children in prison and detention.*

*It is very positive that Ireland has taken steps to deal with the legality of female genital mutilation through the Female Genital Mutilation Bill 2010. It would be preferable, however, for the Bill to follow the recommendation of the Committee Against Torture and explicitly state that the practice constitutes torture. The State should also follow-up the recommendations made by the Committee in respect to appropriate programmes, education and awareness-raising on the matter.*

*The State should also implement the recommendations of the Committee to ban all physical punishment of children and to take measures to protect separated and unaccompanied minors, including the collection of relevant data.*

*The particular needs of children in the Direct Provision system should be examined with a view to establishing whether the system itself is detrimental to their welfare and development and, if appropriate, an alternative form of support and accommodation adopted which is more suitable for families and particularly children.*

*Research is required to establish how the 'equity of care' plan for separated children is working and whether any recommendations should be made about care orders for such children.*

## 1.7 General Comment 13: The Right of the Child to Freedom from all Forms of Violence

Violence against children is a global problem. Ireland has certainly not escaped the high levels of harm experienced by children globally. The Ryan Report, for example, which has been discussed extensively in these reports, gives historical details of the endemic levels of harm and abuse of children in institutional care in Ireland. Current levels of violence against children also make for disturbing reading. In 2008 there were 2,164 confirmed incidents of child abuse reported to the HSE, an increase of almost 200 compared with 2007. Though on average over 3,500 crimes against children are reported to An Garda Síochána every year, less than one fifth of these reports result in a court prosecution, and only 10% result in a conviction. Alarming numbers of adults report having experienced some level of sexual abuse in their childhood – one in three women and one in four men.<sup>271</sup> The figures indicate high levels of reported violence against children and low levels of accountability for that violence.

Article 19 of the UNCRC seeks to protect children from all forms of violence and maltreatment. It is the “core provision”<sup>272</sup> in that instrument on the matter of violence against children. The purpose of a General Comment is to assist governments, and those charged with the duty of safeguarding the rights of children, to ensure that the principles of the CRC are being upheld. A ‘General Comment’ – a document to provide further elaboration on the substance of a right – has been drafted recently on Article 19 by the UN Committee on the Rights of the Child.<sup>273</sup> It was adopted in February 2011. It is beneficial to review the General Comment at this juncture so as to highlight the nature, scope and potential operation of Article 19 of the CRC.

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<sup>271</sup> See ‘Child Abuse – Key Statistics’, available at [www.barnardos.ie](http://www.barnardos.ie).

<sup>272</sup> Committee on the Rights of the Child, *General Comment No. 13 – Article 19: The Right of the Child to Freedom from all Forms of Violence* (CRC/C/GC/13) (17 February 2011), at p. 5.

<sup>273</sup> *Ibid.* The General Comment builds on previous guidance from the Committee and other UN bodies: for example days of general discussion on violence against children in 2000 and 2001, Committee on the Rights of the Child, *General Comment No. 8 – The Right of Children to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment* (CRC/C/GC/8) (2 March 2007) and *Report of the Independent Expert for the UN Study on Violence against Children* (A/61/299) (August, 2006). See General Comment No. 13, at p. 4.

### 1.7.1 Introduction to General Comment No. 13

Article 19 of the CRC covers the obligation of states to take various measures to protect children, no matter who is caring for them. It specifies that the measures should include social programmes, policies and procedures to deal with child abuse, and the involvement of the court where necessary. It reads:

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

While Article 19 is a useful starting point in establishing international standards for child protection, it is obviously insufficient for the provision of comprehensive guidance for those standards. Therefore the adoption of General Comment No. 13 is a very welcome development.

The Committee states in the introductory section that the rationale for the General Comment is that “the extent and intensity of violence exerted on children is alarming”.<sup>274</sup> There is a need, therefore, to strengthen and expand measures to end such violence. The Committee provides an overview of the fundamental assumptions on which the General Comment is based. It states that no violence against children can be justified, and all violence against children is ultimately preventable.<sup>275</sup> It is emphasised that a child rights-based approach should be taken to caring for children, so they are seen as individuals with human rights, rather than ‘victims’. It is stressed that the concept of *dignity* as well as the principle of the rule of law “should apply fully to children as it does to adults”.<sup>276</sup> The Committee is

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<sup>274</sup> Ibid., at p. 3.

<sup>275</sup> This is a reiteration of the *Report of the Independent Expert for the UN Study on Violence against Children*, at para. 1.

<sup>276</sup> General Comment No. 13, at p. 3.



emphasising here that violence against children should not be treated as any less serious than violence against adults, and that the law should reflect this.

The right of children to be heard and to have their views given weight is also laid down as a fundamental assumption of the report. It is stated that this right “must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child caregiving and protection strategies and programmes”. The fact that the Committee uses the word “all decision-making processes” raises questions about Irish practice. As outlined above, children do not always have such a right to be heard when they are, for example, being taken into emergency care, as is the case in England and Wales;<sup>277</sup> nor do children have access to a representative such as the guardian *ad litem* when their interests are being determined before the courts.<sup>278</sup>

The Committee also specifies that the best interests of the child, an emphasis on prevention and awareness of the phenomenon of child abuse in institutions should be fundamental considerations in child protection. Crucially, the “primary position of families”<sup>279</sup> – including extended families – should also be a key consideration in both caregiving and the protection of children from violence. It is noted that states should not interfere unduly in family life,<sup>280</sup> and that proportionate “non-punitive family support services” are the preferable approach to families in which there may be problems.<sup>281</sup> Support services and pre-proceedings work in Ireland need to be improved in this regard. This is not simply a funding issue but also one that needs to be addressed by management. The Committee recognises, however, that the family can in certain circumstances be a dangerous place, and that

The majority of violence takes place in the context of families and that intervention and support are therefore required when children become the victims of hardship and distress imposed on, or generated in, families.<sup>282</sup>

The Committee takes a broad approach to the definition of violence. It refers to the definition offered in Article 19: “all forms of physical or mental violence, injury or abuse, neglect or

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<sup>277</sup> Children can also challenge an emergency protection order under s.45(8) of the Children Act 1989.

<sup>278</sup> See for example section 1.4.4 above.

<sup>279</sup> General Comment No. 13, at p. 4.

<sup>280</sup> *Ibid.*, at p. 19.

<sup>281</sup> *Ibid.*, at p. 27.

<sup>282</sup> *Ibid.*

negligent treatment, maltreatment or exploitation, including sexual abuse...” However, the Committee emphasises that although the common understanding of the term ‘violence’ is of acts that involve physical and intentional harm, General Comment No. 13 employs the wider definition found in the 2006 UN Study on Violence Against Children, which represents ‘violence’ as all forms of harm to children.<sup>283</sup>

The obligations of states are outlined in the introduction to General Comment No. 13. The Committee itemises the obligations of states to prevent violence, to protect children and to punish those responsible for violence. The General Comment then moves on to economic responsibilities, reminding states that they also have a duty “to support and assist parents and other caregivers to secure, within their abilities and financial capacities...the living conditions necessary for the child's optimal development”.<sup>284</sup> As does the CRC,<sup>285</sup> the Committee clearly assumes that primary responsibility for care of children lies with parents, but secondarily with states when parents are unable to provide sufficiently for children’s development.

The numerous ways in which governments and others attempt to protect children from violence is acknowledged by the Committee.<sup>286</sup> It also recognises, however, that “existing initiatives are in general insufficient” to protect children.<sup>287</sup> The General Comment declares that laws are often inadequate, enforcement commonly insufficient and social attitudes regularly tolerant of violence against children. The general lack of information on the prevalence and causes of violence against children is also highlighted.<sup>288</sup>

The General Comment makes a vital point about the human rights-based approach when it states that all the measures recommended and arguments made in the General Comment cannot replace, but instead must reinforce the human rights imperative in attempts to eliminate violence against children.<sup>289</sup> The Committee asserts that because of the strength of this imperative “Strategies and systems to prevent and respond to violence must therefore adopt a child rights rather than a welfare approach.”<sup>290</sup> The emphasis is upon a rights-based

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<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> The General Comment references Articles 18 and 27 of the CRC. Ibid., at p. 4.

<sup>286</sup> Ibid., at p. 6.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

approach where children are seen as individuals with the rights that this status confers, including the right to have their views and wishes taken into account where appropriate, rather than a welfare approach, where children are perceived primarily as weak and vulnerable, with little to teach adults or to add to their own care.

The Committee lists the objectives of the General Comment. It seeks to guide states on their obligations under Article 19. It aims to outline the measures that states must take to tackle violence against children, including legal, social and administrative measures. It also aims to “overcome” the fragmented approach to violence against children employed thus far, which has not been successful in protecting them,<sup>291</sup> and instead promote a more holistic approach based on the principles of the CRC. Indeed the all-encompassing nature of the CRC is a very useful base from which to work in tackling violence against children. By considering the general principles of the CRC, the General Comment provides a template for protecting children.

Those general principles are the principle of the best interests of the child (Article 3, CRC); the right to freedom from discrimination (Article 2); the right to life, survival and development (Article 6); and the right to be heard (Article 12). These principles define children as vulnerable persons (the best interests principle), but also as individuals with rights and views and opinions which can be useful (the right to be heard). They also emphasise that particularly vulnerable children, for example children with disabilities and minority children, need special attention (the right to freedom from discrimination) and that parents and the State have duties to provide for children in financial and other ways so that children realise their potential to the greatest extent possible (the right to life, survival and development).<sup>292</sup> To consider these four principles in all matters relating to children is to take a children’s rights-based approach.

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<sup>291</sup> Ibid., at p. 7.

<sup>292</sup> Ibid., at p. 23 for further elaboration.

## 1.7.2 Committee Analysis of Article 19

The Committee provides a thorough analysis of the text of Article 19. It first considers the scope of the various forms of violence against children. The Committee emphasises that there are no exceptions to the prohibition of all forms of violence against children:

No exceptions: The Committee has consistently maintained the position that *all* forms of violence against children, however light, are unacceptable. ‘All forms of physical or mental violence’ does not leave room for any level of legalized violence against children.<sup>293</sup>

The Committee specifies that factors such as frequency of violence, the severity of harm associated with it and the intention to harm should not determine a definition of violence.<sup>294</sup> Such factors can be used, according to General Comment No. 13, to respond proportionately to violence, but it is not acceptable for these factors to imply that some forms of violence against children are socially acceptable.<sup>295</sup>

The General Comment then argues as part of the legal analysis of Article 19 that states must establish standards to measure child well-being. It is very positive that, as mentioned above, Ireland has child well-being indicators in place.<sup>296</sup> The General Comment also requires “clear operational legal definitions” of the different types of violence.<sup>297</sup> The purpose of this, according to the Committee, is to ban *all* types of violence against children in *all* settings.<sup>298</sup> This leaves no room for any type of violence against children to be permitted.

The General Comment provides an extensive (but, per the Committee, not exhaustive) list of the ways in which children experience violence in different settings. It explains that children can experience violence at the hands of adults or other children, and that gender can lead to greater levels of certain types of violence being experienced by children. Girls may, for example, be more likely to experience sexual violence.<sup>299</sup> This raises the question of the need to consider the CRC general principle of ‘non-discrimination’ when drafting law and policy

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<sup>293</sup> Ibid., at p. 8.

<sup>294</sup> These points clearly relate to the matter of physical punishment. See section 1.7.4 below.

<sup>295</sup> General Comment No. 13, at p. 8.

<sup>296</sup> See section 1.4.3. It must be noted, however, that it would be preferable to have child-rights based indicators; this would complement the child rights approach which the Committee advocates for prevention of violence against children.

<sup>297</sup> General Comment No. 13, at p. 8.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid.

concerning violence against children, as well as taking into consideration any other relevant measures, for example educational measures.

The Committee defines “neglect or negligent treatment”<sup>300</sup> of children as a form of violence against them. Neglect is stated to include physical neglect, psychological neglect, neglect of children’s health, educational neglect, or abandonment.<sup>301</sup> Mental violence (i.e. “psychological maltreatment, mental abuse, verbal abuse and emotional abuse or neglect”<sup>302</sup>) is also included in the forms of violence listed in the General Comment; as is “physical violence”, which explicitly includes physical bullying. It is also emphasised that “all corporal punishment” is to be categorised as physical violence.<sup>303</sup> The Committee notes that it can be called ‘physical’ or ‘corporal’ punishment, and defines it as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light”.<sup>304</sup> The Committee takes a very strong stance on the matter, as it did in its General Comment dedicated solely to physical punishment,<sup>305</sup> and stresses that “corporal punishment is invariably degrading”.<sup>306</sup>

The Committee includes a number of other areas under the heading of violence against children. Some of these areas are obvious: sexual abuse and exploitation, violence among children, violence by means of information technology (e.g. child pornography) and torture and inhuman or degrading treatment. The risks of the occurrence of torture and inhuman or degrading treatment in law enforcement and residential institutions is noted (the practice of imprisonment of 16 and 17 year olds in St Patrick’s Institution comes to mind). This phenomenon obviously leaves these children at greater risk of harm.

Some areas listed by the Committee as constituting violence against children are less obvious: for example, forms of self harm such as suicide or eating disorders from which children may suffer.<sup>307</sup> Another insightful point which the Committee includes is that the media can be a highly destructive influence on children, particularly adolescents, by its

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<sup>300</sup> Ibid.

<sup>301</sup> Ibid., at p. 9.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid., at pp. 9–10.

<sup>304</sup> Ibid., at p. 10.

<sup>305</sup> See Committee on the Rights of the Child, *General Comment No. 8 – The Right of Children to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*.

<sup>306</sup> General Comment No. 13, at p. 10.

<sup>307</sup> Ibid., at p. 11.

sensationalising of incidents of violence by young individuals. The Committee states that the media

Tend to use shocking occurrences and as a result create a biased and stereotyped image of children, in particular of disadvantaged children or adolescents, who are often portrayed as violent or delinquent just because they may behave or dress in a different way.<sup>308</sup>

This in turn, the Committee emphasises, leads to a punitive approach in State policies towards assumed or real “misdemeanours” of children and young people.<sup>309</sup> In Ireland, the Equality Authority and the National Youth Council of Ireland conducted research on the stereotyping of young people. Young people themselves reported that they felt that the portrayal of young people in the media was simplistic, unfair and negative.<sup>310</sup> This is clearly a matter which requires further examination, particularly as various initiatives have long been underway to tackle media bias against young people in Britain and Northern Ireland.<sup>311</sup>

The Committee also considers the term “while in the care of” in Article 19. The point is made that those under the age of 18 should be considered to be “in the care of”, or in need of being in the care of, someone at all times, be that their primary caregivers, the State, or temporary caregivers such as teachers.<sup>312</sup> The Committee underlines that states have duties under the CRC to children without primary caregivers and that care should be provided “preferably in family-like care arrangements”.<sup>313</sup> This raises the important issue of foster care provision in Ireland. The HSE highlights a positive trend in Ireland towards foster care and away from institutional care. The percentage of children in care who are currently fostered has increased from 77% in 1999 to 88.5% in 2008.<sup>314</sup> This figure had risen to 90.2% by August 2011.<sup>315</sup>

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<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> See the website of the National Youth Council of Ireland, ‘Initiative to Challenge Negative Stereotyping of Young People’, available at [www.youth.ie](http://www.youth.ie).

<sup>311</sup> See for example, Children and Young People Now, ‘Northern Ireland: Youth Charity Takes on Negative Media’, 16 March 2005, available at [www.cypnow.co.uk](http://www.cypnow.co.uk).

<sup>312</sup> General Comment No. 13, at pp. 12–13.

<sup>313</sup> Ibid., at p. 13.

<sup>314</sup> Department of Health and Children, *Health in Ireland Key Trends 2010* (Department of Health and Children, 2010) at p. 33. Available at [www.dohc.ie](http://www.dohc.ie).

<sup>315</sup> There were 6,215 children in care in August 2011, of these 90.2% (5,605) were in foster care. See Health Service Executive, *Supplementary Report August 2011* [http://www.hse.ie/eng/services/Publications/corporate/performance-reports/August\\_2011\\_Supplementary\\_Report.pdf](http://www.hse.ie/eng/services/Publications/corporate/performance-reports/August_2011_Supplementary_Report.pdf).

However, HIQA stated recently that there is in fact a “chronic shortage”<sup>316</sup> of foster care placements – a very worrying development indeed and contrary, according to General Comment No. 13, to obligations to reduce the risk of violence against children. Moreover, it appears from anecdotal evidence that it is not uncommon for a child to remain in institutional care for up to 2 years because a “suitable” foster family cannot be found. Research on this issue is vital. This needs to be dealt with as a matter of the utmost priority.

### **1.7.3 Measures Which Must Be Taken**

It is stated authoritatively that where Article 19 specifies that states shall take all appropriate measures to prevent violence against children and to protect children from violence, the use of the term “shall take” means that there is no leeway for the discretion of states in this regard. States are, therefore, under a strict obligation to take “all appropriate measures” in accordance with the CRC to fully implement the right.<sup>317</sup>

The Committee then considers the phrase “*all appropriate...measures*”. The General Comment explains that the term “appropriate” refers to the broad range of measures which the State is obliged to implement in the area. Measures must cut across all sectors of government and they must be both *in use* and *effective*. The Committee stresses that the approach taken must be coordinated and integrated, and that isolated programmes which are not integrated in long-term government policy are of limited value. Measures must also be participative insofar as children themselves must be involved in both planning and evaluation.<sup>318</sup> In line with Article 12 of the CRC, there must be a realisation that children have expert experience of their own lives and an acknowledgement that ultimately it is they who will have to live with the consequences of measures, whether those are successful or not.

Article 19 refers to the obligation of the State to take “all appropriate legislative, administrative, social and educational measures”. The Committee specifies that legislative measures will include not only legislation but also the national budget, and relevant enforcement mechanisms for measures against violence.<sup>319</sup> It seems therefore that the cost of

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<sup>316</sup> Jamie Smyth, “‘Serious’ Foster Care Deficiencies Revealed’ *The Irish Times*, 2 July 2011.

<sup>317</sup> General Comment No. 13, at p. 14.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

measures taken to tackle violence against children should be specified in the budget. The Committee emphasises that all states must review and amend domestic legislation in accordance with obligations under Article 19.<sup>320</sup>

The Committee also outlines a number of other measures which states must take. Fortunately, a number of these measures have already been established in Ireland: for example, the establishment of an Ombudsman for Children. The following are measures relevant to Ireland's current situation which are specified in the General Comment as obligations:

- Establish and implement social programmes to promote optimal positive childrearing;
- Enforce law and judicial procedures in a child-friendly way including remedies available to children when rights are violated;
- Establish a government focal point to coordinate child protection strategies and services which we have complied with by the establishment of a Department of Children and Youth Affairs and the appointment of a Minister for Children;
- Implement systematic and transparent budgeting processes in order to make the best use of allocated resources for child protection, including prevention;
- Establish a comprehensive and reliable national data collection system in order to ensure systematic monitoring and evaluation.<sup>321</sup>

The Committee further emphasises the need for “identification and prevention of factors and circumstances which hinder vulnerable groups’ access to services and full enjoyment of their rights”.<sup>322</sup> It was stated above that approximately 225 children aged between 16 and 17 are detained in St Patrick’s Institution annually. A failure to deal with a situation where children are incarcerated in an adult penal regime should be immediately identified as a high-risk situation for those under 18 and most certainly falls within the ambit of the Committee’s remark quoted above. Indeed, this is precisely why the prohibition of imprisoning children together with adults is called for by the CRC and other international human rights law instruments.<sup>323</sup>

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<sup>320</sup> Ibid.

<sup>321</sup> Ibid., at p. 15. This must include some level of reporting of the child care cases coming before the District Courts.

<sup>322</sup> Ibid.

<sup>323</sup> See section 1.6.3



The Committee states that poverty reduction strategies, including the provision of support (both financial and social) to families at risk must be put in place. A number of other social measures which states are obliged to implement are outlined in the General Comment including

- Public health and safety, housing, employment and education policies;
- Improved access to health, social welfare and justice services;
- ‘Child-friendly cities’ planning;
- Reduced demand for and access to alcohol, illegal drugs and weapons.<sup>324</sup>

The Committee also lays down the nature of the social and financial assistance which states are obliged to provide in order to reduce the risk of violence against children, amongst which are measures such as pre- and post-natal services and “income-generation programmes for disadvantaged groups”.<sup>325</sup> Thus the scope of social and financial assistance which states are required to put in place to implement Article 19 is extensive.

The General Comment also lists measures which states should take to prevent violence against children or to assist them and hold perpetrators accountable when violence has occurred. The identification of at most risk groups is one such measure and therefore the situation of marginalised groups such as children with disabilities and children in detention (and obviously prison) requires particular vigilance.<sup>326</sup>

Safe and accessible ways for children to report violence is another crucial facility. The Committee avers that appropriate referrals and rigorous, child rights-based investigations are also necessary, as are a full range of services for supporting and treating children who report violence.<sup>327</sup> The need for appropriate follow-up (e.g. interventions, review etc) as well as respect for due process is also highlighted.<sup>328</sup>

Ireland has already started to introduce positive measures which implement some of the strategies listed by the Committee. The provision of childcare, for example, is an area in

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<sup>324</sup> General Comment No. 13, at p. 16.

<sup>325</sup> Ibid., at p. 19.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid., at p. 20.

<sup>328</sup> Ibid., at p. 21.

which the State recently adopted measures, although there are still many ways in which provision could be improved.<sup>329</sup> Other measures, however, are starkly lacking in Ireland. The General Comment lists, for example, “counselling support to children experiencing difficulties (including self-harm)” as a measure which must be taken.<sup>330</sup> Access to such a service in Ireland has consistently been shown to be inadequate.<sup>331</sup>

The Committee places a heavy emphasis on the obligation to take a preventive approach to violence against children. The General Comment states boldly that child protection should begin with the dual steps of focus on prevention and “explicitly prohibiting all forms of violence”.<sup>332</sup> Preventive measures, it continues, are the most effective long-term means of countering violence against children, and must include the promotion of positive parenting and tackling “the root causes of violence” in all contexts – tackling the issue with children, perpetrators, community and from many other perspectives.<sup>333</sup> The Committee emphasises that information about the CRC should be disseminated and that children should be made aware of their rights, so that they will be supported to protect themselves.<sup>334</sup>

The Committee also highlights an obligation on states to “widely disseminate the present general comment within government and administrative structures, to parents, other caregivers, children, professional organisations, communities and civil society at large.”<sup>335</sup> This should include culturally appropriate as well as child-friendly versions, and all professionals working with children should be trained accordingly.<sup>336</sup> The matter of reporting requirements (i.e. state reports to the Committee on the Rights of the Child) should also be considered in light of this new document. This General Comment brings together measures

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<sup>329</sup> The Committee does not state explicitly why childcare (specified as part of the measures required to support families, see p. 16) will alleviate violence against children, but one can theorise that it would be part of a broader improvement in which social provision would improve parenting and therefore help prevent violence against children. Provision of childcare certainly helps to alleviate deprivation in families, which must, one could theorise, in turn assist in the reduction of violence against children.

<sup>330</sup> General Comment No. 13, at p. 16.

<sup>331</sup> See for example, Smyth, ‘Number of Children in Care Rises to Over 6,000’ *The Irish Times*, 20 June 2011; Michelle McDonagh, ‘How Can we Tackle the Rise in Self-Harm?’ *The Irish Times*, 17 May 2011; Barnardos, Press Release: ‘Barnardos Condemns “Dismal” Mental Health Care for Children’, 1 March 2010, available at [www.barnardos.ie](http://www.barnardos.ie); and Amnesty International Irish Section, *Mental Illness: The Neglected Quarter – Children*, 4 September 2003.

<sup>332</sup> General Comment No. 13, at p. 18.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid., at p. 5.

<sup>336</sup> Ibid.

which states must take to vindicate the rights of children to freedom from violence.<sup>337</sup> States must therefore include information on measures they have taken to meet these obligations in their state reports to the Committee.

The Committee emphasises in particular that a national coordinating framework on violence against children should be devised in each state in order to tackle adequately the matter of violence against children.<sup>338</sup> While noting the many plans of action that states have in place the Committee points out that all such plans have been deficient in some respects: for example, they have often failed to link adequately to “the overall development policy, programmes, budget and coordinating mechanisms”.<sup>339</sup> Although the Committee states that there is no one model for such a framework, it does insist that the process of development is crucial. The participation of all “stakeholders” (e.g. parents, children, professionals), for example, is a crucial part of such a process. A multi-disciplinary, working group should be established to create such a framework. Gaps should be identified, and it is vital that all stages of the planning process are transparent. The Committee specifies various elements the inclusion of which it regards as necessary for the framework: a child rights approach; gender considerations; an emphasis on prevention; the importance of families; protective factors (i.e. they must be well understood); risk factors; and, particularly, vulnerable children, and resource allocation.<sup>340</sup>

#### **1.7.4 The Obligation To Ban Physical Punishment of Children**

As noted above, parents and others in Ireland have a common law defence of ‘reasonable and moderate chastisement’ open to them when they physically punish children.<sup>341</sup> In General Comment No. 13,<sup>342</sup> the Committee states with absolute clarity that, as part of measures which states are obliged to take under Article 19 to end violence against children, ‘corporal’ or ‘physical’ punishment of children must be banned by law. This may be controversial in Ireland, where a large percentage of the population believes that hitting children is acceptable; however, it is a matter which is in urgent need of addressing. The Committee has

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<sup>337</sup> Ibid., at p. 6.

<sup>338</sup> Ibid., at p. 25.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid., at pp. 26–27.

<sup>341</sup> See section 1.6.3.

<sup>342</sup> See also Committee on the Rights of the Child, *General Comment No. 8 - The Right of Children to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*.

previously expressed deep concern in its concluding observations on Ireland's state report that corporal punishment within the family is not prohibited by law<sup>343</sup> and urged the State to "explicitly prohibit all forms of corporal punishment in the family".<sup>344</sup>

The Committee places great emphasis on the educational measures which must be taken in order to address attitudes to violence against children. Educational and awareness-raising measures are needed in Ireland to promote more positive forms of parenting than hitting children. This is an area which is in need of improvement in Ireland, where physical punishment is permitted and a high percentage of the population believes that it is acceptable.<sup>345</sup> Contrast this with, for example, Sweden, where in 1965 53% of parents believed that smacking was acceptable but by the early 1980s after the enactment of a ban on hitting children the figure had dropped to just 11%.<sup>346</sup> This change in attitudes followed extensive social awareness programmes to accompany the legislative reform.

A thorough examination of all the issues associated with the question of the physical punishment of children is beyond the scope of this particular report. However, it is to be noted that research indicates that such punishment is harmful to children and that a large number of European states have banned it. An oft-cited objection to the prohibition of corporal punishment for children is the need for parents to control small children; however, the Committee deals with this matter robustly in its General Comment No. 8:

The Committee recognizes that parenting and caring for children, especially babies and young children, demand frequent physical actions and interventions to protect them. This is quite distinct from the deliberate and punitive use of force to cause some degree of pain, discomfort or humiliation. As adults, we know for ourselves the difference between a protective physical action and a punitive assault; it is no more difficult to make a distinction in relation to actions involving children.<sup>347</sup>

Another issue commonly raised is the concern that loving, responsible parents will be prosecuted for light hitting. However, as the Committee emphasises in General Comment No.

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<sup>343</sup> Committee on the Rights of the Child, *Concluding Recommendations on Ireland's Second Periodic Report*, at para. 39.

<sup>344</sup> *Ibid.*, at para. 40.

<sup>345</sup> Only 42% of people interviewed for a recent study reported the belief that 'smacking' children should be made illegal. Ann-Marie Halpenny et al., *Parenting Styles and Discipline: Parents' Perspectives, Summary Report*, (Dublin, The Stationery Office /Office of the Minister for Children and Youth Affairs, 2010).

<sup>346</sup> See Klaus Ziegert, 'The Swedish Prohibition of Corporal Punishment: A Preliminary Report' 45 *Journal of Marriage and the Family*, 1983, 917, at 921.

<sup>347</sup> Committee on the Rights of the Child, General Comment No. 8, at para. 14.

13, these matters can be dealt with in a proportionate way, and need not require prosecution.<sup>348</sup>

The Committee also emphasises that the term “all appropriate...measures” in Article 19 should not lead to a legal interpretation that there is to be an acceptance of some forms of violence against children.<sup>349</sup> The Committee is absolutely resolute in its conclusion that international human rights standards require the banning of physical punishment of children and Ireland should legislate accordingly.

The current position of the Irish government on corporal punishment and the recommendations of the Committee can be gleaned from a recent article in *The Irish Times*.<sup>350</sup> The article stated that the Minister for Children, Frances Fitzgerald, TD, is considering an outright ban on corporal punishment or a restriction on the defence of reasonable chastisement. But the Minister also indicated that any changes in the area would not be immediate.<sup>351</sup>

### **1.7.5 Recommendations**

The UN Committee on the Rights of the Child, General Comment No. 13 highlights a vast number of areas where state practice in Ireland needs improvement and reform. Many areas have already been highlighted and analysed in previous reports and in the current report. For the purposes of this section, I have selected a number of points for recommendation. The list of recommendations is not necessarily exhaustive.

*Ireland should move to a position of prohibiting all physical punishment of children through legislative change. Although proportionate responses can be taken to tackle the matter, the law should be clear and explicit that, as the Committee has outlined, all violence against*

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<sup>348</sup> General Comment No. 13, at p. 8.

<sup>349</sup> Ibid., at p. 14.

<sup>350</sup> Paul Cullen, ‘Ban on Parents Smacking Children Considered’ *The Irish Times*, 28 December 2011.

<sup>351</sup> On 22 November 2011 Jonathan O’Brien, TD, questioned the Minister on her plans to introduce a corporal punishment ban. The Minister indicated that the introduction of a ban was under continual review and stated “It is anticipated that in due course there will be an appropriate time for the introduction of an outright ban on corporal punishment in the family setting, which will be widely accepted and endorsed by society.” (Dáil Eireann Debate, Vol 747, No. 3, available at <http://debates.oireachtas.ie/dail/2011/11/22/00396.asp>).

*children is unacceptable. Prior to the implementation of this recommendation, an extensive pre-implementation training and educational programme will be needed.*

*Ireland should reinforce the human rights imperative in attempts to eliminate violence against children. This requires consideration of the general principles of the CRC in the process of drafting all policies and laws concerning violence against children.*

*A national coordinating framework on violence against children should be devised to tackle violence against children. The measures suggested in General Comment No. 13 should be used to guide the framework.*

*The strategy should attempt to tackle the root causes of violence in all contexts – tackling the issue with children, perpetrators, community and from many other perspectives. This will require social and financial assistance as appropriate.*

*Educational measures should be taken to change attitudes to violence against children.*

*There needs to be a renewed prioritisation of mental health services for children and young people. This is vital to tackle the psychological effects of violence against children by others, as well as the complex problem of self-harm.*

*The media should be a particular focus of the national coordinating framework. The matter of the undue use of negative images and perceptions of children and young people in the media should be tackled, particularly those which associate children and young people with violence.*

*Measures must be participative in that children themselves must be involved in both planning and evaluation.*

*The total financial provision for children, including measures to tackle violence against children, should be announced in every budget.*

*The current shortage in foster placements should be dealt with without delay.*

*The matter of the low prosecution rate in Ireland for reported incidents of violence against children must be examined. This should be part of an effort to achieve greater accountability in the area of violence against children.*

*The State should make reference to General Comment No. 13, and measures taken to implement it, in its state report to the Committee on the Rights of the Child, due in 2012.*

## SECTION 2:

# CHILD PROTECTION DEVELOPMENTS IN THE UNITED KINGDOM

### 2.1 Introduction

Comparisons are often made between systems and services in Ireland and the United Kingdom. It is arguable that as a nation we have most in common with our neighbouring jurisdiction. Some might say that the change in government in Ireland this year has brought about a new wave of social change commensurate with that of the new coalition government in the UK. Both governments are trying to make their own mark on society, following the lengthy tenures of their predecessors. Since the beginning of the current coalition government between the Conservatives and the Liberal Democrats in May 2010, numerous reviews of various areas concerning child protection have been commissioned. A key aim of the current UK government is to move away from heavily prescriptive policies towards a more common-sense approach and this is reflected in many of the reports commissioned. It is useful to analyse these developments and consider whether any of the recommendations in the review programmes published ought to be considered in an Irish context.

The most wide-ranging of the government-commissioned reports in the UK has been the *Munro Review of Child Protection*, which was published in three parts, each of which is summarised below.

The coalition government has also invested heavily in researching early intervention strategies, and while it has not yet published a comprehensive formal response to reports commissioned on this issue, it has made a commitment to grant over £2 billion in both 2011–2012 and 2012–2013 for early intervention programmes. Three reviews have been published within the last number of months, and each is summarised below. Each report heavily emphasises the effectiveness and considerable economic benefits of using early intervention strategies and strongly encourages a move towards investment in earlier rather than later intervention.



A report on the commercialisation and sexualisation of children, *Letting Children be Children*, was published in June 2011, and received strong backing from the government. There have been calls for its findings to be assessed and acted upon in Ireland.

Two relevant pieces of draft legislation have been published in recent months: The Protection of Freedoms Bill 2011 and The Sexual Offences Act 2003 (Remedial) Order 2011. The Protection of Freedoms Bill contains wide-ranging changes to the vetting and barring system and to the freedom to obtain the biometric data of children in schools. The Sexual Offences Act 2003 (Remedial) Order 2011 provides for a review mechanism for sex offenders who have been placed on the sexual offenders register for life.

A comprehensive review of both the public and private law family justice system was also commissioned by the government.

An initiative called the Family Drug and Alcohol Court, described as a new approach to care proceedings, is being piloted at present and is showing early signs of success.

The government published a new strategy relating to human trafficking in July 2011, part of which is devoted to the issue of child trafficking.

The issue of child detention for immigration purposes has also been highlighted in recent months, with the government publishing a review into ending child detention in immigration centres in December 2010, and promising to end such detention by May 2011. A High Court case in which it was ruled that detention of children in an immigration centre had been unlawful drew further attention to the issue.

The Coroner's and Justice Act 2009 came into force in June 2011, providing greater rights for children in court regarding their protection in relation to giving evidence.

This chapter concludes with a summary of other ventures relating to female genital mutilation, sexual exploitation of children, missing children and a new national guidance on child protection in Scotland, each of which may be of interest in Ireland.

## 2.2 The Munro Review

In June 2010, Professor Eileen Munro of the London School of Economics and Political Science was asked, by the Secretary of State for Education, Michael Gove, MP, to conduct an independent review of child protection in England, because of his belief that “the system of child protection...is not working as well as it should” and that the system needed a fundamental review.<sup>352</sup>

Professor Munro delivered her report in three parts in September 2010, February 2011 and April 2011. The final part was written as a stand-alone report, summarising many of the focal points of its previous two parts, and as such is given detailed consideration below.

### 2.2.1 *The Munro Review of Child Protection – Part 1: A Systems Analysis and Part 2: The Child’s Journey*<sup>353</sup>

In essence the first part of the review outlines goals and expectations for the two parts to follow. Professor Munro explains in detail the systems approach she followed in undertaking the review.

Her first aim was to “understand why previous well-intentioned reforms have not resulted in the expected level of improvements”.<sup>354</sup> In the first part of the report, she sets out her approach to the overall review, and the features of the child protection system that need to be explored in detail.

As a foundation for the report, Munro explores the truth of the following statement

The perceived punitive effects and the impact of judgments on services in terms of the local media and political response are in danger of creating a climate whereby the inspected manage for inspection rather than managing for quality and outcomes for children and young people.<sup>355</sup>

She concludes that fear of missing a case is leading to too many referrals and too many families getting caught up in lengthy assessments that cause them distress but do not lead to

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<sup>352</sup> Letter to Professor Munro, from Secretary of State for Education, the Right Honourable Michael Gove, MP, available at <http://www.togetherfdc.org/SupportDocuments/Michael%20Gove%20to%20Eileen%20Munro%20100610.pdf>.

<sup>353</sup> Eileen Munro, *The Munro Review of Child Protection – Part 1: A Systems Analysis*. Available at <http://www.education.gov.uk/munroreview/downloads/TheMunroReviewofChildProtection-Part%20one.pdf>.

<sup>354</sup> *Ibid.*, at p. 3.

<sup>355</sup> Association of Directors of Children’s Services (ADCS), see *Munro Review, Part 1*, at p. 6.

the provision of any help.<sup>356</sup> The result has been to create a “skewed system”, which is paying so much attention to identifying abuse and neglect cases that it is draining time and resources away from families. Munro found that there was an 11% rise in the number of children referred to social care between 2008–2009 and 2009–2010, and that overall only 6% of children became the subject of child protection plans, but that many of these children would have benefited greatly from support and help.<sup>357</sup>

Munro also states that earlier reforms have contributed to the growing imbalances by tending to focus on technical solutions while giving less attention to the

skills to engage with families, the expertise to bring about enduring improvements in parenting behaviour, and the organisational support that enables social workers and others to manage the emotional dimensions of the work without it harming their judgment or their own well-being.<sup>358</sup>

In conducting her review of the systems engaged in child protection, Munro adopted a holistic approach and included in her review the contributions of the police, health services, education services and early years settings.<sup>359</sup>

The aim of the second phase of the review was to set out

the characteristics of an effective child protection system and to outline the reforms that might help the current system get closer to the ideal.<sup>360</sup>

The key elements of the Interim Review are all repeated in the Final Review, and are discussed below under the heading of the Final Review.

Part 2 of the review is called ‘The Child’s Journey’, referring to the child’s journey from needing to receiving effective help. Munro concludes from the evidence presented to the review that the system does not currently remain child-centred.<sup>361</sup>

One key feature of the interim report is the discussion of the current policies of prevention and early intervention, with a specific focus on identifying those children who are suffering, or are likely to suffer, significant harm as a result of maltreatment.<sup>362</sup> The report strongly

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<sup>356</sup> *Munro Review, Part 1*, at p. 6.

<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid.*, at p. 7.

<sup>359</sup> Eileen Munro, *The Munro Review of Child Protection – Part 2: The Child’s Journey*. Available at <http://www.education.gov.uk/munroreview/downloads/Munrointerimreport.pdf>.

<sup>360</sup> *Ibid.*, at p. 14.

<sup>361</sup> *Ibid.*, at p. 15.

<sup>362</sup> *Ibid.*, at p. 21.

endorses the work of Frank Field, Graham Allen and Dame Clare Tickell in relation to early intervention, which is discussed below.

### ***2.2.2 The Munro Review of Child Protection: Final Report “A Child Centred System”***<sup>363</sup>

The key aim of this part of the review was to outline recommendations for change based on the evidence accumulated during the review. It was written to be free-standing.<sup>364</sup> In total, fifteen recommendations were made. Those most relevant to this jurisdiction are listed below.

#### 2.2.2.1 Introduction

Munro states that the child protection system in the United Kingdom has become heavily bureaucratised, with a work environment full of obstacles to keeping a clear focus on meeting the needs of children.<sup>365</sup> Her review and resulting recommendations are based on this presupposition. She identifies four major drivers which helped to create the many obstacles to good practice which exist in the current child protection system:

1. The importance that members of the public attach to children and young people’s safety and welfare and, consequently, the strength of reaction when a child is killed or suffers serious harm.
2. The sometimes limited understanding amongst the public and policy makers of the unavoidable degree of uncertainty involved in making child protection decisions, and the impossibility of eradicating that uncertainty.
3. The tendency of the analyses of inquiries into child abuse deaths to invoke human error too readily, rather than taking a broader view when drawing lessons. This has led to recommendations that focus on prescribing what professionals should do without examining well enough the obstacles to doing so.
4. The demands of the audit and inspection system for transparency and accountability that has contributed to undue weight being given to readily

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<sup>363</sup> Munro, *The Munro Review of Child Protection: Final Report “A Child Centred System”*. Available at <https://www.education.gov.uk/publications/eOrderingDownload/Munro-Review.pdf>.

<sup>364</sup> *Munro Review, Final Part*, at p. 14.

<sup>365</sup> *Ibid.*, at p. 19.

measured aspects of practice.<sup>366</sup>

Another major factor which underpins the review's conclusions is the complexity of causality. Munro states that the government should

establish the goals the system should aim at, providing clarity around roles, responsibilities, values and accountabilities, but allowing professionals greater flexibility and autonomy to judge how best to achieve these goals and protect children and young people.<sup>367</sup>

### 2.2.2.2 The Principles of an Effective Child Protection System

As a foundation to her review, Munro outlines the principles of a good child protection system in the following table:<sup>368</sup>

1. **The system should be child-centred:** everyone involved in child protection should pursue child-centred working and recognise children and young people as individuals with rights, including their right to participation in decisions about them in line with their age and maturity.
2. **The family is usually the best place for bringing up children and young people,** but difficult judgments are sometimes needed in balancing the right of a child to be with their birth family with their right to protection from abuse and neglect.
3. **Helping children and families involves working with them** and therefore the quality of the relationship between the child and family and professionals directly impacts on the effectiveness of help given.
4. **Early help is better for children:** it minimises the period of adverse experiences and improves outcomes for children.
5. **Children's needs and circumstances are varied so the system needs to offer equal variety in its response.**
6. **Good professional practice is informed by knowledge of the latest theory and research.**
7. **Uncertainty and risk are features of child protection work:** risk management can only reduce risks, not eliminate them.
8. **The measure of the success of child protection systems, both local and national, is whether children are receiving effective help.**

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<sup>366</sup> Ibid., at pp. 15–16.

<sup>367</sup> Ibid., at p. 22.

<sup>368</sup> Ibid., at p. 23.

### 2.2.2.3 A System that Values Professional Expertise

The review found that some of the constraints experienced by practitioners were attributed to statutory guidelines and the inspection culture. A common complaint was that practice had become focused on compliance with guidance and performance management criteria, rather than on using these as a framework to guide the provision of effective help to children. One conclusion of the review was that statutory guidance needs to be revised and the inspection process modified to enable and encourage professionals to keep a clearer focus on children's needs and to exercise their judgment on how to provide services to children and families.<sup>369</sup>

Munro drew up a list of 'Risk Principles' relevant to all those who work in child protection, to enable them to be 'risk sensible' and to respond to situations using sound judgment as opposed to merely following text book procedures. These principles are as follows:

Principle 1: The willingness to make decisions in conditions of uncertainty (i.e. risk taking) is a core professional requirement for all those working in child protection.

Principle 2: Maintaining or achieving the safety, security and well-being of individuals and communities is a primary consideration in risk decision-making.

Principle 3: Risk taking involves judgment and balance, with decision makers required to consider the value and likelihood of the possible benefits of a particular decision against the seriousness and likelihood of the possible harms.

Principle 4: Harm can never be totally prevented. Risk decisions should, therefore, be judged by the quality of the decision-making, not by the outcome.

Principle 5: Taking risk decisions, and reviewing others' risk decision-making, is difficult, so account should be taken of whether they involved dilemmas or emergencies, were part of a sequence of decisions or might appropriately have been taken by other agencies. If the decision is shared, then the risk is shared too and the risk of error reduced.

Principle 6: The standard expected and required of those working in child protection is that their risk decisions should be consistent with those that would have been made in the same circumstances by professionals of similar specialism or experience.

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<sup>369</sup> Ibid., at p. 39.

Principle 7: Whether to record a decision is a risk decision in itself which should, to a large extent, be left to professional judgment. The decision whether or not to make a record, however, and the extent of that record, should be made after considering the likelihood of harm occurring and its seriousness.

Principle 8: To reduce risk aversion and improve decision-making, child protection needs a culture that learns from successes as well as failures. Good risk taking should be identified, celebrated and shared in a regular review of significant events.

Principle 9: Since good risk taking depends upon quality information, those working in child protection should work with partner agencies and others to share relevant information about people who pose a risk of harm to others or people who are vulnerable to the risk of being harmed.

Principle 10: Those who work in child protection who make decisions consistent with these principles should receive the encouragement, approval and support of their organisation.<sup>370</sup>

Munro highlights the need to reform the inspection system and lists the goals of a new inspection system:

A new inspection system should

- Drive child-centred practice and improved outcomes for children;
- Examine children's experiences and their journey through the system;
- Focus on the quality of frontline practice and the capabilities of staff in exercising professional judgment and providing help;
- Indicate how improvements in services might best be achieved, including highlighting where good practice exists;
- Inspect the effectiveness of help offered to children and families, not just in responding to cases of abuse or neglect, but in providing early help to improve the well-being of children;

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<sup>370</sup> Ibid., at pp. 43–44.

- Look at the breadth and range of available provision when compared with known local need;
- Examine the extent to which key partners work together to protect and help children; and
- Identify whether local authorities and partners are learning, adapting and improving the help provided, including drawing more widely on the lessons from Serious Case Reviews and other types of case reviews.<sup>371</sup>

Munro recommends that inspection should be broad, covering the contribution of all children’s services to the protection of children, and be conducted without announcement in order to minimise the bureaucratic burden of the inspection.<sup>372</sup>

Munro states that the most important measure of how well children’s social care services are operating is whether children and young people are effectively helped and kept safe from harm, and that therefore a new inspection framework must reflect how well this is happening in local areas. This is said to include assessing

not only the role that agencies such as health and the police have played in bringing [children] to the attention of children’s social care, but also their ongoing role in working in collaboration with children’s social care, and how quickly and effectively children’s social care services responded to and progressed cases.<sup>373</sup>

#### 2.2.2.4 Clarifying Accountability and Improving Learning

The key recommendation on this issue is that the integrity of lines of accountability and roles be preserved as the coalition government’s plans for reform in the public services are implemented.<sup>374</sup>

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<sup>371</sup> Ibid., at p. 46.

<sup>372</sup> Ibid., at p. 46.

<sup>373</sup> Ibid., at p. 48.

<sup>374</sup> Ibid., at p. 52.



### 2.2.2.5 Sharing Responsibility for the Provision of Early Help

Munro strongly emphasises the key role of preventive services, and defines this in terms of offering help to children and families before any problems are apparent and in providing help when low level problems emerge. The three key messages conveyed by the review in this respect are that

1. Preventive services will do more to reduce abuse and neglect than reactive services.
2. Coordination of services is important to maximise efficiency.
3. Preventive services need to contain good mechanisms for helping people identify those children and young people who are suffering or likely to suffer harm from abuse or neglect and who need referral to children's social care.<sup>375</sup>

The review emphasises evidence for the cost-effective nature of early intervention, and quotes a summary of the many benefits of early help in the comparable field of the NHS as follows:

- **Value for money:** even though the economic modelling is based on conservative assumptions, many interventions are seen to be outstandingly good value for money;
- **Self-Financing:** a number of interventions are self-financing over time, even from just the narrow perspective of the NHS. However, the scope for 'quick wins', in the sense of very short pay-back periods for the NHS, is relatively limited;
- **Range of impacts:** many interventions have a broad range of pay-offs, both within the public sector and more widely (such as through better educational performance, improved employment/earnings and reduced crime);
- **Timescales:** in some cases the pay-offs are spread over many years. Most obviously this is the case for programmes dealing with childhood mental health problems, which in the absence of intervention have a strong tendency to persist throughout childhood and adolescence into adult life. However, the overall scale of economic pay-offs from these interventions is generally such that their costs are fully recovered within a relatively short period of time;

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<sup>375</sup> Ibid., at p. 69.

- **Low cost:** many interventions are very low cost. A small shift in the balance of expenditure from treatment to prevention/promotion should generate efficiency gains;
- **Range of interventions:** the interventions included in the analysis cover a wide range, from the prevention of childhood conduct disorder to early intervention for psychosis, practical measures to reduce the number of suicides and well-being programmes provided in the workplace. Many of these interventions are an NHS responsibility, but the analysis also highlights opportunities for the NHS to work closely in partnerships with other organisations and in jointly funded programmes;
- **Programme design and implementation:** in many cases the modelling of economic impacts reveals the importance of key elements of programme design and implementation such as targeting, take-up and drop-out. One consequence is that for some interventions the most cost-effective action when refining a programme may be to increase take-up among high-risk groups or to improve completion rates, rather than to broaden coverage of the intervention;
- **Evidence-Based:** each of the modelled interventions is evidence-based, in the sense of having been shown to be effective in improving mental health. The economic analyses summarised in this report show that, over and above these gains in health and quality of life, the interventions also generate very significant economic benefits including savings in public expenditure.<sup>376</sup>

In addition to the cost-effective nature of early intervention, Munro highlights the benefits of adopting a coordinated provision of services to those families with multiple problems. The current UK coalition government has established the Families with Multiple Problems Programme for this purpose. Munro observes:

- families with multiple problems require a range of different help and support which needs to be provided in a focused and targeted way if it is to be effective and yet evidence has shown that these children and families can be targeted by up to 20 professionals. Such an approach is both disruptive for the child and family as well as costly. Cost data provided by local authorities identified that local areas already spend in excess of £4bn each year in supporting and dealing with the problems faced by these children and families. Intensive coordinated interventions with such children and families can deliver substantial savings in public expenditure but the savings do not necessarily accrue to the organisations

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<sup>376</sup> Ibid., at pp. 71–72, quoting Knapp, M., Parsonage, M. and McDaid, D. (eds.) (2011), *Mental Health Promotion and Mental Illness Prevention: The Economic Case*, London, Department of Health, available at [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_126085](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_126085)).

that need to invest in the intervention. Independent monitoring of ‘key worker’ type family interventions show sustained 30–50per cent reductions in problems associated with family functioning, crime, health and education within 12 months through operating in a coordinated and joined up way;

- government funding streams and funding restrictions have prevented local areas from redesigning services, have created unnecessary duplication and have prevented services from focusing on family needs. This has led the coalition government to introduce community budgets to enable local areas to overcome this complexity by allowing services to pool resources and share the savings. It is recognised that local areas may need to invest in service redesign before being able to realise savings in future years. This approach fits well with that taken by this review, of creating space for innovation, working collaboratively across services to create a joined up approach dedicated to tackling family problems and investing in service redesign to meet the specific needs of children, young people and families. From April 2011 there are 16 community budget areas piloting this approach and the review team has been working with a number of them on flexibilities relating to assessment and timescales.<sup>377</sup>

The complexity of deciding whether or not a child is suffering harm and requires a child protection response is acknowledged and Munro outlines five levels of prevention:

- *universal primary prevention* – addressing the entire population and aiming to reduce the later incidence of problems, for example, the universal services of health, education and income support;
- *selective primary prevention* – focusing on groups which research has indicated are at higher than average risk of developing problems. For example, teenage mothers;
- *secondary prevention* – aiming to respond quickly when low level problems arise in order to prevent them getting worse;
- *tertiary help/prevention* – involving a response when the problem has become serious, for example, child protection, hospital care and criminal justice; and
- *quarternary help/prevention* – providing therapy to victims so that they do not suffer long term harm, for example, therapy for victims of sexual abuse or therapeutic help for looked after children.<sup>378</sup>

Munro affirms the role of multi-agency teams in the identification of abuse and neglect cases.<sup>379</sup>

#### 2.2.2.6 Developing Social Work Expertise

The Munro review argues that the balance between following rules and exercising professional expertise has become skewed so that insufficient attention has been given to how to help frontline workers to work effectively with children and families. The main argument

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<sup>377</sup> Ibid., at p. 76.

<sup>378</sup> Ibid., at p. 79.

<sup>379</sup> Ibid., at p. 81.

advanced by Munro is for the radical improvement in the knowledge and skills of social workers from initial training through to continued professional development.<sup>380</sup> Research gathered for the review resulted in the conclusion that “the development of expertise, both in the individual and in the profession in general, has been hampered by a career structure that fails to encourage and reward growing expertise.”<sup>381</sup>

The review considers that two central issues have contributed to the lack of sufficiently widespread good practice.<sup>382</sup> They are:

1. A lack of consensus within the profession about the nature of social work expertise. According to one view the primary driver of change is the relationships formed with families, but another emphasises that social workers also require high intelligence and formal training to make sound judgments and decisions.
2. An inappropriate model of practice underpinning much of the reform. A managerialist approach has developed, where the emphasis has been on the conscious, cognitive elements of the task of working with children and families, on collecting information and making plans.

Munro argues that while knowing what data to collect is useful, it is equally useful to know *how* to collect it: that is, how to create a relationship where the parent is willing to tell you anything about the child and family, how to ask difficult questions and how to develop expertise in assessing a child’s behaviour.<sup>383</sup>

The research collected for the review, in Munro’s opinion, isolates the following key capabilities that must be developed for child and family social work:

Knowledge:

- knowledge of child development and attachment and how to use this knowledge to assess a child’s current developmental state;
- understanding the impact of parental problems such as domestic violence, mental ill health, and substance misuse on children’s health and development at different stages during their childhood; and

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<sup>380</sup> Ibid., at p. 84.

<sup>381</sup> Ibid.

<sup>382</sup> Ibid., at p. 86.

<sup>383</sup> Ibid., at p. 87.

- knowledge of the impact of child abuse and neglect on children in both the short and long term and into adulthood.

Critical Reflection and Analysis:

- ability to analyse critically the evidence about a child and family's circumstances and to make well-evidenced decisions and recommendations, including when a child cannot remain living in their family either as a temporary or permanent arrangement; and
- skills in achieving some objectivity about what is happening in a child's life and within their family, and assessing change over time.

Intervention and Skills:

- # recognising and acting on signs and symptoms of child abuse and neglect;
- # purposeful relationship building with children, parents and carers and families;
- # skills in adopting an authoritative but compassionate style of working;
- # skills to assess family functioning, take a comprehensive family history and use this information when making decisions about a child's safety and welfare;
- # knowledge of theoretical frameworks and their effective application for the provision of therapeutic help;
- # knowledge about, and skills to use and keep up-to-date with, relevant research findings on effective approaches to working with children and families and, in particular, where there are concerns about abuse or neglect;
- # understanding the respective roles and responsibilities of other professionals and how child and family social workers can contribute their unique role as part of a multi-disciplinary team; and
- # skills in presenting and explaining one's reasoning to diverse audiences, including children and judges.<sup>384</sup>

The report highlights three significant issues in social work training and education which require urgent attention. These are the need to:

- begin with clear, consistent criteria for entry to social work courses – with a new regime for testing and interviewing candidates that balances academic and personal skills – so that all students are of a high calibre;

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<sup>384</sup> Ibid., at p. 96.

- provide courses where the content, teaching, placement opportunities and assessment are of a high standard across all providers – proposing, for instance, advanced teaching organisation status for agencies providing high quality practice placements to social work students; and
- culminate in a new supported and assessed first year in employment, which would act as the final stage in becoming a full, practising social worker.<sup>385</sup>

#### 2.2.2.7 The Organisational Context: Supporting Effective Social Work Practice

Munro states that with a reduction of prescription from the centre will come a need for local authority leaders to set about creating a learning system that constantly seeks to improve the quality of help that is given to vulnerable children and families. Whilst clearly there are differences in the manner in which the health services are structured and organised in Ireland and the UK, nonetheless the observations of Munro are of general application. Munro outlines the requirements she believes necessary to an effective local system as follows:

- a clear understanding of the capabilities required by staff, based on theory and best practice evidence;
- an operational structure and systems (practice and managerial) which enable all social workers to spend most of their time undertaking effective work that directly benefits children and families and which values continuity of social worker with children and families;
- a robust selection process for all staff in that structure, so that the requisite knowledge, skills and methodological interests that are needed locally are present and that all recruits have the necessary personal qualities required to develop and learn;
- a clear view on what local regulation is absolutely necessary to enable social workers to do their jobs in a reflective way;
- comprehensive and sufficiently resourced professional development activity to give practitioners the necessary skills set and effect positive and demonstrable change in children and families;
- arrangements for practitioners to have frequent case consultations to explore and reflect on their direct work and plans for children and families, which is separate from on-going case supervision arrangements;

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<sup>385</sup> Ibid., at p. 97.

- arrangements for frequent case supervision for practitioners to reflect on service effectiveness and case decision-making, separate from arrangements for individual pastoral care and professional development;
- arrangements for managers to observe practitioners' direct work with children and families in both family and multi-disciplinary contexts;
- a demonstrable teaching culture, where all managers and leaders are actively and frequently involved in a mix of case consultation, direct work with children and families and the teaching of theory and practice; and
- a learning culture which results in the organisation knowing its child and family social work service and making adjustments to facilitate its practice effectiveness with families and improve outcomes for children.<sup>386</sup>

The review was asked to consider whether there was a compelling argument for the creation of the role of Chief Social Worker central government. Following a comparative analysis of similar roles in other government services, the review recommended the creation of such a role for the following reasons: it would provide a means for government to understand how its policies and procedures affect both practice at the frontline and the experience of children, families and adults; it would also cast light on the practice of social work so that the daily challenges facing social workers would be clear to the government; and it would send out a strong message that practitioners' work is valued and important.<sup>387</sup>

Munro suggests that a Chief Social Worker for England might be given responsibilities to: advise Ministers on social work practice issues; consult with the profession in preparing that advice; promote continuous improvement in localities by helping to facilitate learning from good practice; and highlight the importance of social work.<sup>388</sup>

#### 2.2.2.8 Conclusion

The report concludes with a summary of recommendations, and cautions the government against "cherry picking reforms in isolation" and removing central prescription without creating a learning system. It also recommends not delaying the removal of central prescription until services show that they can take responsibility. Munro further warns that

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<sup>386</sup> Ibid., at p. 108.

<sup>387</sup> Ibid., at p. 118.

<sup>388</sup> Ibid., at p. 118.

the depth of change recommended in the report means it will take time for experience with new ways of working to accumulate to the point of being fully effective.<sup>389</sup>

### 2.2.3 Government Response to the Munro Review<sup>390</sup>

The UK government released its response to the Munro Review on 13 July 2011. The review was welcomed by the government, which accepted “the fundamental argument that the child protection system has lost its focus on the things that matter most: the views and experiences of the children themselves”.<sup>391</sup> The government made a commitment to move towards a child protection system with less central prescription and interference, and one where greater trust and responsibility is placed in skilled professionals at the frontline.

The government stated that the response was not a one-off set of recommended solutions to be imposed from the centre, but rather the start of a shift in mindset and relationship between central government, local agencies and frontline professionals working in partnership. Professor Munro is to undertake an interim assessment in Spring 2012.<sup>392</sup>

#### 2.2.3.1 A System Focused on Helping Children and Families

The UK government set out the characteristics of the type of system that it is going to work towards, as one that is characterised by:

- children and young people’s **wishes, feelings** and **experiences** placed at the centre;
- a relentless focus on the **timeliness, quality** and **effectiveness** of help given to children, young people and their families;
- the availability of a **range of help and services** to match the variety of needs of children, young people and their families;
- recognising that **risk and uncertainty** are features of the system where risk can never be eliminated but it can be managed smarter;
- trusting professionals and giving them the scope to exercise their **professional judgment** in deciding how to help children, young people and their families;
- the development of **professional expertise** to work effectively with children, young people and their families;

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<sup>389</sup> Ibid., at p. 135.

<sup>390</sup> Department for Education, *A Child Centred System: The Government’s response to the Munro review of child protection* (July 2010). Available at <http://www.education.gov.uk/munroreview/downloads/GovernmentResponsetoMunro.pdf>.

<sup>391</sup> *Government response to the Munro Review*, at p. 2.

<sup>392</sup> Ibid., at p. 3.



- truly valuing and acting on **feedback** from children, young people and families; and
- **continuous learning and improvement**, by reflecting critically on practice to identify problems and opportunities for a more effective system.<sup>393</sup>

The government also acknowledged its obligations under the UN CRC, stating that it

establishes that a child’s right to protection from maltreatment means designing a child protection system that does not just react when things go wrong but also provides support to children and families to prevent maltreatment happening in the first place.<sup>394</sup>

The government stated that its reforms of public services were critical if there is to be a transformation of local practice to improve the experience of children. It acknowledged the role that health services, the schools system, the police, reforms in the foundation years and the family justice system has to play in this regard.<sup>395</sup>

The government then responded to what it saw as four themes in Munro’s review.

#### 2.2.3.2 Valuing Professional Expertise

The UK government made a commitment to oversee a radical reduction in the amount of regulation and to work with its partners to achieve a corresponding reduction in locally designed rules and procedures.<sup>396</sup>

The government also undertook to strengthen the role and impact of Local Safeguarding Children Boards.<sup>397</sup>

The government also agreed that there would continue to be an important role for external inspection. It referred to a new inspection framework being designed by Ofsted that would focus on the effectiveness of help given to children and young people and it affirmed its commitment to Professor Munro’s recommendation that the new inspections ought to be

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<sup>393</sup> Ibid., at p. 5.

<sup>394</sup> Ibid.

<sup>395</sup> Ibid., at p. 7.

<sup>396</sup> Ibid.

<sup>397</sup> Ibid., at p. 8.

unannounced in order to minimise the bureaucratic burden associated with preparation for the inspection.<sup>398</sup>

The government accepted Professor Munro's position that there was currently no compelling case for a national database to give access to information about whether a child is subject to a protection plan and stated that it would keep under review the question of how best to help professionals who work with vulnerable children to cooperate and share information to keep children safe.<sup>399</sup>

### 2.2.3.3 Sharing Responsibility for the Provision of Early Help

The UK government referred to the fact that evidence shows that preventive services do more to reduce abuse and neglect than reactive services, and stated its desire to

work with partners to create a radical change in the way local agencies coordinate their work to maximise existing resources and increase the range and number of preventative services on offer to children and families.<sup>400</sup>

The government articulated a vision of local government arrangements characterised by transparency. Such a system would set out:

- the prevalence of need in a given locality;
- the range of professional help available to local children, young people and families, through statutory, voluntary and community services, against the local profile of need;
- mechanisms within such services for identifying those children and young people who need referral to children's social care and in particular those who are suffering, or likely to suffer, significant harm;
- the availability of social work expertise to professionals working with children, young people and families, who are not being supported by children's social care services;
- the training available locally to support professionals working at the front line of universal services; and
- local resourcing of the early help services for children, young people and families.<sup>401</sup>

The government in the neighbouring jurisdiction aims with these arrangements to ensure that practitioners who have everyday contact with children will be better placed to act when they have cause for concern.

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<sup>398</sup> Ibid.

<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

<sup>401</sup> Ibid. at p. 9.

The UK government also stressed the importance of early help for teenagers as well as for children. It affirmed its belief in the importance of the first years of life in determining life chances. It stated that it “has made available a non-ring-fenced early intervention grant worth over £2 billion in each of 2011–12 and 2012–13”. Moreover, the UK government confirmed its commitment to help families by early intervention through Sure Start Children’s Centres, an extra 4,200 health visitors, and doubling the number of places on the Family Nurse Partnership Programme by 2015, and through the Families with Multiple Problems Programme.<sup>402</sup>

#### 2.2.3.4 Developing Social Work Expertise and Supporting Effective Social Work Practice

The UK government stated that it desired social workers to be more concerned with the effectiveness of the help they provide than with compliance with procedures.<sup>403</sup>

The government expressed its wish to radically improve the knowledge, skills, and expertise of social workers from their initial training through to continuing professional development. It committed itself to continuing to work with the Social Work Review Board (SWRB). It also promised to establish a Chief Social Worker “to advise Government on social work practice and the effectiveness of the help being provided to children and young people”.<sup>404</sup>

#### 2.2.3.5 Strengthening Accountability and Creating a Learning System

One result of the UK government’s agreement that the child protection system will need to become better at monitoring, learning and adapting, was its commitment to retain the existing statutory status of the Director of Children’s Services and the Lead Member for Children’s Services. It stated that it is working to revise the statutory guidance for both.<sup>405</sup>

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<sup>402</sup> Ibid.

<sup>403</sup> Ibid., at p. 10.

<sup>404</sup> Ibid.

<sup>405</sup> Ibid., at p. 11.

### 2.2.3.6 Government Response to Specific Recommendations made in the Munro Review.

The UK government published a table giving its detailed response to each of Munro's recommendations. The key commitments made by the government are as follows:

1. The government agreed that a better balance between professional judgment and central prescription was necessary. An amendment will be made to *Working Together to Safeguard Children*, in advance of a full revision of this guidance, to "remove the prescription of timescales and the distinction between core and initial assessments". The amendment will also include the parameters for good assessment set out in Professor Munro's first recommendation. The government committed itself to a revision of *Working Together to Safeguard Children* and *The Framework for the Assessment of Children in Need and their Families* by July 2012.<sup>406</sup>
2. The government agreed that inspection should examine the contribution of all relevant local agencies to the protection of children, and committed itself to initiating further work to consider how the inspectorates could work together to achieve this outcome. The government also agreed that the new inspection framework should operate on the assumption that inspections will be unannounced. A commitment was made that Ofsted would have a new inspection framework in place by May 2012.<sup>407</sup>
3. The government agreed that performance information should be used as an important but not exhaustive measure of effectiveness. The government affirmed that the draft data set included in Munro's final report formed a good foundation for further work. The government promised to work with the Children's Improvement Board to finalise the draft data set which will be used by Local Safeguarding School Boards, practitioners and managers. It agreed to confirm the suite of locally published performance information by December 2011. Publication of the suite of new national performance information is expected before May 2012.<sup>408</sup>
4. The government accepted the principles of the recommendation that a duty be placed on local authorities and statutory partners to secure sufficient early help services for children, young people and families. It stated that there should be in place:

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<sup>406</sup> Ibid., at pp. 12–14.

<sup>407</sup> Ibid., at p. 15.

<sup>408</sup> Ibid., at p. 17.

- sufficient provision of early help informed by the local profile of need;
- arrangements to identify children who are suffering, or likely to suffer, harm;
- access to child protection social work expertise for those professionals providing early help and at the boundary of statutory social care services;
- effective training accessible locally for those professionals providing early help;
- clear resourcing of local arrangements; and
- provision of an ‘early help offer’ to individual children and families<sup>409</sup>

The government committed itself to working with partners to identify the appropriate route to take to share the responsibility for the provision of early help and to creating an inspection framework to test efficacy of the arrangements from May 2012.<sup>410</sup>

5. The government agreed that the skill base and competence of social workers working in child protection needed to be both explicit and a force for improving practice, training and professional development. The government referred to the Professional Capabilities Framework, developed by the Social Work Review Board, which deals with this issue, and which will be implemented by autumn 2012.<sup>411</sup>
6. The government committed itself to working with employers and Higher Education Institutes to build partnerships that would ensure high quality training for prospective social workers, with the aim of having them in place by the end of 2012. The government also made a commitment to ask the College of Social Work to develop plans for designated approved-practice settings and teaching status, and to consider the merits of student units by summer 2012.<sup>412</sup>
7. The government accepted the necessity of local authorities designating a Principal Child and Family Social Worker. It stated that local areas will not necessarily need to create new posts, but rather ought to designate a professional social worker as practice lead. The government envisaged that most local authorities will have designated a

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<sup>409</sup> Ibid., at p. 21.

<sup>410</sup> Ibid., at p. 22.

<sup>411</sup> Ibid., at p. 24.

<sup>412</sup> Ibid., at p. 26.

Principal Child and Family Social Worker by April 2012 and that all will have done so by July 2012.<sup>413</sup>

8. The government accepted the proposal for a Chief Social Worker who would provide a permanent professional presence for social work within government as a complementary role to any corresponding professional body, and promised that this role would be functioning by late 2012. The post will cover children and adults and will report to both the Secretary of State for Education and the Secretary of State for Health.<sup>414</sup>
9. The government agreed that systems-review methodology should be used by Local Safeguarding School Boards when Serious Case Reviews are undertaken and that there should be a group of accredited reviewers to support the local application of this methodology. The government committed itself to considering the evidence and opportunities for using systems-review methodologies for Serious Case Reviews during the second half of 2011.<sup>415</sup>

#### 2.2.3.7 Government Progress on Implementing Munro Review Recommendations

In answer to a Parliamentary question on 13 December 2011, Tim Loughton, MP, Under Secretary of State for Children and Families, outlined the progress made by the government in implementing the recommendations of the Munro Review. The steps taken include

1. Working with professionals to inform the consultation on *Working Together to Safeguard Children* and the *Framework for the Assessment of Children in Need and their Families*,<sup>416</sup> which will take place in early 2012.
2. The development of local child safeguarding performance information by the government and child protection partners. National performance information is planned to be developed in 2012.

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<sup>413</sup> Ibid., at p. 28.

<sup>414</sup> Ibid., at p. 29.

<sup>415</sup> Ibid., at p. 34.

<sup>416</sup> *Working Together to Safeguard Children: a guide to inter-agency working to safeguard and promote the welfare of children* (Department of Education, 2006); *Framework for the Assessment of Children in Need and their Families* (Department of Health, 2000).

3. Consultation on child-centred school inspections.
4. The publication of a work programme, *Safeguarding Children in the Reformed NHS*.<sup>417</sup>
5. Trials run in eight local authorities on flexible approaches to assessment, which are to be extended to March 2012.
6. Support from The Children's Workforce Development Council (CWDC) and the College of Social Work for local authorities in designating a Principal Child and Family Social Worker in every local area.
7. Preparations underway to allow for the appointment of a Chief Social Worker.
8. Consultation undertaken on new guidance for Director of Children's Services and Lead Members.
9. Consideration being given to how the Social Care Institute for Excellence's Learning Together Model can be developed for greater use in light of the recommendation in the Munro Review that systems methodologies for Serious Case Reviews should be used.
10. In light of the recommendation in the Munro Review to end Ofsted's evaluations of Serious Case Reviews, implementation by the government of transitional provisions and from 2012 these evaluations will be streamlined.
11. A decision by the government not to introduce a new statutory duty on delivering a transparent and coordinated offer of early help as it was considered that sufficient legislation existed to deliver this.

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<sup>417</sup> Department of Health, Department of Education and associated stakeholders, 2011.

## 2.3 Early Intervention Reports

### 2.3.1 Early Intervention: The Next Steps<sup>418</sup>

In July 2010, the government commissioned a report on early intervention from Graham Allen, MP, which was published on 19th January 2011. The report makes various recommendations but does not request changes in legislation or immediate public spending.

#### 2.3.1.1 Introduction

The report uses the term ‘early intervention’ to refer to

the general approaches and specific policies and programmes which help to give children aged 0–3 years the social and emotional bedrock they need to reach their full potential; and to those which help older children become the good parents of tomorrow.<sup>419</sup>

The rationale for investing in early intervention is stated as being that

many of the costly and damaging social problems in society are created because we are not giving children the right type of support in their earliest years, when they should achieve their most rapid development. If we do not provide that help early enough, then it is often too late.<sup>420</sup>

The report quotes the following statistics in reinforcement of its view on early intervention, statistics that are equally applicable to consideration of this issue in this jurisdiction:

- A child’s development score at just 22 months can serve as an accurate predictor of educational outcomes at 26 years.
- Some 54 per cent of the incidence of depression in women and 58 per cent of suicide attempts by women have been attributed to adverse childhood experiences, according to a study in the US.
- An authoritative study of boys assessed by nurses at age 3 as being ‘at risk’ found that they had two and a half times as many criminal convictions as the group deemed not to be at risk at age 21. Moreover, in the at-risk group, 55 per cent of the convictions were for violent offences, compared to 18 per cent for those who were deemed not to be at risk.<sup>421</sup>

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<sup>418</sup> Graham Allen, *Early Intervention: The Next Steps*. Available at <http://www.dwp.gov.uk/docs/early-intervention-next-steps.pdf>.

<sup>419</sup> *Ibid.*, at p. xiii.

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*



### 2.3.1.2 Brain Development<sup>422</sup>

The report describes the rapid process of development that occurs in a child's brain from the age of 0–3 years – stating that by the end of this period a child's brain is 80% developed – and also how in that time period, neglect, or the wrong type of parenting or other adverse experiences can have a profound effect on children's emotional foundation.

### 2.3.1.3 Social and Economic Benefits of Early Intervention<sup>423</sup>

The report outlines how early intervention can significantly improve mental and physical health, educational attainment and employment opportunities, and can help to prevent criminal behaviour (particularly violent behaviour), teenage pregnancy and drug and alcohol misuse. It argues that good parenting is a much bigger influence on a child's future than wealth, class, education or any other common social factor.

The report places great emphasis on the economic benefits of early intervention. It cites various examples in support of this, the most notable being the following

The Nurse Family Partnership in the US supports at-risk teenage mothers to foster emotional attunement and confident, non-violent parenting. By the time the children concerned are 15, the programme is estimated to have provided benefits, in the form of reduced welfare and criminal justice expenditures, higher tax revenues, and improved physical and mental health, of **up to five times greater than its cost**.<sup>424</sup>

The report also argues that late intervention is more expensive and less effective than early intervention, and it urges the government to address the imbalance between expenditure on late and early intervention.

### 2.3.1.4 Early Intervention Delivery: Moving On<sup>425</sup>

The report makes a number of broad recommendations that are designed to prepare children adequately for school. The report suggests that the purpose of these recommendations is to address the following issues:

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<sup>422</sup> Ibid.

<sup>423</sup> Ibid., at pp. xiii–xiv.

<sup>424</sup> Ibid., at p. xiv.

<sup>425</sup> Ibid.

- increasing awareness of what Early Intervention can achieve within central government and local areas and among parents;
- increasing the effectiveness of staff such as teachers, social workers, nurses and doctors, and of existing policies and infrastructure;
- providing parents with the information and support they need to help their children;
- providing the data and measurement tools needed to help identify those in need and to track progress; and
- creating the right financial freedoms for local areas to pool budgets and work across agencies to tackle shared problems.<sup>426</sup>

#### 2.3.1.5 Effective Programmes<sup>427</sup>

The report outlines the most effective early intervention programmes and demonstrates their cost-effectiveness. It identifies 72 such projects, stating that this list is not definitive, and identifies 19 in the top category.

#### 2.3.1.6 Early Intervention Places<sup>428</sup>

Early Intervention Places are defined by the report as “focal points for innovation in early intervention”, typically in the form of a local authority or a neighbourhood, or a series of neighbourhoods served by several voluntary organisations.<sup>429</sup> The report highlights the importance of local over central institutions in providing the best early intervention services, and states that the chief executives of 26 local authorities have already agreed in principle to sign up to putting early intervention at the core of their strategies and to start to implement some of the recommendations from the report.

#### 2.3.1.7 An Early Intervention Foundation<sup>430</sup>

A key message of the report is that if local communities are to lead a pioneering early intervention effort and operate the programmes described, they must be able to act in freedom from central government control or interference, and also be free to raise money from the

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<sup>426</sup> Ibid.

<sup>427</sup> Ibid.

<sup>428</sup> Ibid., at pp. xiv–xv.

<sup>429</sup> Ibid., at p. 91.

<sup>430</sup> Ibid., at p. xv.

private sector. The report describes its “prime recommendation” as being the creation of a new, independent Early Intervention Foundation. This Foundation would be “created in the first instance through private, philanthropic, ethical and local funding and it would be run by its initial funders, independently of central government”.<sup>431</sup>

It is proposed that the Foundation would undertake work with four broad goals:

- to encourage the spread of early intervention;
- to improve, develop and disseminate the evidence base of what works, utilising rigorous methodologies;
- to provide independent and trusted monitoring of the effectiveness of programmes; and
- to act as an honest broker between financial investors, local authorities and deliverers to make the most of alternative funding mechanisms to provide the necessary investment that early intervention deserves.<sup>432</sup>

#### 2.3.1.8 Key Recommendations

The foregoing report, *Early Intervention: The Next Steps*, contains a comprehensive list of recommendations. Those recommendations which are most crucial for Ireland are considered below.

The report’s key recommendations are as follows.<sup>433</sup>

1. The 19 ‘top programmes’ identified in the report should be supported and work undertaken with local areas to explore how they might be expanded to demonstrate commitment to early intervention. However, this list of 19 should not be regarded as exhaustive or complete: all 19 should be reviewed and reassessed by the new Early Intervention Foundation (proposed below) before a ‘living list’ is evolved.
2. Early intervention should build on the strength of its local base by establishing 15 local Early Intervention Places to spearhead its development. These should be run by local authorities and the voluntary sector, who are already the main initiators and innovators of early intervention.

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<sup>431</sup> Ibid.

<sup>432</sup> Ibid.

<sup>433</sup> Ibid., at p. xvii.

3. An independent Early Intervention Foundation should be established to support local people, communities and agencies, with initial emphasis on the 15 Early Intervention Places.

The report recommends that the Foundation should

- Support local people, communities and agencies, with initial emphasis on the 15 Early Intervention Places;
- Be led and funded by non-central government sources, including local authorities, ethical and philanthropic trusts, foundations and charities as well as private investors who have already expressed an interest in this initiative;
- Lead and motivate the expansion of early intervention;
- Evaluate early intervention policies based on a rigorous methodology and a strong evidence base, and encourage others to do the same; and
- Develop the capacity to attract private and public investment to early intervention.

It further recommends that the government should champion and encourage this concept. That said, it should neither control nor isolate the Foundation but welcome it and engage with it as a source of complementary activity and advice.

#### 2.3.1.9 Further Recommendations

1. The nation should be made aware of the enormous benefits to individuals, families and society of early intervention.
2. The nation should recognise that influencing social and emotional capability becomes harder and more expensive the later it is attempted, and is more likely to fail.
3. A shift to a primary prevention strategy to rebalance the current culture of 'late reaction' is necessary.
4. Proper coordination of the 'machinery of government' is required to put early intervention at the heart of departmental strategies, including those seeking to raise educational achievement and employability, improve social mobility, reduce crime, support parents and improve mental and physical health.

5. The UK should adopt the concept of the ‘foundation years from 0–5’, including pregnancy, and give it the same status and recognition as primary or secondary stages. To this end, the report recommends that the government number all year groups from birth rather than from the start of primary school.
6. The Department of Health and the Department for Education should work together with other partners and interests to produce, within 18 months, a seamless Foundation Years Plan which should be endorsed by Parliament and disseminated throughout the country.
7. Within the government’s proposed new arrangements for local health services, one of the key themes should be a focus on antenatal education, preparation for parenthood, and social and emotional development for the under-threes.
8. The government should form a broad-based cross-party group to explore what is the appropriate level of maternity and paternity support for all parents and babies in light of international evidence and the resources available.
9. All children should have regular assessment of their development from birth up to and including five years of age, focusing on both social and emotional development.
10. The workforce capability of those working with 0–5 year olds should be improved. To this end:
  - Graduate-Led, or even postgraduate, preschool leadership should be increased;
  - All early years settings should employ onsite someone with an Early Years Professional Status; and
  - A Workforce Development Strategy led by the Departments for Education and Health, with input from across government, should be established.
11. A new National Parenting Campaign should be developed. For this purpose “a broad-based alliance of interested groups, charities and foundations” should be established to ensure that the public, parents, health professionals and particularly newly pregnant women are aware of the importance of developing social and emotional capability in the first years of life. This should be funded and directed from outside central government.

12. A greater proportion of any new public and private expenditure should be spent on proven early intervention policies rather than those that are unproven.
13. A ‘shadow’ Early Intervention Foundation should be created immediately to bring the report’s proposals to fruition over the coming months.

### **2.3.2 Early Intervention: Smart Investment, Massive Savings<sup>434</sup>**

Following on from *Early Intervention: The Next Steps* Graham Allen then published a second report for the government entitled *Early Intervention: Smart Investment, Massive Savings*.

This report was published on 4 July 2011 with the intention of explaining how a shift from late intervention to early intervention could be funded within the constraints of the current budget. Graham Allen reiterates in the report many of the principles propounded in his earlier work.

One striking example in the report is the estimate of management consultants KPMG that £5 million invested in early intervention would produce savings for the government in the region of £100 million over the following 10 years.

The key recommendations of the report are as follows:

1. Ministers should take the lead in encouraging local areas as well as philanthropic and private institutional investors to continue their exploration of setting up an Early Intervention Foundation to complement the work that is beginning inside government.
2. A £20 million endowment fund should be created to sustain an independent Early Intervention Foundation, and the Prime Minister should incentivise donors from the private and charitable sectors as well as local government with the promise that if they create an Early Intervention Foundation the government will provide co-funding.
3. Further creativity is required to acquire additional non-government money.
4. Central and local government should agree to make payments based on early intervention outcomes.

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<sup>434</sup> Graham Allen, *Early Intervention: Smart Investment, Massive Savings*. Available at <http://www.cabinetoffice.gov.uk/sites/default/files/resources/earlyintervention-smartinvestment.pdf>.

5. The Social Justice Committee ought to commission the Early Intervention Task and Finish Group to work with the Early Intervention Foundation to assess the financial and economic value of outcomes to inform better decision making by commissioners of services.
6. Government ought to enable private money to be attracted to early intervention through the establishment of an Early Intervention Fund/s, which over time can be developed to offer investors a diverse range of early intervention products.
7. This initial fund should look to raise approximately £200 million of investment.
8. HM Treasury should encourage councils, together with financial institutions, to produce practical yet innovative locally based financing ideas for early intervention. Ministers would need to issue a Capitalisation Directive to councils that allows up to £500 million of early intervention spending to be capitalised, provided that it is funded through the local bond market.
9. HM Treasury should commission a thorough review of early intervention growth incentives ahead of the 2012 budget to assess what more the tax regimes can do to enable all relevant investor groups, including high net worth individuals, social and philanthropic investors, businesses and retail savers to support early intervention investment. This should include
  - Incentives relating to capital gains tax;
  - Incentives relating to corporation tax;
  - Lessons learnt from tax credits as part of the Dutch green funds scheme;
  - Allowing local authorities the right to borrow against cost savings from outcome-based contracts (similar to tax incremental financing);
  - Community investment tax relief;
  - A cash-limited early intervention tax credit; and
  - Accreditation for early intervention ISAs<sup>435</sup> and increased ISA allowances for early intervention investors.

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<sup>435</sup> Junior Individual Savings Accounts (ISA's) link investment in children by specific investors with that of less advantaged children.

### 2.3.3 Government Response to the Early Intervention Reports<sup>436</sup>

On 4 July 2011, Minister for Children, Sarah Teather, MP, welcomed the reports, stating that the government had already undertaken a considerable amount of work to reflect its commitment to early intervention. The Minister spoke of the recruitment of 4,200 health visitors and expansion of programmes such as Family Nurse Partnerships. She also referred to an annual £2 billion early intervention grant which had been established. The Minister alluded to the offer of free childcare which is to be extended to two year olds. She stated that the government viewed Graham Allen's recommendations as a positive step forward and that a formal response would be issued in due course.

### 2.3.4 Review of Poverty and Life Chances<sup>437</sup>

In June 2010, Frank Field, MP, was commissioned by the Prime Minister to provide an independent review of poverty and life chances. This review was published in December 2010. The key findings and recommendations made in the review are summarised below.

#### 2.3.4.1 Review Findings

The most common recurring question for the review was summarised as being "How can we prevent poor children from becoming poor adults?", and the conclusion was that the issue of child poverty in the UK needs to be addressed in a fundamentally different manner.

The review referred to "overwhelming evidence" that children's life chances are most heavily dependent on their development in the first five years of life. Family background, parental education, good parenting and the opportunities for learning and development were found to be of far greater significance than money in predicting whether a child's potential will be realised in adult life.<sup>438</sup>

The review claims that while later interventions to help poorly performing children can be effective, in general the most effective and cost-effective manner to help and support young

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<sup>436</sup> See <http://www.cabinetoffice.gov.uk/news/graham-allen-launches-second-report-early-intervention>.

<sup>437</sup> Frank Field, *The Foundation Years: preventing poor children becoming poor adults*. Available at <http://webarchive.nationalarchives.gov.uk/20110120090128/http://povertyreview.independent.gov.uk/media/20254/poverty-report.pdf>.

<sup>438</sup> *Ibid.*, at p. 5.



families is in the earliest years of a child's life. In the same manner as Graham Allen, Frank Field refers to evidence that a baby's brain is 80% formed by the age of three and that ability profiles at that age are highly predictive of profiles at school entry.<sup>439</sup>

The report sets out to develop a new, cost-effective strategy to abolish child poverty, claiming that the previous government's policy towards eradicating child poverty by 2020 was unsustainable.

#### 2.3.4.2 Recommendations<sup>440</sup>

The review made two overarching recommendations:

1. Establish a new set of Life Chances Indicators that measure how successful the UK is in making life's outcomes more equal for all children.
2. Establish the 'Foundation Years' covering the period from the womb to five years of age: "The Foundation Years should become the first pillar of a new tripartite education system: the Foundation Years, leading to school years, leading to further, higher and continuing education."<sup>441</sup>

#### 2.3.4.3 The Foundation Years

1. The review recommends that the government should give greater prominence to the earliest years of life, from pregnancy to age five years, referring to this period as The Foundation Years.
2. It also recommends that the government gradually moves funding to the early years, and that this funding is weighted toward the most disadvantaged children.
3. Government strategy to increase the life chances of poorer children should include a commitment that all disadvantaged children should have access to affordable full-time, graduate-led childcare from the age of two years.

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<sup>439</sup> Ibid.

<sup>440</sup> Ibid., at pp. 5–9.

<sup>441</sup> Ibid., at p. 6.

#### 2.3.4.4 Foundation Years Service Delivery

1. New contracts for Sure Start Children's Centres should include conditions that reward Centres for effectively reaching out to the most disadvantaged families.
2. Local authorities should open up commissioning of Children's Centres and their services to providers from all sectors. They should ensure that services within Children's Centres do not duplicate existing provision from private, voluntary and independent groups, but should signpost to those groups.
3. Local authorities should aim to make Children's Centres a hub of the local community.
4. The Department for Education, together with Children's Centres, should develop a model for professional development in early years settings. The government should continue to look for ways to encourage good teachers and early years professionals to teach in schools and work in Children's Centres in deprived areas.
5. Local authorities should pool data and track the children most in need in their areas. Central government should review legislation which prevents local authorities from using existing data to identify and support families who are most in need and provide a template for successful data sharing which respects data privacy issues.
6. Local authorities should ensure use of services which have a strong evidence base and that new services are robustly evaluated.
7. A Cabinet Minister should be appointed for the Foundation Years at the next re-shuffle.

#### 2.3.4.5 Continuing Foundation Years Progress in Narrowing Attainment Gaps

1. The Department for Education should ensure that schools are held to account for reducing the educational attainment gap in the same way that they are for improving overall educational attainment.
2. The Department for Education should continue to publish and promote clear evidence on what is successful in encouraging parental engagement in their children's learning.

3. The Department for Education should ensure that parenting and life skills are reflected in the curriculum, from primary school to GCSE level.

#### 2.3.4.6 New Measures of Poverty and Life Chances

1. The review recommends new measures to run alongside the existing financial poverty measures, primarily that the government ought to adopt a new set of Life Chances Indicators which will measure annual progress at a national level on a range of factors in young children which are known to be predictive of children's future outcomes.
2. Existing local data ought to be made available to parents and used anonymously to enable the creation of Local Life Chances Indicators which can be compared with the national measure.
3. The government should develop and publish annually a measure of 'service quality' which would show whether children have suitable access to high quality services.
4. The report suggests that a new measure of severe poverty be developed.

#### **2.3.5 Government Response to Review on Poverty and Life Chances<sup>442</sup>**

In a letter dated 3 December 2010, Prime Minister David Cameron and Deputy Prime Minister Nick Clegg welcomed the *Independent Review of Poverty and Life Chances*. The focus on Foundation Years was welcomed in particular, with Mr Cameron and Mr Clegg agreeing that "inter-generational poverty needs to be given as much weight as static, income-based measures". They also welcomed the recommendation that a new set of Life Chance Indicators should be adopted.

They stated that "the Coalition Government is keen to stimulate a national debate about the nature of poverty in the UK today and the Government's role in tackling it" and acknowledged Frank Field's report as a "hugely valuable contribution to that debate".

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<sup>442</sup> Letter available at <http://www.number10.gov.uk/news/pm-and-deputy-pm-letter-to-frank-field/>.

### 2.3.6 Early Years Foundation Stage Review<sup>443</sup>

In July 2010, Children's Minister Sarah Teather asked Dame Clare Tickell, Chief Executive of Action for Children, to carry out a review of the Early Years Foundation Stage (EYFS) with a view to making it less bureaucratic and more focused on young children's learning and development.<sup>444</sup> The EYFS is a comprehensive statutory framework of learning, development and care for children from birth to five years which must be followed by schools and early years providers.<sup>445</sup>

The review was published on 30 March 2011. The government is due to officially respond to the review in the coming months and changes will come into force from September 2012 at the earliest.

The review covers four main areas:

1. Scope of regulation: whether there should be one single framework for all early years providers.
2. Learning and development: looking at the latest evidence about children's development and what is needed to give them the best start at school.
3. Assessment: whether young children's development should be formally assessed at a certain age, and if it should what the assessment should cover.
4. Welfare: the minimum standards to keep children safe and support their healthy development.

A foundational conclusion of the review was that while the EYFS

has had a positive impact on children's outcomes and helped to raise standards, in its current form there is far too much time spent filling in forms and not enough interacting with children.<sup>446</sup>

Dame Clare's most significant recommendations are as follows:

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<sup>443</sup> Available in full at <http://media.education.gov.uk/MediaFiles/B/1/5/{B15EFF0D-A4DF-4294-93A1-1E1B88C13F68}Tickell%20review.pdf>. Press release available at <http://www.education.gov.uk/childrenandyoungpeople/earlylearningandchildcare/a0076193/early-years-foundation-stage-to-be-radically-slimmed-down>.

<sup>444</sup> See <http://www.education.gov.uk/inthenews/inthenews/a0061485/review-of-early-years-foundation-stage>.

<sup>445</sup> See <http://www.education.gov.uk/childrenandyoungpeople/earlylearningandchildcare/delivery/education/a0068102/early-years-foundation-stage-eyfs>.

<sup>446</sup> <http://www.education.gov.uk/childrenandyoungpeople/earlylearningandchildcare/a0076193/early-years-foundation-stage-to-be-radically-slimmed-down>.

1. Significantly reduce the number of early learning goals children are assessed against at age five, from 69 to 17.
2. Give parents a summary of their child's development, alongside the health visitor check at age two, to help identify any early problems or special educational needs.
3. Introduce a new focus on three prime areas which are the foundations for children's ability to learn and develop healthily: personal, social and emotional development; communication and language; and physical development.
4. Beneath these teach the four areas of learning where these skills are applied: literacy, mathematics, expressive arts and design, and understanding the world.
5. With the three new prime areas of learning, place a greater emphasis on making sure children have the basic social, emotional communication and language skills they need to learn and thrive at school: for example, being able to make friends and listen effectively.
6. Free the workforce from unnecessary bureaucracy so they can spend more time interacting with children, including removing written risk assessments for nursery trips and outings.
7. Ensure all early years practitioners have at least a level 3 qualification (which is equivalent to A level) and the government should consider applying the 'teaching schools' model to the early years.
8. Ofsted should be clearer on what is required of settings when they are inspected to help reduce high levels of paperwork.
9. Independent schools should be allowed to apply to opt out of the learning and development part of the EYFS, and the exemptions process should be made easier.<sup>447</sup>

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### 2.3.6.1 Government Consultation on Revised Draft of the EYFS

In early July 2011, the government issued for consultation a revised draft Early Years Foundation Stage which aimed to take on board the suggestions made in the review. In December 2011, the government published a response to the consultation.<sup>448</sup> In the draft, the government had focused on

1. reducing paperwork and bureaucracy for professionals;
2. focusing strongly on the three prime areas of learning most essential for children's healthy development and future learning (with four specific areas in which the prime areas are applied);
3. simplifying assessment at age five, including to reduce the early learning goals (ELGs) from 69 to 17; and
4. providing for earlier intervention for those children who need extra help, through the introduction of a progress check when children are age two.

The consultation showed support for the suggested approach to reform. However, it also revealed that the respondents felt that there was a need for more information and guidance on how to implement the new EYFS. The government accepted this and stated in its response that supplementary materials are being produced to underpin the new statutory framework. There was support for the proposal to simplify assessment for children at the age of five years and suggestions were made as to how to formulate the early learning goals (ELGs).

In response to the consultation, the government has commenced a consultation on a revised version of the ELGs and the educational programmes, following which the statutory framework and supporting guidance will be finalised. It is aimed to have this completed by September 2012. The final framework and supporting documentation will be published in spring 2012. Furthermore, Professor Cathy Nutbrown has been commissioned to carry out a review into early years and childcare qualifications. An interim report is due to be published in March 2012, with the final report due in June 2012.

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<sup>448</sup> *Reforming the Early Years Foundation Stage (the EYFS): Government response to consultation* (Department of Education, 2011), available at <http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-2115.pdf>.

### 2.3.7 Report of An Independent Review of the Commercialisation and Sexualisation of Childhood<sup>449</sup>

The report, *Letting Children be Children*, was published on 6 June 2011, and was undertaken as a consequence of a commitment in the Coalition Agreement between the Conservative and Liberal Democrat parties in 2010. Reg Bailey, chairman of the Mother's Union, was appointed by the Secretary of State for Education, Michael Gove, in December 2010 to lead an independent review.

This report was discussed in the Dáil on 5 July 2011. Minister for Children and Youth Affairs, Frances Fitzgerald, TD, stated that the department's new policy framework for children and young people which is due to be published in 2012 would include "emerging issues such as the impact of new technologies, media and consumerism on young people". The Minister also mentioned the UK's current guidelines on responsible retailing of children's wear and suggested that the lack of such guidelines in Ireland is something that needs to be addressed. She stated that the Department of Children is currently consulting with the National Consumer Agency on this issue although the consultations are at a preliminary stage. It was suggested by the Minister that any such guidelines would more than likely be addressed in the new children's strategy.

The outcome of *Letting Children be Children* has been a series of recommendations (outlined below) aimed primarily at businesses and regulators. The recommendations were endorsed by the British government, but there have been no commitments made as yet to legislate on any of the issues which arose. A meeting was scheduled for October 2011, at which progress reports on the implementation of the recommendations were expected from relevant parties in the business and regulatory spheres. The government has committed itself to reviewing progress after 18 months, with a view to determining what further measures ought to be taken to ensure compliance with the recommendations in the report.

The purpose of the review was defined as being "to assess the evidence and provide government with recommendations on how best to address public concern in [the area of excessive commercialisation and premature sexualisation of children]".<sup>450</sup>

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<sup>449</sup> Reg Bailey, *Letting Children be Children: Report of an Independent Review of the Commercialisation and Sexualisation of Childhood*. Full report available at <https://www.education.gov.uk/publications/eOrderingDownload/Bailey%20Review.pdf>.

<sup>450</sup> *Letting Children Be Children*, at p. 91.

Contributors to the review included over 2,000 parents; over 1,000 children; the Children and Youth Board of the Department for Education; 120 organisations and businesses through written submissions; 40 organisations and experts through individual meetings with Mr Bailey; and numerous members of the public.<sup>451</sup>

Four key themes were found to be of primary concern to parents and the wider public, and each of these was addressed separately in the report. They were as follows:

1. The “wallpaper” of children’s lives.
2. Clothing, products and services for children.
3. Children as consumers.
4. Making parents’ voices heard.<sup>452</sup>

In seeking a solution, the report acknowledged two different approaches that were generally encountered. The first of these is the suggestion that attempts should be made to keep children “wholly innocent and unknowing until they are adults”.<sup>453</sup> The second is that the world should be accepted for what it is, and children should be simply given the tools necessary to understand it and navigate their way through it better.<sup>454</sup>

The report concludes that neither of these two approaches can be effective on their own, but rather that the resolution of the issue is to be found in acknowledging the primary role of parents in upholding and reinforcing healthy norms for their children, and the supporting role of businesses and broadcasters in creating a more family-friendly world.<sup>455</sup> It considers the need to “put the brakes on an unthinking drift towards even greater commercialisation and sexualisation, while also helping children understand and resist the potential harms they face”<sup>456</sup> to be crucial.

The report concludes that it is important for parents and others to feel able to “say that they are not happy about aspects of sexualisation and commercialisation, without fearing ridicule or appearing out of touch”<sup>457</sup> and provides practical actions to help support and give a voice

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<sup>451</sup> Ibid., at p. 8.

<sup>452</sup> Ibid., at pp. 9 –10.

<sup>453</sup> Ibid., at p. 10.

<sup>454</sup> Ibid.

<sup>455</sup> Ibid., at p. 11.

<sup>456</sup> Ibid.

<sup>457</sup> Ibid.



to parents in this regard. It recognises the responsibility of parents to acknowledge ambivalence on their part towards some aspects of commercialisation and sexualisation, such as not using parental Internet controls, buying 18-rated games for a younger child or wanting their children to have the latest technology or the most fashionable clothes, and that this ambivalence contributes to the problem.<sup>458</sup>

### **2.3.8 Government Response to *Letting Children Be Children***

The Minister of State for Children and Families, Sarah Teather, issued a written ministerial statement regarding *Letting Children Be Children* in June 2011.<sup>459</sup> She declared that the government “welcomes Mr. Bailey’s analysis and the thrust of all the recommendations he has made”. She acknowledged that the majority of recommendations were directed at industry and the regulators and stated that the government looked to them to see those recommendations implemented as fully as possible. She also stated that it was open to industry and regulators to devise alternative or additional approaches to delivering the outcomes that the recommendations are aimed at achieving.

With regards to the recommendation directed to government that it should consider strengthening controls on music videos, Ms Teather stated that the Department for Culture, Media and Sport would embark on a consultation about the operations of the Video Recordings Act 1984 and 2010. Music videos are currently exempt from the effects of the legislation and the consultation will look at whether it would be appropriate for this exemption to be removed and will call for evidence in support of the costs and benefits of such a change.

Ms Teather also stated that despite the government being “committed to rolling back unnecessary regulation”, it would regulate where necessary. In accordance with one of the recommendations of the report, she made a commitment to take stock of progress in 18 months’ time, and to consider what further measures might be needed to achieve the recommended outcomes.

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<sup>458</sup> Ibid.

<sup>459</sup> Minister Teather’s statement is available here: <http://www.education.gov.uk/inthenews/inthenews/a0077692/the-governments-response-to-the-independent-review-of-the-commercialisation-and-sexualisation-of-childhood>.

### **2.3.9 David Cameron's Response to *Letting Children Be Children*<sup>460</sup>**

The Prime Minister, David Cameron, expressed strong support for the proposals made in *Letting Children Be Children* in a written statement of June 2011, but stopped short of making a commitment to legislate on any aspect of the report. He strongly affirmed the necessity to “put the brakes on an unthinking drift towards ever greater commercialisation and sexualisation”.

He welcomed the fact that many of the actions recommended by the report were aimed at businesses and regulators rather than the government, stating his belief that the leading force for progress should be social responsibility not state control.

He welcomed three of the review's recommendations in particular, namely:

- Make public space more family-friendly by “reducing the amount of on-street advertising containing sexualised imagery in locations where children are likely to see it”;
- Ensure children are protected when they watch television, are on the Internet or use their mobile phones by “making it easier for parents to block adult and age-restricted material” across all media;
- Stop the process where companies pay children to publicise and promote products in schools or on social networking sites by banning “the employment of children as brand ambassadors and in peer-to-peer marketing”.

## **2.4 Protection of Freedoms Bill 2011<sup>461</sup>**

This Bill was published in February 2011 and contains a wide range of measures relating to child protection. It aims to “protect millions of people from unwarranted state intrusion in their private lives with a return to common sense government”.<sup>462</sup> It has been drawn up as a result of a promise in the new government's Programme for Government to “review the criminal records and barring regime and scale it back to common sense levels”.

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<sup>460</sup> Letter available at <http://www.number10.gov.uk/news/letter-to-reg-bailey-following-his-review-of-the-commercialisation-and-sexualisation-of-childhood/>.

<sup>461</sup> Available in full at <http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0189/2012189.pdf>.

<sup>462</sup> Home Secretary, Theresa May, MP, in a press release dated Friday, 11 February 2011. Press release available at <http://www.homeoffice.gov.uk/media-centre/press-releases/sweeping-reform>.

### 2.4.1 Key Changes Relating to Child Protection in the Bill<sup>463</sup>

- Introduction of a requirement for parental consent prior to the taking of fingerprints or other biometric data of children under the age of 18 in schools and colleges;
- Reform of the vetting and barring scheme and criminal records scheme;
- Abolition of the ‘controlled activity’ category of posts;
- Abolition of the requirement of monitoring within the vetting and barring scheme;
- Merging of the Criminal Records Bureau and the Independent Safeguard Authority (ISA) to provide a proportionate barring and criminal records checking service;
- Creation of a system to facilitate the possibility of transferring of criminal records checks between jobs to reduce unnecessary bureaucracy;
- Penalisation of those who knowingly request unlawful criminal record checks.

More details on aspects of the child-protection related changes in the Bill summarised above are set out below in sub-sections 2.4.1.1 to 2.4.1.3.

#### 2.4.1.1 Taking of a Child’s Biometric Information<sup>464</sup>

- Schools or other educational institutions may not process a child’s biometric information without the consent, in writing, of each of the child’s parents;<sup>465</sup>
- If a child refuses to participate in anything that involves the processing of his/her biometric information, the relevant authority must ensure that the information is not processed, irrespective of parental consent;<sup>466</sup>

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<sup>463</sup> See <http://www.homeoffice.gov.uk/publications/about-us/legislation/protection-freedoms-bill/>.

<sup>464</sup> Biometric information is defined by the Bill, at s.28(2) as “information about a person’s physical or behavioural characteristics or features which—(a) is capable of being used in order to identify the person, and (b) is obtained for the purpose of being so used”. Section 28(3) provides that it may include “(a) information about the skin pattern and other physical characteristics or features of a person’s fingers or palms, (b) information about the features of an iris or any other part of the eye, and (c) information about a person’s voice or handwriting”.

<sup>465</sup> Protection of Freedoms Bill, s.26(2).

<sup>466</sup> Ibid., s.26 (4).

- The consent of a parent is not required if the relevant authority is satisfied that the parent cannot be found, lacks capacity to give consent, the welfare of the child requires that the parent is not contacted, or it is otherwise not reasonably practicable to obtain the consent of the parent;
- Parental consent can be withdrawn at any time, and this must be done in writing;<sup>467</sup>
- In cases where the child involved is looked after by a local authority, foster parent or children’s home, “parent” is to be read as meaning the authority or person looking after the child.<sup>468</sup>

#### 2.4.1.2 Police Vetting<sup>469</sup>

The Safeguarding Vulnerable Groups Act 2006 provides for a registration scheme for those wishing to work with children, and originally over 11 million people would have needed to be monitored under the scheme.<sup>470</sup> A review of this scheme was promised in July 2010, and was published in February 2011. The report recommended that the requirements on those working with children and adults to be monitored should be dropped. Part 5 of the Freedoms Bill 2011 gives effect to this aspect of the report.

The Bill scales back the definition of a “regulated activity relating to children”, with the result that only those working most regularly and closely with children will require police vetting.

The Bill also dramatically reduces the number of “categories of people engaging in regulated activities”. The categories of people which will no longer automatically qualify as engaging in regulated activities include

- Members of a relevant local government body;
- Directors of children’s services of local authorities in England and Wales;

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<sup>467</sup> Ibid., s.27(2).

<sup>468</sup> Ibid., s.28(5)–(7).

<sup>469</sup> For a general overview, see article at <http://www.volunteering.org.uk/resources/goodpracticebank/Core+Themes/ProtectionandSafeguarding/SafeguardingVulnerableGroupsAct>.

<sup>470</sup> Explanatory notes to the Protection of Freedoms Bill 2011, at para. 47. Available at <http://www.publications.parliament.uk/pa/cm201011/cmbills/146/en/11146en.htm>.

- Charity trustees of children’s charities;
- Children’s commissioners;
- Members of Local Safeguarding Children Boards;
- Members of the governing body of an educational establishment.<sup>471</sup>

The Bill abolishes “controlled activity”, which is currently outlined in section 21 of the Safeguarding Vulnerable Groups Act 2006. Controlled activity covers the work of employees such as support workers in general health and further education settings (including cleaners, caretakers, car park attendants etc) and those working for organisations with frequent access to sensitive records about children. Although a barred person could not work in a regulated position, he or she could be employed in a role that fell within a “controlled activity”.

The Bill also abolishes “monitoring” within the meaning of the Safeguarding Vulnerable Groups Act 2006. Currently, anyone wishing to take up a regulated post is subject to monitoring, meaning that they must be a member of the vetting and barring scheme (the organisation involved bears the onus of checking that an applicant is a member of the scheme) and if a person is not subject to monitoring or has been barred, such a person cannot assume a regulated position.

#### 2.4.1.3 Other Changes to the Scheme<sup>472</sup>

- The Bill replaces the arrangement whereby employers and others were notified when a person was barred with a requirement that a regulated activity provider or personnel supplier must check whether an individual is barred before engaging them in a regulated activity;
- The barring regime will be restricted to those who have been, are, or might in future be involved in regulated activities;
- The Bill provides for representations against certain types of automatic bars to be made prior to rather than after the decision;

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<sup>471</sup> See Safeguarding Vulnerable Groups Act 2006, Schedule 4, s.4(1), to be deleted by the Freedoms Bill (see s. 63(9)).

<sup>472</sup> See *Fact Sheet – Part 5: Safeguarding of Vulnerable Groups, Criminal Records Etc.* <http://www.homeoffice.gov.uk/publications/about-us/legislation/freedom-bill/fact-sheet-part5?view=Binary>.

- It allows the Independent Safeguard Authority greater flexibility as to when it can review a person's inclusion in a barred list.

## 2.5 The Sexual Offences Act 2003 (Remedial) Order 2011<sup>473</sup>

In April 2010, as discussed in Chapter 1 of this report, the Supreme Court ruled in *R (on the application of F (by his litigation friend F)) and Thompson (FC) (Respondents) v. Secretary of State for the Home Department (Appellant)*,<sup>474</sup> that a mechanism should be put in place to review whether convicted sex offenders should remain liable, after their release from prison, to notify the police of where they lived or their plans to travel abroad, which they are currently obliged to do under section 82 of the Sexual Offences Act 2003.<sup>475</sup> The Court stated that the lack of opportunity for sex offenders to seek a review of being placed on the register for life was a disproportionate interference with their rights under Article 8 of the ECHR.

The Home Office unsuccessfully challenged this ruling, and in February 2011, David Cameron committed the government to do the “minimum necessary” to comply with the Supreme Court ruling.<sup>476</sup>

In June 2011, the UK government announced draft legislation in response to the ruling: The Sexual Offences Act 2003 (Remedial) Order 2011.<sup>477</sup> The Review mechanism is outlined in the draft legislation to amend section 91 of the 2003 Act. It proposes that sex offenders currently on the register may apply to be considered for removal from the register 15 years after their release from prison.<sup>478</sup> Those who were convicted for a sex offence as a juvenile may apply 8 years after release from prison. Offenders who fail in their first application to be taken off the register will have to wait another 8 years before they can re-apply to have their name removed.

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<sup>473</sup> See overview at <http://ukhumanrightsblog.com/2011/07/12/will-the-sex-offenders'-register-review-mechanism-breach-human-rights-law/>.

<sup>474</sup> Available at <http://www.bailii.org/uk/cases/UKSC/2010/17.html>.

<sup>475</sup> Available at <http://www.legislation.gov.uk/ukpga/2003/42/section/82>.

<sup>476</sup> See ‘David Cameron condemns Supreme Court ruling on sex offenders’, <http://www.guardian.co.uk/society/2011/feb/16/david-cameron-condemns-court-sex-offenders>.

<sup>477</sup> Available at <http://www.legislation.gov.uk/ukdsi/2011/9780111512357/contents>.

<sup>478</sup> Draft Sexual Offences Act 2003 (Remedial) Order 2011, laid before Houses of Parliament on 14 June 2011.

## 2.6 Family Justice Review<sup>479</sup>

The Family Justice Review was commissioned by the Ministry of Justice, the Department for Education and the Welsh Assembly Government and its interim report was published by the Family Justice Review Panel on 31 March 2011. Its final report was published in November 2011 (see Section 2.2.6).

### 2.6.1 Introduction

The interim report starts with an overview of current restraints on the family justice system, stating that despite having good elements, on the whole “it is not working”.<sup>480</sup> It states that every year 500,000 children and adults are involved with the system.<sup>481</sup>

Delay of court processes is highlighted as one of the most important issues, with damaging consequences for children and society acknowledged as definite outcomes if delay is not addressed.<sup>482</sup> The report reveals that whereas in 1989 the average public law case took 12 weeks by 2010 this had increased to 53 weeks. Furthermore, it was suggested that because of the large increases in the number of children involved in court processes, increasing reliance is being placed on court processes in the resolution of disputes between couples.<sup>483</sup>

Costs were also highlighted by the report as a major issue in the family justice system. While acknowledging that the report had “no accurate figures” on exact costs, it gave an estimate of “the cost to Government alone as £1.5 billion in 2009–10, of which roughly £0.95 billion is for public law and £0.55 billion for private”. This was put into context by stating that the total local authority spend on looking after children in England and Wales is approximately £3.4 billion.<sup>484</sup>

Other issues needing to be addressed were summarised as follows:

- Children and families do not understand what is happening to them. They can also feel that they are not listened to.

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<sup>479</sup> *Family Justice Review: Interim Report*. Full report available at <http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-interim-rep.pdf>; Executive Summary available at <http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-exec-summ.pdf>. Hereinafter referred to as ‘Family Justice Review – Executive Summary’.

<sup>480</sup> *Family Justice Review – Executive Summary*, at p. 5.

<sup>481</sup> *Ibid.*, at p. 4.

<sup>482</sup> *Ibid.*, at p. 5.

<sup>483</sup> *Ibid.*

<sup>484</sup> *Ibid.*, at pp. 5–6.

- There are complicated and overlapping organisational structures, with a lack of clarity over who is responsible for what. There is no clear sense of leadership or accountability for issues resolution and improving performance.
- Increasing pressure on processes and the people who work in the system, driven by increasing caseloads, has inflamed tensions and a lack of trust between individuals and organisations.
- There is a lack of shared objectives and control. Decisions are taken in isolation, with insufficient regard to the impact they might have on others.
- Morale amongst the workforce is often low. There are limited opportunities to engage in mutual learning, development and feedback. Much of the work is demanding and requires high levels of skill and commitment, but the status of some parts of the workforce may be an impediment to recruitment and retention.
- There is an almost unbelievable lack of management information at a system-wide level, with little data on performance, flows, costs or efficiency available to support the operation of the system.<sup>485</sup>

The report also acknowledged that it was the seventh review of family justice since 1989, and that it was making many of the same recommendations as previous reviews, which it explained as a consequence of the view that “family justice does not operate as a coherent managed system”.<sup>486</sup>

The report clearly states that more money is not the answer, but rather that major reform of the system is needed “to ensure better outcomes and make better use of the available resources”.<sup>487</sup> It states that a coherent system must be created before any possibility for improvements to public and private law processes can be expected.

## **2.6.2 Family Justice Service**

The report recommends the creation of a Family Justice Service which should ensure that

- the interests of children and young people are at its heart and that it provides them, as well as adults, with an opportunity to have their voices heard in decision-making;
- children and families understand what their options are, who is involved and what is happening;
- the service is appropriately transparent and assures public confidence;
- proper safeguards are provided to protect vulnerable children and families;

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<sup>485</sup> Ibid., at p. 6.

<sup>486</sup> Ibid.

<sup>487</sup> Ibid.



- out of court resolution is enabled and encouraged, where this is appropriate;
- there is proportionate and skillfully managed court involvement; and
- resources are effectively allocated and managed across the system.<sup>488</sup>

With regard to the structure of the system, the report recommends that the Ministry of Justice should sponsor the Family Justice Service.<sup>489</sup> The creation of a Family Justice Board was recommended to manage and govern the family justice system. Simplification of the current structure of overlapping bodies was also recommended, including the creation of Local Family Justice Boards which ought also to work closely with local authorities and Local Safeguarding Children Boards.<sup>490</sup>

The report also recommends the creation of a dedicated post within the judiciary, a Senior Family Presiding Judge, “to report to the President of the Family Division on the effectiveness of family work amongst the judiciary”.<sup>491</sup> It emphasised the importance of judicial continuity for the provision of a more secure environment for children, for its potential to increase speed and efficiency and its promotion of firmer case management.<sup>492</sup>

The report outlines its vision of the priorities of the Family Justice Service as amongst other things to

- manage the budget of the consolidated functions, including monitoring their use of resources during the year and over time;
- provide court social work functions;
- ensure the child’s voice is adequately heard;
- procure publicly funded mediation and court ordered contact services in private law cases;
- coordinate the professional relationships and workforce development needs between the key stakeholders;
- coordinate learning, feedback and research across the system;
- ensure there is robust, accurate, adequately comprehensive and reliable management information; and
- manage a coherent estates strategy, in conjunction with key stakeholders.<sup>493</sup>

The report argues for the creation of a single family court, with a single point of entry, to replace the current three tiered system.<sup>494</sup>

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<sup>488</sup> Ibid., at p. 7.

<sup>489</sup> Ibid.

<sup>490</sup> Ibid., at p. 8.

<sup>491</sup> Ibid.

<sup>492</sup> Ibid., at p. 9.

<sup>493</sup> Ibid., at p. 11.

### 2.6.3 The Public Law System

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

- A culture where the need for additional assessments and the use of multiple experts is routinely expected;
- A lack of trust in the judgment of local authority social workers “driven by concerns over the poor presentation of some assessments coming from often under-pressure staff”;
- A shortage of court capacity, delays in appointing guardians and the need to meet the various demands of both local authority and court processes.<sup>495</sup>

The report gives a clear outline of its vision for a successful court system within the context of family justice. It states that “courts should refocus on the core issues of whether the child or children can safely remain with, or return to, the parents or, if not, to the care of family or friends” and substantially reduce their scrutiny of the detail of the care plan.<sup>496</sup> In particular, the report considers that the courts should not examine the following details:

- whether residential or foster care is planned;
- plans for sibling placements;
- the therapeutic support for the child;
- health and educational provision for the child; and
- contingency planning.<sup>497</sup>

#### 2.6.3.1 Timetabling of Cases

The report, at the interim stage, considered whether a time limit of six months for the completion of care proceedings should be stipulated by legislation.<sup>498</sup>

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<sup>494</sup> Ibid., at p. 10.

<sup>495</sup> Ibid., at p. 14.

<sup>496</sup> Ibid., at p. 16.

<sup>497</sup> Ibid.

### 2.6.3.2 Case Management

With the aim of enabling “effective and robust case control by the judiciary”, the report proposes measures to

- confirm the central role of the judge as case manager;
- simplify processes;
- develop wider system reform that will facilitate effective case management; and
- develop the skills and knowledge of judges so they will be better case managers.<sup>499</sup>

The report advocates the removal of the requirement to renew interim care orders after eight weeks and then every four weeks, proposing instead that the length of renewal requirements ought to be a matter of judicial discretion with perhaps a six month maximum before renewal is required.<sup>500</sup>

### 2.6.3.3 Use of Experts

The report strongly recommends making “the criteria against which it is considered necessary for a judge to order expert reports” more explicit and strict.<sup>501</sup>

### 2.6.3.4 Reform of the ‘tandem model’<sup>502</sup>

The report suggests that the tandem model be retained but in a more proportionate manner. It considers that the core role of the guardian ought to be “to represent and act as the child’s voice in support of the court’s welfare decision on whether a care order is in the child’s best interests”, and that of the solicitor should be to “act as advocate for the child in court and to advise the court on legal matters”, resulting in the guardian’s presence not always being required at court.<sup>503</sup>

### 2.6.3.5 Alternative Approaches to Dispute Resolution

The report suggests that there is scope to further develop and extend the use of alternatives to court in public law, including Family Group Conferences, the use of mediation in child

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<sup>498</sup> Ibid.

<sup>499</sup> Ibid., at p. 17.

<sup>500</sup> Ibid.

<sup>501</sup> Ibid., at p. 18.

<sup>502</sup> Ibid., at p. 20. The report explains that the ‘tandem model’ refers to the provision of a guardian and legal representative for the child in the court process.

<sup>503</sup> Ibid., at p. 18.

protection issues, and the Family Drug and Alcohol Court (discussed below).<sup>504</sup> More specific proposals are outlined in the final report considered below.

#### **2.6.4 Private Law System**

The report summarises the issues involved in the current system as follows:

- Arrangements for children following parental separation made with minimal court involvement, can become entrenched and parents can lose the opportunity for meaningful contact with their child;
- The emotional and financial cost of using the private law system is great;
- There are many limitations on the degree to which judicial intervention can provide real resolution of issues;
- Many parties are made aware of alternatives to use of the courts only after they have entered the court system.<sup>505</sup>

##### 2.6.4.1 The Way Forward

The report outlines its vision for future progress as follows:

- Disputes should be resolved independently, as far as possible, or using dispute resolution services when it is safe to do so and people need to expect court to be a “last resort, not a first port of call”;
- Swift and decisive action is required when serious child protection concerns come to light.<sup>506</sup>

##### 2.6.4.2 Principles and Process

The report questions whether “more should be said in legislation to strengthen the rights of children to a continuing relationship with both parents after separation” and states that much evidence on this issue was heard, both for and against such legislation. The report summarises its position as follows:

No legislation should be introduced that creates or risks creating the perception that there is an assumed

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<sup>504</sup> Ibid., at p. 19.

<sup>505</sup> Ibid., at p. 20.

<sup>506</sup> Ibid.

parental right to substantially shared or equal time for both parents. But we do recommend that there should be a statement in legislation to reinforce the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm.<sup>507</sup>

The report affirms that the requirement for grandparents to seek leave of the court before making an application for contact should remain.<sup>508</sup>

#### 2.6.4.3 The Private Law Process

The report recommends the creation of an online hub and helpline to offer “support and advice in a single, easy to access point of reference at the beginning of the process of separation or divorce”.<sup>509</sup> The report’s vision for the hub is that it would collate

- clear guidance about parents’ responsibilities towards their children whether separated or not, including their roles and responsibilities as set out in legislation;
- information and advice about services available to support families, whether separated or not;
- information and advice to resolve family conflicts, including fact-sheets, case studies, peer experiences, DVD clips, modelling and interactive templates to help with Parenting Agreements;
- advice about options for supported dispute resolution, which would highlight the benefits of alternative forms of dispute resolution, including mediation, and Separated Parents Information Programmes (PIPs);
- information about court resolution, should alternative dispute resolution not be suitable, and costs of applications;
- support for couples to agree child maintenance arrangements;
- guidance on the division of assets; and
- what to do when there are serious child welfare concerns.<sup>510</sup>

After accessing the hub, the report recommends that if parties do not feel the need for further help, a meeting with a mediator should be compulsory. The role of the mediator would be to

- assess the most appropriate intervention, including mediation and collaborative law, or whether the risks of domestic violence, imbalance between the parties or child protection issues require immediate referral to the family court; and
- provide information on local dispute resolution services and how they could support parties to resolve

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<sup>507</sup> Ibid., at p. 21.

<sup>508</sup> Ibid.

<sup>509</sup> Ibid., at p. 22.

<sup>510</sup> Ibid., at p. 23.

disputes.<sup>511</sup>

Following assessment, the report suggests, parents ought to be required to attend a Separated Parents Information Programme, which would include a description of the relevant law, court process and likely costs.<sup>512</sup> The report provides the following rationale for this suggestion:

Experience shows that the programme can deter parents from court and bring them to agreement when they realise the effects on their children, the cost, and the fact that the judge will not necessarily condemn their former partner.<sup>513</sup>

Thereafter, the report recommends that parents attend mediation or another form of accredited dispute resolution which would not be compulsory but would aim to become the norm.<sup>514</sup>

Only in cases where parents cannot agree on a specific aspect of a Parenting Agreement, or where an exemption is raised by a trained professional, would one or both parties be permitted to apply to court for a determination on a specific issue.<sup>515</sup>

The report praises the First Hearing Dispute Resolution Appointment (FHDRA) system, in which the judge and a Cafcass officer intervene in order to resolve issues at an early stage, and recommends that this process remain as it currently is.

If further court involvement is required after the FHDRA, the report recommends the application of a 'track' system (either 'simple' or 'complex') which matches the level of complexity of the case.

For cases allocated to the complex track, the report recommends that the same judge hear each session throughout the process.<sup>516</sup>

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<sup>511</sup> Ibid.

<sup>512</sup> Ibid.

<sup>513</sup> Ibid.

<sup>514</sup> Ibid.

<sup>515</sup> Ibid., at pp. 23–24.

<sup>516</sup> Ibid., at p. 24.

### **2.6.5 Financial Implications**

The report states that it was not possible to estimate the cost of its proposals at the point of publication.<sup>517</sup> However, the report clearly states its belief that the removal of duplication, the refocusing of the court's attention and the encouragement of other methods of dispute resolution will result in costs being reduced.

### **2.6.6 Family Justice Review: Final Report**

The final report of the Family Justice Review was published on the 3 November 2011.<sup>518</sup> This document is a stand-alone report which contains the final recommendations for reform. The report acknowledges that while the legal framework underpinning the family justice system is robust, it is subject to "immense stress and difficulties".<sup>519</sup> The final recommendations are as follows:<sup>520</sup>

#### **The Child's Voice:**

- Children and young people should be given age appropriate information to explain what is happening when they are involved in public and private law cases;
- Children and young people should as early as possible in a case be supported to be able to make their views known and older children should be offered a menu of options of the methods in which they could do this when they wish to;
- The Family Justice Service should take the lead in developing and disseminating national standards and guidelines on working with children and young people in the system. It should also:
  - ensure consistency of support services, of information for young people and of child-centred practice across the country; and
  - oversee the dissemination of up-to-date research and analysis of the needs, views and development of children.

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<sup>517</sup> Ibid., at p. 25.

<sup>518</sup> *Family Justice Review: Final Report* (Justice UK, 2011), available from <http://www.justice.gov.uk/downloads/publications/policy/moj/family-justice-review-final-report.pdf>.

<sup>519</sup> Ibid., at p. 5.

<sup>520</sup> Ibid., pp. 26–36.

- There should be a Young People’s Board for the Family Justice Service, with a remit to consider issues in both public and private law, and to report directly to the service on areas of concern or interest;
- The UK government should closely monitor the effect of the Rights of Children and Young Persons Measure (Wales) 2011, discussed earlier in this report.

### **Family Justice Service**

- A Family Justice Service should be established, sponsored by the ministry of justice, with strong ties at both ministerial and official level with the Department for Education and the Welsh government. As an initial step, an interim board should be established, which should be given a clear remit to plan for more radical change on a defined timescale towards a Family Justice Service;
- The Family Justice Service should have strong central and local governance arrangements;
- The roles performed by the Family Justice Council will be needed in any new structure, but the government will need to consider how they can be exercised in a manner that fits in with the final design of the Family Justice Service (and interim board);
- The Family Justice Service should be responsible for the budgets for court social work services in England, mediation, out of court resolution services and experts and solicitors for children (especially the potential for overtime);
- Charges to local authorities for public law applications and to local authorities and Cafcass for police checks in public and private law cases should be removed;
- A duty should be placed on the Family Justice Service to safeguard and promote the welfare of children in performing its functions. An annual report should set out how this duty has been met;



- An integrated information technology system should be developed for use in the Family Justice Service and wider family justice agencies. This will need investment. In the meantime the government should conduct an urgent review of how better use could be made of existing systems;
- The Family Justice Service should develop and monitor national quality standards for system wide processes, using local knowledge and the experiences of service users;
- The Family Justice Service should coordinate a system wide approach to research and evaluation, supported by a dedicated research budget (amalgamated from the different bodies that currently commission research);
- The Family Justice Service should review and consider how research should be transmitted around the family justice system.

### **Judicial Leadership and Culture**

- A Vice President of the Family Division should support the President of the Family Division in his/her leadership role, monitoring performance across the family judiciary;
- Family Division Liaison Judges should be renamed Family Presiding Judges, reporting to the Vice President of the Family Division on performance issues in their circuit;
- Judges with leadership responsibilities should have clearer management responsibilities. Job descriptions should provide clear details of expectations of management responsibilities and inter-agency working;
- Her Majesty's Courts and Tribunals Service (HMCTS) should make information on key indicators for courts and areas available to the Family Justice Service. Information on key indicators for individual judges should be made available to those judges as well as judges with leadership responsibilities. The judiciary should agree key indicators;

- Designated Family Judges should have leadership responsibility for all courts within their area. They will need to work closely with justices' clerks, family bench chairs and judicial colleagues;
- The judiciary should aim to ensure judicial continuity in all family cases;
- The judiciary should ensure that conditions of undertaking family work include willingness to adapt work patterns to be able to offer continuity;
- The President of the Family Division should consider what steps should be taken to allow judicial continuity to be achieved in the High Court;
- In Family Proceedings Courts judicial continuity should if possible be provided by all members of the bench and the legal adviser. If this is not possible, the same bench chair, a bench member and a legal adviser should provide continuity;
- Judges and magistrates should be enabled and encouraged to specialise in family matters;
- The Judicial Appointments Commission should consider willingness to specialise in family matters in making appointments to the family judiciary;
- The Judicial Office should review the restriction on magistrate sitting days.

### **Case Management**

- HCMTS and the judiciary should review and plan how to deliver consistently effective case management in the courts.

### **The Court**

- A single family court, with a single point of entry, should replace the current three tiers of court. All levels of the family judiciary (including magistrates) should sit in the family court and work should be allocated according to case complexity;
- The roles of District Judges working in the family court should be aligned;

- Flexibility should be created for legal advisers to conduct work to support judges across the family court;
- The Family Division of the High Court should remain, with exclusive jurisdiction over cases involving the inherent jurisdiction and international work that has been prescribed by the President of the Family Division as being reserved to it;
- All other matters should be heard in the single family court, with High Court judges sitting in that court to hear the most complex cases and issues;
- HMCTS and the judiciary should ensure routine hearings use telephone or video technology wherever appropriate;
- HMCTS and the judiciary should consider the use of alternative locations for hearings that do not need to take place in a court room;
- HMCTS should ensure court buildings are as family friendly as possible;
- HMCTS should review the estate for family courts to reduce the number of buildings in which cases are heard and to promote efficiency, judicial continuity and specialisation. Exceptions should be made for rural areas where transport is poor;
- HMCTS and the judiciary should review the operation and arrangement of the family courts in London.

### **Workforce**

- The Family Justice Service should develop a workforce strategy;
- The Family Justice Service should develop an agreed set of core skills and knowledge for family justice;
- The Family Justice Service should introduce an inter-disciplinary family justice induction course;
- Professional bodies should review continuing professional development schemes to ensure their adequacy and suitability for family justice;

- The Family Justice Service should develop annual inter-disciplinary training priorities for the workforce to guide the content of local inter-disciplinary training;
- The Family Justice Service should establish a pilot in which judges and magistrates would learn the outcomes for children and families on whom they have adjudicated;
- A system of case reviews of process should be created to help establish reflective practice in the family justice system;
- The Judicial College should review training delivery to determine the merits of providing a core judicial skills course for all new members of the judiciary;
- The Judicial College should develop training to assist senior judges with carrying out their leadership responsibilities;
- The Judicial College should ensure judicial training for family work includes greater emphasis on child development and case management;
- The Judicial College should ensure induction training for the family judiciary includes visits to relevant agencies involved in the system;
- There should be an expectation that all members of the local judiciary including the lay bench and legal advisers involved in family work should join together in training activities;
- The President's annual conference should be followed by circuit level meetings between Family Presiding Judges and the senior judiciary in their area to discuss the delivery of family business;
- Designated Family Judges should undertake regular meetings with the judges for whom they have leadership responsibility;
- Judges should be encouraged and given the skills to provide each other with greater peer support;

- The Judicial College should ensure induction training for new family magistrates includes greater focus on case management, child development and visits to other agencies involved in the system;
- The Judicial College should ensure legal advisers receive focused training on case management;
- Solicitors' professional bodies in tandem with representative groups for expert witnesses should provide training opportunities for solicitors on how to draft effective instructions for expert evidence;
- The College of Social Work and Care Council for Wales should consider issuing guidance to employers and higher education institutions on the teaching of court skills, including how to provide high quality assessments that set out a clear narrative of the child's story;
- The College of Social Work and Care Council for Wales should consider with employers whether initial social work and post-qualifying training includes enough focus on child development, for those social workers who wish to go on to work with children;
- The Children's Improvement Board should consider what training and work experience is appropriate for Directors of Children's Services who have not practised as social workers.

### **Public Law: The Role of the Court**

- Courts must continue to play a central role in public law in England and Wales;
- Courts should refocus on the core issues of whether the child is to live with parents, other family or friends, or is to be removed to the care of the local authority;
- When determining whether a care order is in a child's best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead the court should consider only the core or essential components of a child's plan. These are:

- planned return of the child to their family;
  - a plan to place (or explore placing) a child with family or friends;
  - alternative care arrangements; and
  - contact with birth family to the extent of deciding whether that should be regular, limited or none.
- The government should consult as to whether section 34 of the Children Act 1989 should be amended to promote reasonable contact with siblings, and to allow siblings to apply for contact orders without leave of the court.

### **Public Law: The Relationship between courts and local authorities**

- There should be a dialogue both nationally and locally between the judiciary and local authorities. The Family Justice Service should facilitate this. Designated Family Judges and the Director of Children's Services/Director of Social Services should meet regularly to discuss issues;
- Local authorities and the judiciary need to debate the variability of local authority practice in relation to threshold decisions and when they trigger care applications. This again requires discussion at national and local level. The government should support these discussions through a continuing programme of analysis and research;
- The revised Working Together and relevant Welsh guidance should emphasise the importance of the child's timescales and the appropriate use of proceedings in planning for children and in structured child protection activity.

### **Public Law: Case Management**

- Different courts take different approaches to case management in public law. These need corraling, researching and promulgating by the judiciary to share best practice and ensure consistency;

- The government should legislate to provide a power to set a time limit on care proceedings. The limit should be specified in secondary legislation to provide flexibility. There should be transitional provisions;
- The time limit for the completion of care and supervision proceedings should be set at six months;
- To achieve the time limit would be the responsibility of the trial judge. Extensions to the six month time limit will be allowed only by exception. A trial judge proposing to extend a case beyond six months would need to seek the agreement of the Designated Family Judge/ Family Presiding Judge as appropriate;
- Judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales. There is a strong case for this responsibility to be recognised explicitly in primary legislation;
- The Public Law Outline provides a solid basis for child-focused case management. Inconsistency in its implementation across courts is not acceptable and the senior judiciary are encouraged to insist that all courts follow it;
- The Public Law Outline will need to be remodelled to accommodate the implementation of time limits in cases. The judiciary should consult widely with all stakeholders to inform this remodelling. New approaches should be tested as part of this process;
- The requirement to renew interim care orders after eight weeks and then every four weeks should be amended. Judges should be allowed discretion to grant interim orders for the time they see fit subject to a maximum of six months and not beyond the time limit for the case. The court's power to renew should be tied to their power to extend proceedings beyond the time limit;
- The requirement that local authority adoption panels should consider the suitability for adoption of a child whose case is before the court should be removed.

### **Public Law: Local Authority Practice**

- The judiciary led by the President's office and local authorities via their representative bodies should urgently consider what standards should be set for court documentation, and should circulate examples of best practice;
- We encourage use of the Letter Before Proceedings. We recommend that its operation be reviewed once full research is available about its impact;
- Local authorities should review the operation of their Independent Reviewing Officer service to ensure that it is effective. In particular they should ensure that they are adhering to guidance regarding case loads;
- The Director of Children's Services /Director of Social Services and Lead Member for Children should receive regular reports from the Independent Reviewing Officer on the work undertaken and its outcomes. Local Safeguarding Children Boards should consider such reports;
- Effective links between the courts and Independent Reviewing Officer need to be created. In particular, the working relationship between the guardian and the Independent Reviewing Officer needs to be stronger.

### **Public Law: Expert Witnesses**

- Primary legislation should reinforce that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case. The Family Procedure Rules would need to be amended to reflect the primary legislation;
- The court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved. Independent social workers should be employed only exceptionally;
- Research should be commissioned to examine the value of residential assessments of parents;



- Judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out in the order giving permission for the commissioning of the expert witness the questions on which the expert witness should focus;
- The Family Justice Service should take responsibility for work with the Department for Health and others as necessary to improve the quality and supply of expert witness services. This will involve piloting new ideas, sharing best practice and reviewing quality;
- The Legal Services Commission should routinely collate data on experts per case, type of expert, time taken, cost and any other relevant factor. This should be gathered by court and area;
- It is recommended that studies of the expert witness reports supplied by various professions be commissioned by the Family Justice Service;
- Agreed quality standards for expert witnesses in the family courts should be developed by the Family Justice Service;
- A further pilot of multi-disciplinary expert witness teams should be taken forward, building on lessons from the original pilot;
- The Family Justice Service should review the mechanisms available to remunerate expert witnesses, and should in due course reconsider whether experts could be paid directly.

### **Public Law: Representation of Children**

- The tandem model should be retained with resources carefully prioritised and allocated;
- The merit of using guardians in pre-proceedings needs to be considered further;

- The merit of developing an in-house tandem model needs to be considered further. The effects on the availability of solicitors locally to represent parents should be a particular factor.

### **Public Law: Alternatives to Convention Court Proceedings**

- The benefits of Family Group Conferences should be more widely recognised and their use should be considered before proceedings. More research is needed on how they can best be used, their benefits and their cost;
- A pilot on the use of formal mediation approaches in public law proceedings should be established;
- The Family Drug and Alcohol Court in Inner London Family Proceedings Court shows considerable promise. There should be further limited roll out to continue to develop the evidence base;
- Proposals should be developed to pilot new approaches to supporting parents through and after proceedings.

### **Private Law: Making Parental Responsibility Work**

- The government should find means of strengthening the importance of a good understanding of parental responsibility in information it gives to parents;
- No legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents;
- The need for grandparents to apply for leave of the court before making an application for contact should remain;
- Parents should be encouraged to develop a Parenting Agreement to set out arrangements for the care of their children post separation;

- The government and the judiciary should consider how a signed Parenting Agreement could have evidential weight in any subsequent parental dispute;
- The government should develop a child arrangements order which would set out arrangements for the upbringing of a child when court determination of disputes related to the care of children is required;
- The government should repeal the provision for residence and contact orders in the Children Act 1989;
- Prohibited steps orders and specific issue orders should be retained for discrete issues where a child arrangements order is not appropriate;
- The new child arrangements order should be available to fathers without parental responsibility, as well as those who already hold parental responsibility, and to wider family members with the permission of the court;
- Where a father would require parental responsibility to fulfil the requirement of care as set out in the order, the court would also make a parental responsibility order;
- Where the order requires wider family members to be able to exercise parental responsibility, the court would make an order that that person should have parental responsibility for the duration of the order;
- The facility to remove the child from the jurisdiction of England and Wales for up to 28 days without the agreement of all others with parental responsibility or a court order should remain;
- The provision restricting those with parental responsibility from changing the child's surname without the agreement of all others with parental responsibility or a court order should remain.

## **Private Law: A Coherent Process for Dispute Resolution**

- The government should establish an online information hub and helpline to give information and support for couples to help them resolve issues following divorce or separation outside court;
- ‘Alternative dispute resolution’ should be rebranded as ‘Dispute Resolution Services’, in order to minimise a deterrent to its use;
- Where intervention is necessary, separating parents should be expected to attend a session with a mediator, trained and accredited to a high professional standard, who should:
  - assess the most appropriate intervention, including mediation and collaborative law, or whether the risks of domestic violence, imbalance between the parties or child protection issues require immediate referral to the family court; and
  - provide information on local Dispute Resolution Services and how they could support parties to resolve disputes.
- The mediator tasked with the initial assessment (Mediation Information and Assessment Meeting) would need to be the key practitioner until an application to court is made;
- The regime would allow for emergency applications to court and the exemptions should be as in the Pre-Application Protocol;
- Those parents who were still unable to agree should next attend a Separated Parents Information Programme and thereafter if necessary mediation or other dispute resolution service;
- Attendance at a Mediation Information and Assessment Meeting and Separated Parent Information Programme should be required of anyone wishing to make a court application. This cannot be required, but should be expected, of respondents;

- Judges should retain the power to order parties to attend a mediation information session and Separated Parents Information Programmes, and may make cost orders where it is felt that one party has behaved unreasonably;
- Where agreement could not be reached, and having been given a certificate by the mediator, one or both of the parties would be able to apply to court;
- Mediators should at least meet the current requirements set by the Legal Services Commission. These standards should themselves be reviewed in the light of the new responsibilities being laid on mediators. Mediators who do not currently meet those standards should be given a specified period in which to achieve them;
- The government should closely watch and review the progress of the Family Mediation Council to assess its effectiveness in maintaining and reinforcing high standards. The Family Mediation Council should if necessary be replaced by an independent regulator;
- The Family Justice Service should ensure for cases involving children that safeguarding checks are completed at the point of entry into the court system.

### **Private Law: Divorce and Financial Arrangements**

- The process for initiating divorce should begin with the online hub and should be dealt with administratively by the courts, unless the divorce is disputed;
- People in dispute about money or property should be expected to access the information hub and should be required to be assessed for mediation;
- Where possible all issues in dispute following separation should be considered together, whether in all-issues mediation or consolidated court hearings. HMCTS and the judiciary should consider how this might be achieved in courts. Care should be taken to avoid extra delay particularly in relation to children;

- The government should establish a separate review of financial orders to include examination of the law;
- The Ministry of Justice and the Legal Services Commission should carefully monitor the impact of legal aid reforms. The supply of properly qualified family lawyers is vital to the protection of children.

## 2.7 The Family Drug and Alcohol Court (FDAC)

The FDAC is described as “a new approach to care proceedings, in cases where parental substance misuse is a key element in the local authority decision to bring proceedings”.<sup>521</sup> It is being piloted at the Inner London Family Proceedings Court until March 2012 and is co-funded by the Department for Education, the Ministry of Justice, the Home Office, the Department of Health and three pilot authorities.

FDAC is a “court-based family intervention which aims to improve children’s outcomes by addressing the entrenched difficulties of their parents”.<sup>522</sup> It is based on a model of family treatment drug courts that is widely used in the USA which has shown positive results with a higher number of cases where “parents and children were able to remain together safely, and with swifter alternative placement decisions for children if parents were unable to address their substance abuse successfully”.<sup>523</sup>

FDAC is distinctive from ordinary care proceedings in various ways:

1. A multi-disciplinary team of practitioners, the only one of its type in the UK, works with the court. The team

carry out assessments, devise and coordinate an individual intervention plan, help parents engage and stay engaged with substance misuse and parenting services, carry out direct work with parents, get feedback on parental progress from services, and provide regular reports on parental progress to the court and to all others involved in the case.”<sup>524</sup>

A team of volunteers work alongside the team as parent mentors.

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<sup>521</sup> *FDAC Evaluation Final Report – Executive Summary – May 2011*, at p. 3. Available at <http://www.brunel.ac.uk/7067/FDAC/FDACEVALUATIONFINALREPORTEXECUTIVESUMMARYMay2011.pdf>.

<sup>522</sup> *Ibid.*, at p. 3.

<sup>523</sup> *Ibid.*

<sup>524</sup> *Ibid.*, at p. 4.

2. Cases in FDAC are heard by two dedicated district judges, with two additional judges available to provide back up for sickness and holidays, and cases are dealt with by the same judge for their duration.
3. Following the first two court hearings, at which legal representatives are present, there are fortnightly court reviews which legal representatives do not attend. These reviews are the “problem-solving, therapeutic aspect of the court process”<sup>525</sup> where parents’ progress is monitored, and judges engage and motivate parents, speak directly to social workers, and seek out ways to resolve problems that may have arisen.

### **2.7.1 Evaluation of FDAC May 2011**

An evaluation funded by the Home Office and the Nuffield Foundation was carried out by Brunel University London in May 2011. The details were as follows:

The FDAC sample was the 55 families (77 children) from the three pilot local authorities who entered FDAC between January 2008 (the start of the pilot) and the end of June 2009. The comparison sample was the 31 families (49 children) subject to care proceedings due to parental substance misuse brought by two other local authorities during the same period. Cases were followed up for six months from the first hearing and it was also possible to track 41 FDAC and 19 comparison cases to final order.<sup>526</sup>

### **2.7.2 Summary of Findings of the Evaluation**

1. FDAC parents accessed core substance misuse services more quickly than comparison parents, and they received greater assistance than comparison parents for their substance misuse problems.<sup>527</sup>
2. Early outcomes are positive. The tracking of 41 FDAC cases (56 children) and 19 comparison cases (26 children) showed that:
  - A higher proportion of FDAC than comparison parents had ceased misusing substances by the end of proceedings:

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<sup>525</sup> Ibid.

<sup>526</sup> Ibid., at p. 5.

<sup>527</sup> Ibid., at p. 6.

- 48% of FDAC mothers (19 of 41) were no longer misusing substances, compared to 39% (7 of 19) of comparison mothers.
  - 36% of FDAC fathers (8 of 23) were no longer misusing substances, compared to none of the comparison fathers ceasing.
  - More FDAC parents engaged with substance misuse services in the first six months, and a higher proportion remained engaged throughout the proceedings. More FDAC parents had plans to continue in treatment after the proceedings concluded.
  - More FDAC than comparison families were reunited with their children. The children of 39% of FDAC mothers (16 of 41) were living at home at the time of the final order, compared with children of 21% of comparison mothers (4 of 19).<sup>528</sup>
3. The length of proceedings was comparable for FDAC cases and ordinary care proceedings, but time was thought to be used more constructively in FDAC cases.<sup>529</sup>
  4. Local authorities could make savings in FDAC cases on court hearings and out-of-home placements, and the ‘expert’ activities of the FDAC team were less expensive than the cost of independent experts in ordinary proceedings.<sup>530</sup>
  5. The response of parents to FDAC was largely very positive. All but two of the parents stated they would recommend FDAC to others in a similar situation.<sup>531</sup> Parents reported feeling very motivated by both the FDAC team and the judges, displayed clear respect for the authority of the judges and said they valued, in particular, judicial continuity throughout the duration of their cases.<sup>532</sup>
  6. The parent mentor programme within FDAC is recognised as one of its most distinctive features, with considerable potential. However, it was found that this aspect of the programme was too poorly developed at the time of review for a proper assessment of its value.<sup>533</sup>

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<sup>528</sup> Ibid.

<sup>529</sup> Ibid., at p. 7.

<sup>530</sup> Ibid.

<sup>531</sup> Ibid., at p. 8.

<sup>532</sup> Ibid., at p. 9.

<sup>533</sup> Ibid., at p. 12.



### 2.7.3 Conclusion

The evaluation concludes that early indications for the FDAC are promising, and identifies some key challenges faced by the FDAC pilot scheme, the addressing of which it was believed would promote better results. These included furthering the development of the parent mentoring scheme, reducing the delays involved in cases, increasing inter-agency coordination and continued financial investment in the programme.<sup>534</sup>

The evaluation notes that two other reviews endorse the FDAC programme.<sup>535</sup> It recommends that FDAC should continue “so that it can consolidate progress, tackle some of the challenges, and test out the contribution of an expanded pre-trial and aftercare service”.<sup>536</sup>

## 2.8 Human Trafficking: The UK Government’s Strategy<sup>537</sup>

The UK Government’s strategy on human trafficking report was published on 19 July 2011.

The strategy has four key aims:

1. International action to stop trafficking happening in the first place;
2. A stronger border at home to stop victims being brought into the UK;
3. Tougher law enforcement action to tackle the criminal gangs that orchestrate the crime; and
4. Improved identification and care for the victims of trafficking.<sup>538</sup>

The government made the following commitments in relation to child trafficking:<sup>539</sup>

1. To continue to work closely with partners to raise awareness of child trafficking and ensure child victims are safeguarded and protected from re-trafficking.
2. To update the core government guidance – *Safeguarding Children who may have been Trafficked* (2001) – with current information.

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<sup>534</sup> Ibid., at pp. 14–15.

<sup>535</sup> The Munro Review of Child Protection, and the Interim Report of the Family Justice Review. See *FDAC Evaluation Final Report – Executive Summary – May 2011*, at p. 16.

<sup>536</sup> *FDAC Evaluation Final Report – Executive Summary – May 2011*, at p. 16.

<sup>537</sup> Full report available at <http://www.homeoffice.gov.uk/publications/crime/human-trafficking-strategy?view=Binary>.

<sup>538</sup> *Human Trafficking: The Government’s Strategy*, at p. 3.

<sup>539</sup> Ibid., at pp. 24–28.

3. To identify opportunities to promote the ‘child trafficking toolkit’ developed by the London Safeguarding Children Board.
4. To work with the police and the criminal justice system to ensure that trafficked children found to be involved in criminal activity are dealt with from a child safeguarding perspective and not unnecessarily criminalised.
5. To continue to tackle the issue of trafficked children who go missing from local authority care in England and Wales.
6. To ensure that the border represents a robust line of defence for child trafficking victims.
7. To continue to routinely question children and any accompanying adults to confirm there is no exploitative relationship.
8. To minimise the impact on child victims and to ensure that child victims are not unnecessarily asked to recount their experiences to different agencies.

The government endorsed the response mechanisms of the following bodies due to their effectiveness in dealing with issues pertaining to child trafficking.

### **2.8.1 London Borough of Hillingdon’s Best Practice in Reducing Numbers of Missing Children<sup>540</sup>**

Between 2007 and 2009, 79 people in this borough went missing from care shortly after arriving in the UK, and many of these were potentially child trafficking victims. Hillingdon established an operational model in partnership with law enforcement agencies. There are three tiers to the response mechanism:

1. The Senior Local Safeguarding Children Board (LSCB) level is made up of senior managers working at the strategic level from a range of agencies including the UK Border Agency, police, health and local authority.

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<sup>540</sup> Ibid., at p. 25.

2. The LSCB trafficking, exploitation and missing children subgroup is composed of middle managers, and focuses on policy, procedure and training. This group meets six to eight times a year.
3. A multi-agency operational group made up of frontline staff meets every six weeks to discuss and assess the situation of every child reported missing in Hillingdon.

The government states that this approach has significantly reduced the number of potentially trafficked children going missing in the local authority.

### **2.8.2 Operation Newbridge<sup>541</sup>**

This is a joint approach to safeguarding potentially trafficked children, the aim of which is to accept the responsibility of safeguarding children who may have been trafficked as soon as they land. The intention is to establish the circumstances, and the method of and motivation for their journey and arrival in the UK, and by so doing prevent them from going missing.

### **2.8.3 Operation Paladin<sup>542</sup>**

This is a joint operation of the UK Border Agency and Metropolitan Police Service which is designed to safeguard children arriving in the UK by identifying offenders and children at risk, investigating cases, gathering and sharing intelligence and working with other agencies.

### **2.8.4 CEOP (Child Exploitation and Online Protection) work in Vietnam<sup>543</sup>**

CEOP is building partnerships in source and transit countries to obtain more information on recruitment, trafficking routes and methods. It recently conducted a scoping exercise of child trafficking issues within Vietnam and delivered training to professionals there to enable them to educate children about the risks of trafficking.

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<sup>541</sup> Ibid., at p. 26.

<sup>542</sup> Ibid.

<sup>543</sup> Ibid.

## 2.9 *Review into Ending the Detention of Children For Immigration Purposes*<sup>544</sup>

This review was published by the UK Border Authority in December 2010 and outlines the conclusions of a review of evidence regarding the detention of children for immigration purposes, as well as how the UK government aims to fulfil the commitment on ending the detention of children for immigration purposes. In April 2011, the government published a table showing that no children had been detained for immigration purposes as a signal that they had fulfilled their promise.<sup>545</sup>

The report sets out a new four-stage process for managing family returns which is designed to strengthen confidence in the process of taking immigration and asylum decisions and maintain public confidence in [the UK's] ability to control borders, while ensuring that families with children are treated humanely and in a way that is consistent with international obligations and statutory duty in relation to children.<sup>546</sup>

The key elements of the new process are outlined as follows:<sup>547</sup>

### A) **Decision-Making**

Decision-making will be strengthened by continuing to work with the Office of the United Nations Commissioner for Refugees (UNHCR) to test and improve decisions and create a speciality group of family case owners. The UK Border Agency has already launched pilots of new arrangements to provide early access to legal advice and practical support and guidance to families through the asylum application process and will build on these approaches by refining and evaluating these pilots further.

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<sup>544</sup> Home Office: UK Border Agency, *Review Into Ending the Detention of Children for Immigration Purposes*. Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/26-end-child-detention/child-detention-conclusions.pdf?view=Binary>.

<sup>545</sup> Table available at <http://webcache.googleusercontent.com/search?q=cache:X8QO2ieYWLcJ:www.homeoffice.gov.uk/publication/s/science-research-statistics/research-statistics/immigration-asylum-research/child-detention-apr2011%3Fview%3DBinary+home+office+child+detention&cd=4&hl=en&ct=clnk&client=safari&source=www.google.com>.

<sup>546</sup> *Review into Ending the Detention of Children for Immigration Purposes*, at p. 4.

<sup>547</sup> *Ibid.*, at p. 4.

**B) Assisted return**

Families will have a dedicated family conference to discuss future options and the specific option of assisted return.

**C) Required return**

Families who do not choose to take up the offer of assisted return will be given at least two weeks' notice of the need to leave the country and the opportunity to leave themselves. This extended notice period (which was previously 72 hours) will ensure that the family can prepare properly for their return and give them time to raise any further issues or pursue further legal options.

**D) Ensured return**

Once a family has exhausted their rights to appeal and after the additional 'assisted' and 'required' stages have been exhausted, enforcement action will be considered. The aim is for families to depart before reaching this stage of the process. An independent Family Returns Panel will be created to help to ensure that individual return plans take full account of the welfare of the children involved. The review promises that wherever possible, the Panel will seek to manage return direct from the family home to the port of departure while respecting the need, for both welfare and legal reasons, to give notice of the departure.

The report describes the range of options that the Panel will have at its disposal as alternatives to detention. The Panel will still have the option to refer families who resolutely fail to co-operate with other return options to a new form of pre-departure accommodation. The report states that while this pre-departure accommodation would be secure, it would only be for those families who had refused to comply with the process and who the Panel consider to need that level of oversight.<sup>548</sup>

It is promised that the pre-departure accommodation will be family-friendly and very different from immigration removal centres. While the site will be secure, it will respect family privacy and independence, and stays will be for up to 72 hours, apart from in exceptional circumstances where stays will be strictly limited to a maximum of one week. Children will be given the opportunity to leave the premises subject to a risk and

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<sup>548</sup> Ibid., at p. 5.

safeguarding assessment and suitable supervision arrangements. Third sector organisations will also be given the opportunity to participate in running the new accommodation.<sup>549</sup>

The government has retained the right to hold families at the border while enquiries are made to ascertain whether they can be admitted to the country and/or pending their immediate return to their point of origin. The right to hold families with individuals who may pose a risk to the public, subject to Ministerial authorisation, was also retained. The UK government estimated that this type of detention would affect a few dozen families each year usually for a period of less than 24 hours.<sup>550</sup>

The Family Returns Panel was brought into operation in March 2011.<sup>551</sup>

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<sup>549</sup> Ibid.

<sup>550</sup> Ibid., at p. 5.

<sup>551</sup> Ibid., at p. 6. The government summarised the commitments being made as follows:

Decision Making:

- We will test whether early access to legal advice supports better decision-making and increases trust in the system.
- We will test out the “key worker” pilot principles with family cases.
- We will work with others to develop new models of community engagement and support.
- We will establish specialist family case-owners within the UK Border Agency.
- We will introduce a link between the asylum-seeking family and the UK Border Agency.
- We will review decision-making in family asylum cases in partnership with the UNHCR.

Assisted Return:

- We will introduce an independent element into the assessment of future AVR schemes when the existing AVR contracts are re-tendered.
- We will provide an incentive for earlier acceptance of voluntary return by modifying the re-entry ban.
- We will conduct a family return conference in every family case as a first step towards return.
- We will ensure that every family is aware of the assisted return packages available.
- We will seek to work with partners in helping families to engage with the option of AVR.
- We will provide every family with adequate time to consider their options before we take firmer action.
- We will seek to ensure that we are aware of all relevant compassionate factors as early as possible in the family returns process.

Required Return:

- We will no longer detain families before serving removal directions.
- We will increase the minimum notice period in family cases from 72 hours to 2 weeks for a required return.
- We will give families the opportunity to leave under their own steam via a self check-in and without the need for enforcement action.

Ensured Return:

- We will set up an independent Family Returns Panel to oversee the return of difficult cases.
- We will implement new return options of:
  - \* Limited notice removal
  - \* Open accommodation
  - \* Pre-departure accommodation
- We will hold families only in very limited circumstances for border and other high risk cases.
- We will close the family unit at Yarl’s Wood for the detention of families with children.

### 2.9.1 The Suppiah Case

The case of *R (on the application of Suppiah and Others) v. Secretary of State for the Home Department*<sup>552</sup> dealt with the detention of children at immigration centres. The detention in this case was ruled to be unlawful, and this has led to speculation that the decision will provide a renewed impetus to the coalition government's commitment to end the detention of children in immigration centres.<sup>553</sup> This was the first case where it was acknowledged by the court that detention for immigration purposes could be seriously detrimental to children. A promise was made by the coalition government in May 2010 to end child detention for immigration purposes by May 2011 which was confirmed by Deputy Prime Minister, Nick Clegg in December 2010.<sup>554</sup>

The case was brought on behalf of two single mothers, Ms Suppiah and Ms Bello, and their children, who were detained by UK Border Agency officers after raids on their homes in 2010 for periods of 17 and 12 days respectively. The families were brought to Yarl's Wood Detention Centre for women and children. The three children involved were aged between one and eleven. All of the children became ill while detained and suffered vomiting and diarrhoea. One of the children had been diagnosed with post-traumatic stress disorder and depression, which had been confirmed by numerous expert witnesses, and was attributed to the experience of sudden removal, the attempted placing on the plane and detention in Yarl's Wood<sup>555</sup>.

Both claimants' removal directions were cancelled: one as a consequence of judicial review proceedings, and the other on the obtaining of an injunction restraining removal. In spite of this, neither claimants was immediately released from detention. The claimants issued proceedings based on the claim that the detention had been unlawful from its inception, or the moment when removal directions had been cancelled. Proceedings were issued on the basis of the claim that Articles 3, 5 and 8 of the ECHR had been breached. The claimants argued that the government's policy of detaining minors was unlawful.

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<sup>552</sup> [2011] EWHC 2 (Admin).

<sup>553</sup> <http://www.guardian.co.uk/uk/2011/jan/11/yarls-wood-child-detention-unlawful>.

<sup>554</sup> See Nick Clegg's speech here: [http://www.libdems.org.uk/speeches\\_detail.aspx?title=Nick Clegg confirms end to child detention \(full speech\)&pPK=d73b587e-f837-4b16-b7d5-a14b1bfa8a9b](http://www.libdems.org.uk/speeches_detail.aspx?title=Nick+Clegg+confirms+end+to+child+detention+(full+speech)&pPK=d73b587e-f837-4b16-b7d5-a14b1bfa8a9b).

<sup>555</sup> The process of removing people who are subject to deportation orders in Ireland includes some of the same practices which gave rise to concern in this case because of the impact upon children. This includes taking parents with children from home in the early hours of the morning without warning and holding them at the airport before putting them on a plane.

The Court explored the defendant's policy of detaining families with young children, which made it clear that the welfare of children was the primary concern, that detention was a last resort and that alternatives should be considered in all cases, and that where detention was required, it should be for the minimum time possible. The Court also had regard to the Enforcement Instructions, section 55 of the Borders, Citizenship and Immigration Act 2009 and the decision in *RS v. SSHD (2007)*.

Wyn Williams, J. stated that detention could cause serious harm to children. He held that the Border Authority policy was not in itself unlawful, but that there was significant evidence that UK Border Authority staff had failed to apply the policy "with the rigour it deserves", and that if the policy was correctly understood and applied, it could be applied in a lawful manner.

The judge reiterated that families with children should only be detained in exceptional circumstances. The judge held that the families had been unlawfully detained and that Articles 5 and 8 of the ECHR had been breached, but that Article 3 had not.

## **2.10 Amendments to the Youth Justice and Criminal Evidence Act 1999<sup>556</sup>**

The Coroners and Justice Act 2009 came into force on 27 June 2011, amending the "special measures" provisions originally introduced by the Youth Justice and Criminal Evidence Act 1999.

The relevant sections for the purpose of this review are Chapter 3: Vulnerable and Intimidated Witnesses, sections 98–105.<sup>557</sup>

Section 98 of the 2009 Act provides that all persons under 18 years of age will automatically be eligible for special measures. Previously these measures had been applicable only to those aged 17 years and under.

Prior to its amendment, the 1999 Act had ensured that child witnesses gave evidence-in-chief via video recorded evidence and were then subject to cross-examination via a live video link.

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<sup>556</sup> See press release at <http://www.justice.gov.uk/news/press-releases/moj/newsrelease270611b.htm> and summary at [http://stives.htldigital.co.uk/pdfs/St\\_Ives\\_Crime\\_Update\\_-\\_Special\\_Measures.pdf](http://stives.htldigital.co.uk/pdfs/St_Ives_Crime_Update_-_Special_Measures.pdf).

<sup>557</sup> Available at <http://www.legislation.gov.uk/ukpga/2009/25/part/3/chapter/3>.



This process was known as the ‘primary rule’ and was followed unless the court was satisfied that to do so would not improve the quality of the child’s evidence.

The new provisions permit the court to depart from the primary rule if it is satisfied that not giving evidence in that way will not diminish the quality of the child’s evidence. Section 100 (6) of the 2009 Act contains the non-exhaustive list of factors that the court must take into account. These factors are:

- (a) the age and maturity of the witness;
- (b) the ability of the witness to understand the consequences of not giving evidence in accordance with the “primary rule”;
- (c) the relationship (if any) between the witness and the accused;
- (d) the witnesses social and cultural background and ethnic origin; and
- (e) the nature and alleged circumstances of the offence to which the proceedings relate.

If the primary rule is departed from, the child witness will give evidence in accordance with a secondary requirement, which in practical terms means he/she will give evidence from behind a screen. The court retains the power to depart from the secondary requirement if it considers that it would not maximise the quality of the child’s evidence. The court is required to consider the factors set out above if it wishes to depart from the secondary requirement.

The 2009 Act also gives child witnesses a greater degree of choice about how they give evidence, allowing them to opt-out of giving video-recorded evidence and instead give evidence in court.

The Act also contains provisions to ensure that children can have a supporter in the room when they are giving video-link evidence.

Other “special measures” which the court can direct in order to assist child witnesses to give their best evidence in court include:

- Screening the witness from the accused;
- Ordering the removal of wigs and gowns;
- Introducing intermediaries to enhance witness communication.

## **2.11 Dedicated Team Created to Lead National Response on Missing Children<sup>558</sup>**

On 25 May 2011, Home Office Minister for Crime and Security, James Brokenshire, MP, announced that a new team of experts from the Child Exploitation and Online Protection (CEOP) Centre will strengthen and lead the UK's response to missing children.

The new team will work in partnership with police forces, non-governmental organisations and the wider child protection community, and will provide preventive support through the provision of educational tools, products and training to children and professionals, and direct operational support to local forces.

## **2.12 Female Genital Mutilation: Multi-Agency Practice Guidelines<sup>559</sup>**

New guidelines regarding female genital mutilation of women and young girls were published in February 2011. They have been sent to prosecutors, teachers, charity groups, health services and GPs. It is hoped that as a result of a greater understanding of the issue, more prosecutions will take place. The government is hoping to rectify a situation in which, to date, no convictions for female genital mutilation have been secured under the Female Genital Mutilation Act of 2003. Fifteen specialist clinics are also being provided by the NHS to which women and girls will be able to go directly without referral.<sup>560</sup>

## **2.13 Action Plan on Child Sexual Exploitation Promised<sup>561</sup>**

Tim Loughton, MP, Under-Secretary of State for Children and Families, announced, in May 2011, that he was to launch the government's action plan on child sexual exploitation in autumn 2011. At the time the the Minister stated that

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<sup>558</sup> See <http://www.cjp.org.uk/news/crime-control/public-protection/uks-child-protection-centre-to-lead-national-response-on-missing-children-25-05-2011/>.

<sup>559</sup> Available at [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/documents/digitalasset/dh\\_124588.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_124588.pdf).

<sup>560</sup> See generally <http://www.guardian.co.uk/lifeandstyle/2011/jul/22/female-genital-mutilation-laws-families>.

<sup>561</sup> Speech available at <http://www.education.gov.uk/inthenews/speeches/a0077355/tim-loughton-to-barnardos-event-on-child-sexual-exploitation>.

It will help to develop our understanding of sexual abuse by looking at effective prevention strategies going on around the country; by identifying those most at risk of exploitation; by supporting victims; and by taking the very strongest, most uncompromising action against the people who perpetrate these appalling crimes.

The *Tackling Child Exploitation: Action Plan* was published by the Department of Children on 23 November 2011.<sup>562</sup> It was drawn up in the light of the Munro Review and takes its definition of child sexual exploitation from the Barnardos Report, *Puppet on a String: The Urgent Need to Cut Children Free from Sexual Exploitation*,<sup>563</sup> and categorises such exploitation as follows:<sup>564</sup>

1. Inappropriate relationships.
2. 'Boyfriend' model of exploitation and peer exploitation.
3. Organised/networked sexual exploitation or trafficking.

The action plan highlights the fact that Local Safeguarding Children Boards (LSCBs) have the leading role to play in ensuring that there is cooperation between the local relevant authorities in the safeguarding and promoting of children's welfare. It identifies a number of action points<sup>565</sup> which will be reviewed by the government in a progress report by the spring of 2012. The action points are grouped so as to address:

1. Managing the risks of the growing independence of the child/young person.
2. Getting children out of and combating child sexual exploitation.
3. Getting justice for victims.
4. Getting help to deal with what has happened and looking towards the future.

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<sup>562</sup> Department of Children, 2011, available at <http://media.education.gov.uk/assets/files/pdf/c/tackling%20child%20sexual%20exploitation%20-%20action%20plan.pdf>.

<sup>563</sup> Barnardos, 2011, available at [http://www.barnardos.org.uk/ctf\\_puppetonastring\\_report\\_final.pdf](http://www.barnardos.org.uk/ctf_puppetonastring_report_final.pdf).

<sup>564</sup> *Tackling Child Sexual Exploitation: Action Plan*, at p. 4.

<sup>565</sup> *Tackling Child Exploitation: Action Plan*, table of action points, at p. 34.

## **2.14 *National Guidance for Child Protection in Scotland 2010***<sup>566</sup>

A new national guidance for child protection was published in Scotland on 13 December 2010. The key initiatives resulting from this guidance may be summarised as follows:<sup>567</sup>

1. Unborn babies will be placed on the child protection register where they are identified as being at risk.
2. The 'pink book', which gives specific children protection guidance for health professionals, will be revised to bring it into line with the new national child protection guidance for Scotland.
3. New guidance for children with disabilities, who are at a much higher risk of abuse, will be developed.
4. Best practice will be developed and research undertaken on the link between mental illness and child protection, to help professionals better identify concerns and risk factors and offer effective, early support to children and their families.
5. A national risk assessment toolkit for professionals working in children protection will be developed to promote common practices and consistency across agencies.
6. Plans will be made to develop new inspection arrangements for child protection and children's services to sit alongside the creation of the new scrutiny body, Social Care and Social Work Improvement Scotland (SCSWIS), which will be operational from April 2012.

## **2.15 Recommendations**

The decision by the Irish Government in March 2011 to create a dedicated Child and Family Support Agency is to be welcomed. From January 2012, a shadow agency will begin to operate within the HSE with a ring fenced budget. It is anticipated that the new Agency will be operational by 2013 under the remit of the Minister for Children and Youth Affairs. The establishment of a new Agency provides an opportunity to enhance the integration of our

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<sup>566</sup> Full text available at <http://www.scotland.gov.uk/Publications/2010/12/09134441/0>.

<sup>567</sup> See press release at <http://www.scotland.gov.uk/News/Releases/2011/01/18112310>.

child welfare and protection and family support systems. It is imperative that the transfer of legal responsibilities from the HSE to the new Agency are managed appropriately.

The developments in the neighbouring jurisdiction considered in this chapter should be examined in the context of the establishment of the new Agency and the new Department of Children and Youth Affairs. In particular, the following recommendations may prove useful:

*Mirror recommendations should be introduced in this country on early intervention.*

*The new policy framework for young people to be published in 2012 should include guidelines reflecting the recommendations of the report Letting Children Be Children discussed in this chapter.*

*The National Vetting Bureau Bill 2011 should be reviewed having regard to the wide range of measures relating to child protection in the Protection of Freedoms legislation in the UK.*

*The recommendations discussed in this chapter of the Family Justice Review on hearing the voice of the child, the Family Justice Service, case management in child care cases, the relationship between courts and local authorities and alternatives to court proceedings should be implemented in this jurisdiction.*

*In particular, a time limit for the completion of care proceedings should be stipulated. Exemptions to the time limit should be allowed only by exception.*

*Alternatives to court in child care cases should be further developed, including Family Group Conferences and the use of mediation in child protection issues.*

*The Child Care Act 1991 should be amended to reinforce that in commissioning an expert's report, regard must be had to the impact of delay on the welfare of the child.*

*The Coroners and Justice Act 2009 came into force in the neighbouring jurisdiction in June 2011, providing a greater degree of choice for children in court for their protection when giving evidence. Similar provisions should be introduced in this jurisdiction.*

*The 2011 guidelines regarding female genital mutilation published in the UK should be considered as a template for guidelines to compliment new legislation in this area in this jurisdiction.*

*The national guidance for child protection in Scotland should be considered in the context of the new legislation on mandatory reporting and any guidance that might issue when this legislation is commenced.*

## SECTION 3:

# CRIMINAL JUSTICE SYSTEM

### 3.1 Introduction

The rationale of the criminal justice system is it to balance the need to protect and safeguard society with the obligation to protect the rights of the accused and to ensure that that person receives a fair trial. However, there is another stakeholder in the system whose rights and needs must be considered, the victim of the crime. In recent years there have been increasing calls for more emphasis to be placed on the victim throughout the criminal justice process from the point of investigation to trial and thereafter. In particular, vulnerable victims, such as children, require special consideration. The protection of victims' rights has been the subject of recent developments in both the EU and Ireland and these will be the subject of the analysis which follows.

### 3.2 Consolidation of Victims' Rights in the EU

Research by the Central Statistics Office indicates that in 2006 almost 5% of the Irish population were victims of crime. A number of voluntary and government agencies<sup>568</sup> have been brought into existence to assist individuals through the criminal justice process and to support those enduring any financial and/or emotional difficulties arising from criminal behaviour: however, victims of crime still have few statutory rights in Ireland. Whilst the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1985<sup>569</sup> was adopted by the UN General Assembly, it is not a legally binding document. It sets out basic principles of treatment for crime victims, based on compassion and respect for human dignity. The Declaration urges access to judicial and administrative processes, and restitution, compensation and assistance for victims. The Declaration can only be used as a benchmark for measuring State practice in relation to victims' rights. In 2001, the Council of the European Union adopted a *Framework Decision on the standing of victims in criminal proceedings*,<sup>570</sup> designed to afford victims the best legal protection and defence of their

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<sup>568</sup> For example, the Commission for the Support of Victims of Crime and the Victims of Crime Office.

<sup>569</sup> A/RES/40/34.

<sup>570</sup> 2001/220/JHA.

interests, regardless of the EU Member State in which they find themselves. To that end all EU Member States, including Ireland, must align their legislation on criminal proceedings so as to guarantee to victims certain defined rights and supports. In 2004, a Report from the European Commission<sup>571</sup> on the implementation of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings concluded that Ireland's transposal could not be considered fully satisfactory. A specific criticism levelled at Ireland was that it had failed to put any of the provisions in the Victims' Charter into statute.

In order to reinforce existing national and EU measures on victims' rights, the European Commission adopted on 18 May 2011 a package of legislative proposals which include

- A Communication presenting the Commission's current and future action in relation to victims;
- A Directive<sup>572</sup> establishing minimum standards on the rights, protection and support of victims of crime (replacing the 2001 Framework Decision), which will seek to guarantee that victims are recognised, treated with respect and receive proper protection, support and access to justice;
- A Regulation on mutual recognition of protection measures in civil matters which will assist the prevention of harm and violence and ensure that victims who benefit from a protection measure taken in one EU country are provided with the same level of protection in other EU countries should they move or travel to them. This measure complements the proposal for a Directive on the European Protection Order initiated by a group of EU countries in September 2009, which will apply in criminal matters and is currently being discussed in the European Parliament and Council.

### **3.2.1 Background to the Proposal**

In an effort to consolidate the area of freedom, security and justice, the European Commission identified as a strategic priority based on the Stockholm Programme and its action plan, the need for action to strengthen the rights of victims of crime and to ensure that their need for protection, support and access to justice is met. Whilst the Commission recognised that most of the Member States have some level of victim protection and support

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<sup>571</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.

<sup>572</sup> 2011/0129 (COD), published by the European Commission on 18 May, 2011.



in place, it considered that the role and needs of victims in criminal proceedings are addressed insufficiently in the EU States.

The concept of the availability of victims' rights on an equal and non-discriminatory basis was confirmed in the European Court of Justice in 1989,<sup>573</sup> when it was held that the provision of compensation for victims could not be limited on grounds of nationality. Whilst the EU sought to establish general minimum standards for victims through the 2001 Council Framework Decision, the implementation of those standards was deemed to have been inadequate.

The notion of the appropriate treatment of victims runs parallel to a range of fundamental rights recognised in the Charter of Fundamental Rights of the European Union (the EU Charter) and the ECHR. Victims' rights, in particular their human dignity, private and family life and property, therefore, must be safeguarded whilst the fundamental rights of others, including the accused, are also protected.

### **3.3 Victims of Crime: Addressing Their Needs**

The core objective of the Commission's legislative package is to deal with victims' needs, which it identifies as follows: the need to be recognised and treated with respect and dignity; to be protected and supported; to have access to justice; and to get compensation and restoration. The Commission's proposals address the needs of both direct victims of crime and indirect victims, such as the family members who also suffer from the consequences of the crime. Immediate family or dependents of direct victims will therefore, where appropriate, benefit from the support and protection proposed in this package.

#### **3.3.1 Protection**

Victims require additional support during criminal proceedings because of the manner in which the system operates. The proposed legislative package acknowledges that child witnesses are often subjected to repeated and insensitive interviewing. My fourth report<sup>574</sup> highlighted the likelihood of trauma being caused to a child by repeated interviewing by separate agencies and how joint interviewing might reduce such effects. The fact that the European Commission specifically recognised the importance of this protection for

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<sup>573</sup> *Cowan v. Trésor Public*, Case 186/87 (Judgment, 2nd February, 1989).

<sup>574</sup> Shannon, *Fourth Report of the Special Rapporteur on Child Protection*.

particularly vulnerable victims such as children further highlights the need for a formal structure to address this issue.

The fact of increased mobility in the EU, resulting in more victims moving or travelling abroad and the consequent loss of protections when they cross borders is also addressed. To protect people who exercise their right to free movement, the Commission has proposed the mutual recognition of protection measures.

### **3.3.2 Access to Justice**

The Commission, in its Communication document, highlights the fact that victims across the EU are frequently denied access to basic elements of justice.

It acknowledges that victims have a legitimate interest in seeing that justice is done. Effective access to justice for victims is identified as including the provision of information for victims on their rights and on key dates and decisions. Such provision must be easily understood. Victims should also be able to attend the trial and follow their case through the various stages. As children are identified as a particularly vulnerable category of victim, ensuring their access to information regarding the proceedings is essential.

### **3.3.3 Addressing the Specific Needs of Child Victims**

The particular vulnerability of certain categories of victims is recognised in the proposals. The categories include victims of sexual violence, persons with disabilities, victims of terrorism and human trafficking, and children. These categories are identified as being more prone than others to the risk of suffering further harm during criminal proceedings.

The approach taken by the Commission corresponds to the provisions of the proposed new Directive on sexual abuse and sexual exploitation of children and child pornography<sup>575</sup> and the new Directive on trafficking in human beings. Both of these measures address the specific needs of those vulnerable victims.

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<sup>575</sup> *Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA (COM (2010) 94 final).*

### **3.4 Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime 2011<sup>576</sup>**

A number of provisions of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings have been maintained in their original form. The following commentary concentrates on those articles which affect child victims and which introduce substantive changes to the Framework Decision.

#### Article 2: Definitions

The Directive seeks to ensure that all victims of crime benefit from minimum standards throughout the EU. Recognition is afforded to family members of victims, who are often also harmed by the crime and may themselves be at risk of secondary victimisation as well as victimisation or intimidation by the offender. Accordingly, the Directive makes provision for support and protection to be given to family members of victims.

#### Articles 3, 4, 5 and 6 of the Draft Directive: Information rights and right to understand and to be understood

The purpose of these Articles is to ensure that victims receive sufficient information in a form which is easy for them to understand and enables them to fully access their rights. Such information should be available from the initiation of the complaint by the victim and should remain so throughout criminal proceedings. The level of detail provided should enable victims to make informed decisions about their participation in proceedings, particularly when deciding whether to request a review of the decision not to prosecute.

Factors which may impede a victim's comprehension of information [e.g. age, maturity, intellectual and emotional capacities, literacy or disabilities (e.g. sight or hearing)] must be considered. At all times, information should be provided in the most suitable format.

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<sup>576</sup> Brussels 18.5.2011, COM (2011) 275 final. A copy of this Directive was laid before the Dáil and the Seanad on 13 June 2011. The motion to approve the Directive was referred to the Joint Committee on Justice, Defence and Equality on 19 July 2011. The Dáil and the Seanad approved the adoption and application of the Directive on 20 July 2011.

#### Article 7: Right to access victim support services

This Article seeks to ensure that victims have access to support services which provide information and advice, emotional and psychological support and practical assistance. Support should be available immediately after the commission of a crime and must not be dependent upon the reporting of the crime. This Article recognises that victims may require support both during proceedings and in the long term. Access to such services must be effective, not involve excessive procedures and formalities, and be widely available by a variety of means. Those groups which require specialist support services, such as victims of sexual violence, should be facilitated.

#### Article 9: Right to be heard

The purpose of this Article is to ensure that the victim's voice is heard, especially when offering initial or further information or views or evidence during criminal proceedings. It is proposed that national law will determine the exact extent of this right. It may range from basic rights to communicate with and supply evidence to a competent authority through to more wide-ranging rights such as a right to have evidence taken into consideration, the right to ensure that certain evidence is taken or the right to make interventions during the trial.

#### Article 10: Rights in the event of a decision not to prosecute

This Article enables victims to confirm that established procedures and rules have been adhered to and that a correct decision has been made in respect of a decision not to prosecute. Precise mechanisms for a review are left to national law, but with the minimum standard that such a review is undertaken by a different person or authority from the one who took the original decision not to prosecute.

#### Article 11: Right to safeguards in the context of mediation and other restorative justice services

The purpose of this Article is to ensure that where restorative justice services are provided, safeguards are implemented to ensure the victim is not further victimised as a result of the process. The provision of services must centre primarily upon the interests and needs of the victim: that is repairing the harm to the victim and preventing further harm. The victim's participation should be voluntary and on the basis of an informed choice with full awareness and understanding of the risks and benefits.

#### Article 18: Identification of vulnerable victims

The aim of this Article is to ensure the individual treatment of victims and the application of a procedure to identify vulnerable victims who may require special measures during criminal proceedings. The particular vulnerability of certain victims lies in the potential for further victimisation arising from their involvement in criminal proceedings, whether through the giving of evidence or through other forms of involvement. The Article recognises the requirement for special measures to reduce the likelihood of further harm occurring. This Article also provides that the vulnerability of victims to such harm be determined from the personal characteristics of the victim and by the nature or type of crime a victim has suffered.

The particular risk posed to children and persons with disabilities because of their personal characteristics identifies them as belonging to particularly vulnerable groups in need of special protection. The Article also recognises that a victim may be vulnerable despite not fitting into a specific vulnerable victim category. The creation of an individual assessment mechanism seeks to ensure that all vulnerable victims are identified and adequately protected.

#### Article 19: Right to avoidance of contact between victim and offender

This Article provides that where a victim's attendance at a venue is required as a result of their involvement in criminal proceedings, suitable measures should be taken to ensure contact with accused or suspected persons is avoided. Separate waiting areas should be provided and the arrival times of victims and the accused should be controlled.

#### Article 20: Right to protection of victims during questioning in criminal investigations

The purpose of this Article is to prevent secondary victimisation by ensuring that the victim is interviewed at the earliest possible opportunity and that as far as possible the number of unnecessary interactions the victim has with the authorities is limited. The timing of any interviews should, where possible, take account of the victim's needs in addition to the urgency of evidentiary requirements. Victims may be accompanied by a trusted person of their choice (subject to certain minimum limitations).

Articles 21 and 22: Right of protection of vulnerable victims including children during criminal proceedings

The purpose of this Article is to ensure that when victims have been identified as being vulnerable to further victimisation or intimidation, appropriate measures are taken to help prevent such harm. Such measures should be available throughout criminal proceedings whether during the initial investigative or prosecutorial phase or during the trial itself. The measures necessary will vary according to the stage of the proceedings. During a criminal investigation, minimum levels of protection are required in relation to any interviews with the victim. The Article directs that interviews should be conducted in a sensitive manner and officials should have received appropriate training. Appropriate methods of interviewing should be tailored to a victim's particular situation to reduce distress. The vulnerability of the victim may necessitate interviews being carried out in appropriate premises, such as those which allow for video interviews.

The Article requires that in most cases a vulnerable victim is to be interviewed by the same person. Exceptions to this requirement should be strictly limited. In cases of sexual violence, victims should have the right to be interviewed by a person of the same gender. Minimum procedures to reduce distress during the trial and, in particular, when testifying are established by this Article. Measures to enable the victim to avoid visual contact with the defendant are established, as well as measures to exclude members of the public and press. In particular, in order to ensure that the fundamental rights of an accused or suspected person are respected, the decision on whether such measures are to be taken is left to judicial discretion. However, the fact that a victim is a child, a person with a disability, a victim of sexual violence or of human trafficking combined with the individual assessment should provide a strong indication of the need for a protection measure. In normal circumstances, the particular vulnerabilities of children warrant the availability and use of additional measures. Article 22 provides that interviews may be videotaped and used as evidence in court and that in appropriate cases where a child does not have a representative the judicial authority should appoint one.

#### Article 24: Training of practitioners

The purpose of this Article is to establish training requirements for public officials who come into contact with victims. The level, type and frequency of training, including any specialist training, should be determined in accordance with the extent and nature of officials' contacts with victims as well as, in particular, whether they are in contact with specific groups of victims.

Training should provide direction to officials on respectful treatment of child victims, on how to identify protection needs and on how to provide child victims with appropriate information to help them cope with proceedings and access their rights. Such training should cover issues such as

- Awareness of the adverse effects of crime on victims and the danger of causing secondary victimisation;
- Skills and knowledge, including special measures and techniques necessary to support victims and minimise any trauma to the victim from secondary victimisation in particular;
- Recognising and preventing intimidation, threats and harm to victims; and
- The availability of services providing information and support specific to the needs of victims and the means of accessing these services.

### **3.5 Proposal for a Regulation of the European Parliament and of the Council on Mutual Recognition of Protection Measures in Civil Matters<sup>577</sup>**

This proposal, regarding protection orders taken in civil matters, aims at complementing the Member States' initiative of September 2009 for a Directive on the European Protection Order. The proposal seeks to ensure the mutual recognition of protection measures taken in criminal matters. The need for further action to place the needs of victims of crime at the

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<sup>577</sup> Brussels, 18.5.2011 COM (2011) 276 final 2011/0130 (COD). This was considered by the Joint Committee on Justice, Defence and Equality on 19 July 2011. The Regulation had been laid before the Dáil and the Seanad on 13 June 2011. The Dáil approved the adoption and application of the Regulation on 21 July 2011 and the Seanad approved it on 20 July 2011.

centre of EU justice systems was recognised in The Stockholm Programme (2010–2014). The placing of victims high on the EU agenda firmly established the need to create an integrated and coordinated approach to victims.

The Council sought to adopt a comprehensive legal framework offering victims of crime the widest protection possible. Victims of violence or persons whose physical and/or psychological integrity or liberty is at risk and who benefit from a protection measure taken in one Member State should benefit from the same level of protection in other Member States should they move or travel, without costly and time consuming procedures. The proposal aims at completing a legal instrument on the mutual recognition of protection measures taken in criminal matters to ensure that all protection measures taken in a Member State benefit from an efficient mechanism to ensure its recognition throughout the EU.

### **3.5.1 Summary of the Proposed Regulation**

To protect victims of violence – and in particular victims of domestic violence, stalking or violence against children – the national laws of the Member States should provide for temporary and preventive measures to protect a person when a serious risk is considered to exist to the person’s physical and/or psychological integrity or liberty.

Protection measures are typically ordered by a court/judicial authority without the person causing the risk being summoned to appear, in particular in case of urgency (‘*ex parte*’ procedures). Such measures may consist of, for example, the obligation not to approach closer to the protected person than a prescribed distance, or the obligation not to enter certain localities where the protected person resides or visits. In cases of violation of this obligation by the person causing the risk, the person is directly subject to a sanction, often a criminal sanction.

Previously, temporary protection provided in one Member State could not be maintained when a person travelled or moved to another Member State. The proposal provides for an effective, prompt and efficient mechanism to ensure that the Member State to which the person at risk moves will recognise the protection measure issued by the first Member State. The absence of any intermediate formalities to access the protective measures is an important feature of this proposal.



#### 3.5.1.1 Certificate

In a manner similar to mutual recognition instruments in civil matters, this proposal introduces a standardised certificate which contains all the information relevant to the recognition and, where applicable, enforcement. Therefore, a certificate will be issued by the competent authority of the first Member State, either ex-officio or on request of the protected person, who will then contact the competent authorities in the second Member State and provide them with the certificate.

#### 3.5.1.2 Notice

The competent authorities of the second Member State will notify the person causing the risk of the geographical extension of the foreign protection measure, the sanctions applicable in the event of its violation and, where applicable, ensure its enforcement.

#### 3.5.1.3 Automatic Recognition

The proposal provides for the abolition of intermediate procedures in respect of recognition of a foreign protection measure and the only ground for refusal is where there exists an irreconcilable decision in the Member State of recognition. Automatic recognition also applies when the Member State of recognition and/or enforcement does not have protection measures in civil matters.

#### 3.5.1.4 Safeguards

Fundamental rights safeguards, particularly for those persons causing the risk, are also provided with the abolition of intermediate procedures:

- The authority of the first Member State which will be requested to issue the certificate will have to check that the right to a fair trial, in particular the right of defence, of the person causing the risk has been respected. If such rights have not been guaranteed, the certificate cannot be issued;
- In case of suspension or withdrawal of the protection measure by the first Member State, the competent authority of the second Member State has, at the request of the person causing the risk, to suspend or withdraw its recognition and, when applied, enforcement;

- The competent authorities of both Member States have to bring to the notice of the person causing the risk and to the protected person any information related to the issuing, recognition, possible enforcement and sanctions, suspension or withdrawal of the protection measure.

The proposal does not deal with criminal sanctions put in place by Member States in case of violation of a protection measure. This issue will continue to be determined by the national law of each Member State.

### **3.6 Child Victims in Ireland: An Overview 2010/2011**

On 26 of June 2011, the Minister for Justice, Equality and Defence, Alan Shatter, TD, welcomed the decision by the government to seek the approval of both Houses of the Oireachtas to ‘opt in’ to the draft European Union Directive establishing minimum standards on the rights, support and protection of victims of crime, or EU Victims’ Rights Directive. Ireland may now play a full role in negotiations on the draft European Union Directive to ensure that victims of crime receive appropriate protection and support and those victims of crime are recognised and treated in a respectful, sensitive and professional manner. The Directive’s recognition of the particular vulnerability of child victims will further assist in child protection measures within Ireland.

#### **3.6.1 Data**

##### 3.6.1.1 Annual Report of the Commission for the Support of Victims of Crime

On that same date, the Minister also published the fifth Annual Report of the Commission for the Support of Victims of Crime for the year 2010. The report provides information regarding the provision of support to child victims of crime. The information refers to children as a distinct sector.

1. Number of Children assisted – 58 out of a total of 12,173 victims assisted.
2. Number of Volunteers assigned to Child Victims – 6 out of a total of 408.
3. Total percentage of funding provided to Child Victims Programmes – 5%.

### 3.6.1.2 Statistics

An investigation by the *Irish Examiner* published in 2010<sup>578</sup> based on figures supplied by the Central Statistics Office stated that on average more than 3,500 crimes against children are being reported to the Gardaí every year.

Less than a fifth of these result in a court prosecution, with to date only one in ten of all cases ending in a conviction. The figures reveal that children are the victims of a fifth of all robberies from the person and minor assaults.

Covering 2003–2009, the statistics show that, on average, there were

- \* 3,500 reported crimes against children each year (reaching a peak of 3,959 in 2008);
- \* 2,000 assaults on children per year, including 400 serious assaults;
- \* 170 sexual offences against children each year;
- \* 470 thefts and 300 robberies each year;
- \* 300 cases of abandoning a child or child neglect per year;
- \* 7 homicide victims each year, including an average of nearly 3 murders.

Trends include sharp rises in certain offences, such as murder threats (sevenfold increase), dangerous driving causing death (fivefold increase), abandoning or neglect of a child (up 250%), menacing phone calls (up 180%), harassment (up 70%) and minor assaults (up 40%).

In the period 2003–2008 only 18% of the 21,000 cases resulted in court proceedings. Of those 21,000, just 10% resulted in a conviction (half of all prosecutions). Some 4% of cases were pending at the end of 2008. A third of all sex offences resulted in a prosecution, with a fifth of all cases ending in a conviction. The lowest prosecution and conviction rates were for defilement and incest. Only 7% of abandoning/neglect cases resulted in a prosecution (4% in conviction).

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<sup>578</sup> Cormac O’Keeffe, ‘3,500 crimes against children a year’ *Irish Examiner*, 9 August 2010.

### **3.6.2 The Voice of the Victim**

The *Crime Victims Helpline Annual Report 2010*<sup>579</sup> provides a helpful insight in to what assistance victims are seeking and the particular difficulties they experience within the criminal justice system. Regrettably, the information provided does not contain an analysis of the age profile of the victims who sought assistance from that service. It is instructive nonetheless. The analysis provided states that 60% of callers to the helpline are seeking emotional support and 27% are seeking information on the justice system, and on support services. The majority of callers reported experiences of secondary victimisation, “Throughout the investigation process many callers feel frustrated, isolated and disempowered by a system in which their role is limited to being a witness.”

The victims of crime reported difficulty making contact with the Garda who is investigating the case:

When people who have reported a crime do not hear from the investigating Garda for long periods of time, they frequently experience feelings of exclusion, alienation and a sense of being ‘let down’ by the system. Mostly people want to know when someone has been questioned about the offence, when someone has been charged, when someone had been given bail and/or refused bail, any conditions imposed with bail, each time a suspect is appearing in court, and the outcome of any court hearing. In cases where no suspect is identified most people would appreciate being given this information at some point.

## **3.7 Victims: Child Offenders in Ireland**

### **3.7.1 A Deferral**

The fact that some child offenders are themselves victims must be reflected in any proposed reforms. I have discussed this issue in detail in Chapter 1 in considering the Report of the UN Committee Against Torture. My Fourth Report also reviewed the welfare of child offenders in Ireland. The recent announcement by the government that plans for the redevelopment of the Oberstown Juvenile Detention Centre would be deferred as part of capital expenditure cuts requires a further review of measures to address these victims’ needs.

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<sup>579</sup> [http://www.crimevictimshelpline.ie/images/stories/annual\\_report\\_2010](http://www.crimevictimshelpline.ie/images/stories/annual_report_2010).

In response to the announcement, the Ombudsman for Children, Emily Logan, stated “Until the funding for the expansion of Oberstown is available, creative solutions must be found to transition the children from St Patrick’s as soon as possible.”<sup>580</sup>

The Ombudsman's statements followed an Oireachtas All-Party Penal Reform Group seminar, on the detention of children in St Patrick's Institution and the need for reform.

Following the seminar, a number of TD’s raised the issues in a Dáil debate ‘Review of Serious Incidents including Deaths of Children in Care: Statements’ on 17 November, 2011, including Maureen O’Sullivan, TD, and Simon Harris, TD. Minister for Children, Frances Fitzgerald, TD, responded:

In response to Deputy Harris’s point on St. Patrick’s Institution, I will ask my officials to examine the issue. I am concerned that 16 and 17 year old children remain in the institution. While I do not have budgetary provision for moving the young people in question elsewhere, the Government remains committed to delivering such a change in its lifetime. I am discussing this matter with the Minister for Public Expenditure and Reform, Deputy Howlin, who understands its seriousness and the need for decisions to be taken.

### **3.7.2 A Creative Solution**

I have repeatedly raised concerns about the situation of young people in St Patrick’s Institution.<sup>581</sup> I am also concerned at the exclusion of children in prison from the investigatory mandate of the Ombudsman for Children;<sup>582</sup> the detention of children in adult facilities alongside adults; and the material conditions of the prison.

The report of Council of Europe Commissioner for Human Rights, Thomas Hammarberg, following his visit to Ireland in June 2011 was published in September. During the

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<sup>580</sup> Jennifer Hough, ‘Fears as juvenile facility plans are shelved’ *Irish Examiner*, 16 November, 2011.

<sup>581</sup> See *Young People in St Patrick’s Institution: A report by the Ombudsman for Children’s Office, 2011* and Ombudsman for Children’s Office ‘Children’s Ombudsman calls on the next Government to expedite closure of St. Patrick’s Institution as a place of detention for children’ 9 February 2011. Also Ombudsman for Children 2006 *Advice on the proposed changes to the Children Act, 2001*; 2005 and 2007 Annual Reports; the UN Committee on the Rights of the Child in 2006 and the Council of Europe’s Commissioner for Human Rights in November 2007.

<sup>582</sup> Under the exclusions set out in s.11 of the Ombudsman for Children Act 2002, young people under 18 years of age detained in prison are outside the OCO’s investigatory remit (s.11(1)(e)(iii)).

Commissioner's visit, he held discussions on human rights issues with a focus on the protection of vulnerable groups in times of austerity budgets.

In the report, the Commissioner expressed concern that no time-frame had been given at that stage for the building of the new National Children Detention Facility at Lusk. He recommended that the process of transfer from the prison to Children Detention Schools should begin "soon" with a pilot group.

On the issue of the exclusion of children held in St Patrick's Institution from the Ombudsman for Children's complaints remit, the Commissioner stated that he "deplores this discrepancy as he believes that all children in detention must have the same right of access to an independent complaints mechanism". He called on the government to "close this protection gap as a matter of priority".

## **3.8 Recommendations**

### **3.8.1 The EU Package**

#### 3.8.1.1 The Proposal on the Mutual Recognition of Protection Measures in Civil Matters

*Domestic violence against children is widespread and studies have revealed the link between domestic violence against women and physical abuse of children, as well as the trauma that witnessing violence in the home causes to children. The proposal provides effective measures for the protection of victims of violence, in particular domestic violence, stalking or violence against children.*

#### 3.8.1.2 The Directive on Victims' Rights

*The Directive identifies the particular risk posed to children because of their personal characteristics. Child victims are acknowledged to be vulnerable and in need of special measures. The Irish data highlights a need for victim protection measures to focus upon the provision of assistance to child victims. Article 7 of the Directive regarding access to information and advice, emotional and psychological support and practical assistance should be the focus of such protective measures in Ireland. The concerns raised regarding the potential eradication of confidentiality of counselling and support services as a result of the*

*Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011, should be carefully considered in this context.*

*The Directive should be recommended as a clear means of addressing the justice needs of child victims. This particularly vulnerable category of victims requires measures in addition to simply increasing the range of criminal offences and the severity of penalties. The Directive should be welcomed as an important move towards the emphasis on victims as opposed to conventional legal responses which have focused solely upon ‘symbolic justice’, by way of increased convictions.*

### **3.8.2 Child Offenders**

*The grounds used to justify the continued exclusion of children in St Patrick’s Institution from the complaints remit of the Ombudsman for Children are unsustainable. If children held in Children Detention Schools, which come under the inspections regime of HIQA, can have access to the Ombudsman for Children’s complaints function then there is no reason why children held in St Patrick’s Institution, which comes under the inspections regime of the Inspector of Prisons, cannot have access to an independent complaints mechanism.*

*Children are accommodated separately from adults in St Patrick’s Institution. Therefore, the claim that the facility accommodates both children and adults is no longer a valid reason to exclude children held there from the Ombudsman for Children’s complaints remit. The extension of the remit of the Ombudsman for Children to St Patrick’s Institution represents an essential safeguard which should be implemented immediately, particularly in light of the deferral of the Oberstown proposal.*

## **3.9 Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011**

Following the publication of the Cloyne Report in July 2011, the Department of Justice and Equality published legislative proposals for a Criminal Justice (Withholding Information on Crimes against Children and Vulnerable Adults) Bill.

### 3.9.1 Withholding Information

Under this legislation, a person will be guilty of an offence if he or she knows that an arrestable offence has been committed against a child or vulnerable adult, or has information that would be of material assistance and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.

The Rape Crisis Network Ireland Submission on the Draft General Scheme<sup>583</sup> states that it is appropriate to limit criminal liability for withholding information to what a person knows or believes (as opposed to surmises, suspects, conjectures or assumes). It further states that “Belief in this context should be defined as a belief honestly held in good faith by the holder of the information.” The Rape Crisis Network Ireland’s submission argues furthermore that a requirement that the belief be reasonably held would impose too high a standard on the reporter thereby discouraging such persons from reporting. However, it has been argued that a ‘belief’ entails that one holds the idea to be true, but “In the context of mandated reporting, however, one is seldom sure that abuse occurred. More typically, we are “concerned that abuse might have occurred”.<sup>584</sup>

By contrast, the Advice of the Ombudsman for Children on the Draft General Scheme<sup>585</sup> recommends that it be made an offence to withhold information where a person knows or believes on reasonable grounds that an arrestable offence has been committed; however, interpreting ‘reasonable grounds’ or ‘reasonable suspicion’ in reporting statutes has become a matter of some controversy in light of data emerging from the USA. The data suggests that attempts to interpret mandatory reporting statutes and determine when reports should be made are “ad hoc, idiosyncratic and difficult to justify”.<sup>586</sup> The penalties in respect of a failure to report in the Draft General Scheme are high: therefore there is a risk of excessive reporting. This risk can be addressed by a clear statutory provision as to when reports should be made.

The advantages and disadvantages of the introduction of mandatory reporting were reviewed in my third report. The Draft General Scheme provides some useful information regarding the

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<sup>583</sup> RCNI Submission on Draft General Scheme of Criminal Justice (Withholding Information on Crimes against Children and Vulnerable Adults) Bill 2011, September 2011, [www.rcni.ie](http://www.rcni.ie).

<sup>584</sup> Benjamin H. Levi and Sharon G. Portwood, ‘Reasonable Suspicion of Child Abuse: Finding a Common Language’, *The Journal of Law, Medicine and Ethics*, Vol 39, Issue 1, Spring 2011, pp.62–69.

<sup>585</sup> Advice of the Ombudsman for Children on the Draft General Scheme, October 2011.

<sup>586</sup> Levi and Portwood, ‘Reasonable Suspicion of Child Abuse: Finding a Common Language’, at 67.



proposed Bill, however, the provision regarding “reasonable excuse” is one which warrants further review.

### **3.9.2 Reasonable Excuse**

#### 3.9.2.1 The Victim

The Draft General Scheme states that

“reasonable excuse” may include circumstances where the person in respect of whom the sexual offence concerned was committed makes it known that he or she does not want that offence, or information relating to that offence, to be disclosed.

The wording of this provision should not be in conflict with the *Children First Guidelines*. The fact that existing administrative and Children First (legislative) obligations remain applicable to the person and/or organisation hearing the information, must be clearly stated.

The *Children First Guidelines* provide that

The HSE Children and Family Services should always be informed when a person has reasonable grounds for concern that a child may have been, is being or is at risk of being abused or neglected.<sup>587</sup>

It further states:

No undertakings regarding secrecy can be given. Those working with a child and family should make this clear to all parties involved, although they can be assured that all information will be handled taking full account of legal requirements.<sup>588</sup>

Clarification as to what factors will be taken into account when determining whether a reasonable excuse exists for a child victim should be considered. It is expected that such factors will include: the age of the child; the understanding of the child; whether the child’s wishes were freely arrived at; and whether other children are at risk.

There exists a divergence of opinion amongst submissions received on the inclusion of this clause. In its submission on the scheme, the Rape Crisis Network Ireland supported the

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<sup>587</sup> At para.3.2.2.

<sup>588</sup> At para.3.9.3.

inclusion of instances where the victim does not wish to make a report to the Gardaí on their own account:

It cannot become a requirement to force victims of crime to undergo the rigours of our criminal justice system against their will, and any semblance of such compulsion is likely to lead to a swift and steep decline in numbers reporting crime- which would in turn lead to increased offending, a catastrophic collapse of public faith in the criminal justice system and eventually, to a culture of criminal impunity.

By contrast, the Advice of the Ombudsman for Children<sup>589</sup> raises the apparent contradiction of providing for an exception to a duty to report where the impetus for the exception is the protection of those who face barriers in reporting the matter themselves. That advice recommended that the Draft General Scheme be revised to clarify in the case of children that a reasonable excuse does not include circumstances where the person in respect of whom the offence concerned was committed makes it known that he or she does not want that offence, or information relating to that offence, to be reported.

### 3.9.2.2 Uncertainty

Apart from instances involving a victim's wishes, further clarity as to the meaning of "reasonable excuse" would prove helpful. Such clarity would eliminate the possibility of vagueness resulting in constitutional issues as highlighted in the Advice of the Ombudsman for Children on the Scheme. The advice reviewed the potential impact of the recent High Court case of *Dokie v. Director of Public Prosecutions*.<sup>590</sup> That case concerned a review of section 12 of the Immigration Act 2004 that provided "Every non-national shall produce on demand, unless he or she gives a satisfactory explanation of the circumstances to prevent him or her from so doing, [certain specified identity documentation]."

Section 12 of the Immigration Act 2004 was declared to be inconsistent with the provisions of the Constitution and, in particular Articles 38.1 and 40.4.1:

the failure to define the term "satisfactory explanation" within s.12 of the Act does give rise to vagueness and uncertainty.

In my view Section 12 is not sufficiently precise to reasonably enable an individual to foresee the consequences of his or her acts or omissions or to anticipate what form of explanation might suffice to

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<sup>589</sup> Advice of the Office of the Ombudsman for Children, October 2011.

<sup>590</sup> *Dokie v. Director of Public Prosecutions* [2011] IEHC 110 (High Court, Kearns P., 25 March, 2011).

avoid prosecution. Furthermore, there is no requirement in the section to warn of the possible consequences of any failure to provide a satisfactory explanation.

As a result, the offence purportedly created by s.12 is ambiguous and imprecise. In my view it lacks the clarity necessary to legitimately create a criminal offence.

Whilst the full implications of this judgment are uncertain, it can be interpreted to mean that one must define the term “satisfactory” in legislation or at least give guidance as to its meaning. Accordingly, it may be argued that the legislation must define or provide guidance on the meaning of “reasonable excuse”. In any case, aside from potential constitutional implications, if the aim of the legislation is to be met, such clarification should be provided.

### 3.9.2.3 Reasonable Excuse and Privilege

The explanatory report to the Lanzarote Convention<sup>591</sup> states that parties must ensure that professionals who would normally be bound by rules of professional secrecy have the option of reporting any situation where they have reasonable grounds to believe that a child is the victim of sexual exploitation or abuse to child protection services. However, the Lanzarote Convention does not impose an obligation on such professionals to report sexual exploitation or abuse of a child, it merely requires that they be given the chance to do so without breach of confidence.

Any proposal to exclude certain categories of privileged relationship from the remit of reasonable excuse should be afforded due consideration in light of its very negative consequences for and its potential to undermine the very goal of the proposed Bill.

On the other hand both victims and abusers may be deterred from discussing an abusive situation with health professionals and from accessing the assistance those professionals can provide, unless they are assured of complete confidentiality. In the absence of an assurance of confidentiality, it would be very difficult for health professionals to provide successful treatment.

Arguably, the abrogation of a professional privilege may be justified in certain instances; however, the overall impairment of professional relationships caused by the enactment of reporting statutes should not be misjudged. Commentators frequently voice the concern that the lack of confidentiality caused by mandatory reporting will deter both victims and abusers

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<sup>591</sup> Council of Europe, Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25.X.2007.

from seeking treatment in the first place. The proposed legislation must, by necessity, involve a weighing of the value of the information to be provided by reporters against the costs associated with requiring reporting by professionals who traditionally may have maintained confidential relationships with clients or patients.

The potential for harm to professional relationships may be reduced by retaining the evidentiary trigger at a certain level of knowledge or belief, as provided in the Draft General Scheme as opposed to “reasonable grounds” or “suspicions”. The levels of such knowledge or belief should perhaps be defined as “clear and convincing” or at a minimum “more likely than not”. Arguably, such an evidentiary threshold for the duty to report at least strikes a better balance in protecting the opposing interests of on the one hand vulnerable groups which need protection and on the other supporting open communication between offenders or victims and the professionals who have traditionally provided confidential sessions.

### **3.9.3 Recommendation**

*The mandatory reporting system proposed is likely to result in the improved reporting of welfare concerns. That said, to equate child protection solely with reporting, investigation, prosecution and trial, falls short of addressing the justice needs of children. An innovative response to child protection should seek to attain a balance between censuring wrongs, vindicating victims and protecting society. We must also provide supports and services for offenders and victims. The draft European Directive on establishing minimum standards of rights, support and protection for the victims of crime 2011 does not support a position of compelling victims to report crime. Article 7 of that Directive proposes a right to access victim support services, a right which will apply whether the crime has been reported or not.*

### **3.10 EU Directive: Combating Exploitation of Children**

On 27 October 2011 the European Parliament approved the European Commission’s proposal for a Directive on combating sexual abuse, sexual exploitation of children and child pornography. The Directive, including certain amendments adopted in the Parliament, closely reflects the Commission’s proposal. It is expected that the EU Member States in the Council will formalise the political agreement and adopt the Directive in the near future.

The EU Directive represents an important improvement of EU legislation designed to prevent sexual crimes against children. The existing Council Framework Decision (2004/68/JHA) on this topic contained deficiencies which prevented an effective collective response within the EU. The Framework Decision failed to address new forms of sexual abuse and exploitation which can be committed by using information technology, failed to eliminate obstacles to prosecuting offences outside national territories, insufficiently addressed the specific needs of child victims and contained inadequate preventive measures. These deficiencies warranted substantive improvements which are now introduced by the Directive.

### **3.10.1 Context of the Proposal**

The Directive's explanatory memorandum discusses the prevalent phenomenon of sexual abuse and sexual exploitation of children, which forms the context of the proposal. It states the general policy objective of ensuring a high level of security through measures to prevent and combat such crimes.<sup>592</sup> The method of achieving this objective is stated as requiring the establishment of minimum rules concerning the definition of criminal offences and sanctions in this area. The specific objectives are identified as the effective prosecution of the crime, the protection of victim's rights and the prevention of child sexual exploitation and abuse.

### **3.10.2 Grounds for the Proposal**

The stated grounds for the Directive's proposal whilst identifying the vulnerability of children, also identifies the contributing factors to that vulnerability. The fact that certain forms of offence transcend national borders, the varying forms of investigation and prosecution which arise as a result in differences in national criminal law and procedure, and the continuing risk posed by recidivist sex offenders are acknowledged as substantial impediments to an effective enforcement mechanism. In respect of information technology, the rapid development and the general accessibility of information technology, the manner in which these developments afford anonymity to offenders and the complex issues regarding jurisdiction are stated as warranting an effective legislative response. A further contributing factor highlighted is the apparent liberty of child sex offenders to commit offences abroad.

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<sup>592</sup> Article 67 of the Treaty on the Functioning of the European Union.

### **3.10.3 Summary of the Legal Elements**

The new Directive will both repeal and incorporate Framework Decision 2004/68/JHA and will include the following elements:

- On criminal law in general, serious forms of child sexual abuse and exploitation currently not covered by EU legislation will be criminalised, and minimum levels of penalties will be established to reflect the gravity of the crimes;
- On information technology advancements, new forms of sexual abuse and exploitation facilitated by the use of the Internet, such as grooming or viewing child pornography without downloading the files, will be criminalised;
- On criminal investigation and initiation of proceedings, various provisions will be introduced to support the investigation of offences and the initiation of charges in the absence of reporting by the child victim;
- On prosecution of offences committed abroad, rules on jurisdiction will be amended to ensure that child sexual abusers or exploiters from the EU can be prosecuted even where they commit their crimes in a non-EU country;
- On protection of victims, new provisions will seek to ensure that abused children gain access to legal remedies without difficulty and do not endure further trauma by their participation in criminal proceedings (e.g., by limiting the number of interviews, providing for legal aid or for a special representative, etc);
- On prevention of offences, special programmes should be accessible for offenders to prevent recidivism, and prohibitions imposed on them to stop them carrying out activities with children. In addition, national mechanisms to block access to websites with child pornography, which are frequently located outside EU territory, should be implemented under the supervision of judicial services or the police.

### **3.10.4 Definitions: Child Pornography and Solicitation of Children for Sexual Purposes**

Article 1 sets out key definitions under the new Directive:

#### Definitions: Article 1

- (a) 'Child' means any person under the age of 18 years;
- (b) 'Age of sexual consent' means the age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child;
- (c) 'Child pornography' means:
  - (i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct;
  - (ii) any depiction of the sexual organs of a child for primarily sexual purposes;
  - (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or
  - (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes;
- (d) 'Child prostitution' means the use of a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment in exchange for the child engaging in sexual activities, regardless of whether that payment, promise or consideration is made to the child or to a third party ;
- (e) 'Pornographic performance' means a live exhibition aimed at an audience, including by means of information and communication technology, of:
  - (i) a child engaged in real or simulated sexually explicit conduct; or
  - (ii) the sexual organs of a child for primarily sexual purposes.

### **3.10.5 An Analysis of the Legal Elements**

#### **3.10.5.1 On Substantive Criminal Law in General**

##### *3.10.5.1.1 Measures Against Advertising Abuse Opportunities and Child Sex Tourism*<sup>593</sup>

The organisation of travel arrangements with the purpose of committing sexual abuse, something particularly relevant in the context of child sex tourism is criminalised. The Directive requires Member States to take appropriate measures to prevent or prohibit advertising abuse opportunities and child sex tourism, specifically:

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<sup>593</sup> Article 21.

- (a) the dissemination of material advertising the opportunity to commit any of the offences referred to in Articles 3 to 6; and
- (b) the organisation for others, whether or not for commercial purposes, of travel arrangements with the purpose of committing any of the offences referred to in Articles 3 to 5.

#### *3.10.5.1.2 The Definition of Child Pornography*

The definition is amended to approximate it to the COE Convention and the Optional Protocol to the Convention on the Rights of the Child.

#### *3.10.5.1.3 Criminal Penalties*

By way of combination of different criteria, a distinction may be made between five different groups of offences, depending on their degree of seriousness leading to different levels of penalties for the basic crimes. In determining the degree of seriousness and the penalties proportionate to the offences, different factors such as the degree of harm to the victim, the level of culpability of the offender and the societal risk will be considered.

Consequently, activities involving sexual contact are more serious than those which do not; the presence of exploitation makes the offence more serious; coercion, force or threats involving the power of the offender or weakness of the victim, are more serious than those which involve the free consent of the victim.

Prostitution warrants a greater penalty than pornographic performances, which may or may not include them; recruiting to prostitution or similar is more serious than mere causing, as it involves actively seeking children for such offences. In respect of child pornography, production, usually involving recruiting and sexual contact with the child, is more serious than other offences such as distribution or offering of child pornography materials, which are more serious than possession or access.



### 3.10.5.2 New Criminal Offences: Information Technology

New forms of sexual abuse and exploitation facilitated by advances in information technology are to be criminalised. This includes on-line pornographic performances, or knowingly obtaining access to child pornography, to cover cases where viewing child pornography from websites without downloading or storing the images does not amount to “possession of” or “procuring” child pornography.

#### *3.10.5.2.1 Offences Concerning Child Pornography: Article 5*

The offences concerning child pornography are addressed in Article 5 as follows:

1. Member States shall take the necessary measures to ensure that the intentional conduct, when committed without right, referred to in paragraphs 2 to 6 is punishable.
2. Acquisition or possession of child pornography shall be punishable by a maximum term of imprisonment of at least one year.
3. Knowingly obtaining access, by means of information and communication technology, to child pornography shall be punishable by a maximum term of imprisonment of at least one year.
4. Distribution, dissemination or transmission of child pornography shall be punishable by a maximum term of imprisonment of at least two years.
5. Offering, supplying or making available child pornography shall be punishable by a maximum term of imprisonment of at least two years.
6. Production of child pornography shall be punishable by a maximum term of imprisonment of at least three years.

#### *3.10.5.2.2 Irish Position*

The Child Trafficking and Pornography Act, 1998 and the Child Trafficking and Pornography (Amendment) Act, 2004 address the issues of child trafficking and pornography.

There is a distinction between viewing and being in possession of child pornography. As highlighted in my Second Report,<sup>594</sup> s.6 of the 1998 Act fails to cover the viewing of child pornography, particularly such material on the Internet. Therefore, the Irish law currently provides that those who view child pornography on the Internet will only commit the offence of possession under s.6 if they download the material to their computer or other device or print the material. My second report recommended that s.6 of the Child Trafficking and

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<sup>594</sup> Shannon, *Second Report of the Special Rapporteur on Child Protection*, Section 3.7.2.1.

Pornography Act 1998 should be amended to include the offence of viewing child pornography, and/or indecent material. The Directive's inclusion of the acquisition of child pornography as an offence presents an opportunity to implement the recommended amendment.

#### *3.10.5.2.3 Solicitation of Children for Sexual Purposes: Article 6*

The solicitation of children for sexual purposes is covered in Article 6 and provides:

1. Member States shall take the necessary measures to ensure that the following intentional conduct is punishable: the proposal by an adult, by means of information and communication technology, to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in Article 3(4) and Article 5(6), where that proposal was followed by material acts leading to such a meeting, shall be punishable by a maximum term of imprisonment of at least one year.
2. Member States shall take the necessary measures to ensure that an attempt by an adult, by means of information and communication technology, to commit the offences provided for in Article 5(2) and (3) of soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child is punishable.

#### *3.10.5.2.4 Irish Position*

The Criminal Law (Sexual Offences) (Amendment) Act 2007 makes it an offence to solicit or importune a child (whether or not for the purposes of prostitution) for the purposes of the commission of a sexual offence. However, the Act does not actually criminalise the act of grooming (i.e. the initiation and encouragement of a relationship by an adult with a child for the purposes of sexual exploitation by that adult or others). Instead s.6 of the Act creates the offence of travelling to or meeting with a child with the intention of sexually exploiting that child. The offence in Article 6 of the Directive is narrower than the offence in the Act because it has been restricted to conduct involving the use of information and communication technology, but wider in that Article 6 only requires a single communication prior to the meeting whereas the Act requires the offender to have had at least two previous contacts with the child.

#### *3.10.5.2.5 Incitement, Aiding and Abetting, and Attempt: Article 7*

Incitement and aiding and abetting are dealt with in Article 7:

1. Member States shall take the necessary measures to ensure that inciting or aiding and abetting to commit any of the offences referred to in Articles 3 to 6 is punishable.
2. Member States shall take the necessary measures to ensure that an attempt to commit any of the offences referred to in Article 3(4), (5) and (6), Article 4(2), (3), (5), (6) and (7), and Article 5(4), (5) and (6) is punishable.

### 3.10.5.3 Criminal Investigation and Initiation of Criminal Proceedings

A number of provisions are introduced to promote the investigation of offences and assisting in charges being brought.

### 3.10.5.4 Prosecution of Offences Committed Abroad

Our jurisdiction rules will need to be amended to ensure that child sexual abusers or exploiters from the EU, both nationals and habitual residents, face prosecution even if they commit their crimes outside the EU.

#### *3.10.5.4.1 Jurisdiction and Coordination of Prosecution: Article 17*

Article 17 deals with jurisdiction and coordination of prosecutions:

1. Member States shall implement the measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where
  - (a) the offence is committed in whole or in part within their territory; or
  - (b) the offender is one of their nationals.
2. A Member State shall inform the Commission where it decides to establish further jurisdiction over an offence referred to in Articles 3 to 7 committed outside its territory, inter alia where
  - (a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;
  - (b) the offence is committed for the benefit of a legal person established in its territory; or
  - (c) the offender is a habitual resident in its territory.
3. Member States shall ensure that their jurisdiction includes situations where an offence referred to in Articles 5 and 6, and insofar as is relevant, in Articles 3 and 7, is committed by means of information and communication technology accessed from their territory, whether or not it is based on their territory.
4. For the prosecution of any of the offences referred to in Article 3(4), (5) and (6), Article 4(2), (3), (5), (6) and (7) and Article 5(6) committed outside the territory of the Member State concerned, as regards paragraph 1(b) of this Article, each Member State shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the acts are a criminal offence in the place where they were performed.
5. For the prosecution of any of the offences referred to in Articles 3 to 7 committed outside the territory of the Member State concerned, as regards paragraph 1(b) of this Article, each Member State shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the prosecution can only be initiated following a report made by the victim in the place where the offence was committed, or a denunciation from the state of the place where the offence was committed.

### 3.10.5.5 Protection of Victims

New provisions dealing with the protection of victims will be included to facilitate easy access to legal remedies and to ensure that victims do not endure further victimisation from their involvement in ensuing criminal proceedings. The provisions cover assistance and support to victims with specific protection for victims in criminal investigations and proceedings.

#### *3.10.5.5.1 General Provisions on Assistance, Support and Protection Measures for Child Victims: Article 18*

Article 18 is of importance in that it sets out the general provisions on assistance, support and protection measures for child victims:

1. Child victims of the offences referred to in Articles 3 to 7 shall be provided with assistance, support and protection in accordance with Articles 19 and 20, taking into account the best interests of the child.
2. Member States shall take the necessary measures to ensure that a child is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that a child might have been subject to any of the offences referred to in Articles 3 to 7.
3. Member States shall ensure that, where the age of a person subject to any of the offences referred to in Articles 3 to 7 is uncertain and there are reasons to believe that the person is a child, that the person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 19 and 20.

#### *3.10.5.5.2 Assistance and Support to Victims: Article 19*

Assistance and support to victims is the focus of Article 19:

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive. Member States shall, in particular, take the necessary steps to ensure protection for children who report cases of abuse within their family.
2. Member States shall take the necessary measures to ensure that assistance and support for a child victim are not made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution or trial.
3. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims in enjoying their rights under the Directive are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns.
4. Child victims of any of the offences referred to in Articles 3 to 7 shall be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA.
5. Member States shall take measures, where appropriate and possible, to provide assistance and support to the family of the child victim in enjoying the rights under the Directive when the family is in

the territory of the Member States. In particular, Member States shall, where appropriate and possible, apply Article 4 of Framework Decision 2001/220/JHA to the family of the child victim.

### *3.10.5.5.3 Protection of Child Victims in Criminal Investigations and Proceedings: Article 20*

The protection of child victims in criminal investigations and proceedings has been discussed in my previous reports and is outlined in Article 20:

1. Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, competent authorities appoint a special representative for the child victim where, under national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim, or where the child is unaccompanied or separated from the family.
2. Member States shall ensure that child victims have, *without delay*, access to legal counselling and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. *Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.*
3. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations relating to any of the offences referred to in Articles 3 to 7:
  - (a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;
  - (b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;
  - (c) interviews with the child victim are carried out by or through professionals trained for this purpose;
  - (d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;
  - (e) the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purpose of criminal investigations and proceedings;
  - (f) the child victim may be accompanied by his or her legal representative or, where appropriate, by an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.
4. Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 3 to 7 all interviews with the child victim or, where appropriate, with a child witness, may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law.
5. Member States shall take the necessary measures to ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 that it may be ordered that:
  - (a) the hearing take place without the presence of the public;
  - (b) the child victim is heard in the courtroom without being present, in particular through the use of appropriate communication technologies.
6. Member States shall take the necessary measures, where in the interest of child victims and taking into account other overriding interests, to protect the privacy, identity and image of child victims, and to prevent the public dissemination of any information that could lead to their identification.

### *3.10.5.5.4 Irish Position*

While children are protected under Irish legislation by the prohibition of activity and punishment of offenders, legislation to date has failed to provide for the creation of a

protective environment for victims of sexual offences, sexual abuse, child trafficking and pornography.

In June 2011, the Oireachtas voted to allow Ireland to ‘opt in’ to the draft European Union Directive establishing minimum standards on the rights, support and protection of victims of crime, or the EU Victims’ Rights Directive. This Directive is considered in Section 3.2 above.

#### 3.10.5.6 Prevention of Offences

New legislation is required to help prevent child sexual abuse and exploitation offences, through a number of actions concentrating on preventing recidivism in previous offenders.

##### *3.10.5.6.1 Preventive Intervention Programmes or Measures: Article 22*

Article 22 covers preventive intervention programmes or measures:

Member States shall take the necessary measures to ensure that persons who fear that they might commit any of the offences referred to in Articles 3 to 7 may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of such offences being committed.

##### *3.10.5.6.2 Prevention: Article 23*

Prevention is the focus of Article 23:

1. Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of sexual exploitation of children.
2. Member States shall take appropriate action, including through the Internet, such as information and awareness-raising campaigns and research and education programmes, where appropriate, in cooperation with relevant civil society organisations and other stakeholders, aimed at raising awareness of the possibility of and reducing the risk of children becoming victims of sexual abuse or exploitation.
3. Member States shall promote regular training for officials likely to come into contact with child victims of sexual abuse or exploitation, including frontline police officers, aimed at enabling them to identify and deal with child victims and potential child victims of sexual abuse or exploitation.

##### *3.10.5.6.3 Measures Against Websites Containing or Disseminating Child Pornography: Article 25*

Article 25 includes measures against websites containing or disseminating child pornography:

1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.
2. Member States may take measures to block access to web pages containing or disseminating child pornography to the Internet users in their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress.

#### *3.10.5.6.4 Irish Position*

##### *3.10.5.6.4.1 Preventive Intervention Programmes or Measures in Ireland*

The mainstay of preventive intervention programmes are those for convicted sex offenders or those who are registered on the Sex Offenders Register. The treatment of sex offenders in prison is managed in accordance with the Building Better Lives programme. After the release of sex offenders, the State has two key means at its disposal to continue engaging with and monitoring them: the Probation Service and the Gardaí. In the private sphere there are a number of therapeutic options, albeit limited in number. A review of the effectiveness of preventive measures is contained in the review of the Sex Offenders Act 2001, below.

##### *3.10.5.6.4.2 Education*

Stay Safe is a personal safety skills programme for Irish primary schools to prevent child abuse. The Social, Personal and Health Education programme provided in Irish post-primary schools supports personal development, health and well-being.

The Safer Internet Ireland project is a consortium of industry, education, child welfare and government partners that acts as a Safer Internet Centre to provide Safer Internet Awareness hotline and helpline functions and activities for the Republic of Ireland. The project, funded by the EU under its Safer Internet Programme administered by the European Commission, runs from 1 March 2010 to 28 February, 2012. The project is coordinated by the Office for Internet Safety (OIS), an executive office of the Department of Justice and Equality. The main aim of the project is to develop national initiatives promoting the safer use of electronic media and enhance protection of the vulnerable, particularly children, against the problems presented by the Internet.

### *3.10.5.6.4.3 Measures Against Websites Containing or Disseminating Child Pornography*

Currently, there exists a self-regulatory framework for Internet service providers (ISPs) in operation in Ireland which actively encourages the adoption of best practice procedures aimed at preventing the production of illegal child pornography content online. Members of the public may report such material to the [www.hotline.ie](http://www.hotline.ie) service of the Internet Service Providers' Association of Ireland (ISPAI). If the material is hosted in Ireland and considered to be contrary to Irish law, ISPAI members are required to remove such materials. If the material is hosted in another jurisdiction, it is notified to the Internet hotline in that jurisdiction and/or to the relevant law enforcement agencies for follow-up, with the objective of having the illegal content taken down.

By virtue of a voluntary agreement brokered by the European Commission with the GSM Alliance Europe, the association representing European mobile phone operators, all of the mobile phone operators in Ireland implement a form of filtering on their mobile Internet service which prevents access to websites which have been identified as containing child pornography content.

### *3.10.5.6.5 Disqualification Arising from Convictions: Article 25*

Article 25 deals with disqualification arising from convictions as follows:

1. In order to avoid the risk of repetition of offences, Member States must take the necessary measures to ensure that a natural person who has been convicted of any of the offences referred to in Articles 3 to 7 may be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children.
2. Member States shall take the necessary measures to ensure that employers, when recruiting a person for professional or organised voluntary activities involving direct and regular contacts with children, are entitled to request information in accordance with national law by way of any appropriate means, such as access upon request or via the person concerned, of the existence of criminal convictions for any of the offences referred to in Articles 3 to 7 entered in the criminal record, or of the existence of any disqualification from exercising activities involving direct and regular contacts with children arising from those criminal convictions.
3. Member States shall take the necessary measures to ensure that, for the application of paragraphs 1 and 2 of Article 25, information concerning the existence of criminal convictions for any of the offences referred to in Articles 3 to 7, or of any disqualification from exercising activities involving direct and regular contacts with children arising from those criminal convictions, is transmitted in accordance with the procedures set out in Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from criminal records between Member States when requested under Article 6 of that Framework Decision with the consent of the person concerned.



### *3.10.5.6.6 Irish Position*

The current law in Ireland makes it a criminal offence for certain categories of people to fail to notify their employers that they have been found guilty of certain criminal offences in advance of accepting an offer of employment or performing a service. This duty to notify an employer relates primarily to sex offenders guilty of offences committed in Ireland and abroad. Section 26 of the Sex Offenders Act 2001 makes it an offence for a sex offender to

apply for work or to perform a service (including State work or service) which involves having unsupervised access to, or contact with children or mentally impaired people without telling the prospective employer or contractor that you are a sex offender.

Disqualification from exercising professional activities involving direct and regular contacts with children is not provided for in the Sex Offenders Act 2001. In 2008, by way of a Submission to the Joint Committee on the Constitutional Amendment on Children, the National Youth Council of Ireland called for the revision of the Act to ensure that offenders placed on the register are disqualified from working with children, in line with legislation in Northern Ireland. A further request was made by the Council for such revised legislation to also make it an offence for any employer to employ a person disqualified from working with children.

The Draft Heads on the National Vetting Bureau Bill 2011 were published in July 2011. A summary of the submissions made to the Joint Oireachtas Committee on Justice, Equality and Defence is considered below.

## **3.11 Draft Heads of National Vetting Bureau Bill 2011**

In 2007, my first report<sup>595</sup> recommended new vetting legislation as a matter of urgency. In July 2011, a draft bill was introduced which aims to put the current unregulated Garda vetting system on a statutory footing and to establish a National Vetting Bureau. The Bill will allow the bureau to give a determination to an applicant based on soft information, such as information gained during the course of an investigation which did not result, or has yet to result, in a conviction.

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<sup>595</sup> Shannon, *First Report of the Special Rapporteur on Child Protection*.

### **3.11.1 Main Points of Submissions to the Oireachtas Committee**

A group of 17 organisations made submissions to an Oireachtas committee on the Bill. The main points raised were as follows:

1. Any persons with access to confidential information on children and vulnerable adults should be vetted in addition to those who have direct contact with them.
2. All persons seeking employment with caregiving organisations should be vetted, not merely those who have contact with children or vulnerable adults.
3. The definition of “premises” should be widened to include private residences, particularly where some smaller organisations are run from home.
4. Previous convictions for offences such as minor road traffic offences should be expunged over time.
5. There should be a requirement to establish a reliable process of sharing vetting information with other jurisdictions.
6. Vetting should be transferable to allow a positively vetted individual move from one organisation to another without undue delay.

### **3.11.2 “Persons Required to Submit Vetting Disclosure Applications”<sup>596</sup>**

With regard to the phrase “regular or on-going unsupervised contact with children or vulnerable adults”, concerns have been raised that this wording would exclude several categories of employee whose work places them in settings where they would have irregular and unsupervised contact with young people or vulnerable adults. It was submitted that such contact could permit opportunities for ‘grooming’ of children and/or vulnerable adults by such employees. Examples given include school domestic staff and school caretakers and gardeners.

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<sup>596</sup> Section 5(1)(d).

### **3.11.3 Suggested Extension of Persons Required to Submit Vetting Disclosure Applications**

The Rape Crisis Network Ireland's submission to the Oireachtas recommended that the legislation should apply vetting obligations in situations where employees/volunteers have access to confidential information relating to children or vulnerable adults. This recommendation is based upon the potential for considerable harm to children and/or vulnerable adults by the misuse of such information.

### **3.11.4 Recommendations**

#### 3.11.4.1 Definitions

*Terms such as 'ad hoc', 'occasional' and 'voluntary' should be properly defined. It is recommended that the proposed vetting obligations need to include all those employees whose work places them in settings where there are children with whom they could come into contact, regardless of whether that contact is "regular or on-going unsupervised contact" or not.*

#### 3.11.4.2 Safeguards

*Careful consideration should be afforded to the constitutional rights of those being vetted. My 2007 Report highlighted certain safeguards for consideration, specifically the importance of clear, concise legislation which is limited in application, provides for procedural safeguards and takes account of the constitutional doctrine of proportionality. To that end, the following suggestions were offered:*

- *Only consider information that has led to investigations into alleged abuses or crimes;*
- *Consider the circumstances surrounding the offence;*
- *Clearly stipulate the class of persons who will be subject to such disclosure;*
- *Strictly limit to the basis of necessity the number of persons to whom such disclosure can be made;*
- *Put in place appropriate safeguards for such information to be furnished to vetted persons and corrected if this is appropriate;*
- *Provide the vetted person with the reasons if employment is declined;*
- *Ensure that the entire process is transparent and reasonable, attributing due weight to each charge considered;*

- *Provide a mechanism through which a person can appeal his/her entry on to a soft information register to an independent third party;*
- *Conduct periodic reviews of the status of those included on a soft information register.*

#### 3.11.4.3 Exchanges of Vetting Information between the State and Foreign Institutions

*Whilst cooperation exists between Ireland and Britain, the fact that some European countries do not provide information should be addressed. Consideration should also be afforded to legal and cultural differences in different jurisdictions.*

### **3.12 Child Witnesses: Recent Developments**

Recent UK research<sup>597</sup> shows that the number of young witnesses in criminal cases (many of whom are also victims) are increasing dramatically. Whilst there are no official figures for the number of children in the UK who actually give evidence, approximately 48,000 were called to court in 2008/9, compared to around 30,000 in 2006/7, representing an increase of 60%. Certain witnesses are very young. In a 14 month period, children aged 5 and under were assessed by a Registered Intermediary in 114 cases.

These findings, combined with recent moves by the Irish courts to admit pre-trial recordings in criminal cases and a study proving wrong the assumption that the testimonies of child victims of sexual abuse are unreliable (see Section 3.12.2), demonstrate an urgent requirement for legislative reform.

#### **3.12.1 Pre-Trial Recording of Evidence**

A recent decision to admit the recording of a Garda interview of a complainant with a mental disability in a criminal trial<sup>598</sup> concerning an alleged sexual offence is one which has

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<sup>597</sup> Joyce Plotnikoff and Richard Woolfson, *Young witnesses in criminal proceedings: a progress report on Measuring up?*, Nuffield Foundation (2009).

<sup>598</sup> *The Irish Times*, 9 November 2010.

significant implications for the pre-trial recording of the evidence of children and those with mental disabilities. This was the first time such an application has succeeded.

The accused had been charged under section 4 of the Criminal Law (Rape) (Amendment) Act 1990. The Act does not have regard for any mental impairment a complainant may have. The Judge informed the jury of legislation which makes certain sexual activity with a mentally impaired person illegal, but that it did not cover the alleged circumstances of the case before them. He further told the jury that, having had regard to case law, he had to come to the conclusion that there had not been an assault involving a person being actually forced to do something or threatened so that they felt they must submit. He told the jurors they had heard the complainant use the word 'forced' in her evidence on the DVD, but she had not expanded upon that and there was no suggestion of threat or menace. The jury was asked to return a verdict of not guilty.

Section 16(1)(b) of the Criminal Evidence Act 1992 provides for pre-trial recording of examination in chief testimony. This legislation acknowledged the need to provide protection for the most vulnerable witnesses who have been the victims of sexual and violent offences when permitting evidence to be taken after the alleged incident.

An aim of pre-trial recording is to reduce the likelihood of secondary trauma of the witness in the trial process. What is vitally important is that the interviewer is trained in the appropriate manner to conduct the interview. However, the legislation also provides<sup>599</sup> that the witness must be available in court (probably via video link) for cross-examination thereby exposing the complainant to possible or actual cross-examination. The absence of any safeguards for the complainant is mirrored in the absence of clearly defined safeguards for the accused. The legislation provides that the recording will not be admitted if it is not in the interests of justice to do so and if there is a risk that its admission will result in unfairness to the accused. In the absence of any clear guidelines there are risks for both the accused and the complainant.

The latest EU package of legislative proposals regarding victims' rights is of direct relevance to this issue. Ireland's current role in negotiations on the draft European Union Directive presents the ideal opportunity to review legislation on pre-trial recording.

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<sup>599</sup> Section 16(1)(b).

### 3.12.2 Recent Study on Reliability of Child Witnesses

A recent Spanish study conducted by the Centre for Legal Studies (CEJFE) in Catalonia<sup>600</sup> has overturned the assumption that the testimonies of child victims of sexual abuse and maltreatment are unreliable because children have a tendency to exaggerate.

In the past reviews and theoretical analysis created serious doubts in the judicial system about the credibility of child witnesses. Children were considered to be susceptible to suggestion and liable to confuse fantasy with reality.<sup>601</sup>

This opinion has varied over time and recent indications suggest that these assumptions are outdated. The CEJFE paper reinforces this changing view by proving children to be accurate, capable, competent and credible witnesses.

As part of the study, 135 nursery school children were interviewed to test the theory that children between the ages of three and five are capable of recounting an emotionally significant event in great detail.

The objective of the research was to evaluate the efficiency of three different models of the interview, taking into account the particular characteristics of preschool children. The study involved the display and explanation of an emotionally significant event which the children could identify with, such as a bicycle accident in which a child, falls, is injured and bleeds and finally is helped by the father. Children were then asked to remember and narrate this event.

### 3.12.3 Conclusions

The results of the study illustrate that young children achieve high rates of correct recollection and reporting, especially children aged four (79.18%) and aged five (82.50%). Although children of three years of age presented at a lower percentage (52.93%), correct information was also provided.

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<sup>600</sup> Josep Ramon Juárez López and Eva Sala Berga *Interviewing children preschool victims of sexual abuse and / or family abuse: the effectiveness of forensic interview models*”, Department of Justice, Generalitat Catalonia 2011, <<http://www.crin.org/violence/search/closeup.asp?infoID=26077>>.

<sup>601</sup> Berger and Thomson, 1998.

By contrast, dramatically lower percentages were recorded in respect of errors. Children aged four years provided the highest level of incorrect information (8.18%). Children aged three to five years achieved rates of 5.25% and 5.81%, respectively.

The average total of misinformation provided by all of the children was only 6.43%. The study concluded that even if a child's testimony contains flaws, that testimony should never be overlooked by a court.

#### **3.12.4 Recommendation**

*Legislative amendment is recommended to clarify when a recording will not be admitted; specifically, in instances in which it is not in the interests of justice to do so.*

*Training should be provided to the judiciary, Gardaí and social workers on the most progressive method of interviewing young children.*

### **3.13 Recent Legal Challenge: *ZS v. D.P.P.***

On 21 December 2011 the Supreme Court delivered judgment in *ZS v. D.P.P.*,<sup>602</sup> a case involving a challenge to the constitutionality of section 2 of the Criminal Law Amendment Act 1935 ('the 1935 Act'), as amended by section 13 of the Criminal Law Act 1997 ('the 1997 Act'). In a three to two majority decision,<sup>603</sup> the Supreme Court ruled that the offence of unlawful carnal knowledge of a female under the age of 17 years, contrary to section 2 of the Criminal Law Amendment Act 1935, is inconsistent with the Constitution. The defendant contended that, under the statute, he was not permitted to raise a reasonable mistake as to the victim's age. The Supreme Court agreed and, on that basis, struck down the offence.

In 2004, *ZS* was charged with unlawful carnal knowledge of a female under the age of 17 years contrary to section 2 of the 1935 Act as amended by section 13 of the 1997 Act. Whilst the provision has since been repealed and replaced by the Criminal Law (Sexual Offences) Act 2006, the plaintiff was charged before its repeal.

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<sup>602</sup> [2011] IESC 49.

<sup>603</sup> Fennelly, Hardiman and Macken JJ. for the majority, Denham CJ and Murray J. for the minority.

The complainant was aged 16 at the time of the alleged offence and was an employee of the plaintiff. At all material times during his arrest and questioning the plaintiff maintained that he had not engaged in any sexual contact with her. However, he sought to challenge the constitutionality of section 2(1) of the 1935 Act on the basis that if he did have intercourse with the complainant, he honestly and reasonably believed her to have attained the age of consent. He submitted that section 2(1) precluded him from invoking such a defence at a trial.

ZS contended that he had no opportunity to raise the defence of a reasonable mistake as to the victim's age at his trial. He argued that section 2 of the 1935 Act was unconstitutional for the same reason that section 1 was found to be unconstitutional in *C.C. v. Ireland*.<sup>604</sup>

In *C.C. v Ireland*, the constitutionality of section 1 was challenged on the ground of the absence of any provision permitting a defence that the accused reasonably or honestly mistook the age of the complainant (i.e. the 'reasonable mistake defence'). The Court decided the issue in two stages. Firstly, it decided by a majority that section 1 of the 1935 Act by necessary implication excluded any defence based on bona fide or reasonable mistake as to the age of the girl. In a second judgment delivered by Hardiman J., speaking for a unanimous Court, it was decided that the section was, consequently, inconsistent with the Constitution.

Section 2(1) of the 1935 Act provided as follows:

Any person who unlawfully and carnally knows any girl who is of or over the age of fifteen years and under the age of seventeen years shall be guilty of a misdemeanour and shall be liable, in the case of a first conviction of such misdemeanour, to penal servitude for any term not exceeding five years nor less than three years or to imprisonment for any term not exceeding two years or, in the case of a second or any subsequent conviction of such misdemeanour, to any term of penal servitude not exceeding ten years nor less than three years or to imprisonment for any term not exceeding two years.

Section 13 combined with item number 7 of the First Schedule of the Criminal Law Act, 1997 amended that provision by deletion of the underlined words, "of or over the age of fifteen years". Accordingly, the section purported to apply to cases of carnal knowledge of all girls under the age of 17.

The prosecution argued that the courts should save section 2 by construing it so as to make a reasonable mistake as to age relevant. A fundamental argument presented by the prosecution was that the Oireachtas amended section 2 in 1997 and on this basis the courts can and ought

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<sup>604</sup> [2006] IESC 33.



to apply the double construction rule, a course that was unavailable in *C.C.* In the High Court in 2008,<sup>605</sup> Judge Murphy rejected ZS's challenge, applying the double construction rule and finding that ZS would have some way of raising a reasonable mistake as to age.

ZS was tried in 2010 after the High Court, having dismissed his claims of unconstitutionality in 2008, refused to grant an injunction restraining his trial pending the outcome of his Supreme Court appeal. The jury failed to agree on a verdict and a retrial is listed for 2012.

The central argument in the Supreme Court appeal was the implications of the 1997 amendment. In delivering the majority judgment of the Supreme Court, Fennelly J. stated that as section 2(1) excluded the defence of honest mistake, the section had no effect after the 1937 Constitution and its purported amendment by the 1997 law had no legal effect. The purported amendment of section 2 by the Oireachtas was based upon the mistaken assumption that section 2 was still in force, when it was not. The Court found that the law was inconsistent with the Constitution because it did not allow for the defence of honest mistake as to age.

### 3.13.1 Review of High Court Judgment

In the High Court judgment, Murphy J. stated

The only potentially material distinction between ss. 1 and 2 is that the latter was amended after the entry into force of the Constitution and is said to be entitled to the presumption of constitutionality... I regard that distinction as material.

It was submitted that section 2 did not exclude a defence of mistake as to age. It was argued that section 2 could be distinguished from section 1 on the basis that it had been amended subsequently to the Constitution. Unlike section 1, which had not been so amended and therefore did not enjoy the presumption of constitutionality (*The State (Sheerin) v. Kennedy*;<sup>606</sup> *Haughey v. Moriarty*<sup>607</sup>), section 2 could avail of that presumption, and of the double construction rule that flows from it.

The Court found that the presumption of constitutionality applies to section 2 of the 1935 Act, as amended.

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<sup>605</sup> [2008] IEHC 427.

<sup>606</sup> [1966] I.R. 379.

<sup>607</sup> [1999] 3 I.R. 1.

The plaintiff contended that even if that presumption arose, it was immediately displaced on the ground that section 2 is obviously unconstitutional in light of the decision in *C.C.* regarding section 1. The plaintiff relied on the decision of the Supreme Court in *Re Equal Status Bill, 1997*.<sup>608</sup> The Bill under consideration in that case contained two provisions which were similar to provisions which the Supreme Court had held to be unconstitutional in *Re Employment Equality Bill, 1996*.<sup>609</sup> Hamilton C.J., delivering the judgment of the Court, observed (at 402)

the Court found itself confronted by a Bill which contains two sections which were and are indisputably repugnant to the Constitution. As a result the Bill enjoys no presumption of constitutionality. There is no presumption for counsel assigned by the Court to rebut and no justiciable issue for the Court to try.

However, Murphy J. identified a crucial distinction between that situation and the present case. In *Re Employment Equality Bill, 1996*, the Supreme Court held (at 334) “The Bill having been passed by both Houses of the Oireachtas is entitled to the presumption that no provision thereof is repugnant to the Constitution.”

It was deemed that the Supreme Court in *Re Equal Status Bill* was faced with provisions materially no different from sections which had previously been struck down as unconstitutional despite enjoying the presumption of constitutionality and despite enjoying the benefit of the double construction rule which flows from that presumption.

This case was deemed to be capable of being distinguished because of the 1997 Act. In *C.C.* no presumption of constitutionality could apply and it was held that, as a result, no double construction rule could arise in interpreting section 1. Murphy J. stated that the effect of the 1997 amendment was to extend the presumption to section 2 since an additional rule of statutory interpretation fell to be applied in the context of section 2. That rule (the double construction rule) could bring about an interpretation of section 2 which was different from the interpretation applicable to section 1. Whilst section 2, as originally enacted within the framework of the 1935 Act, was intended, like section 1, to exclude any mental element or defence as to age, this was not the case with the amended section 2. In its amended form, section 2 was deemed to have been endowed with the status of a post-Constitution statute and

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<sup>608</sup> [1997] 2 I.R. 387.

<sup>609</sup> [1997] 2 I.R. 321.

this was deemed sufficient to justify a construction of that provision which differed from that of the original section 2.

Accordingly, the Court concluded that section 2, in its amended form, must be interpreted in such a manner as to imply that knowledge of age is a relevant consideration. This was stated to mean that knowledge as to age is to be regarded as an element of the offence, or that a defence of honest or reasonable mistake as to age may be raised. The Court accepted the submission of the defendants that that question should be determined by the trial court. As the Supreme Court indicated in *C.C.*, any of the three formulations identified above, and perhaps others, would “pass constitutional muster”, so that once it has been determined that the provision does not impose strict liability, the question of what the provision requires is one of statutory interpretation rather than constitutional law. The duty of the trial court was stated as providing whatever interpretation is consistent with the Constitution and follows from an application of the ordinary rules of statutory interpretation, including the unrebutted presumption at common law that some mental element should be inferred.

### **3.13.2 The Supreme Court Decision**

Delivering judgment for the majority, Fennelly J. analysed the differences between sections 1 and 2 of the 1935 Act. Both sections created offences of unlawful carnal knowledge of a girl and were distinguished only by the ages of the female victims: Section 1 making it an offence to have unlawful carnal knowledge of girls under the age of 15; and Section 2, as originally enacted, making it an offence to have unlawful carnal knowledge of girls aged over 15 and under 17. The other variations between the two sections, the penalty provisions and the fact that a prosecution under section 2 had to be brought within a year, were not material to the case so that the essential elements of the offence were the same. Each section created an offence of unlawful carnal knowledge.

It was found that there was no difference between the two sections insofar as the question of *mens rea* was concerned. In its judgments in *C.C.*, the Supreme Court held that the legislature in 1935 had quite deliberately excluded the possibility of any defence based on mistake, bona fide or otherwise, with regard to the age of the girl. The judgments arrived at such a conclusion on the basis of the legislative history of the provisions.

Geoghegan J. concluded as follows (at page 41 of that judgment):

However, the proviso permitting the defence of mistake of age in the case of “the older girl offence” was not inserted into the Act of 1935 and by necessary implication this must have been deliberate particularly when regard is had to the fact that the mens rea element inserted into s. 5 of the Act of 1885 in relation to carnal knowledge with women of unsound mind was effectively repeated in the Act of 1935. To hold otherwise would be an unjustifiable distortion of what was clearly the intention of the Oireachtas of Saorstát Éireann.

Following a second hearing in the Supreme Court in *C.C.*, Hardiman J. delivered a judgment with which all members of the Court agreed. He held that “the form of absolute liability provided in s. 1(1) of the Act 1935 [was], in all the circumstances, inconsistent with the Constitution”. Hardiman J. described the section as, “inconsistent” with the Constitution in the sense which appears in Article 50.1 of the Constitution, which reads:

Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

Fennelly J. noted that Hardiman J. declined to accept a proposal that a more limited declaration might be made declaring the provision inconsistent with the Constitution only to the extent that it excluded a defence of honest mistake. The Court, therefore, made an order declaring that section 1(1) of the Act of 1935 was inconsistent with the Constitution.

Fennelly J. further stated that section 1(1) and section 2(1)

cannot be materially distinguished insofar as both provisions, as enacted by the Oireachtas of Saorstát Éireann, excluded any defence of honest mistake regarding the age of the complainant. It follows inevitably that section 2(1) was also inconsistent with the Constitution at the time it came into operation. By virtue of Article 50.1 of the Constitution, section 2(1) did not “continue to be of full force and effect...” after 1937.

The judgment of the Supreme Court then referred to Hardiman J.’s explanation of inconsistency in the *C.C.* judgment.<sup>610</sup> In particular his statement that the consequence of the provision’s inconsistency with the Constitution was that it did not continue to be of “full force and effect,” as provided by Article 50.1 of the Constitution.

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<sup>610</sup> Page 86 of *C.C.*

Fennelly J. described the situation in the *ZS* case as a “unique circumstance”. Insofar as the availability of a defence of honest mistake is concerned, section 2(1) was indistinguishable from section 1(1), on which the Court has already pronounced, and therefore under Article 50.1 of the Constitution section 2(1) could not continue. According to the Supreme Court, as section 2(1) was inconsistent with the Constitution section 2(1) ceased to have any effect in law from the time of coming into operation of the Constitution. Accordingly, it had no force in law at the date of the passing of the Criminal Law Act, 1997 and its amendment by that Act had no legal effect. In 1997, the Oireachtas did not purport to re-enact section 2(1). It mistakenly assumed that it was still in force. The amendment of 1997 took the form of the deletion of the words “of or over the age of fifteen years and” from section 2(1) of the Act of 1935. The Oireachtas was not deemed to have re-enacted section 2(1) as it had done, in the case of section 29 of the Courts of Justice Act 1924, by section 48 of the Courts (Supplemental Provisions) Act 1961, considered in *People (Attorney-General) v. Conmey*.<sup>611</sup>

This highly unusual situation, the Supreme Court averred, was the consequence of the *C.C.* judgment of 2006, which declared “a materially identical” provision to be inconsistent with the Constitution. The *ZS* situation was found to be fundamentally different from the legislative provision at issue in *ESB v. Gormley*.<sup>612</sup> In that case, there were two provisions *in force* which were amended in a way which the Court found to amount to effective re-enactment, whereas, section 2(1) did not survive the entry into force of the Constitution. It was not in force in 1997 and could not be amended by the Criminal Law Act of that year. Section 2(1) of the 1935 Act was, for the same reason as was held in relation to section 1(1) in *C.C.*, inconsistent with the Constitution.

The Court allowed the appeal and set aside the order of the High Court. It agreed to a declaration that section 2(1) of the Criminal Law (Amendment) Act 1935 is and was at all material times inconsistent with the Constitution.

The decision has implications for a small number of other people charged with the same offence since repeal, but it has been reported that the Director of Public Prosecutions may explore bringing prosecutions on other bases.

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<sup>611</sup> [1975] 341

<sup>612</sup> [1985] I.R. 129.

## SECTION 4:

# A RE-EVALUATION OF MANDATORY REPORTING AND OTHER MISCELLANEOUS ISSUES

### 4.1 Introduction

In 2009, the issue of mandatory reporting was brought into the spotlight following the publication of the *Report of the Commission to Inquire into Child Abuse* (the ‘Ryan Report’).<sup>613</sup> This was followed by the Commission of Investigation *Report into the Dublin Archdiocese, July 2009* (the ‘Murphy Report’).<sup>614</sup> Despite persistent calls by children’s rights groups and charities, mandatory reporting was not introduced on to the Irish statute book at that time. This matter was considered in detail in my *Third Report of the Special Rapporteur for Child Protection*.<sup>615</sup> However, the recent publication by the Commission of Investigation of the *Report into the Catholic Diocese of Cloyne, December 2010* (the ‘Cloyne Report’) (see Section 4.3) and the commitment by the government to introduce mandatory reporting on to the statute book means that the issue needs to be reconsidered.

### 4.2 *Third Report of the Special Rapporteur for Child Protection*

In my 2009 Special Rapporteur Report,<sup>616</sup> a review of the practice of mandatory reporting was carried out. Consideration was first given to the *Children First* policy document and the guidelines which were included in it regarding the reporting of child abuse. A revised version of this document was launched in July 2011<sup>617</sup> and has been accompanied by the *Child Protection and Welfare Practice Handbook*, launched by the Minister for Children and Youth

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<sup>613</sup> *Report of the Commission to Inquire into Child Abuse*, April 2009, available at <http://www.childabusecommission.com/rpt/pdfs/>.

<sup>614</sup> Commission of Investigation: *Report into the Catholic Archdiocese of Dublin, July 2009*. Available at <http://www.dacoi.ie/>.

<sup>615</sup> Shannon, *Third Report of the Special Rapporteur on Child Protection*. This report was completed prior to the publication of the Report of the Commission of Investigation into the Dublin Archdiocese.

<sup>616</sup> *Ibid.*, at Section 1.

<sup>617</sup> Available at [http://www.dcyw.gov.ie/documents/child\\_welfare\\_protection/ChildrenFirst.pdf](http://www.dcyw.gov.ie/documents/child_welfare_protection/ChildrenFirst.pdf).

Affairs, Frances Fitzgerald, TD, on 22 September 2011, which aims to ensure consistent application of the *Children First Guidelines* throughout the child protection services, a problem which had been previously identified.<sup>618</sup>

My 2009 Report included an analysis of the operation of the practice in several international jurisdictions. The form of mandatory reporting varies across these jurisdictions. Many limit the obligation to report to certain groups of professionals who work with children: however there are some jurisdictions which impose a blanket obligation.<sup>619</sup> The penalty to be imposed for failure to report also varies from the imposition of a fine to a fine and imprisonment. Each jurisdiction mandates the response to a report of child abuse, but for the most part, the response is an investigation/inquiry carried out by the State or its agents. One significant exception to this which was considered in the 2009 Special Rapporteur Report is Minnesota, which has made a concerted effort since 2000 to introduce a differential response model while still operating a system of mandatory reporting. New Zealand was examined as another example of an attempt to introduce a differential response model. At present, New Zealand has no scheme of mandatory reporting on its statute book but, as in Ireland, a public debate regarding its introduction is continuing in the wake of a number of high profile child protection scandals.

My 2009 Special Rapporteur Report also considered the benefits and disadvantages of the practice of mandatory reporting. It was concluded that, ultimately, the system of child protection which was in place in any jurisdiction was the crucial factor in ensuring effective child protection and this needed to be addressed in Ireland before a system or scheme of statutory mandatory reporting was introduced. It was recommended that Ireland should move towards a 'differential response model' of child protection and introduce a number of pilot schemes based on this model to assess its effectiveness in an Irish context. If the differential response pilots were effective, it was recommended that the *Children First Guidelines* be amended to reflect this new approach to child protection and then placed on a statutory footing. It was noted that a number of jurisdictions which operated a practice of mandatory

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<sup>618</sup> See for example Office of the Minister for Children and Youth Affairs, (2008) *National Review of Compliance with Children First: National Guidelines for the Protection and Welfare of Children*, (Dublin), at page 3. Available online at [http://www.omc.gov.ie/documents/publications/CF\\_Compliance.pdf](http://www.omc.gov.ie/documents/publications/CF_Compliance.pdf).

<sup>619</sup> Of the jurisdictions considered in the 2009 Report, Northern Territories (Australia), Delaware (USA) and the majority of Canadian Territories and Provinces imposed a blanket obligation to report. New South Wales (Australia), Western Australia, Minnesota (USA) and Yukon (Canada) all impose obligations to report on certain groups of professionals alone.

reporting had moved to a differential response model with positive outcomes for child protection.<sup>620</sup>

The creation of the new Agency and the ongoing reform programme offer a further opportunity to introduce a new model of service delivery in the child care area. I welcome the fact that four pilot sites have been established to explore the operation of new practice models. I am particularly interested in the Differential Response Model (DRM) site established in north Dublin. I hope that the evaluations of these models will be drawn upon to develop a composite delivery model when the new Agency is established.

### **4.3 Report by the Commission of Investigation into the Catholic Diocese of Cloyne**

The report by the Commission of Investigation into the Catholic Diocese of Cloyne<sup>621</sup> has resulted in further discussion on mandatory reporting. The report considered the actions of the Catholic Church and State authorities in handling abuse allegations in the diocese of Cloyne between 1996 and 2009. The findings of this report are shocking in the extreme and, needless to say, there has been a prolonged public outcry for an appropriate State response to the clear and horrific failures of the Church authorities to protect children. It is, however, the active cover-up by the Church authorities of abuse allegations and the refusal to report these allegations to the appropriate authorities that is of particular concern. Despite ostensibly following and implementing child protection guidelines, the Church authorities essentially stood by while child abuse was going on. Criticism was also levelled in the report at An Garda Síochána for a failure to carry out adequate investigations in some cases where allegations had been reported.

In the wake of the publication of this report, children's rights groups called for legislation to be introduced to place the *Children First* guidelines on a statutory footing<sup>622</sup> and a commitment to do this was given by the Government.<sup>623</sup>

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<sup>620</sup> Shannon, *Third Report of the Special Rapporteur on Child Protection*, at section 1.6.

<sup>621</sup> Commission of Investigation: *Report into the Catholic Diocese of Cloyne, December 2010*. Available at [http://www.justice.ie/en/JELR/Pages/Cloyne\\_Rpt](http://www.justice.ie/en/JELR/Pages/Cloyne_Rpt).

<sup>622</sup> See for example <http://www.childrensrights.ie/index.php?q=knowledgebase/child-protection/childrens-rights-alliance-response-cloyne-report-publication>.

<sup>623</sup> <http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/press/130711-coyne2.htm>.



### 4.3.1 Government Commitment

The government committed itself in the wake of the publication of the Cloyne Report to placing the *Children First Guidelines* on a statutory footing. As noted above, these guidelines have been recently revised. This commitment was also made in the aftermath of the publication of the Ryan Report.<sup>624</sup> It is likely, however, that the current commitment will be fulfilled, following the creation of a new Government Department of Children and Youth Affairs with a specific Minister for Children and Youth Affairs overseeing the Department.

In addition to the above, the Department of Justice and Equality recently published the scheme of a Bill which makes it an offence to withhold information regarding the commission of arrestable offences against children and vulnerable adults. The Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011, discussed earlier in this report, provides provisionally that where a person knows or believes an arrestable offence has been committed against a child or vulnerable adult and has information which might be of material assistance in securing the apprehension, prosecution or conviction of the perpetrator, and fails without reasonable excuse to disclose that information to An Garda Síochána, such a person will be liable to be prosecuted for an indictable offence. The penalty suggested at the moment is imprisonment for a term not exceeding five years and/or a fine.

While this Bill is very wide in scope, it is materially different from the mandatory reporting regimes considered in the 2009 Special Rapporteur Report. First, it is not confined to abuse of children but encompasses all arrestable offences committed against a child, although it can be argued that any offence committed against a child is an abuse of some sort. The obligation is imposed on all people. It also requires that the information be passed not to the child protection services but to An Garda Síochána.

It is difficult to carry out any proper analysis of the Bill as it is in the very earliest of stages. That said, in addition to the matters outlined in Chapter 3 of this report, the following issues need to be considered:

- If this Bill is not to include the placing of the *Children First* guidelines on a statutory footing and that is to be done in a separate statute how will these two statutes interact?

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Available at [http://www.omc.gov.ie/documents/publications/Implementation\\_Plan\\_from\\_Ryan\\_Commission\\_Report.pdf](http://www.omc.gov.ie/documents/publications/Implementation_Plan_from_Ryan_Commission_Report.pdf).

- Will the obligation imposed under the Criminal Justice Bill to report information to An Garda Síochána be in addition to any obligation imposed under a putative Bill codifying *Children First*?
- What will be the response of An Garda Síochána to information received as a result of this new obligation: a criminal investigation alone or will there be some requirement to interact with the child protection services?

#### **4.3.2 Conclusion**

The response of the Minister for Children, Frances Fitzgerald, TD, to the Cloyne Report is to be commended. The failings in the child protection system need to be addressed; however, the same concerns which existed when my Third Report was published remain. Mandatory reporting is not necessarily a good or bad practice to have in place: it is the system which underpins all the child protection legislation which needs to be effective. If mandatory reporting is introduced without the proper resources and procedures in place, it could weaken the effectiveness of the system. Consideration must be given to how such a scheme will operate.

#### **4.4 Proposed Amendment to the Child Care Act 1991**

The Child Care Act 1991 ('1991 Act') is described therein as "*An Act to provide for the care and protection of children and for related matters*". As the risks to children are forever developing and evolving it is imperative that the statutory protection of children replicates this. One of the main concerns amongst those involved in child protection is early detection of risks to children. The key to any successful child protection system is detection and prevention. Whilst a child protection system also provides supports and reliefs to children who have suffered at the hands of their carers or others, arguably that is a recognition of the failure of the child protection system in respect of that child. The perfect system would prevent harm before it happens. As aspirational as it may be the perfect system must always be the ultimate objective so as to best safeguard the children of our society.

It is proposed that greater emphasis be placed on the detection and identification of risks to children before such risks manifest themselves in harm to the child. Section 3 of the 1991 Act

dictates that this is the role and indeed duty of the HSE. Furthermore, section 16 imposes a duty on the HSE to apply to court in circumstances where the HSE is of the view that the welfare and best interests of the child dictate that the child ought to be made the subject of a care order or supervision order. Thus it is the HSE alone that polices the safety and welfare of children in Ireland. The question must be asked, is this sufficient?

It is a genuine fear that a referral might be made to the HSE by a person who is of the view that a child is not receiving adequate care and protection, but that, owing to, for example, resource constraints the HSE might not be able to investigate the matter until it is too late. A solution must be found and in that regard it is proposed that the standing of those who are entitled to apply to court in respect of the welfare and protection of a child be extended.

If a person is of the view that the HSE is failing in its duty to a child then that person is limited in the manner in which he/she may progress the matter. A complaint may be made to the Children's Ombudsman and be pursued as a case of maladministration. Another avenue is to initiate a judicial review of the decision of the HSE but the costs involved in such an application are often viewed as a deterrent, let alone the delays. In *C.L.T. v. H.S.E. and another*<sup>625</sup> the applicant grandmother of the child brought a judicial review seeking to compel the HSE to institute proceedings in the District Court seeking either a care order or supervision order in respect of the child. The HSE had investigated the matter and concluded that there was no risk to the child. Judge McMahon, granting the relief sought, concluded that one must not only look at the likelihood of the complained act occurring, but also the seriousness of the harm to the child in the event of it occurring so as to properly calculate the risk to a child. This case demonstrates that court supervision of decisions taken by the HSE is vital in order to ensure the effective operation of our child protection system.

It is proposed that the 1991 Act be amended so as to allow any person apply to court for directions in relation to a child that is not in care but in respect of whom the person has a concern. On foot of such an application the court could then give such directions or make such order affecting the welfare of the child as it deems proper. At present such directions or orders can only be sought when a child is in care, or by a guardian of a child pursuant to section 11 of the Guardianship of Infants Act 1964.

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<sup>625</sup> [2010] IEHC 467.

This proposal may well meet resistance on the ground of it being excessively broad and thereby encourage nuisance applications to come before the courts. However, it is important to emphasise that this proposal is intended to apply only in exceptional circumstances and the wording must be circumscribed accordingly. It is proposed that it would only apply as follows:

- In respect of children of whom the HSE are already aware but for whom no steps have yet been taken. This avoids the courts being used as the point of first referral in respect of child protection concerns. The point of first referral must always be the HSE, but if it is deemed to have failed in its duty then orders may have to be made against it.
- No private family law proceedings concerning the child should be in being. Section 20 of the 1991 Act already enables the court in the context of private family law proceedings under the Guardianship of Infants Act 1964 to make orders and directions in respect of a child where there may be concerns as to his/her welfare.
- The threshold to be satisfied so as to bring the matter to court must be relatively burdensome. For example, the applicant should have to demonstrate to the court that there are “reasonable grounds for believing that the child in question is not receiving adequate care and protection”.

#### **4.4.1 Recommendation**

*Amend the Child Care Act 1991 so as to enable any person to apply to the court seeking an order or direction in respect of a child who is not the subject of proceedings under the Child Care Act 1991 or the Guardianship of Infants Act 1964, but who has been brought to the attention of the HSE, where there are reasonable grounds for believing that the child in question is not receiving adequate care and protection.*

#### 4.5 *Nottinghamshire County Council v. B.: Impact on Adoption?*

On 15 December, 2011, the Supreme Court delivered a majority judgment in the case of *Nottinghamshire County Council v. B.*,<sup>626</sup> a case which justifiably might be described as being one of the most significant judgments in family law jurisprudence in Ireland for some time. It was a child abduction case in which the married parents of two children, relying on Article 20 of the Hague Convention, sought to resist the return of the children to England on the basis that the return would lead to the adoption of the children out of the family unit in circumstances where this would be contrary to the Irish Constitution. O'Donnell J., delivering the majority decision, identified the two substantive issues for determination at paragraph 13 as

- (i) In what circumstances does the Constitution have regard to and/or attribute legal significance, to events occurring abroad? In particular when can acts occurring abroad be said to be in breach of the Irish Constitution?
- (ii) When is a non citizen (or non resident) entitled to invoke the provisions of the Irish Constitution in an Irish Court?

These are questions of considerable importance, but do not need to be considered in great detail in the context of this report. As is evident from the judgment of O'Donnell J. the answers to these questions are dependent on the legal and factual matters before a court in any given case and are not questions which lend themselves to generalisations in terms of principles to be applied. It is further to be noted that O'Donnell J. was at pains to emphasise that the reasoning adopted throughout the course of his judgment was directed towards the issues before the Court in that case. That said, however, a number of issues were raised in the judgment which, albeit they were not necessarily considered in great detail, still give rise to issues of importance.

At paragraph 48 O'Donnell J. calls into question the legal basis upon which a child may be adopted out of a constitutional family (i.e. a married couple under Irish law). Heretofore it has been commonly accepted that children of a marital family can only be adopted out of that family in accordance with Part 7 of the Adoption Act 2010 (previously the Adoption Act 1988). That said, O'Donnell J. states:

In my view, it is a similar error to assert that only the adoptions permitted under the particular procedure of that Act are permitted by the Constitution. In fact, all that can be said both as a matter of

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<sup>626</sup> [2011] IESC 48.

logic and as a matter of now impregnable constitutional law is that the provisions of the 1988 Act do not offend the Constitution. However, it would be extremely surprising if the provisions of that Act, designed to safely surmount constitutional challenge, were by some happy or unhappy chance to identify the only circumstances in which the Constitution would permit adoption of children of a married couple.

The learned Judge continues at paragraph 49:

However, I would be very slow, at a minimum without much more elaborate and comprehensive argument than was made in this case, to conclude that in some way the 1988 Act prescribes the absolute minimum that can be permitted in respect of adoption of children of a family so that any statutory code which does not reproduce the precise details of the 1988 Act would if part of the law of Ireland, be unconstitutional.

One has to ask the question that if the adoption of a child can be permitted outside of the statutory framework currently in place then what regulation could there be of the adoption process in Ireland? If a person seeking to adopt a child out of a marital family was not required to do so pursuant to Part 7 of the Adoption Act 2010 (formerly the Adoption Act 1988) then on what basis would such a state of affairs be deemed to be legal? These are significant issues that are now called into question in light of the judgment.

That said, it must be borne in mind that the Adoption Act 1988, now constituted at Part 7 of the Adoption Act 2010, was specifically tailored to fall within the terms of the Constitution, in particular Article 42.5 thereof. Arguably the grounds upon which a child may be adopted out of a marital family are too restrictive. It is unclear whether the Supreme Court is of the view that such an adoption might be permissible on less restrictive grounds. However, it is submitted that for there to be real reform in this area a referendum on children's rights including consideration of this issue is necessary.