Tenth Report of the Special Rapporteur on Child Protection

A Report Submitted to the Oireachtas

Professor Geoffrey Shannon

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Dr Geoffrey Shannon

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EXECUTIVE SUMMARY

SECTION 1: DEVELOPMENTS RELATING TO INTERNATIONAL INSTRUMENTS AND STANDARDS

In 2016 the Committee on the Rights of the Child reported on the implementation of children's rights in Ireland and made a number of observations and recommendations. Ireland's ratification of international instruments progressing children's rights and the various domestic legislative steps taken in that regard were commended. However, notably, the Committee observed that Ireland had still not fully incorporated the UN Convention on the Rights of the Child (UNCRC) into Irish law. The Committee also made observations on socially divisive issues in Ireland such as the influence of religious faith on a child's entitlement to be admitted to a particular school.

In 2016 the Committee also published *General Comment No. 19 on Public Budgeting for the Realisation of Children's Rights (Art.4)* which provides guidance on the legal obligations under Article 4 of the United Nations Convention on the Rights of the Child relating to investing financially in children. The Committee emphasises the need for public budgets to be managed bearing in mind the four general principles of the UNCRC, namely – the principle of non-discrimination, the right to be heard, the principle of the best interests of the child and the right of the child to life, survival and development.

The Committee observed a lack of specific budget allocation for the implementation of UNCRC objectives. In addition, a significant increase in the number of children living in 'consistent poverty' was observed, coupled with significant delays in accessing social housing for many homeless families and the inappropriate, temporary or emergency accommodation provided on a long-term basis in some cases. These concerns are particularly acute amongst children in disadvantaged groups of society, e.g. from Traveller, Roma or refugee backgrounds. These are matters to be addressed in the present as a failure to do so has been shown to lead to greater, and more costly, social problems in the future such as unemployment, crime and ill-health.

Concerns regarding the sale of children, child prostitution and child pornography are ever present. This is both an international and domestic child protection concern. At an international level a protocol to the UNCRC has been published, namely the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography ('second Optional Protocol to the CRC). Although Ireland signed the second Optional Protocol to the CRC in 2000 it has not yet ratified it. Ireland remains the only member state of the European Union not to have ratified the second Optional Protocol to the CRC. The two main premises of the second Optional Protocol to the CRC are that 1) there is an obligation on states to ensure the protection of all children, and 2) child exploitation is criminal in nature, and perpetrators must be held accountable.

Whilst the domestic legislative regime has been bolstered over the last number of years to combat the sale of children, child prostitution and child pornography it needs to be applied to give proper effect to the legislative intention. In this regard, the US Department of State 2016 Trafficking in Persons Report has voiced concerns as to ongoing issues in Ireland in relation to the victims of sex trafficking and forced labour, including that of children. Prosecutions ought to be pursued and lengthy sentences handed down on conviction. In addition, specialised services ought to be available for victims of such crimes. In 2015 the High Court found that the current scheme for identifying and protecting victims of human trafficking is inadequate. Greater efforts must be made to address these serious concerns.

The phenomenon of international migration increasingly affects millions of children. Notwithstanding increasing calls at an international level to do so, Ireland has not yet ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This Convention seeks to afford equal treatment and respect to migrants as is afforded to nationals. It is also highly relevant to the rights of migrant children whose numbers continue to grow owing to displacement as a consequence of war, for example the Syrian conflict. One in five of the refugees and migrants who arrived in Europe via the Mediterranean in 2015 were children. In addressing child migration the first step to be taken is to ensure an effective and appropriate age assessment procedure. It is necessary to first accurately ascertain the age of a child in order to properly address his/her needs. The statutory or standardised age assessment procedures in Ireland should be reviewed. International best practice should be followed in any such review and a rights-respecting age assessment process invoked.

The increase in child migration brings with it a corresponding impetus to bolster family tracing and reunification processes for the benefit of migrants. Ireland has opted out of the provisions of the EU Directive on the Right to Family Reunification, which sets common rules for those living legally in EU states to be reunited with family. Ireland has consequently fallen behind best practice in the EU. The right to family reunification needs to be placed on a legislative footing.

Children have a right to be heard in public and private law cases. This right is enshrined in the UNCRC. The scope, meaning and implementation of a child's right to be heard in public and private law cases is a complex issue. It requires consideration of a number of factors including the assessment of children of an age appropriate to express their views; when such an assessment is to take place; how those views are to be ascertained; the type of representation to be afforded to children; and the assessment of children's views. Unfortunately Ireland continues to lag far behind other industrialised states when it comes to implementation of the right of children to be heard in proceedings affecting them. This is an issue that has been addressed in previous years in this report. The Children and Family Relationships Act 2015 (the "2015 Act") has brought significant changes to Irish family law. One positive development is that it places on a legislative basis the requirement that in any proceedings related to guardianship, custody or access the court shall also have regard to the views of the child. However, this provision comes with much uncertainty about how children's views can or should be obtained by the courts, considering the lack of procedures, processes and infrastructure for this purpose. In particular, financial resources need to be made available to make this a reality.

The child protection system in Ireland has undergone significant change in recent years but, when viewed against international comparators and best standards, it is clear that further improvement is required. The UN Committee on the Rights of the Child has commended Ireland for issuing the Children First Guidelines but has equally voiced concern as to the lack of power and resources afforded to the Child and Family Agency to ensure compliance with the Children First Guidelines. Referrals to child protection services in Ireland are increasing necessitating an increase in resources to those services. There are, however, problems with recruitment and retention of social workers and also a growing concern within the Irish child protection system of social workers and other practitioners being overwhelmed by policy requirements to the detriment of the services they are to provide.

In 2006 the age of criminal responsibility in Ireland was raised from seven to 12 years, except for more serious crimes such as murder or rape where the minimum age is set at 10 years. Viewed in the overall context of the right of a child to partake in certain acts dependent on his/her age, the minimum age of criminal responsibility in Ireland is highly illogical. Ireland has been called upon repeatedly at UN level to amend the minimum age of criminal responsibility. The Committee on the Rights of the Child has recommended in its recent report that Ireland set the age of criminal responsibility at 14 years for all offences. In particular, the Committee asserts that multiple ages of criminal responsibility, which at present exist in Ireland, whereby younger children will be held responsible for more serious crimes, is not permissible.

SECTION 3: COMMENCEMENT ISSUES AND PATHWAYS TO PARENTAGE IN THE CHILDREN AND FAMILY RELATIONSHIPS ACT 2015

The Children and Family Relationships Act 2015 was passed by the Oireachtas in April 2015. One of the most significant family law developments in Ireland in decades, the 2015 Act heralds a move away from the exclusive concept of the family based on marriage to ensure that the law in this jurisdiction also places protection around the diverse types of modern families that exist in Irish society today. A number of provisions commenced on 18 January 2016, including guardianship provisions, the reforms in relation to access and custody, the enforcement order regime, the new maintenance obligations and the "best interests" provisions.

Notwithstanding earlier drafts of the 2015 Act, the 2015 Act as published does not address the issue of surrogacy. In the absence of comprehensive legislation for parental status in assisted reproduction there is no legal regime in place to govern donor-assisted human reproduction and protect the rights of all involved, including any child conceived. The 2015 Act is revolutionary in that it makes provision for the establishment of parental status based on the giving of informed consent on the part of the intended parent, and the revocation of parental status on the part of the egg or sperm donor. Issues arise that remain to be addressed as to the manner and form in which information is to be provided to donors to ensure substantive consent in accordance with the 2015 Act is acquired. Particular difficulties may arise in relation to gametes acquired from abroad.

Sections 20 to 22 of the 2015 Act make provision for the establishment of parental status in respect of children who were born before the commencement of Parts 2 and 3 of the 2015 Act. This includes procedures performed outside the state where the person who performed the procedure was authorised to do so under the law of the place where the procedure was performed.

One of the most distinctive aspects of the 2015 Act is its provisions regarding donor anonymity. The ethics of anonymous donation is one of the most hotly debated issues in assisted reproduction worldwide. The 2015 Act provides for a donor identification regime and prohibits the use of anonymously donated gametes.

The 2015 Act establishes a National Donor-Conceived Person Register. This requires infrastructural development prior to its commencement. Donor-conceived children over the age of 18 years are entitled to request from the Minister for Health the information and contact details of their donor, as collected from the fertility clinic. The Minister is required to send to the donor a notice of this request and the donor is entitled to make representations to the Minister outlining his or her objections to the information being provided. These objections must be based on concern for the safety of the relevant donor or the donor-conceived child, or both. If the Minister is satisfied that "sufficient reasons" exist to withhold the information requested, he or she is entitled to refuse the request. The 2015 Act creates obligations with regard to the provision of information regarding the donor-conceived child to the donor and with regard to the provision of information to and regarding genetic siblings of donor-conceived children, where those children share a donor. Such information may only be provided with the consent of the donor-conceived person.

Perhaps the most controversial aspect of the 2015 Act is the provision it makes in relation to a donor-conceived person's birth certificate. Section 39 of the 2015 Act requires the Minister to notify An t-Ard-Chláraitheoir that the Minister holds a record in respect of a donor-conceived child. Where a donor-conceived child reaches the age of 18 years and he or she applies for a copy of his or her birth certificate, he or she will be informed that further information is available about him or her from the registrar. He or she will then be able to find out that he or she was donor-conceived.

One highly complex aspect of the 2015 Act is its enforcement provisions. Notably, these centre around enforcement of the obligations of Donor-Assisted Human Reproduction (DAHR) facilities under section 28 of the Act. DAHR facilities are under obligations to retain certain information and provide certain information to the Minister. The 2015 Act provides for the appointment of "authorised persons" who are tasked with the role of ensuring the operator of a DAHR facility complies with the obligations under the 2015 Act. Such authorised persons will have the power to enter into and inspect DAHR facilities. The Minister also enjoys enforcement powers, including standing to apply to the Circuit Court for relief against a DAHR facility.

SECTION 4: CHILD PROTECTION AND THE CRIMINAL JUSTICE SYSTEM

The Criminal Law (Sexual Offences) Act 2017 is now on the statute books in Ireland. This was the subject of extensive examination in my previous report (2016) and it is imperative that such an important piece of legislation from a child protection perspective be fully commenced without further delay.

In addition to the grooming of children for sexual exploitation there is an increasing trend in the grooming of children to carry out criminal acts to the profit of others. Adult criminals have targeted young persons to carry out criminal acts on their behalf. Whilst the common law on incitement may address this to some extent it falls short of what is required. In 2016 the legislature in Victoria, Australia announced the proposed introduction of a stand-alone statutory offence targeted at adults who groom children to carry out criminal offences on their behalf. This is known as "Fagin's Law". The terms of this new statutory offence are due to be published in 2017 and should inform such a debate in this jurisdiction.

There has been a definite movement in recent years in the criminal justice system towards greater deference and acknowledgement of the rights of victims of crime. This has been welcomed. In December 2016, the government published the Criminal Justice (Victims of Crime) Bill. The passage of this legislation is essential to ensure Ireland complies with its obligations under EU Directive 2012/29/EU. A statutory scheme accounting for the rights of victims of crime is therefore required and should be progressed forthwith.

In my report in 2010, I recommended that a Bail Support Scheme be introduced for the purpose of engaging with young offenders on bail with the aim of positively assisting them in an effort to avoid recurrent criminal behaviour. In 2016 the Minister for Children and Youth Affairs announced the establishment of such a scheme on a trial basis in Dublin. This is a welcome development. The trial scheme needs to be monitored closely to ensure its practical effectiveness so that the scheme can be rolled out on a nationwide basis at the earliest opportunity.

In my report in 2016, I highlighted a number of concerns pertaining to the operation of suspended sentences pursuant to section 99 of the Criminal Justice Act 2006. In the intervening period the High Court has declared sections 99(9) and (10) to be unconstitutional. Amending legislation to address this development has been published but not yet enacted. Issues remain pertaining to the operation of section 99 and the opportunity should be taken to address those issues by way of a comprehensive statutory response.

A growing and worrying development in society is that of cyber harassment of children on the internet and through social media. The effect of such conduct can be stark and there have been numerous instances of suicide or attempted suicide by victims of cyber harassment. Section 10 of the Non-Fatal Offences Against the Person Act 1997 addresses the offence of harassment. Whilst it is broad enough to capture cyber harassment the terms of section 10 require persistent acts of harassment. Section 10 is unlikely to be successfully invoked where there has been one incident of cyber harassment no matter how serious the act, or consequences thereof. Further, empirical evidence demonstrates that cyber harassment is under-reported and under-prosecuted thereby suggesting that section 10 does not sufficiently address such behaviour. In addition, "indirect harassment" (i.e. communications to a third party about the victim) is not presently captured by our criminal statutes. It is imperative that our criminal statute book keep apace with modern developments. In this regard, I welcome the announcement in December 2016 that the Government has approved the drafting of a Non-Fatal Offences (Amendment) Bill to address the aforementioned loopholes in current legislation.

A form of cyber harassment that has garnered attention in recent times is that commonly dubbed "revenge porn" whereby a person posts an intimate photo or video of another that had been generated on a consensual basis but the publication of which had not. The Law Reform

Commission has recommended a specific offence to address behaviour such as this. An intent to commit harm is a requirement for such an offence but the Law Reform Commission has also recommended a separate specific offence to address the publishing of intimate photos or videos of another without the intent to cause harm. This recommended offence is designed to target voyeuristic related activities commonly termed "up-skirting" or "down-blousing".

Children can be both victims and perpetrators of cyber harassment related activities. The prevalence of mobile devices and engagement in social media facilitates this. It must be borne in mind, however, that children can act with haste and absent-mindedness due to immaturity. Where appropriate children should not be introduced into the criminal justice system and suitable alternative means of addressing such conduct need to be considered.

While the criminal law seeks to prohibit certain behaviour and punish those who do not adhere to its provisions, a criminal prosecution is usually not the first priority for victims of cyber or digital harassment. Quite often, the real remedy sought by persons so affected is what is termed a "take down" – the immediate removal of the offending publication or image from the website it has been posted on. Empirical evidence to date suggests that it is often difficult to have a social media company remove a posting. These companies regularly place a premium on policies in aid of free speech. Such matters are not assisted by the absence of clear rules. Each company operates its own self-regulated code in that regard. The ad-hoc nature of existing take down processes, which are dependent on each company's specific policies, means that individuals are at the mercy of each company, its regime and approach as to whether it will take the impugned material down and how quickly it will do so.

The Law Reform Commission has proposed the establishment of a new statutory oversight system with a dual role of promoting digital safety and ensuring an efficient take down procedure for harmful digital communications. The proposed Office of the Digital Safety Commissioner of Ireland would therefore oversee an "effective and efficient" take down procedure in a timely manner, regulating for a system of take down orders in respect of harmful cyber communications made in respect of both adults and children. Included in the role of the Digital Safety Commissioner would be to publish a Code of Practice on a Take Down Procedure for Harmful Communications.

In 2016, Humphreys J. considered an application for leave to judicially review a decision taken by the Child and Family Agency in the course of an investigation into alleged sexual abuse of a child. He examined to what extent a Court can or should intervene during the process of investigation, prior to the formation of an opinion as to whether a complaint is well-founded. Humphreys J. set out the following four principles to be considered in such applications:

- the amenability of the investigative process to judicial review;
- the level of natural justice required in the process;
- the relevance of discretion and full disclosure to the intervention of the court and any necessary undertakings; and
- the need for the applicant to personally swear the grounding affidavit.

SECTION 5: MISCELLANEOUS ISSUES

The Children and Family Relationships Act 2015 has vastly expanded the jurisdiction of the court to order expert reports in family law proceedings. It introduces a number of important amendments into the Guardianship of Infants Act 1964 that significantly broaden the circumstances in which expert reports may be ordered in family law cases. These amendments brought in by the 2015 Act not only widen the basis on which an expert report may be ordered, they also serve to expand to the District Court the power to order such reports, where previously only the Circuit and High Courts could do so. Ensuring that the District Court has power to order expert reports under s.32(1)(a) is an important development that enables this court to use experts extensively where their assistance is required on any question affecting the welfare of the child. It cures the previous anomaly whereby the District Court could not appoint experts in such cases and recognises that this court deals with vast numbers of cases concerning children and may need to utilise the experience and guidance of experts in its dealing with certain cases.

Prior to the enactment of the 2015 Act a perennial issue with the procurement of expert reports in family law proceedings was the cost associated with same. Often the cost of such reports, in the region of €3,000 - €4,000, proved prohibitive thereby depriving the parties and the court of the benefit of such expertise. The 2015 Act has not ameliorated that issue and it is set to remain a particular operational difficulty in that regard. The net effect of this in the

context of the 2015 Act is to potentially deprive a child of the opportunity for his or her voice to be heard as a result of costs.

One of the most significant international events of 2016 was the result of the referendum held in the United Kingdom leading to the introduction into our vernacular of the term 'Brexit'. The impact of 'Brexit' is largely uncertain in circumstances where no Member State has left the EU previously. The anticipated effect of same on this jurisdiction remains a matter of great concern. Specifically, how Britain's decision to leave will affect the international operation of child and family law and in particular the UK's dealings with Ireland in this area of law is questionable. What is clear is that family law in the UK is strongly influenced by its membership of the EU and undoubtedly its exit from the Union will have significant consequences.

It is not yet clear what impact 'Brexit' will have on Irish family law. 'Brexit' is certain to have an impact but for the time being the United Kingdom remains a member of the European Union and the legal position continues to operate as it did prior to the referendum vote. Whilst the United Kingdom will no longer be bound by European Union law on leaving the European Union, there are a number of international family law related conventions that the United Kingdom will remain a party to thereby providing some continuity. In addition, suggestions have been made in the United Kingdom to repeal the Human Rights Act 1998 thereby removing the United Kingdom from the jurisdiction of the European Court of Human Rights. No immediate steps are expected in this regard but this situation must be monitored closely.

RECOMMENDATIONS

1.2.1 Report of the Committee on the Rights of the Child on Ireland

Ireland should take all necessary measures to fully incorporate the UN Convention on the Rights of the Child into domestic law. A detailed legislative assessment should be undertaken to determine how best to do this.

Ireland should enact legislation stipulating statutory obligations for public entities to respect the UN Convention on the Rights of the Child in relevant administrative proceedings and decision-making processes.

Ireland should work to implement the other recommendations of the Committee on the Rights of the Child delivered in the recent set of concluding observations.

1.3.4 General Comment No. 19 – Children and Budgets

Data and information about children should be collected and disseminated to inform legislation, policies, programmes and budgets in a way which advances children's rights.

Sufficient public resources must be put in place to fully implement legislation, policies, programmes and budgets which aim to progress children's rights.

Ireland must demonstrate how the public budget-related measures chosen in this country result in improvements in children's rights, and publish 'children's budgets' annually.

Budget allocation must be conducted with regard for the four general principles of the CRC – the principle of non-discrimination, the right to be heard, the principle of the best interests of the child and the right of the child to life, survival and development.

Ireland should identify groups of children experiencing discrimination, and manage public budgets to implement special measures to benefit them. Specific budgetary allocations should

be made for Traveller and Roma children and children with disabilities and these allocations should be protected in times of financial crisis.

It is crucial that resources and training are made available to ensure that children are heard on budget allocation. There are examples of good practice and suitable methodologies from around the world which should be drawn upon for this purpose.

It must be made clear how all age groups have been considered in budget allocation.

Ireland should continue the increased investment in early childhood development because of its vital importance.

Ireland must consider future generations in budget allocations, developing sustainable revenue and spending projections for future years.

Ireland must integrate and apply the principle of the best interests of the child in all phases of budgets. CRC-based child rights impact assessments should be conducted to determine how budgets affect children.

Ireland should follow the budget principles of effectiveness, efficiency, equity, transparency and sustainability.

A specific budget allocation for the implementation of the CRC should be put in place.

Social welfare payments, particularly those affecting children, should be reviewed having regard to the higher costs of living.

A children's rights approach should be taken when formulating the State budget including an assessment of the budget needs of children, the use of children's rights indicators and CRC-based impact assessments.

Ireland should revise poverty reduction targets for 2020 to better take into account children living in 'consistent poverty', and establish a detailed action plan outlining targets and timeframes.

The availability of social housing and emergency housing support should be increased as a matter of priority, with adequate safeguards, reviews and evaluations put in place for such provision.

1.4.5 Issues Regarding the Sale of Children, Child Prostitution and Child Pornography

Ireland must ratify the Optional Protocol on the sale of children, child prostitution and child pornography forthwith.

Greater efforts should be taken to ensure that traffickers are held accountable through convictions and lengthy sentences.

Arrangements for identification of victims should be placed on a statutory basis, with special provision for children in this regard.

A more rights-based approach should be taken when tackling the issue of child trafficking and exploitation. A commitment should be made, for example, that children's rights (including the right to be heard), rather than solely their protection, will be a priority when dealing with child trafficking and exploitation. Legal guardians should be appointed for child victims of trafficking (and all unaccompanied minors). Regularisation of status should be a priority as should access to justice for child victims of trafficking.

Good practice examples from the UNICEF Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography should be considered.

1.5.7 Child Protection for Migrants and Refugees

Ireland must sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, including the optional protocol to this instrument that enables individual complaints.

Age Assessment Practice:

Ireland should clearly establish a policy on rights-respecting age assessment processes for migrant and refugee children. Ireland should follow international best practice in this regard, including the best practice guidance of the European Asylum Support Office: Age Assessment Practice in Europe.[1]

The best interests checklist should be followed in all age assessment processes to ensure the principle of the best interests of the child has been adequately applied.

In all age assessment processes individuals should be given the benefit of the doubt and treated as a child. As per General Comment No. 6 of the Committee on the Rights of the Child (Treatment of Unaccompanied and Separated Children Outside their Country of Origin)[2] *if uncertainty remains following age assessment, the individual should be afforded the benefit of the doubt so that if it is possible that the individual is a child, then the person should be treated as a child.*

[1] European Asylum Support Office, *Age Assessment Practice in Europe*.
[2] Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*.

Family tracing and reunification:

Ireland should ensure best practice in family tracing and reunification, heeding the 2016 report of the European Fundamental Rights Agency on migration-related rights.[3]

Ireland's family tracing and reunification processes should also follow the European Asylum Support Office's practical guide for family tracing, particularly recommendations concerning children's best interests and right to be heard.

Ireland should adopt the EU Directive on the Right to Family Reunification.

The right to family reunification (rather than solely the right to apply for the same) must be placed on a legislative footing in Ireland.

An independent Immigration Appeals Tribunal should be established to ensure that individuals have accessible appeals processes in cases where they have an adverse outcome in an application for family reunification.

Children should be able to apply for reunification with siblings without having to demonstrate that those siblings are dependent on the applicant child.

1.6.4 The Right of Children to be Heard in Public and Private Law Cases

Guidance should be provided as to how children will be heard in all proceedings affecting them. Such guidance should be in line with the Committee on the Rights of the Child's General Comment No. 12. In particular the following points are of importance:

- *A presumption in favour of hearing children should be adopted, with care taken that the approach to how and whether to hear children is context-appropriate*

[3] European Fundamental Rights Agency, *Thematic Focus: Family Tracing and Family Reunification* (European Fundamental Rights Agency, 2016). Available at: fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-family (last accessed 12 Dec. 2016).

(e.g. bearing in mind the age of the child). Children themselves should be the primary decision-makers on how and whether they are heard.

- *Particular care must be taken to facilitate children who may experience distinct difficulties in expressing their views, for example children with disabilities.*

- *Children should be permitted to instruct their own solicitor unless there are compelling reasons inclining against this.*

- *Systematic training should be provided to judges overseeing cases concerning children, specifically where they will be conducting interviews with children. Guidelines on the judicial interview should be introduced.*

- *'Due weight' means that children's views should be treated as a significant factor in the settlement of an issue concerning their interests, and decision-makers should explain clearly how children's views were treated.*

- *Legislation should be enacted providing for children to be heard in not just judicial proceedings, but also administrative proceedings.*

Adequate procedures, processes and infrastructure must be developed in Ireland for the purpose of hearing children in line with Article 42A of the Constitution and under the Children and Family Relationships Act 2015.

Hearing children should be interpreted as a fundamental principle of justice in Ireland, particularly in proceedings under the Hague Convention on Child Abduction (1980).

The discretion judges enjoy in Hague Convention cases concerning the treatment of children's objections to return should not be construed too narrowly.

1.7.3 Ireland's Child Protection System and International Developments

Ireland should ensure that adequate resources, to the maximum extent possible, are made available for child protection services so that referrals can be responded to quickly, and so the needs of children at risk are met in a timely manner.

There should be less focus on screening reports of abuse, and more on provision of support for families who need it, as well as timely removal of children into care where support does not work.

There should be a greater availability of community-based support services, and more data from Tusla about family support. All children in care should have a designated social worker at all times.

In line with an increase in resources for child protection, guidance for social workers should be reviewed in order to ensure that professionals do not feel overburdened by policies. Greater emphasis on professional judgement is required.

Greater resources should be made available to ensure the right of children in care to access visits with birth families, and to adequate provision of mental health and other services.

Greater attention to child protection planning is required, with thorough, timely child protection processes based on "rigorous assessment, planning and review" in line with UN General Assembly Resolution, Guidelines for the Alternative Care of Children.

1.9.1 The Minimum Age of Criminal Responsibility in Ireland

Consideration should be given to whether Ireland should implement a system modelled on Scotland's children's hearings system, with the ethos that all children coming to hearings require care and support.

In Ireland the overriding principle in the youth justice system, as in Sweden, should be that interventions should be based on the needs of the child rather than the crime.

In Ireland the age of criminal responsibility should be set at least at the age of 14 years for all offences, as recommended by the UN Committee on the Rights of the Child.

Adequate support should be made available to ensure that children who engage in criminal activity are provided with any support and care that may be required, and that adequate provision is also made for any victims of their crimes.

3.2.1 Assisted Human Reproduction and the 2015 Act

In view of the fact that the 2015 Act regulates donor-assisted human reproduction ('DAHR'), for the first time, there are certain steps that will need to be taken prior to and alongside the commencement of the relevant parts of the 2015 Act. The following actions are recommended to be undertaken in advance of commencement of those parts of the 2015 Act.

First, the 2015 Act requires that certain infrastructure be established in advance of commencement. In particular, the 2015 Act requires the establishment of a National Donor-Conceived Person Register.

Second, there is a need for departmental engagement with fertility clinics. It is essential that the clinics are assisted in achieving compliance with the new regime, and it is undoubtedly in the best interests of intending parents and their children (current and future) that the clinics become compliant as soon as possible.

Third, there is a need for public awareness activities in relation to the 2015 Act. Intending parents, and parents who already have donor-conceived children, should be informed about their legal position.

Fourth, there are some instances in which it may be advisable to provide further detail on the 2015 Act via secondary legislation. Section 41 of the 2015 Act enables the Minister for Health to make regulations prescribing any matter or issue which is referred to in Parts 2 or 3 as prescribed or to be prescribed. Regulations under Part 2 or Part 3 may contain such incidental, supplementary and consequential provisions as the Minister considers necessary or expedient for the purposes of the regulations.

Fifth, in some instances it may be appropriate for the relevant Minister to provide informal advice to clinics in the form of a guidance document. This has previously been used in the field of assisted reproduction; in 2012 the then Minister for Justice issued a guidance document on surrogacy arrangements entered into outside the State.[4]

3.3.1 Consent Regime for Parental Status

The form for consent certificates should be prescribed by ministerial regulation in advance of the commencement of Parts 2 and 3 of the 2015 Act.

3.3.3 DAHR Procedure

Consideration might be given in the future to establishing a regime whereby intending parents who engage in DAHR procedures overseas can establish their parental status. Such procedures would, presumably, be limited to DAHR arrangements which would be lawful if carried out in Ireland.

3.3.5 Consent Requirements

It is advisable that fertility clinics be provided with guidance as to the form in which information is to be provided to donors in order to ensure substantive consent in the form required by the 2015 Act is obtained.

3.3.7 Consent and the Acquisition of Gametes from Abroad

Section 26(1)(b)(ii) of the 2015 Act governs the issue of donor consent where a fertility clinic in Ireland acquires a gamete from outside the state. This provides that a DAHR facility is only entitled to use an acquired gamete where the donor of that gamete has consented to the use of the gamete in a DAHR procedure "where that consent is <u>*substantially the same*</u> *as that provided for in section 6." The section provides no further guidance on the definition of*

[4] See Department of Justice, *Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children born as a Result of Surrogacy Arrangements Entered into Outside the State* (21 February 2012). Available at http://www.justice.ie/en/JELR/20120221%20Guidance%20Document.pdf/Files/20120221%20Guidance%20Document.pdf.

"substantially the same." This may be an appropriate subject for ministerial guidance, as clinics will need to ensure compliance with this section in the course of their activities.

The question of the liability of an Irish clinic using foreign gametes should be explored e.g. presumably a mother would seek to avoid any obvious genetic defect being passed on to a child born through Assisted Human Reproduction.

3.3.9 Payment of Reasonable Expenses

The issue of payment of egg and sperm donors raises issues of an ethical nature. Engagement with fertility clinics is necessary. It may be the case that some Irish clinics may use gametes provided for sums of money in excess of the reasonable expenses specified.

3.3.11 Consequences of Inadequate Consent

It is advisable to clarify the position as to the extent, if at all, section 5 of the 2015 Act operates where the consent of the donor is incomplete, especially as there may very well be circumstances in which adequate consent is provided by the intending parents, but the consent of the donor is flawed. This would arise, for example, if anonymous eggs or sperm were used, or if the donor was paid in excess of reasonable expenses.

Clear guidance should be provided to both fertility clinics and intending parents as to the consequences of inadequate donor consent.

3.4.1 Retrospective Attribution of Parental Status

The key action that needs to be undertaken in respect of sections 20 to 22 of the 2015 Act is in relation to public awareness. These sections will only have the desired effect if the parents of donor-conceived children are made aware of them. In this instance, a public awareness campaign for family law solicitors would also be appropriate, given that most parents will not want to make these court applications in the absence of legal representation. It would also be appropriate to disseminate this information to fertility clinics. For most parents of donor-conceived children, they would be the first point of contact.

A further action that should be undertaken in relation to these sections is to enact amendments to the rules of the District Court and Circuit Court setting out the proofs as required in the 2015 Act, and any other practical rules that might assist the courts in streamlining applications of this kind. Section 21(1) expressly states that an application to the District Court shall be in such form as may be prescribed by rules of court.

3.5.4 Donor Identification Regime

It is important that there is engagement with the clinics to provide guidance on the donor identification regime established by the 2015 Act. In particular, clinics will need guidance on the acquisition of gametes from identifiable donors overseas and whether their current practices for identifiable donation comply with section 24 of the 2015 Act.

3.6.3 Transitional Provisions of the 2015 Act

Clarification is required as to consent required for the purpose of sections 26(5)(b), 26(6)(c) and 26(8)(b) of the 2015 Act. Primary legislation may be required to provide the requisite clarification.

3.6.5 Record-Keeping and Reporting Obligations of DAHR Facilities

Guidance ought to be given to DAHR facilities as to the steps required to be taken in obtaining information from intended parents to assist in such facilities complying with their legal obligations in that regard.

The 2015 Act suggests that DAHR facilities are under an indefinite obligation to retain records of consents and revocations. As many DAHR facilities are private organisations capable of being terminated at any time, consideration should be given to what should be required of clinics as regards records in the event that they cease operation. It might be appropriate for clinics to pass on this information to the Minister in such circumstances. Guidance could be provided to the clinics in this regard, or a legal obligation could be imposed in the form of primary legislation in the future.

3.7.1 National Donor-Conceived Person Register

On receipt of a request for information and contact details of a donor or donor-conceived person, the Minister for Health may refuse the request if "sufficient reasons" justify so doing. While it can be anticipated that each individual application for information will be decided on its own particular facts and merits, further guidance as to what may amount to a "sufficient reason" to withhold this information would be of assistance to the relevant persons.

The 2015 Act imposes a positive obligation on the Minister for Health not to release such information unless satisfied that the person has received counselling. Steps should be taken to ensure the availability of appropriate counselling on this complex issue.

3.7.4 The National Donor-Conceived Person Register and the Register of Births

Steps should be taken to ensure that counselling services are available to people who apply for a birth certificate and are informed that further information is available about him or her from the registrar. Appropriate sensitive procedures also need to be put in place for the dissemination of this information to such a person.

A culture of openness needs to be fostered in the general practice of donor-assisted reproduction in Ireland. A child ought not find out that he or she was conceived by way of donor-assisted reproduction from a state official. Rather, the parents of such a child should provide this information when appropriate.

3.7.6 Substantive Vindication of the Child's Right to Know its Genetic Heritage

Donors ought to be encouraged to maintain up to date contact details with the Donor-Conceived Person Register.

Infrastructure should be put in place to facilitate donor-conceived persons make cross-border contact with donors resident abroad.

3.9.2 Appointment of Authorised Persons

It would be prudent to have authorised persons appointed and in place prior to commencement of those provisions of the 2015 Act regulating DAHR facilities.

4.2 The Criminal Law (Sexual Offences) Act 2017

The Criminal Law (Sexual Offences) Act 2017 should be fully commenced as soon as possible in order to secure an effective response to sexual offending perpetrated against children, especially through the use of the internet and social media, bringing Irish law in line with the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.

4.3.1 Fagins's Law – Grooming Children for Crime

A statutory offence targeted at adults who groom children to carry out criminal offences on their behalf ought to be introduced in this jurisdiction. A lacuna presently exists in that regard and the development of "Fagin's Law" in Victoria, Australia provides a useful comparator from which our legislature can develop an appropriate statutory provision in this jurisdiction.

4.4.8 The Criminal Justice (Victims of Crime) Bill 2016

Pursuant to Directive 2012/29/EU (Victims' Directive) of the European Parliament and of the Council, Ireland is under an obligation to transpose same into national law by 16 November 2015. In July 2015, the Heads and General Scheme of the Criminal Justice (Victims of Crime) Bill 2015 were published and the government approved the drafting of a Criminal Justice (Victims of Crime) Bill along the lines of this General Scheme. The Criminal Justice (Victims of Crime) Bill 2016 was published in December 2016. For as long as this Bill remains unimplemented, Ireland is in default of its obligations under Directive 2012/29/EU. It is imperative, therefore, that the Criminal Justice (Victims of Crime) Bill 2016 be progressed to the point of enactment expeditiously.

4.5.1 Pilot Bail Support Scheme

The pilot Bail Supervision Scheme in Dublin needs to be monitored closely to ensure its practical effectiveness with a view to rolling out such a scheme on a nationwide basis at the earliest opportunity.

4.6.1 Suspended Sentences

In Moore & Others v DPP the High Court declared sections 99(9) and (10) of the Criminal Justice Act 2006 to be unconstitutional. As a consequence the Criminal Justice (Suspended Sentences of Imprisonment) Bill 2016 was published. This Bill addresses the aforementioned High Court decision. The Bill has not yet been enacted into law and it is recommended that the opportunity be taken to supplement the Bill further to address other aspects of section 99 of the Criminal Justice Act 2006 which remain a cause for concern.

4.7.6 Cyber Harassment and "Takedowns"

It is recommended that section 10 of the Non-Fatal Offences Against the Person Act 1997 be amended in line with the Law Reform Commission's Report on Harmful Communications and Digital Safety 2016, to include a reformulation of the definition of harassment to adequately account for information and technology communication advances. In addition, "indirect harassment", i.e. communications to third parties, should also be captured by the offence of harassment.

It is also recommended that the suggested offences published by the Law Reform Commission targeted at "revenge porn" and other voyeuristic activities such as "up-skirting" or "down-blousing" be introduced into Irish law in order to combat such harmful acts which do not necessarily fall within the scope of the current criminal statute book.

The definition of "intimate images" as proposed by the Law Reform Commission is to be welcomed. It includes a scenario whereby the subject person is nude or displaying intimate areas covered by underwear only. I suggest that this definition be expanded to include the exposure of intimate areas partially covered by clothing.

The Law Reform Commission recommends that children under the age of 17 years who commit cyber harassment related crimes should not be prosecuted without the consent of the DPP. I recommend that the age be increased to 18 years having regard to the definition of 'child' in our legal system.

Regard should be had to both the recommendations of the Law Reform Commission and the recommendations made in this Report in the drafting of the General Scheme and draft Heads of the Non-Fatal Offences (Amendment) Bill.

The Law Reform Commission has proposed the establishment of a new statutory oversight system with a dual role of promoting digital safety and ensuring an efficient take down procedure for harmful digital communications. The proposed Office of the Digital Safety Commissioner of Ireland would therefore oversee an "effective and efficient" take down procedure in a timely manner, regulating for a system of take down orders in respect of harmful cyber communications made in respect of both adults and children. It is recommended therefore that consideration be given by the government to Chapter 3 of the Commission's Report forthwith, to enable progress to be made in this regard and to ensure that steps are taken to establish an Office of the Digital Safety Commissioner. It is further recommended herein that the Office of the Digital Safety Commissioner be subject to strict timelines within which to act on complaints received and take such further steps as might be necessitated.

4.8.9 Investigations by the CFA into Allegations of Child Abuse

In light of the judgment of Humphreys J. in P.O'T. v Child and Family Agency [2016] IEHC 101 it is recommended that the CFA deal efficiently with all reports of complaints and suspicions relating to child abuse or neglect. Thought should be given to the means through which quicker investigations can be undertaken to avoid the significant risks mentioned in the judgment. This may necessitate a review into the allocation of resources in the CFA. In addition, the Tusla policy document entitled "Policy and Procedures: Responding to Allegations of Child Abuse and Neglect", published by the Child and Family Agency in September, 2014; and the "Child Protection and Welfare Practice Handbook" (HSE, 2011)

need to be reviewed in light of the concerns raised by the High Court as to whether the procedures prescribed therein comply with the principles of natural justice.

5.2.5 Expert Reports and the Children and Family Relationships Act 2015

Notwithstanding the enactment of the Children and Family Relationships Act 2015 the cost of expert reports in family law proceedings remains an issue. The 2015 Act now provides a mechanism through which the voice of the child can be heard in accordance with Article 42A of the Constitution. Arguably, this constitutional provision places a positive obligation upon the State to fund reports so as to vindicate the constitutional rights of those children whose parents cannot afford to fund an assessment or report privately. The establishment of state funding for expert reports in a systematic and accessible way should therefore be introduced as soon as possible.

The body established to address the funding of such reports ought to be separate to the Legal Aid Board as many lay litigants may require financial assistance for the preparation of a report ordered by the court in their case but they do not have or seek legal aid. What proportion of the costs of the report that the person will be expected to contribute, if any, should be determined by this body on a means-tested basis. The remainder should be claimed directly from the state by the expert.

Pursuant to section 32(1) of the Guardianship of Infants Act 1964, as inserted by the 2015 Act, the Minister for Justice and Equality may introduce regulations specifying both the qualifications and experience required of an expert appointed under section 32 and the fees and allowable expenses that may be charged by such an expert. It is recommended that these regulations be utilised to create a panel of experts who possess the requisite qualifications and experience to prepare such reports and who are available for this type of work, acting within the specific fees and expenses scale set out in the regulations. This will improve accessibility to such experts and also transparency on the issue of fees.

5.3.5 Brexit

In the wake of 'Brexit', and prior to the United Kingdom formally withdrawing from the European Union, it is recommended that the Irish government conduct an in-depth analysis into the implications for Ireland of Brexit in the area of family and child law.

SECTION 1:
DEVELOPMENTS RELATING TO INTERNATIONAL INSTRUMENTS AND STANDARDS

1.1 Introduction

In keeping with the structure of past reports, this report opens with an examination of recent developments in matters pertaining to child protection and welfare on the international stage, with a particular focus on comparing and contrasting international best practice to the Irish system. In the past year the UN Committee on the Rights of the Child published its concluding observations in respect of Ireland's compliance with UN standards, and in particular the United Nations Convention on the Rights of the Child. The more pertinent of those issues shall be addressed below.

1.2 Report of the Committee on the Rights of the Child on Ireland

The Committee on the Rights of the Child is the body of experts which monitors implementation of the UN Convention on the Rights of the Child (CRC). Part of the monitoring process is a periodic report which outlines areas of strengths and weaknesses in the implementation of children's rights in the state in question. The Committee responds to a report submitted by the state, and 'shadow' reports by other groups (such as the Ombudsman for Children, the Irish Human Rights and Equality Commission and non-governmental organisations), with the Committee ultimately providing recommendations on what improvements should be made in the state (referred to as 'concluding observations and recommendations'). Ireland's report was considered in January 2016 – technically it was a combined third and fourth periodic report as there had been such a delay since the last report in 2006[5] – and the concluding observations of the Committee were adopted on 29 January 2016.[6]

[5] Reports should generally be submitted every five years under section 44 of the UN Convention on the Rights of the Child.

[6] Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland* CRC/C/IRL/CO/3-4 (1 Mar. 2016). See also Department of Children and Youth Affairs, *Ireland's Consolidated Third and Fourth Report to the UN Committee on the Rights of the Child* (Department of Children and Youth Affairs, 2013); Children's Rights Alliance of Ireland, *Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child* (Children's Rights Alliance of Ireland, 2015) and Children's Rights Alliance of Ireland, *Picture Your Rights: A Report to*

The Committee acknowledged the ratification by Ireland of international instruments progressing children's rights such as the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, which permits individuals to take complaints of alleged breaches of the CRC. The Committee also praised the adoption of various legislative measures at a domestic level. Amongst other positive developments, the Committee referred to the Thirty-First Amendment of the Constitution (Children) Act 2012 which expressly recognises children as rights-holders under the Constitution; the Children First Act 2015 which improves child protection measures; the Children and Family Relationships Act 2015, which reforms family law to address the situation of children of diverse families; the Children (Amendment) Act 2015, which repeals the statute permitting the detention of children in adult prison facilities; and the Gender Recognition Act 2015 which provides that, from 16 years, the preferred gender of a person will be fully recognised.

The Committee notes that Ireland has not, however, taken all necessary measures to fully incorporate the CRC into domestic law. The Committee also notes that there is no legislation placing statutory obligations on public entities to respect the provisions of the CRC when engaging in relevant administrative proceedings and decision-making processes. In a previous report I noted that other countries such as Wales and Scotland have enacted such legislation.[7] The Committee recommends that Ireland conduct a detailed assessment – using adequate resources – into the legislative change required, and to consequently implement specific legislative amendments to ensure that the CRC is respected in decision-making processes.

The Committee praised the establishment of the Department of Children and Youth Affairs for the coordination of the implementation of children's issues but referred to a lack of clarity on responsibility around children's issues across Government entities. The Committee recommended greater clarity, and greater resources for implementation of children's issues. The Committee pointed to a lack of disaggregated data on children's rights and wellbeing, in particular pointing to the need for data on vulnerable groups such as Traveller and Roma children. Disaggregated data, including on the socioeconomic situation of various groups, should be gathered, and used for formulation, monitoring and evaluation of various policies,

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the UN Committee on the Rights of the Child from Children Living in Ireland (Department of Children and Youth Affairs/Unicef, 2015).

[7] See e.g. Rights of Children and Young Persons (Wales) Measure 2011. Available at: http://www.legislation.gov.uk/mwa/2011/2/contents (last accessed 1 Dec. 2016).

programmes and projects on children's rights and well-being. Ireland should also strengthen efforts to combat discrimination against Traveller and Roma children, as well as discrimination based on the sexual orientation or gender identity of children and establish a successor to the National Action Plan against Racism 2005 to 2008. The Committee emphasised the need for Ireland to ensure that the business sector complies with human rights.

The Committee recommended that Ireland go to greater efforts to ensure that the right of children to have their best interests as a primary consideration in all matters affecting them is integrated and applied in all proceedings and decisions. It should also be applied in relevant policies, programmes and projects. A number of recommendations were made for provision of supports and services for children with disabilities, including the adoption of a human rights-based approach to disability and the development of a comprehensive strategy for the inclusion and education of children with disabilities. The Committee criticised disparities in access to health between the general population on the one hand, and minorities such as Roma and Traveller children on the other, recommending that all necessary measures be taken to rectify this, including programmes specifically for the issuance of medical cards to these groups. The Committee also noted the low breastfeeding rates in Ireland, and recommended amongst other things the development and implementation of a national strategy on the breastfeeding of infants.

The Committee pointed to problems in provision of mental health care for children and adolescents, recommending legislation to provide for children's consent to and refusal of medical treatment; measures to improve mental health-care services for children and adolescents; establishing a mental health advocacy and information service for children and to further strengthen measures for the prevention of child and adolescent suicide (including through allocation of sufficient resources).

The lack of accessible options for children when it comes to opting out of religious classes was raised by the Committee. The Committee urged increasing the number of multi-denominational schools, and changing the practice of many schools which discriminate on the basis of religion when it comes to admission policies. Change to the Leaving Certificate was also recommended, in order to reduce the stress that it places on students. The treatment of asylum seeker children was noted, with the Committee urging Ireland to ensure to such

children the same standards of (and access to) support services as Irish children, in particular in their living arrangements, child protection standards and child allowance. The Committee also pointed to the need for adequate policies for dealing with the legal status of migrant children. The Committee considered the juvenile justice situation in Ireland, emphasising the need to raise the minimum age of criminal responsibility, to ensure detention of children is only used as a measure of last resort, and to ensure that under-18s are never held in detention with adults.

The Committee pointed to a low level of awareness of children's rights amongst public bodies, professionals and the public, and recommended greater efforts to initiate advertising and awareness-raising. The Committee advised that the Ombudsman for Children should be independently resourced, rather than through the Department of Children and Youth Affairs.

The Committee further considered a number of other important children's rights issues such as poverty, housing, the allocation of resources, the protection of children from abuse and neglect and the right of children to be heard in matters affecting them. Many of these issues are considered in greater detail throughout this section of my report.

1.2.1 Recommendations

- *Ireland should take all necessary measures to fully incorporate the UN Convention on the Rights of the Child into domestic law. A detailed legislative assessment should be undertaken to determine how best to do this.*

- *Ireland should enact legislation stipulating statutory obligations for public entities to respect the UN Convention on the Rights of the Child in relevant administrative proceedings and decision-making processes.*

- *Ireland should work to implement the other recommendations of the Committee on the Rights of the Child delivered in the recent set of concluding observations.*

1.3 General Comment No. 19 – Children and Budgets

1.3.1 CRC Article 4 – The Obligation to Implement the Convention

In 2016 the Committee on the Rights of the Child published *General Comment No. 19 on Public Budgeting for the Realization of Children's Rights (Art.4).*[8] Article 4 of the Convention on the Rights of the Child provides:

> States parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the 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 cooperation.

General Comment No. 19 assists state parties to the CRC in the implementation of Article 4 in relation to public budgets. It identifies the nature of the obligations that Article 4 places on states in this regard and makes recommendations on how to realise relevant rights, particularly those of vulnerable children, through effective, transparent and sustainable public budget decision-making; providing states with a framework through which to progress children's rights in budgetary decision-making. It is the first UN document to provide detailed guidance on the legal obligations relating to investing financially in children.

In the General Comment, it is explained that the obligation to undertake "all appropriate measures" refers to the duty to ensure that laws and policies result in budget allocation and spending which progress children's rights. It requires that data and information about children is collected and disseminated which also informs legislation, policies, programmes and budgets in a way which advances children's rights. It further requires that sufficient public resources are in place to fully implement such legislation, policies, programmes and budgets. States must actually demonstrate "how the public budget-related measures they choose to take result in improvements in children's rights."[9] Simply showing evidence of measures taken is insufficient – evidence of positive results is necessary for CRC Article 4 to be satisfied.

[8] Committee on the Rights of the Child, *General Comment No. 19 on Public Budgeting for the Realization of Children's Rights (Art.4)* CRC/C/GC/19 (20 Jul. 2016).
[9] *Ibid.*, para. 24.

States must immediately realise the civil and political rights in the instruments which they ratify, and must implement economic, social and cultural rights "to the maximum extent of their available resources". It is recognised therefore that the full realisation of economic, social and cultural rights will be achieved progressively. States must however meet basic requirements, and they must demonstrate that they have taken every effort to spend budget resources to fulfil children's economic, social and cultural rights. It should also be recognised that particular rights are not always easily categorised as either civil and political on the one hand, and economic, cultural and political on the other. Fair trial rights, for example, are a civil right, and yet a fair judicial system requires adequate resourcing.

The Committee emphasises that it is not permissible to take regressive measures when it comes to children's economic, social and cultural rights:

> In times of economic crisis, regressive measures may only be considered after assessing all other options and ensuring that children are the last to be affected, especially children in vulnerable situations.[10]

Therefore it is insufficient to claim that children's budgets must necessarily be decreased in a time of economic crisis.

1.3.2 General Principles of the CRC

The Committee emphasises that a budget allocation which progresses children's rights must be conducted with regard for the four 'general principles' of the UNCRC – principles of such importance that all other CRC rights must be interpreted bearing them in mind. These are – the principle of non-discrimination, the right to be heard, the principle of the best interests of the child and the right of the child to life, survival and development.

Regarding non-discrimination, states parties should identify groups of children experiencing discrimination, and manage public budgets to implement special measures to benefit them. All government branches, civil society and the business sector should be required to actively advance the right of children from these groups to be free from discrimination. Relevant legislation, policies and programmes should be reviewed to benefit these groups and budgets should be reprioritised or improved to this end.

[10] *Ibid*., para. 31.

Children should be heard in the process of budget allocation. The Committee stipulates that:

> States parties should take appropriate measures so that the groups of children who are affected, and others with knowledge about those children's situation, participate in the decision-making process related to such measures.[11]

Resources and training must be set aside to ensure that children can have a say in budget allocations – this constitutes an important part of ensuring that the process is transparent. The Committee points to the fact that there are many examples of good practice in this regard. One example of good practice is that many states publish 'children's budgets' annually.[12]

A recent report by *Plan International* documents many other good practice examples,[13] demonstrating how various forms of children's participation helped to strengthen budget planning in children's interests. In Honduras, for example, local youth committees acted to negotiate with politicians and other decision-makers to ensure better investments in children. They held assemblies, established a board representing their local Committees, developed proposals and then presented these to candidates running for Mayor. Mayoral candidates and representatives came together at a formal event at which they signed pledges committing to investing in children. Local government worked further with the children, approved with them a document on investment in children, and made it public policy.

Children around the world took part in a process of consultation conducted by Queen's University Belfast in 2014 where they gave views on what governments should invest in children's rights; including via the public budgeting process.[14] A survey was conducted in which 2,700 children took part from 71 countries. It was clearly demonstrated that children not only wish to be heard on the matter of how governments should spend money (and how this can be done in a way that progresses children's rights) but also that they are very capable of doing so. Methods and research instruments are proposed in the research to facilitate children's engagement in the process – these could be used at state level to glean children's views on state finances and budget-setting.

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[11] *Ibid*., para. 31.
[12] UNICEF, *Influencing Budgets for Children's Rights* (UNICEF, 2004).
[13] Plan International, *Good practices on children's right to participate in government budgeting* (Plan International, 2015).
[14] Laura Lundy *et al.*, *Towards Better Investment in the Rights of the Child: The views of children* (Queen's University Belfast, 2015).

Although children's views varied between contexts, children generally felt that investment in an adequate standard of living for children was crucial for all other rights, and that investing in children's rights was positive for all of society, in the present and in the future. Half of children in Europe feel that government does not think about children when allocating budgets. The top priorities for children in Europe are "support for families who cannot afford food/housing etc.", accessible healthcare and education, protection from harm and having their views taken seriously.[15] Children want to be included when it comes to public expenditure, and feel that investing in families means investment in children. They wish for governments to provide them with information about how they are spending money for children, and believe that their insight can help governments to make better decisions, and that "[m]aybe they need to be trained to understand our views."[16]

The third general principle is contained in Article 6 of the CRC – the inherent right to life and the obligation that state parties shall ensure the survival and development of all children. The Committee explains that the development of the child is "a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development" and that "implementation measures should be aimed at achieving the optimal development for all children".[17] The Committee emphasises that recognition of this principle requires an understanding that children have different needs at different stages of growth and development, so the relevant factors for children of all ages to survive, grow and develop must be taken into consideration. It must be made clear how states have considered all age groups in their budgets: state parties should show their commitment to children's rights by making visible the parts of their budgets that affect children in different age groups. States must acknowledge that investment in early childhood has a significantly positive impact on children's rights throughout their lifetime, breaking poverty cycles and yielding high economic returns which benefit all. States must also focus not just on the current generation, but also consider future generations; developing sustainable revenue and spending projections for future years.

Finally, Article 3(1) of the 1989 CRC provides that the best interests of the child shall be a primary consideration in all actions concerning children. In General Comment No. 19, the

[15] *Ibid*.
[16] *Ibid*.
[17] Committee on the Rights of the Child, *General Comment No. 5*, para. 12.

Committee emphasises that states must integrate and apply this principle in all proceedings affecting children, including all phases of budgets. The CRC provides a framework through which states can assess and determine the best interests of the child – this will be particularly important when states must balance competing budget allocation priorities. States must be able to demonstrate how this has been done, that is to demonstrate how the best interests of the child have been considered in such decision-making, and how they have been weighed against other factors. Child rights impact assessments should be conducted by states in order to determine how legislation, policies and programmes are affecting children's interests – particularly children who are vulnerable, as such children require a disproportionate share of spending. Such child rights impact assessments should be CRC-based and will complement other monitoring and evaluation initiatives. Such processes should be transparent, and involve children, civil society organizations, experts, and others. The outcomes of such assessments should shape amendments and improvements to budget allocation.

The Committee in General Comment No. 19 elaborates on the budget principles of effectiveness, efficiency, equity, transparency and sustainability. Effectiveness refers to the obligation to ensure that budgets are planned and executed and outcomes monitored in such a way that ensures effectiveness for progressing children's rights, particularly the rights of children in vulnerable situations. Efficiency refers to the obligation to ensure that public resources for child-related policies and programmes are managed in a way that ensures both value for money and progress for children's rights. Monitoring, evaluation and auditing to ensure sound financial management must be conducted. The principle of equity requires states to refrain during budget allocation from discrimination against groups of children. Spending decisions should lead to substantive equality (i.e. equality in reality, not just on paper) among children, with resources being used to promote such equality. Transparency requires states to have public financial management systems and practices that can be scrutinised, with information available publically in a timely manner. The principle of sustainability requires states to consider current and future generations of children and to engage in ongoing amendments of policies and programmes which realise children's rights, only taking retrogressive measures in relation to children's rights where it has been established that there are no other options.

1.3.3 Application of CRC-Based Standards in Ireland

In January 2016, the Committee on the Rights of the Child reported its concluding observations on the state of children's rights in Ireland, as noted above,[18] expressing concern at the lack of a specific budget allocation for the implementation of the Convention. The failure to proportionately increase social welfare payments (particularly child benefit and support for children with disabilities) in order to reflect higher costs of living was also highlighted. The Committee recommended that Ireland use a children's rights approach when formulating the state budget by using a tracking system for the allocation and use of resources for children at all levels of government. A comprehensive assessment of the budget needs of children should be conducted the Committee stated, and the budget allocated to social sectors should be increased. Indicators relating to the rights of the child should be used to address disparities, and CRC-based impact assessments should be engaged. Sufficient resources for progressing of children's rights should be allocated, and regular assessments of relevant projects should be conducted. Specific budgetary allocations should be made for Traveller and Roma children and children with disabilities and these allocations should be protected in times of financial crisis.

The Committee expressed "deep concern" about the significant increase in the number of children living in 'consistent poverty',[19] particularly the disproportionate levels of poverty affecting children from Traveller, Roma and refugee backgrounds, and children in single-parent households. The Committee stated that Ireland should further strengthen efforts to reduce poverty among children in such vulnerable situations. This should include revision of poverty reduction targets for 2020 in order to take into account increases in the number of children living in 'consistent poverty', and the establishment of a detailed action plan outlining targets and timeframes. The Committee was also "deeply concerned" at reports of significant delays in accessing social housing experienced by many homeless families, and at reports of inappropriate, temporary or emergency accommodation being provided long-term in some cases. Ireland, the Committee urged, should increase the availability of social

[18] Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*.

[19] European Anti-Poverty Network defines this as a situation where income is below the relative/at risk of poverty threshold (60% of national median income) and the individual cannot afford at least two of eleven deprivation indicators. Available at http://www.eapn.ie/eapn/training/consistent-poverty-rates (last accessed 2 Dec. 2016).

housing and emergency housing support, and ensure that measures used are appropriate to the needs of children and subject to "adequate safeguards, reviews and evaluations."[20]

It is crucial to adequately provide for the state's children, particularly disadvantaged groups, including protecting them from the adverse effects of economic policies or financial downturns. Ireland has a long way to go in order to achieve budgeting and financial planning which accords with children's rights. There must be a more explicit exercise of children's rights 'proofing' in order to make the budget process more transparent and to provide greater accountability for children and marginalised groups more generally. As it stands, the budget process does not accord with the CRC and General Comment No. 19. There are very pragmatic reasons to improve financial provision for children. It is highlighted in numerous research studies that failing to invest in children in the present necessarily leads to greater social problems later, such as unemployment, crime and ill-health, which can prove "intractable and expensive to remedy."[21]

1.3.4 Recommendations

- *Data and information about children should be collected and disseminated to inform legislation, policies, programmes and budgets in a way which advances children's rights.*

- *Sufficient public resources must be put in place to fully implement legislation, policies, programmes and budgets which aim to progress children's rights.*

- *Ireland must demonstrate how the public budget-related measures chosen in this country result in improvements in children's rights, and publish 'children's budgets' annually.*

- *Budget allocation must be conducted with regard for the four general principles of the CRC – the principle of non-discrimination, the right to be heard, the principle of*

[20] Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, para. 62.
[21] See e.g. Action for Children/The New Economics Foundation, *Backing the Future: Why Investing in Children is Good for us all* (Action for Children/The New Economics Foundation, 2009) and Richard Wilkinson and Kate Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (Allen Lane, 2009).

the best interests of the child and the right of the child to life, survival and development.

- *Ireland should identify groups of children experiencing discrimination, and manage public budgets to implement special measures to benefit them. Specific budgetary allocations should be made for Traveller and Roma children and children with disabilities and these allocations should be protected in times of financial crisis.*

- *It is crucial that resources and training are made available to ensure that children are heard on budget allocation. There are examples of good practice and suitable methodologies from around the world which should be drawn upon for this purpose.*

- *It must be made clear how all age groups have been considered in budget allocation.*

- *Ireland should continue the increased investment in early childhood development because of its vital importance.*

- *Ireland must consider future generations in budget allocations, developing sustainable revenue and spending projections for future years.*

- *Ireland must integrate and apply the principle of the best interests of the child in all phases of budgets. CRC-based child rights impact assessments should be conducted to determine how budgets affect children.*

- *Ireland should follow the budget principles of effectiveness, efficiency, equity, transparency and sustainability.*

- *A specific budget allocation for the implementation of the CRC should be put in place.*

- *Social welfare payments, particularly those affecting children, should be reviewed having regard to the higher costs of living.*

- *A children's rights approach should be taken when formulating the State budget including an assessment of the budget needs of children, the use of children's rights indicators and CRC-based impact assessments.*

- *Ireland should revise poverty reduction targets for 2020 to better take into account children living in 'consistent poverty', and establish a detailed action plan outlining targets and timeframes.*

- *The availability of social housing and emergency housing support should be increased as a matter of priority, with adequate safeguards, reviews and evaluations put in place for such provision.*

1.4 Issues Regarding the Sale of Children, Child Prostitution and Child Pornography

There are a number of provisions in the CRC concerning child protection, including the right to be free from all forms of violence (CRC Article 19) and Article 35 which stipulates that:

> States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

At the 1996 World Congress against Commercial Sexual Exploitation of Children, it was agreed that additional efforts beyond the text of the CRC were necessary in order to address sexual exploitation, bearing in mind the particular problems posed for children's rights by globalisation, new technologies, and accelerated rates of human mobility. The modern phenomenon of paedophile websites and the now transnational character of child sexual abuse were also acknowledged. It was in this context that experts and state representatives worked together to develop a protocol to the CRC that would better ensure children's rights in this area – the Optional Protocol on the sale of children, child prostitution and child pornography.[22] The two main premises of the second Optional Protocol to the CRC are that

[22] UNGA Res 54/263, Annex II, 54 UN GAOR Supp (No 49) 6, UN Doc A/54/49, Vol III (2000), entered into force on 18 January 2002.

1) there is an obligation on states to ensure the protection of all children, and 2) child exploitation is criminal in nature, and perpetrators must be held accountable.[23]

As I noted in my Sixth Report, Article 3 of the second Optional Protocol to the CRC includes a list of offences that state parties must criminalise, including offering, delivering or accepting a child for sexual exploitation; use of the child as forced labour, and various offences relating to prostitution and pornography. Article 9 requires states to attempt to prevent such offences through law and social programmes. Article 5 requires that states make provision for extradition of suspects in respect of relevant offences and Article 6 urges mutual assistance between states. Article 8 imposes positive obligations on states with regard to child victims – their special needs as especially vulnerable victims should be recognised. They should be informed of their rights, and protected as witnesses in civil or criminal proceedings. Adequate support services should also be provided for such victims.

1.4.1 Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

Ireland has yet to ratify the Optional Protocol on the sale of children, child prostitution and child pornography, although it was signed by Ireland in 2000. Ireland has ratified the Optional Protocol on the involvement of children in armed conflict, and the Optional Protocol on a communications procedure. Ireland is the only EU Member State which has not yet ratified the Optional Protocol on the sale of children, child prostitution and child pornography.[24] Ireland must immediately ratify this Optional Protocol (hereafter referred to as the second Optional Protocol to the CRC).

1.4.2 Ireland's Compliance with the CRC and Other Standards

There have been positive developments in law and policy in Ireland to combat matters such as trafficking. Trafficking of children overlaps significantly with the sale of children, child prostitution and child pornography. I noted in my Sixth Report, for example, the Child

[23] See further UNICEF, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (UNICEF, 2009).
[24] See further Irish Human Rights and Equality Commission, *Ireland and the UNCRC: Report by the Irish Human Rights and Equality Commission to the UN Committee on the Rights of the Child on Ireland's Combined Third and Fourth Periodic Reports* (Irish Human Rights and Equality Commission, 2015), at 5.

Trafficking and Pornography Act 1998, the Illegal Immigrants (Trafficking) Act 2000 and the Department of Justice's National Action Plan to Prevent and Combat Trafficking of Human Beings in Ireland.[25] I noted that the Criminal Law (Human Trafficking) Act 2008 created the offence of trafficking of children for the purpose of labour exploitation, and increased the maximum sentence for conviction of such activities. More recently, the 2008 Act was amended by the Criminal Law (Human Trafficking) (Amendment) Act 2013 to give effect to Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. Furthermore, in October 2016, the Second National Action Plan to Prevent and Combat Human Trafficking in Ireland was launched.[26] Building on the First National Plan, the Second National Action Plan seeks to prevent trafficking; identify, assist and protect victims; ensure an effective criminal justice response; ensure that responses are human rights-based and gender sensitive; ensure effective co-ordination and co-operation; increase knowledge of emerging trends in trafficking; and respond to child trafficking.

However there are significant gaps in Irish law and policy when it comes to matters such as trafficking. The US Department of State 2016 Trafficking in Persons Report[27] identifies a number of ongoing problems, such as increases in reports of suspected victims of sex trafficking and forced labour, sex trafficking of Irish children within the country, and the prosecution of trafficked Asian migrants for cannabis cultivation. In the US Department of State 2016 Trafficking in Persons Report it is recommended that traffickers are held accountable through convictions and lengthy sentences; and that efforts to identify and assist victims are increased; including making specialised emergency accommodation and legal services available to victims.[28]

Although victim identification and protection efforts continue, the failure of authorities to identify suspected victims of forced criminal activity, and the prosecution and imprisonment of such persons "remained a serious concern" according to the US Department of State 2016 Trafficking in Persons Report.[29] A recent High Court case demonstrates well how Ireland is

[25] Department of Justice, Equality and Law Reform, *National Action Plan to Prevent and Combat Trafficking of Human Beings in Ireland* (Stationary Office, 2009).
[26] See http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/irelandsresponse-overview-en (last accessed 1 Dec. 2016).
[27] US Department of State, *2016 Trafficking in Persons Report* (US Department of State 2016), available at: http://www.state.gov/j/tip/rls/tiprpt/countries/2016/258788.htm (last accessed 1 Dec. 2016).
[28] *Ibid*.
[29] *Ibid*.

failing trafficking victims in this regard. It was found in the 2015 case of *P v The Chief Superintendent of the Garda National Immigration Bureau*[30] that Gardaí had failed to identify a victim of human trafficking – a Vietnamese woman used in the cannabis trade – resulting in her imprisonment in Mountjoy prison for two and a half years. It was established by the court that the current scheme for identifying and protecting victims of human trafficking is inadequate. The court pointed in particular to the fact that the woman had been locked into the premises in which she was found, strongly indicating that she was not in control of the situation in which she found herself. The UN Special Rapporteur on Trafficking in Persons has further stated that trafficked persons should not be held responsible for the offences of which they are suspected in the course of trafficking, as they cannot be considered to have acted of their own free will.[31]

Of course, there are significant concerns that children are being affected by relevant failings in Ireland. The Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) has pointed to the need for "a specific identification mechanism which takes into account *the special circumstances and needs of child victims of trafficking*, involves child specialists and ensures that the best interests of the child are the primary consideration".[32] The Irish Human Rights and Equality Commission argues that *P v The Chief Superintendent of the Garda National Immigration Bureau* points to the need for arrangements for identification of victims to be placed on a statutory basis, with special provision for children in this regard.[33]

The Second National Action Plan to Prevent and Combat Human Trafficking in Ireland[34] outlines a number of action points for dealing with child trafficking. In the plan it is stated that the possibility of establishing a specific identification mechanism, and taking into account the special circumstances of child victims of trafficking, will be addressed. It is also

[30] [2015] IEHC 222.

[31] UN General Assembly, *Report of the Special Rapporteur on Trafficking in Persons, especially women and children*, A/69/33797 (28 Jul. 2014). See further Irish Human Rights and Equality Commission, *Ireland and the UNCRC: Report by the Irish Human Rights and Equality Commission to the UN Committee on the Rights of the Child on Ireland's Combined Third and Fourth Periodic Reports*.

[32] Group of Experts on Action against Trafficking in Human Beings, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland: First Evaluation Round* (GRETA, 2013), at 64. Emphasis added.

[33] See further Irish Human Rights and Equality Commission, *Ireland and the UNCRC: Report by the Irish Human Rights and Equality Commission to the UN Committee on the Rights of the Child on Ireland's Combined Third and Fourth Periodic Reports*.

[34] See http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/irelandsresponse-overview-en (last accessed 1 Dec. 2016).

stated that efforts will be made to ensure that children who go missing from care are found, that unaccompanied minors will continue to receive care equitable to Irish national children in care, and that the education of such children will be a priority. It will be ensured that the best interests of trafficked children is a primary consideration in the provision of services. Special consideration must be given to the needs of child trafficking victims in the criminal justice system, and to the training of professionals likely to encounter such victims.[35]

1.4.3 Ireland and the Second Optional Protocol to the CRC

Ratification of the second Optional Protocol to the CRC will greatly assist Ireland in progressing protection of children from problems such as trafficking and other forms of exploitation. One of the benefits of adopting the principles of the document is that there are a variety of standards assisting in the implementation of the second Optional Protocol to the CRC. The UNICEF *Guidelines on the Protection of Child Victims of Trafficking* identify key areas in developing good practice in the protection of child victims of trafficking, for example: identification of victims, appointment of guardians for victims, registration and documentation, regularisation of status, case assessment, access to justice and the implementation of durable solutions. UNICEF emphasises the importance of ensuring that children's rights, rather than simply 'protection', are central to measures for protecting child trafficking victims.[36]

It is clear from the Second National Action Plan that many of these elements are missing from intended activities in this area in Ireland. It is not emphasised in the plan that legal guardians will be appointed for child victims.[37] There is no intention that the regularisation of status should be a priority for children in this situation. It is not outlined in the plan that access to justice for such children will be treated as a key issue, though it has been identified as such by many interested groups, not least because the immigration status of many of these children will be an issue. Certainly, there is no sense in the plan that the rights of these children, rather than protection and provision for their needs, has been given explicit consideration. There is no mention, for example, of the right of children to be heard and to

[35] UN High Commissioner for Refugees, *UNHCR Guidelines on Formal Determination of the Best Interests of the Child* (UN High Commissioner for Refugees, 2006).
[36] UNICEF, *UNICEF Guidelines on the Protection of Child Victims of Trafficking* (UNICEF 2006). See further my Sixth Report.
[37] Unaccompanied children are taken into care in Ireland under sections 4 and 5 of the Child Care Act 1991 as amended, but neither section provides for a legal guardian.

participate in any actions affecting them – a key right under the CRC. In the Action Plan, the stated possibility of establishing a specific identification mechanism is not framed in strong language, and leaves it unclear how the issue of identification of victims, a major gap in Irish provision, will be dealt with.

Ratifying the second Optional Protocol to the CRC would provide greater focus on many important rights issues for children contained in the international standards adopted by most states, including every other EU state.

1.4.4 Good Practice on Child Trafficking and Exploitation

UNICEF has also developed a *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* for public officials and others working with children. It aims to promote understanding and implementation of the Optional Protocol describing the scope of the Protocol, and provides examples of measures taken by states to fulfil obligations under this instrument.[38] The report also contains implementation guidelines and examples of best practice. It shares, for example, principles regarding best practice in care facilities for children who have been sexually exploited.[39] These principles state that: institutions should be a last resort as the well-being of children is generally best promoted in a family setting, with informal 'family-like' care (e.g. foster care) as the next best option. Where formal residential settings are necessary, it must be temporary, as institutionalisation prevents effective reintegration of children. Children's consent to placements should be taken seriously, and efforts should be made to retain relationships with family. Children in care have the right of access to information about their situation and the right to participate in decisions on all matters affecting them. They should have access to the surrounding community and positive relationships should be encouraged. Care facilities should create a healing environment, with positive relationships between residents and staff, positive recreational activities, and opportunities to personalise private space in home-like surroundings.

[38] UNICEF, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (UNICEF, 2009).
[39] Based on J. Frederick, *Guidelines for the Operation of Care Facilities for Victims of Trafficking and Violence against Women and Girls: Rationale, basic procedures and requirements for capacity building* (Planète Enfants, 2005).

The report also outlines details of an exploitation awareness programme conducted in the UK from 2005 to 2007 in schools and residential facilities for children aged 13 to 16. The aim of the programme was to reduce the risk of sexual exploitation, including relationships with older partners as well as 'formal' prostitution. The methodology included discussion of case studies covering child exploitation. A subsequent evaluation focused on the extent to which children understood key messages and self-reported attitudinal changes. It was found that most children had greater awareness after the programme of risky relationships, as well as awareness of services available to them.[40]

Another UK project investigated types of services required by children at risk of sexual exploitation, through interviews with professionals and children themselves. Recommendations arising from the research included: Children who are considered to "persistently and voluntarily return" to prostitution should not be arrested or prosecuted; local authorities should develop a protocol on how to deal with sexual exploitation and proactively identify children at risk, and authorities should conduct active investigation of cases of missing or runaway children.[41]

Another project considered in the UNICEF report includes the creation of a special criminal court (the Court of Serious Crimes) in Albania. A specialised branch of the Prosecutor's Office for serious crimes has also been put in place, which has competence over trafficking issues. The work of these institutions has resulted in more effective prosecution of individuals and groups engaged in the trafficking of both children and adults.[42]

1.4.5 Recommendations

- *Ireland must ratify the Optional Protocol on the sale of children, child prostitution and child pornography forthwith.*

- *Greater efforts should be taken to ensure that traffickers are held accountable through convictions and lengthy sentences.*

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[40] Barnardos, *'It Could be Anyone', Evaluation Report of the London Prevention Education Programme* (Barnardos, 2007).
[41] Barnardos, *Meeting the Needs of Sexually Exploited Young People in London* (Barnardos, 2005).
[42] United Nations Economic and Social Council, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Juan Miguel Petit*, Addendum, E/CN.4/2006/67/Add.2 (2006).

- *Arrangements for identification of victims should be placed on a statutory basis, with special provision for children in this regard.*

- *A more rights-based approach should be taken when tackling the issue of child trafficking and exploitation. A commitment should be made, for example, that children's rights (including the right to be heard), rather than solely their protection, will be a priority when dealing with child trafficking and exploitation. Legal guardians should be appointed for child victims of trafficking (and all unaccompanied minors). Regularisation of status should be a priority as should access to justice for child victims of trafficking.*

- *Good practice examples from the UNICEF Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography should be considered.*

1.5 Child Protection for Migrants and Refugees

1.5.1 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

In 2016 the Committee on the Rights of the Child together with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families resolved to develop a Joint General Comment on the human rights of children in the context of international migration. The phenomenon of international migration increasingly affects millions of children. The root causes of migration are often directly related to severe violations of human rights, such as the military attacks affecting civilian populations in Syria. Children are doubly vulnerable in the context of international migration on the basis of age, and on the basis of being a migrant (or affected by migration in another way). They may be unaccompanied migrants, the children of migrant parents in countries of transit or destination, or they may be left behind in the country of origin. The Joint General Comment aims to provide authoritative guidance to states on the measures to adopt to achieve full compliance with their obligations under the CRC (and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[43]) to children in the

[43] Adopted by General Assembly resolution 45/158 of 18 December 1990.

context of international migration. It will cover issues relating to health, education, abuse and exploitation, detention, discrimination, access to justice, right to nationality and other issues. It is expected that the General Comment will be released in 2017.

Ireland has not yet signed or ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The major objective of this Convention is to secure respect of migrants' human rights, not by creating new rights for migrants but instead working to guarantee equality of treatment and equal working conditions for migrants as compared to nationals. The Convention obliges states to ensure humane living and working conditions, and to prevent abuse and degrading treatment (Articles 10-11, 25, 54); and to ensure to migrants the right to legal equality, which necessitates correct procedures, access to interpreting services and freedom from disproportionate penalties such as expulsion (Articles 16-20, 22). The Convention also obliges states to ensure migrants' rights to freedom of thought, expression and religion (Articles 12-13); access to information on their rights (Articles 33, 37); and equal access to educational and social services (Articles 27-28, 30, 43-45, 54) and to ensure that migrants have the right to participate in trade unions (Articles 26, 40). The Convention obliges states to ensure that migrants have the right to return to their country of origin where they so wish and to ensure that migrants are allowed to pay occasional visits to their country of origin (Articles 8, 31). States must also guarantee the right of migrants to political participation in the country of origin (Articles 41-42) and the right to transfer their earnings to their home country (Articles 32, 46-48). Although it is recognised in the Convention that it is legitimate that legal migrants may hold more rights than undocumented migrants, it is emphasised that the fundamental rights of undocumented migrants must nevertheless be respected. The Convention also requires states to work against clandestine groups inciting irregular migration, by applying appropriate sanctions.

This instrument is highly relevant to the rights of the children of migrants, as their access to education and health is emphasised. The Convention also recognises a wide definition of the family. Under Article 4 the term 'members of the family' refers not just to those married to migrant workers, but also to those having with them a relationship which produces effects equivalent to marriage (in accordance with applicable law), as well as dependent children and others recognised by laws of the State concerned as members of the family.

Ireland has been called upon by many UN and other bodies to ratify this convention.[44] The European Parliament has also called upon all Member States to ratify the Convention.[45] Ireland should ratify this instrument without further delay, including the optional protocol to this instrument that enables individual complaints.

1.5.2 Safeguarding the Best Interests of the Child in Age Assessment Procedures

With a migration and refugee crisis ongoing, having an appropriate, rights-based approach to age assessment of migrant and refugee children has become more important than ever. There has been a significant increase in children in need of international protection arriving on European territory. One in five of the refugees and migrants who arrived in Europe via the Mediterranean in 2015 were children.[46] Age assessment is an important process that authorities may need to conduct in order to identify the ages of young migrants and refugees. It is crucial to ensure that children – defined as anyone under the age of 18 by the CRC Article 1 – are identified as such, so that they can access the services and protections to which they are entitled by virtue of their age. It is a difficult process, however, as there are no reliable methods to identify age, and there are concerns over the invasiveness of some techniques, and the need to respect human dignity.[47]

1.5.3 Good Practice in Age Assessment in Europe

An expert meeting on age assessment procedures took place in Malta in September 2016, convened by the European Asylum Support Office.[48] The purpose of the meeting was to support a process of revision to the 2013 publication of the European Asylum Support Office: *Age Assessment Practice in Europe*.[49] The meeting sought to update information and recommendations for EU Member States; highlighting procedural measures when assessing

[44] See e.g. Human Rights Council, *Universal Periodic Review Report of the Working Group on the Universal Periodic Review: Ireland* A/HRC/19/9 (21 December 2011), at 21.
[45] Recommendation 22, European Parliament resolution on the EU's priorities and recommendations for the 61st session of the UN Commission on Human Rights in Geneva (14 March to 22 April 2005).
[46] IOM and UNICEF, *Data Brief: Migration of Children to Europe* (2015).
[47] European Asylum Support Office, *Age Assessment Practice in Europe* (European Asylum Support Office, 2013).
[48] http://fra.europa.eu/en/news/2016/expert-group-hears-fundamental-rights-implications-age-assessments (last accessed 4 December 2016).
[49] European Asylum Support Office, *Age Assessment Practice in Europe*.

age in a way that ensures the best interests of the child throughout the process. It is expected that the updated publication will be available in 2017.

It is nevertheless important to consider the key recommendations from the 2013 report in order to ensure that Ireland is in compliance with best practice in Europe at present:

- In all actions undertaken the best interests of the child should be a primary consideration.
- Age assessment should only be undertaken where there are doubts about the claimed age, for the legitimate purpose of determining whether an individual is an adult or a child.
- Assessment should take a multidisciplinary and holistic approach.
- Before resorting to medical examination, consideration should first be given to documentary or other forms of evidence available.
- Age assessment should be performed with full respect for the individual's dignity and the least invasive methods should be selected.
- Individuals and/or their representative should consent to the assessment and should be consulted in accordance with their age and level of maturity. Refusal to undergo an age assessment should not, in itself, result in refusal of the claim for protection.
- So that individuals may provide informed consent, they and/or their representative should be provided with information on the examination and possible consequences of the result of the examination, as well as the consequences of a refusal to undergo a medical examination.
- If an individual disagrees with the outcome of an assessment there should be an opportunity for him/her to challenge the decision.
- All individuals involved should be provided with initial and on-going training relevant to their expertise. This should include training on the needs of children.[50]

The document also contains a useful checklist to ensure the principle of the best interests of the child has been adequately applied in the process:

- Before undertaking any action, is the principle of the best interests of the child given

[50] European Asylum Support Office, *Age Assessment Practice in Europe*, at 6-7.

primary consideration? Has this been documented or recorded?

- In assessing best interests, have factors such as: (a) necessity for assessment; (b) respect for the individual's dignity; (c) invasiveness of the method; (d) reliability of the result; and (e) benefits of the assessment, as well as any other relevant factors been taken into consideration?
- Has the child been involved in the decision, including consultation of his/her views and/or that of his/her guardian or representative in accordance with his/her age and maturity?
- Where it has been disputed that a course of action would be in the best interests of the child, has the proposed decision been reviewed? Has this been documented or recorded?
- Do decisions clearly show how the best interests of the child were considered and balanced with other possible interests?
- Is there evidence that those working with the child (interpreters, the representative, those undertaking age assessment) have the necessary expertise to perform their duties in accordance with the best interests principle?[51]

It is further outlined in the document that the principle of the benefit of the doubt is a significant safeguard in the field of age assessment.[52] This is particularly so considering no method of age assessment available at present can establish age with certainty. During the process, individuals should be given the benefit of the doubt and treated as a child. It is also stated in General Comment No. 6 of the Committee on the Rights of the Child *(Treatment of Unaccompanied and Separated Children Outside their Country of Origin)*[53] that, if uncertainty remains following age assessment, the individual should be afforded the benefit of the doubt so that if it is possible that the individual is a child, then the person should be treated as a child and benefit from the relevant protections.

[51] *Ibid*., at 16.
[52] *Ibid*.
[53] Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin* CRC/GC/2005/6 (1 September 2005).

1.5.4 Age Assessment in Ireland

The age assessment procedures in Ireland should be reviewed having regard to international best practice.[54] If a social worker or immigration official at the Office of the Refugee Applications Commissioner believes a young person claiming asylum may be over 18, an age assessment may be conducted. In the asylum procedure the Office of the Refugee Applications Commissioner forms an initial opinion of the age of the person claiming asylum. Tusla – the state Child and Family Agency responsible for improving wellbeing and outcomes for children – then conducts a child protection risk assessment, which includes an examination of age. This is performed by two social workers, often with an interpreter, using a social age assessment methodology involving questions about family, education and other matters. The emotional and physical development of the child, his or her language abilities and other matters are assessed.[55] Where the assessment does not determine an exact age, there is a concern that young people are not given the benefit of the doubt and individuals are usually moved into adult accommodation.[56]

In Ireland's Second National Action Plan to Prevent and Combat Human Trafficking[57] it is stated that Ireland will aim to ensure best practice in age assessment procedures, however steps to be taken to achieve this are not outlined. There are a number of steps which should be taken in order to ensure rights-respecting age assessment processes. Ireland should clearly establish a policy on rights-respecting age assessment processes for migrant and refugee children. Although the International Protection Act 2015 makes some provision for age assessment, Ireland should follow international best practice in this regard, including the best practice guidance of the European Asylum Support Office: *Age Assessment Practice in Europe*.[58] In particular, the best interests checklist should be followed in all procedures to ensure the principle of the best interests of the child has been adequately applied, and individuals should be given the benefit of the doubt and treated as a child. As per General Comment No. 6 of the Committee on the Rights of the Child (*Treatment of Unaccompanied*

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[54] Emma Quinn, Corona Joyce and Egle Gusciute, *Policies and Practices on Unaccompanied Minors in Ireland* (Economic and Social Research Institute, 2014).
[55] See Asylum Information Database, http://www.asylumineurope.org/reports/country/republic-ireland/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/age. (last accessed 1 December 2016).
[56] *Ibid*.
[57] See http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/irelandsresponse-overview-en (last accessed 1 December 2016).
[58] European Asylum Support Office, *Age Assessment Practice in Europe*.

and Separated Children Outside their Country of Origin)[59] if uncertainty remains following age assessment, the individual should be afforded the benefit of the doubt so that if it is possible that the individual is a child, then the person should be treated as a child.

1.5.5 Family Tracing and Reunification for Migrant and Refugee Children and Families

The right to respect for family life is guaranteed by a number of international instruments, including Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union. Refugee and migrant families risk being separated during the journey to the EU. Children often arrive unaccompanied after their journey, as they become separated from their family. Family tracing is a duty for Member States of the EU under the EU asylum acquis (the body of laws concerning asylum). In Ireland, under section 18 of the Refugee Act 1996, refugees have the right to apply for family reunification.

A 2016 report of the European Fundamental Rights Agency on migration-related rights examines how the present migrant and refugee crisis is affecting family tracing and reunification.[60] Good practice examples of family tracing and reunification processes are provided, in an effort to progress the adoption of rights-compliant approaches at EU and national level. The main findings include:

1. Most EU states use the Red Cross' tool 'Trace the Face' to search for family members**.**
2. Practical obstacles impede family tracing such as a lack of documentation among migrants and errors in processing names.
3. Some Member States have made the process for applying for family tracing more complicated.
4. Under the EU's Dublin Regulation, family considerations such as keeping families together may be taken into account in asylum actions. There are many obstacles to

[59] Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin* CRC/GC/2005/6 (1 September 2005).
[60] European Fundamental Rights Agency, *Thematic Focus: Family Tracing and Family Reunification* (European Fundamental Rights Agency, 2016). Available at fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-family (last accessed 1 December 2016).

this, however, including a lack of information for applicants about the process and complex procedures.

To assist EU Member States with ensuring best practice in family reunification processes, the European Asylum Support Office has developed a practical guide for family tracing.[61] The recommendations of that report include:[62]

- States should establish a mechanism to regulate the family-tracing process.
- A 'best interests of the child assessment' must clarify if the family-tracing process should be initiated or not.
- Unaccompanied children should be appointed a legal guardian, who should be involved in the assessment of the best interests of the child and any reunification efforts.
- If tracing is in the best interests of the child, the process should be initiated without delay.
- The child should be heard and have adequate information at all stages, and if a decision contrary to the child's views is taken, children should have an explanation.
- States should apply a broad definition of 'family members' for family-tracing purposes.
- All efforts should be made to re-establish family links between the child and the parents if it is in the best interests of the child.
- Strict precautions should be taken for the safeguarding of individuals' information.
- Where there is a lack of documentary evidence for verifying family links, states should apply the benefit of doubt and take into account factors such as children's views.
- Children should have legal and procedural information free of charge, and access to fair appeal procedures.
- On completion of the family-tracing process states should conduct an assessment to establish the way forward in the child's best interests.

[61] European Asylum Support Office, *EASO Practical Guide on Family Tracing* (European Asylum Support Office, 2016).
[62] *Ibid*. at 48-50.

In Ireland at present, Irish citizens and migrant workers do not have a legal right to family reunification with immediate family members. Applications for reunification are instead decided on a discretionary basis by the Irish Naturalisation and Immigration Service (INIS). This has created a situation whereby Irish citizens (and non-EEA citizens) are treated less favourably than counterparts from other EU countries living in Ireland. This is because Ireland has opted out of the provisions of the EU Directive on the Right to Family Reunification,[63] which sets common rules for those living legally in EU states to be reunited with family. Ireland has consequently fallen behind best practice in the EU. The right to family reunification needs to be placed on a legislative footing.[64]

Furthermore at present there is no appeals process for those dissatisfied with an adverse decision on family reunification. The only option in such an instance is to initiate judicial review proceedings, which is extremely expensive and burdens the higher courts with immigration-related cases. An independent Immigration Appeals Tribunal should be established to ensure that individuals have accessible appeals processes to relieve the courts of such cases.[65]

Finally, family reunification can be rendered meaningless by the fact that children can apply for reunification with parents but not siblings, unless those siblings are dependent on the applicant child. This has the consequence in many cases of preventing parents from joining children in Ireland where parents do not wish to leave other children behind in the country in which they are currently living.

1.5.6 Parents' Deportation Cases and Children's Best Interests

In the recent UK Supreme Court case of *Makhlouf v Secretary of State for the Home Department (Northern Ireland)*[66] children's interests as a primary consideration were analysed in the context of the deportation cases of their parents. It was determined that, where a decision was made about the deportation of a foreign national with a criminal record, where that individual had children residing in the UK, the best interests of those children must be

[63] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.
[64] See further the Irish Immigration Support Centre, *Family Reunification*. Available at: http://www.nascireland.org/know-your-rights/family-reunification/ (last accessed 4 December 2016).
[65] *Ibid*.
[66] [2016] UKSC 59.

considered separately and treated as a primary consideration. The rights of an applicant's children were not however an inevitable route for a successful application.

The appellant, a Tunisian, had married a UK citizen and settled in Northern Ireland. He had indefinite leave to remain in the UK and had a daughter in 1999. He subsequently separated from his wife and had no contact with his daughter from 2003, but sought contact with her in 2007. An order for indirect contact was made by the courts. He had also become the father of a son in 2006 with a new partner, but that relationship had broken down shortly after the birth. The appellant was convicted of various offences between 2005 and 2011 which led the UK Home Secretary to issue a deportation order in 2012.

The applicant was appealing the deportation decision in the UK Supreme Court on the basis that the right of his children should be recognised and independently investigated, and that sufficient investigation had not occurred. The court held that separate consideration of children's best interests was indeed required in such circumstances, particularly if those interests were not identical to those of the parent facing deportation. The child's interests were to be considered as a primary consideration.

In this case, however, the appellant did not enjoy a relationship with his children. Although the possibility of a future relationship was a factor to be considered, in this case it was highly unlikely that future relationships would develop. No further inquiries in relation to the father and his children were required in this case. The father's application was dismissed.

Ireland appears to have moved to an approach which places greater weight on the best interests of the children involved in such cases, as for example in *S v Minister for Justice*,[67] in which the court revoked a father's deportation order on the basis that it would be unreasonable and therefore disproportionate to expect the family to live without the father, or to leave Ireland and return with him to Nigeria.[68] Where children have relationships with the parent facing deportation (usually the applicant in such cases is the father), then clearly the child is being deprived of that relationship where there is no prospect that the mother will

[67] [2011] IEHC 417.
[68] See further Cliodhna Murphy, "Family Rights and Deportation in Ireland: On-going issues in the 'Irish-Born Child Cases'" *Human Rights in Ireland* (1 July 2013). Available at http://humanrights.ie (last accessed 12 December 2016).

leave to follow him. This, of course, means that the best interest of the child should be upheld unless there are very strong reasons inclining against such a course of action.

1.5.7 Recommendations

- *Ireland must sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, including the optional protocol to this instrument that enables individual complaints.*

Age Assessment Practice

- *Ireland should clearly establish a policy on rights-respecting age assessment processes for migrant and refugee children. Ireland should follow international best practice in this regard, including the best practice guidance of the European Asylum Support Office: Age Assessment Practice in Europe.*[69]

- *The best interests checklist should be followed in all age assessment processes to ensure the principle of the best interests of the child has been adequately applied.*

- *In all age assessment processes individuals should be given the benefit of the doubt and treated as a child. As per General Comment No. 6 of the Committee on the Rights of the Child (Treatment of Unaccompanied and Separated Children Outside their Country of Origin)*[70] *if uncertainty remains following age assessment, the individual should be afforded the benefit of the doubt so that if it is possible that the individual is a child, then the person should be treated as a child.*

[69] European Asylum Support Office, *Age Assessment Practice in Europe*.
[70] Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*.

Family tracing and reunification

- *Ireland should ensure best practice in family tracing and reunification, heeding the 2016 report of the European Fundamental Rights Agency on migration-related rights.*[71]

- *Ireland's family tracing and reunification processes should also follow the European Asylum Support Office's practical guide for family tracing, particularly recommendations concerning children's best interests and right to be heard.*

- *Ireland should adopt the EU Directive on the Right to Family Reunification.*

- *The right to family reunification (rather than solely the right to apply for the same) must be placed on a legislative footing in Ireland.*

- *An independent Immigration Appeals Tribunal should be established to ensure that individuals have accessible appeals processes in cases where they have an adverse outcome in an application for family reunification.*

- *Children should be able to apply for reunification with siblings without having to demonstrate that those siblings are dependent on the applicant child.*

1.6 The Right of Children to be Heard in Public and Private Law Cases

There have been significant developments of late in Ireland concerning the right of children to be heard, and to have their views given 'due weight', in all matters affecting them, a right enshrined in CRC Article 12. So important is this right that it is a 'general principle' of the CRC, so that all other rights have to be interpreted with the right to be heard (also often referred to as 'children's participation') in mind. The right of children to be heard has subsequently been enshrined in a number of other instruments, for example Article 24 (1) of the Charter of Fundamental Rights of the European Union 2000 which states:

[71] European Fundamental Rights Agency, *Thematic Focus: Family Tracing and Family Reunification* (European Fundamental Rights Agency, 2016). Available at: fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-family (last accessed 12 December 2016).

> Children shall have the right to such protection and care as is necessary for their well-being. They may also express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

Article 12(2) of the CRC specifies that children should in particular be heard in all judicial and administrative proceedings affecting them. Where children's interests are being determined, they have a right to be heard. It is well recognised in the literature around hearing children that children very much want to be heard in such matters, that children have much to contribute in decision-making about their best interests (unsurprisingly, as the decision is after all about them) and that outcomes are improved when they are heard.[72] There are, however, many outstanding questions about how children should be heard. For example, when should they be offered the opportunity to be heard? What type of representation should they have? How should their views be accorded 'due weight'?

The Committee on the Rights of the Child released General Comment No. 12 in 2009,[73] which provides guidance to states on the matter of how states should implement Article 12. It is useful to examine the nature of the right to be heard in proceedings, considering recent developments in Irish legislation in this area (these developments will then be considered further below).

1.6.1 Guidance from the Committee on the Right of Children to be Heard

1.6.1.1 Offering Children the Opportunity to be Heard

The question of which children should be heard is a difficult one. At what point in their cognitive development should children be involved? In General Comment No. 12 the Committee makes it clear that children who are capable of expressing views must be given the opportunity to be heard, elaborating that children "who are able to understand the

[72] See e.g. Hadley Centre for Adoption and Foster Care Studies/Coram Voice, *Children and Young People's Views on Being in Care: A Literature Review* (Hadley Centre for Adoption and Foster Care Studies Coram Voice, 2015), at 3 and Anne Graham and Robyn Fitzgerald, "Taking Account of the 'To and Fro' of Children's Experiences in Family Law" 31 *Children Australia* 30 (2006).

[73] Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* CRC/C/GC/12 (1 July 2009).

significance of the proceedings"[74] should be heard. The Committee further emphasises that the onus is on authorities to determine which children have this capacity – the burden of proof does not rest on children themselves.[75] Essentially a presumption in favour of hearing children should exist. The Committee emphasises that it is experts in child development, such as social workers, who should determine whether children should be heard.[76]

The Committee has also stated that all children involved in proceedings should be informed of the right to be heard "in a child friendly manner … ".[77] It is the choice of the child whether he/she wishes to be heard or not – children should never be compelled to give views, and should have every opportunity to refuse the offer. It is stated in General Comment No. 12 that once a child has decided to exercise the right to be heard, the child must then decide "how to be heard"[78] and must be given information as to the options available to him/her.[79] There are a wide variety of ways in which children can be heard. A child may meet the decision-maker (for example the judge) to give his or her views directly, or alternatively the child may have a representative do this on his or her behalf. It is the child who should decide how the process occurs.

Of course, great care must be taken with upholding the right of children to be heard. It may not be appropriate to invite younger children to be heard, and great care should be taken with, for example, children in some circumstances such as those who have suffered abuse.[80] The Committee recommends that "States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children."[81] A balance must be achieved between ensuring that children are offered the opportunity to be heard on the one hand, and ensuring that the process is conducted in a way that is appropriate for the circumstances of the child on the other.

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[74] Committee on the Rights of the Child, *Concluding Observations: Slovenia* (26 February 2005) CRC/C/15/Add. 230, para. 25.
[75] Committee on the Rights of the Child, General Comment No. 12, para. 44.
[76] Committee on the Rights of the Child, Committee on the Rights of the Child, *Concluding Observations: Ireland* (29 September 2006) CRC/C/IRL/CO/2, para. 23.
[77] Committee on the Rights of the Child, *Day of General Discussion on the Right to be Heard*, Forty-third session, 11-29 September 2006, para. 40.
[78] Committee on the Rights of the Child, General Comment No. 12, para. 35.
[79] Committee on the Rights of the Child, General Comment No. 12, para. 41.
[80] *Ibid.*, para. 21.
[81] *Ibid*., para. 21.

The Committee asserts that states have a positive obligation in all contexts to facilitate children who may experience distinct difficulties in expressing their views. In General Comment No. 12 the Committee makes reference to minority or migrant children, indigenous children and those who do not speak the majority language. The Committee refers to children with disabilities as a group which may be in particular need of facilitation, emphasising that "children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views."[82] In the context of proceedings, therefore, there are particular positive obligations on states to ensure that children in vulnerable situations have the facilities they require in order to permit them to be heard.[83]

1.6.1.2 The Type of Representation Which Should be Provided to Children

Children may wish to meet with the decision-maker to provide their views directly. Many states, including common law jurisdictions such as New Zealand, have extensive experience of this.[84] Much work must be done in Ireland in this regard, for example in the recent report of the Committee on the Rights of the Child on Ireland, it was noted that judges do not receive systematic training on overseeing cases concerning children, and it was recommended that Ireland ensure sufficient resources for the training of judges for cases concerning children.[85] Clearly if judges in Ireland are to meet directly with children, specific training should be set aside for this.[86] Much work has been done on preparing judges for such interviews in England and Wales, with the introduction for example of guidelines for this purpose.[87] The President of the District Court, Judge Rosemary Horgan, has provided training for District Court judges on hearing the voice of the child.

Children may wish instead to be heard indirectly through a representative. The type of professional that could represent the views of children is a key issue for the right to be heard

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[82] *Ibid*, para. 21.

[83] It is positive that the Department of Children and Youth Affairs has recently released a guide for including the voices of children in such circumstances. Department of Children and Youth Affairs, *A Practical Guide to Including Seldom-Heard Children and Young People in Decision-Making* (Department of Children and Youth Affairs, 2015).

[84] John Caldwell, "Common Law Judges and Judicial Interviewing" 23 *Child and Family Law Quarterly* 41 (2011).

[85] Paras. 41-42.

[86] In my Seventh Report I also called for the introduction of a specialised family court division.

[87] Family Justice Council, *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (April 2010).

in proceedings. Usually it is a social work professional, a lawyer, or both, who provides this representation.[88] An independent social work professional or a psychologist (referred to as a guardian *ad litem* or children's guardian) is in many jurisdictions – including Ireland – the main avenue for children's voices. The guardian *ad litem* presents an independent assessment of the wishes and interests of the child to the judge.[89]

The question of whether representation of children's interests on the one hand, or their views and wishes on the other, should be the primary concern is a hotly debated one.[90] If children's wishes are represented, any risks associated with their wishes may not be adequately represented to the court. Yet if children's wishes are represented in a paternal way, adult interpretations of what children want may obscure the views that children intended to be presented to the court. One way to ensure that children's views are adequately represented is to provide them not just with a social work-type representation but with counsel also, and permit direct instruction.[91] In fact, the Committee stated recently in the General Comment on Article 3 (General Comment No. 14), that children should have both a guardian *ad litem* and a lawyer in proceedings affecting them:

> The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.[92]

This is an authoritative statement that states are obliged to provide children with legal representation in best interests proceedings, in particular where there are conflicts between parties.

[88] Committee on the Rights of the Child, General Comment No. 12, para. 36.
[89] See further my Sixth Report.
[90] See e.g. Michelle Fernando, 'Family Law Proceedings and the Child's Right to be Heard in Australia, the United Kingdom, New Zealand, and Canada' 51 *Family Court Review* 46 (2014).
[91] Although the matter of whether children should directly instruct counsel is also contentious, see e.g. *W. (A Child)* [2016] EWCA Civ 1051 considered below.
[92] Committee on the Rights of the Child, *General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* CRC/C/GC/14 (29 May 2013), para. 96.

1.6.1.3 Weighing Children's Views

CRC Article 12 involves an obligation that states not only facilitate children to be heard in proceedings affecting them, but also to ensure that their views are taken into account. The Committee has stated that "*[t]o speak, to participate, to have their views taken into account* … describe the sequence of the enjoyment of the right to participate from a functional point of view."[93] Therefore the taking of children's views into account is as important as the initial 'hearing' of children. Yet it can be the most difficult part of the process associated with hearing children, as courts rarely have a procedure for how children's views are to be treated, and they can be overridden with ease.[94] Children can then interpret the hearing process as tokenistic, and this can mean the process risks doing more harm than good for children.[95] In many research studies, children report that they feel like their views made little difference: "I can say what I like but I'm wasting my breath. No one takes any notice."[96]

The Committee warns against tokenism, asserting that "appearing to 'listen' to children is relatively unchallenging; giving due weight to their views requires real change."[97] If children's views are heard, but those views are not given any consideration, then this would constitute tokenism. The Committee claims the views of the child must be considered "as a significant factor in the settlement of the issue"[98] if the child is capable of forming views "in a reasonable and independent manner."[99] This requires then that there is a high degree of transparency and clarity in a judgment as to how children's views have been treated and weighed against other factors.

Article 12 requires that decision-makers weigh children's views "…in accordance with the age and maturity of the child." There is no provision in the text of Article 12 that particular weight be given at a particular age. The principle of the evolving capacities of the child is

[93] Committee on the Rights of the Child, *Day of General Discussion on the Right to be Heard*, Forty-third session (11-29 September 2006), para. 5. Emphasis original.
[94] In the Irish context, for example, see Aoife Daly, "Considered or Merely Heard? The Views of Young Children in Hague Convention Cases in Ireland" 12 *Irish Journal of Family Law* 16 (2009).
[95] See e.g. Kay Tisdall and Fiona Morrison, "Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences" 14 *Law and Childhood Studies: Current Legal Issues* 156 (2012).
[96] Sixteen-year-old boy quoted in Alison McLeod, "Respect or Empowerment? Alternative Understandings of 'Listening' in Child Care Social Work" 30 *Adoption and Fostering* 43 (2006), at 45.
[97] Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* CRC/GC/2003/5 (27 November 2003), para. 12.
[98] Committee on the Rights of the Child, General Comment No. 12, para. 44.
[99] *Ibid*.

applicable here, as noted by the Committee which states that adults responsible for the child will move from directing children as to what to do, to providing them with advice, and ultimately to an equal exchange.[100] It is stated that: "This transformation will not take place at a fixed point in a child's development, but will steadily increase as the child is encouraged to contribute her or his views."[101] The focus is therefore on maturity rather than age.

The Committee states that decision-makers should also explicitly explain the outcome of proceedings to children, especially if the views of the child involved could not be accommodated.[102] As noted above, feedback on the positioning of the views of the child in the decision-making process is particularly important in this regard. The Committee instructs that legislative measures should be put in place to "… explain the extent of the consideration given to the views of the child and the consequences for the child."[103]

1.6.1.4 Systems for Hearing Children

Provision must be made at a domestic level, therefore, for determining whether a child is capable of and wishes to be heard, for deciding how the process should be conducted, and for ensuring the transmission of the outcome to children.

This obviously requires that systems are in place to oversee this, and to ensure in particular that children have the necessary resources for example to access legal representation. The Committee has requested that states "…establish specialised legal aid support systems in order to provide children involved in administrative and judicial proceedings with qualified support and assistance."[104] This is a clear requirement that states engage a high level of organisation concerning legal representation and assistance for children, ensuring that services are tailored to the specific needs of this group. Taken together with the statements of the Committee on the requirements concerning information and facilitation for children, it is clear that a cohesive and comprehensive approach to hearing children in proceedings is necessary in order to meet international standards.

[100] Committee on the Rights of the Child, General Comment No. 12, para. 84.
[101] *Ibid*.
[102] Committee on the Rights of the Child, *Day of General Discussion on the Right to be Heard*, para. 41.
[103] Committee on the Rights of the Child, General Comment No. 12, para. 33.
[104] Committee on the Rights of the Child, *Day of General Discussion on the Right to be Heard*, para. 43.

It appears that it would necessitate the operation of a body such as Cafcass (The Child and Family Courts Advisory and Support Service) in England to ensure the running of a system in which it would be the norm to hear children. Cafcass can co-ordinate efforts to facilitate the right to be heard, determine the information that children are required to have, and manage and appoint the professionals involved in providing the services. As noted in previous reports, in England and Wales children's guardians are appointed with much greater frequency than in Ireland,[105] and Cafcass oversees this extensive service.[106] In Ireland, Barnardos operates a guardian *ad litem* service, although the organisation does not have the same level of responsibility as Cafcass, nor does it have a statutory basis.[107]

1.6.2 Recent Developments Concerning the Right to be Heard in England and Wales

There has been a high volume of cases in England and Wales in recent times on the topic of the voice of the child in proceedings concerning them.

1.6.2.1 *D (A Child) (International Recognition)* [2016] – Hearing Children as a Fundamental Principle

D (A Child) (International Recognition)[108] concerned an appeal in relation to a judgment concerning the Hague Convention on Child Abduction (1980). A Romanian court had ordered that the custody of the child (aged nine by 2016) change from the mother to the father. The child was to be sent from England – where he had lived with his mother since shortly after his birth – to Romania where his father was based. The order to return the child to that jurisdiction, it was decided by the English High Court,[109] would not be upheld, because the child had not been given the opportunity to be heard in the Romanian proceedings (amongst other reasons).

[105] In public law, the appointment will be made unless the court is satisfied that it is not necessary to do so, under section 41(1) of the Children Act 1989. In private law cases, however, the appointment is discretionary.
[106] A 'dual representation model' is used, whereby the children's guardians will appoint a solicitor for the child but the solicitor usually takes instructions from the children's guardians.
[107] See https://www.barnardos.ie/what-we-do/our-services/specialist-services/guardian-ad-litem.html (last accessed 12 December 2016).
[108] [2016] EWCA Civ 12.
[109] See *MD v AA & Another* [2014] EWHC 2756 (Fam).

The father appealed the High Court judgment.[110] The Court of Appeal held, amongst other things, that the failure to hear the child's views constituted a violation of a fundamental principle of procedure. Section 1(3)(a) of the Children Act 1989 – a factor on the 'welfare checklist' which judges must consider when determining the welfare of the child – was an example of domestic legislation in England and Wales giving effect to such a fundamental principle, the court determined. Section 1(3)(a) provides that in deciding matters of the child's upbringing the court must consider "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)".

The Court of Appeal concurred with the High Court's assertion that, in England and Wales, it would be highly unusual to fail to seek the child's views, as occurred in Romania, in a case where a child was facing being taken from the primary carer and the country in which he lived essentially since birth:

> An English court, faced with a striking application of this kind (peremptory change of lifelong carer, country and language) would as a minimum seek a report from a court social worker that would, among other things, contain the child's perspective on such a momentous change of circumstances. Far from being unusual, such a report would be fundamental. Any decision reached without such information would immediately be vulnerable on procedural and substantive grounds.[111]

The appellant argued that hearing children as provided for in the Children Act is not a statement of fundamental principle, but instead simply a provision to ensure that the court considers all relevant factors in reaching a decision on the welfare of the child. The court stated that was not the case, and that this had already been asserted by the highest court in *In re D (A Child)*[112] in which it was stated that:

> [T]here is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.[113]

[110] The father ultimately appealed to the Supreme Court which determined that it did not have jurisdiction to hear the appeal. *In the Matter of D (A Child)* [2016] UKSC 34.
[111] *D (A Child) (International Recognition)* [2016] EWCA Civ 12, para. 12.
[112] [2006] UKHL 51.
[113] *In re D (A Child) (International Recognition)* [2016] EWCA Civ 12, para. 57.

One point of note arising from the case was it emphasised the requirement to hear even very young children in such matters. Though the child was only five to seven years old at the time of the Romanian proceedings, efforts should nevertheless have been made to determine the views of the child as he grew older: "In any event, even when viewed as a whole, time passes quickly for a child and what might be clear at the age of 5 or 6 is not necessarily so at the age of 7 or 8. In my judgment, each court should be astute to consider participation in context."[114]

In Ireland, a checklist now exists under section 31 of the Guardianship of Infants Act 1964 which is equivalent to that in section 1(3) of the Children Act 1989. It also includes reference to the views of the child as a factor in determining the best interest of the child. Similarly, Ireland is also subject to the same laws under the Hague Convention on Child Abduction (1980), as well as the EU laws which further strengthen the voice of the child in Hague Convention proceedings. It can be deduced then that hearing children in such circumstances could also be considered to be a fundamental principle of Irish law.

1.6.2.2 *W (A Child)* [2016] – Instructing a Solicitor

In *W (A Child)*[115] a 16-year-old girl in care appealed an outcome in public law proceedings on the ground that she should have been permitted to directly instruct her own solicitor. She had been the subject of care proceedings and she wished to return home. The girl, A, had been refused permission by the court to directly instruct her solicitor, although under Family Court Proceedings rule 16.29(2) children are permitted to instruct their legal representative directly if they have sufficient understanding, and A had instructed her legal representative directly in other proceedings previously.

A's appeal was upheld, with the court noting the importance of children's autonomy rights, and that it could be in a child's interest to have direct involvement in proceedings concerning her interests. The court decided that at trial level the judge had conflated the child's welfare with her understanding when applying the relevant test under rule 16.29(2) of the Family Court Proceedings. The court further held that the judge in the lower court had given insufficient weight to A's age, her previous experience of instructing her own solicitor and

[114] *D (A Child) (International Recognition)* [2016], para. 35.
[115] [2016] EWCA Civ 1051.

the views of that solicitor that she had the capacity to instruct. Too much weight was placed on concerns about the extent to which A's parents might influence her, A's denial of facts determined in the care proceedings, and perceptions about future risks.

1.6.2.3 *Re JS (Disposal of Body)* [2016] – Responsibility for a Child's Body after Death

In the tragic case of *Re JS (Disposal of Body)*[116] the applicant, a 14-year-old girl (JS) had been diagnosed with terminal cancer. JS had decided that she wished to be cryogenically frozen after her death, in the hope that at some point in the future she might be revived and cured. Her estranged father sought to prevent this. As children cannot make wills, JS sought an order clarifying that responsibility for dealing with her body after death would fall to her mother.

The court made particular reference to the fact that this was not a decision on the matter of whether cryogenics should be permitted or endorsed: "The court is not deciding or approving what should happen, but is selecting the person best placed to make those decisions after JS's death."[117] Nor was the case about judging the wisdom of the wishes of the child concerning cryogenic preservation:

> All the court is doing is to provide a means of resolving the dispute between the parents … [T]his case [is not] about whether JS's wishes are sensible or not. We are all entitled to our feelings and beliefs about our own life and death, and none of us has the right to tell anyone else – least of all a young person in JS's position – what they must think.

Nevertheless, this case constitutes a positive outcome for a child with strong wishes. The judgment is sensitive, nuanced and respectful about JS's position. JS received her dying wish on the basis that her father had had a very limited role in her life, and in contrast, she had a very close relationship with her mother. It was sensible, then, that her mother, who happened to support the cryogenic freezing option, take responsibility for JS's body on her death.

[116] [2016] EWHC 2859 (Fam).
[117] *Re JS (Disposal of Body)* [2016] EWHC 2859 (Fam), para. 37.

1.6.2.4 *Re M (Republic of Ireland)* [2015] – Exercise of Discretion on the Basis of Children's Objections Should Not be Too Narrow

The case of *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)*[118] concerned an appeal against a return order made in Hague Convention proceedings on the basis of children's objections. The three children, aged between six and 13 years, were afraid of their violent father and did not wish to return to Ireland from where they had been taken by their English mother. Two issues were decided in this case: (1) the substantive challenge to the return order; and (2) a procedural question concerning whether children may be joined as parties for the first time at Court of Appeal level. The court referred to established principles regarding the children's objections exception under the Hague Convention:

> (1) Whether a child objects to a return in a Hague Convention case is a matter of fact.
> (2) There is no age limit below which a child's objections will not be considered, however older children are more likely to have the necessary maturity.
> (3) It must be an objection and nothing less than this.
> (4) The child's objection must be to returning to the country rather than particular circumstances in that country, though in practice these factors may be difficult to separate.
> (5) A child's objections to return are not determinative – judges retain discretion on this.

The court considered the exercise of discretion in this particular case, and found that at trial the court's consideration had been "much too narrow … in light of the material before it." Considering all the circumstances of the case and weighing the relevant factors, the Court of Appeal dismissed the father's application for the return of the children to Ireland and upheld the appeal on the basis that: "there are strong reasons to exercise the discretion not to order the return of J [the eldest boy] to Ireland, particularly in light of his age, his fears, the strength of his objections, and his emotional vulnerability."[119] J was very distressed at the prospect of return and this combined with his age meant that discretion should be exercised in favour of

[118] [2015] EWCA Civ 26.
[119] *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, para. 137.

him remaining in England. The situation with the younger children was similar, and the appeal against their return was also upheld.

In the matter of the party status of the children in the present proceedings, the court outlined that it is crucial that consideration is given at the earliest possible stage to whether the children should be joined as parties. It was clear, the court stated, that children could appeal a decision in spite of the lack of party status and that they could be joined as parties for the first time at the appeal stage.

Both *Re JS* and *Re M* highlight the level of importance which should be placed on children's views and preferences. *Re M* particularly highlights that the discretion judges have in Hague Convention proceedings concerning the treatment of children's objections to return should not be construed too narrowly.

1.6.3 The Right of Children to be Heard in Proceedings in Ireland

Ireland needs to make further progress when it comes to implementation of the right of children to be heard in proceedings affecting them. This is a matter which I have considered in a number of my previous reports. The Committee on the Rights of the Child recently reported its concluding observations on the state of children's rights in Ireland, as noted above.[120] The Committee raised a number of points relating to our current legal situation with regard to the right of children to be heard in proceedings.

In public law proceedings, judges have discretion as to whether guardians *ad litem* – who represent children's wishes and interests – will be appointed. This is in contrast to the system in England and Wales outlined above, where children automatically have party status and the representation of a guardian *ad litem*. In private law proceedings in Ireland, guardians *ad litem* are rarely appointed. Under section 28 of the Guardianship of Infants Act 1964 (as amended by section 11 of the Children Act 1997), a guardian *ad litem* may be appointed in private proceedings "if in special circumstances" it appears to the court "necessary in the interests of the child to do so." This section of the Act has never been commenced, however. In the rare instance in which guardians are appointed, parents are expected to pay the costs. In

[120] Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*.

my sixth report I considered the voice of the child in proceedings affecting him or her in Ireland, calling for greater clarity on the appointment of guardians *ad litem* in both private and public proceedings and for the guardian *ad litem* system to be placed on a statutory footing. In this regard, I welcome the publication of the General Scheme of the Child Care (Amendment) Bill 2017.

In my sixth report I also acknowledged the inclusion of a right to be heard of children in proceedings affecting them which is contained in the constitutional amendment on children's rights. As the report of the Committee on the Rights of the Child emphasises, the Constitutional Amendment went some way towards improving children's right to be heard. But whilst the constitutional provision requires that the views of the child be ascertained, it does not provide guidance on how this is to be achieved, "leaving it to the legislature to decide."[121]

As I also pointed out in my sixth report legislation should be enacted which provides for the views of the child to be ascertained in *any* proceedings about his or her interests. The amendment states that children should be heard in specific family law cases, for example adoption and child care cases, as well as those involving guardianship, custody and access. Article 12 of the CRC on the other hand provides for children to be heard in a broader variety of proceedings – all judicial and administrative proceedings and indeed all matters affecting them beyond that.

Administrative proceedings can include, for example, those relating to a child's education (for example if a child is at risk of being expelled from school) and social welfare provision (for example family social housing). The Committee has pointed to the fact that the Education Act does not provide for the right of the child to be heard in individual cases and calls upon Ireland to ensure that children are heard in cases arising under this Act.[122]

There have been significant changes in family law brought about by the Children and Family Relationships Act 2015. One positive development is that it places on a legislative basis the requirement that in any proceedings related to guardianship, custody or access the court shall

[121] Conor O'Mahony, "The Constitutionality of the Children and Family Relationships Bill" 18 *Irish Journal of Family Law* 3 (2015), at 5.
[122] Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, para. 31.

also have regard to the views of the child. This provision comes with much uncertainty, however, about how children's views can or should be obtained by the courts, considering the lack of procedures, processes and infrastructure for this purpose.[123]

The Committee on the Rights of the Child has drawn attention to the fact that it is unclear what is to happen with the resourcing of hearing children in proceedings, noting that "[u]nder the Children and Family Relationships Act 2015, parents must bear the cost of an expert to hear the views of the child in family law proceedings" and recommends the establishment of systems and procedures for courts to be able to hear children. In particular the Committee calls for provision in the legislation for the costs of experts to hear children's views.[124]

The recent legislative changes have brought Ireland a step closer to realising the right of children to be heard in proceedings. Yet without a properly resourced system, and clarity around how the costs of hearing children are to be covered, children will not effectively enjoy this right. This is something which is emphasised strongly in General Comment No. 12 as a necessary component of meeting international obligations to hear children.

1.6.4 Recommendations

- *Guidance should be provided as to how children will be heard in all proceedings affecting them. Such guidance should be in line with the Committee on the Rights of the Child's General Comment No. 12. In particular the following points are of importance:*

    - *A presumption in favour of hearing children should be adopted, with care taken that the approach to how and whether to hear children is context-appropriate (e.g. bearing in mind the age of the child). Children themselves should be the primary decision-makers on how and whether they are heard.*

[123] See e.g. Fiona Gartland, "Family law cases to take longer after legal changes" *The Irish Times* (20 January 2016). Available at http://www.irishtimes.com/news/crime-and-law/family-law-cases-to-take-longer-after-legal-changes-1.2502927 (last accessed 13 December 2016).
[124] Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, para. 31.

- *Particular care must be taken to facilitate children who may experience distinct difficulties in expressing their views, for example children with disabilities.*

- *Children should be permitted to instruct their own solicitor unless there are compelling reasons inclining against this.*

- *Systematic training should be provided to judges overseeing cases concerning children, specifically where they will be conducting interviews with children. Guidelines on the judicial interview should be introduced.*

- *'Due weight' means that children's views should be treated as a significant factor in the settlement of an issue concerning their interests, and decision-makers should explain clearly how children's views were treated.*

- *Legislation should be enacted providing for children to be heard in not just judicial proceedings, but also administrative proceedings.*

- *Adequate procedures, processes and infrastructure must be developed in Ireland for the purpose of hearing children in line with Article 42A of the Constitution and under the Children and Family Relationships Act 2015.*

- *Hearing children should be interpreted as a fundamental principle of justice in Ireland, particularly in proceedings under the Hague Convention on Child Abduction (1980).*

- *The discretion judges enjoy in Hague Convention cases concerning the treatment of children's objections to return should not be construed too narrowly.*

1.7 Ireland's Child Protection System and International Developments

The child protection landscape in Ireland has undergone many recent changes, such as the establishment of the new Tusla Child and Family Agency. I have extensively considered the child protection system in previous reports. The recent report of the Committee on the Rights

of the Child on Ireland provides further points for consideration in relation to our child protection system.

1.7.1 Sufficient Resources for Child Protection

The Committee on the Rights of the Child welcomed the reissuing of the child protection guidelines: "Children First: National Guidance for the Protection and Welfare of Children" in 2011. However, the Committee also expressed concern that the Child and Family Agency has not been provided with sufficient powers or resources to ensure compliance with the Children First guidelines.

The Committee pointed in its recommendations to Ireland to the UN Guidelines for the Alternative Care of Children,[125] recommending that Ireland ensure that adequate human, technical and financial resources are available for alternative care centres and child protection services. The Guidelines outline that states should provide for child protection and alternative care for children to the maximum extent of their available resources.[126] The Committee called upon Ireland to ensure that child protection referrals can be responded to quickly, and so that the needs of children at risk are met in a timely manner.

There are significant gaps in Ireland in the provision for the needs of children in care which require immediate rectification. Although regulations stipulate that all children in care should have a social worker it was found in December 2016 that 7% of children did not.[127] There is also a high turn-over of social workers,[128] which means that Ireland's most vulnerable children are at risk of experiencing inadequate care without oversight due, in large part, to problems with recruitment and retention.

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[125] General Assembly Resolution, *Guidelines for the Alternative Care of Children* A/RES/64/142 (24 February 2010).
[126] General Assembly Resolution, *Guidelines for the Alternative Care of Children*, para. 24.
[127] See Tusla, *Monthly Management Data Activity Report* (December 2016); and Children's Rights Alliance of Ireland, *Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child*, at 54.
[128] Tusla, *National Review Panel Reports Published March 2015: Thematic Overview* and Children's Rights Alliance of Ireland, *Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child*, at 54.

This lack of provision is occurring in a context where the number of referrals made to the child protection system is on the increase[129] – reports on the basis of concerns for the welfare of children grew between 2007 and 2014.[130] There are therefore high levels of referrals to the system, yet in only a small percentage of reports made is abuse confirmed.[131] Therefore there is a system in operation in Ireland that invests very considerable resources in screening and filtering out the vast majority of reports received. There is a high threshold for statutory intervention, and for those who do not reach it, there are few community-based support services. Furthermore, there is an absence of data about family support which points to a lack of coherent planning in the sector.[132]

Irish social workers report that they are overwhelmed by policy requirements, that they worry about getting in trouble for not being sufficiently familiar with them, and that they fear using individual discretion and making the wrong professional judgement.[133] A similar issue was identified in the Munro Review of child protection in England and Wales.[134] It was claimed in that report that the large volume of guidance and the focus on key performance indicators detrimentally affected the ability of practitioners to remain child-centred and to exercise professional discretion. Authorities subsequently committed to reviewing the guidance and placing greater emphasis on professional judgement.[135] The same must occur in Ireland, however it must also be matched with adequate resourcing of the system, something which has not happened in the UK, where social budgets have been reduced to the detriment of children and staff.[136]

Another significant challenge for the child protection system in Ireland is that of ensuring access visits between children in care and their families. This is the most common concern of

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[129] Health Service Executive, *Review of Adequacy for HSE Children and Family Services 2010* (Health Service Executive, 2012). See further Helen Buckley, "Using Intelligence to Shape Reforms in Child Protection" 12 *Irish Journal of Applied Social Studies* 65 (2012).
[130] Carl O'Brien, "Children at risk as pressure grows on frontline social work services" *The Irish Times* (5 Sep. 2014).
[131] In 2010 there was a 5% confirmation rate. Health Service Executive, *Review of Adequacy for HSE Children and Family Services 2010*. See further Helen Buckley, "Using Intelligence to Shape Reforms in Child Protection".
[132] Buckley, *ibid*.
[133] Olivia O'Connell, "Social workers in Ireland are swamped by child protection policy" *The Guardian* (25 August 2015).
[134] Eileen Munro, *The Munro Review of Child Protection – Interim Report: The Child's Journey* (Department of Education [England and Wales], 2011).
[135] See Department for Education [England and Wales] *Government Response to Munro* (Department for Education, 2012) and Helen Buckley, "Using Intelligence to Shape Reforms in Child Protection".
[136] Hannah Richardson, "NSPCC: Child protection services forced to struggle" *BBC News* (31 March 2014).

children in care – that is, they wish to see their birth families more often. Recent research with 211 children in care demonstrates the importance of this matter to children, concluding that: "With limited exception, most young people living in foster care still had contact, or aspired to have contact and/or further contact, with their birth family."[137]

A further problem is the lack of provision for the mental health needs of children in care. One report on foster care services in the South East found that 45 children were waiting on mental health services, some for up to one year. Furthermore, for children who require institutional care (because foster care is not possible) there appears to be insufficient provision for their needs due to a lack of high-support care units.[138]

There is also evidence of inappropriate use of isolation units where children are kept from others.[139] This is another point that was emphasised by the Committee as requiring change. Ireland was urged to: "Prioriti[s]e the development of its special care services to ensure that the needs of such children are addressed, that this takes place throughout the territory of the State party, and that single isolation is not used inappropriately."[140]

1.7.2 Inadequate Care Planning

The Committee noted that in Ireland inadequate measures are taken to provide for individual needs assessments and care planning for children at risk of abuse or neglect, urging that authorities "[e]nsure the effective implementation of individual needs assessments, care planning and record-keeping for children in alternative care."[141] This problem was also noted in the 2012 report into the deaths of 196 children in care (or known to child protection services) in which it was highlighted that instead of a proactive approach based on a risk assessment and a care plan drafted in a considered and responsive manner, at present it appears that "the system reacts to each individual event and new crisis."[142]

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[137] Department of Children and Youth Affairs, *Listen to Our Voices: A report of consultations with children and young people living in the care of the state* (Department of Children and Youth Affairs, 2011).
[138] See Children's Rights Alliance of Ireland, *Are We There Yet? Parallel Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child*, at 54.
[139] *Ibid*.
[140] Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, para. 44.
[141] *Ibid*.
[142] See Dr. Geoffrey Shannon and Norah Gibbons, *Report of the Independent Child Death Review Group (*Government Publications, 2012) at 404; and Children's Rights Alliance of Ireland, *Are We There Yet? Parallel*

The UN Guidelines for the Alternative Care of Children[143] document contains detailed recommendations to assist states in developing and implementing care plans for children.[144] It is stipulated that children should be heard in all proceedings with children being consulted at all stages, and that child protection processes should be based on "rigorous assessment, planning and review", with every effort being made by the state to provide adequate resources for the training of the professionals. The Guidelines also state that assessments of children's situations should be carried out in good time, thoroughly and carefully. Children's immediate well-being, together with their longer-term care and development, should be considered.[145]

Assessments should involve consideration of the child's various characteristics: "[P]ersonal and developmental characteristics, ethnic, cultural, linguistic and religious background, family and social environment, medical history and any special needs." The reports arising from the assessment should be used in the future as tools for planning decisions about children so that undue delay and contradictory decisions are avoided. Extensive efforts should be made to avoid frequent changes in a care setting as these are known to be harmful to children. Permanency for children should be secured without delay.[146]

1.7.3 Recommendations

- *Ireland should ensure that adequate resources, to the maximum extent possible, are made available for child protection services so that referrals can be responded to quickly, and so the needs of children at risk are met in a timely manner.*

- *There should be less focus on screening reports of abuse, and more on provision of support for families who need it, as well as timely removal of children into care where support does not work.*

Report to Ireland's Third and Fourth Combined Report under the UN Convention on the Rights of the Child, at 53.

[143] General Assembly Resolution, *Guidelines for the Alternative Care of Children.*

[144] *Ibid*.

[145] *Ibid*.

[146] *Ibid*.

- *There should be a greater availability of community-based support services, and more data from Tusla about family support. All children in care should have a designated social worker at all times.*

- *In line with an increase in resources for child protection, guidance for social workers should be reviewed in order to ensure that professionals do not feel overburdened by policies. Greater emphasis on professional judgement is required.*

- *Greater resources should be made available to ensure the right of children in care to access visits with birth families, and to adequate provision of mental health and other services.*

- *Greater attention to child protection planning is required, with thorough, timely child protection processes based on "rigorous assessment, planning and review" in line with UN General Assembly Resolution, Guidelines for the Alternative Care of Children.*

1.8 Scotland Raises the Minimum Age of Criminal Responsibility

The Scottish government has announced that it is raising the age of criminal responsibility to 12 years.[147] In Scotland at present, children can have a criminal record as young as eight years old, although children of this age are dealt with through the children's hearings system.[148] Child protection and most youth justice proceedings are conducted in the same venue. It involves a more informal hearing run by highly trained lay people, with the ethos that all children coming to hearings require care and support. The children's hearing system is an example of the manner in which a holistic approach is taken in Scotland in responding to the needs of children including those in conflict with the law.

An Advisory Group was established by the Scottish government in 2015 to consider issues relating to the minimum age of criminal responsibility. The Group made recommendations to

[147] BBC News, "Scottish government to raise age of criminal responsibility" *BBC News* (1 December 2016). Available at http://www.bbc.co.uk/news/uk-scotland-scotland-politics-38160549 (last accessed 10 December 2016).
[148] The minimum age of prosecution was set at 12 years in the Criminal Justice and Licensing (Scotland) Act 2010.

raise the minimum age of criminal responsibility from eight to 12 years, and to implement safeguards to reinforce victim and public confidence. The Group has further recommended that where children under the age of 12 engage in harmful behaviour the focus should be on child protection and addressing risk rather than a punitive approach. Police should continue to investigate alleged incidents, but new procedural safeguards based on child protection standards should be employed, rather than those from criminal justice, to support children through such investigation processes. The Scottish Government is at present considering these further recommendations.[149]

The age of 12 as a minimum age of prosecution was chosen in Scotland for a number of reasons. Offending by children under this age is very rare.[150] Furthermore 12 years is the age set as the very lowest acceptable minimum level by the UN Committee on the Rights of the Child; although 14-16 years is preferred, and states are expected to progressively raise the age of criminal responsibility from age 12.[151] The Scottish government also argues that it reflects the age in Scotland at which children are presumed to have capacity to instruct a solicitor and to consent to an adoption order. The Advisory Group on the Age of Criminal Responsibility recognised that there are arguments in favour of raising the age of criminal above 12 years but was asked only to consider that age.[152]

1.9 The Minimum Age of Criminal Responsibility in Ireland

In 2006, under the Children Act 2001, the age of criminal responsibility in Ireland was raised from seven to 12 years, so that no child under the age of 12 can be charged with an offence, except where charged with very serious offences, such as murder or rape, in which case the age is set at 10 years. The consent of the Director of Public Prosecutions must be given before a child under the age of 14 years can be charged.

The approach to the minimum age of criminal responsibility in Ireland, as it is in many countries, is highly illogical. The law deems children incapable of consenting to sexual

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[149] Scottish Government, *Consultation on the Minimum Age of Criminal Responsibility* https://consult.scotland.gov.uk/youth-justice/minimum-age-of-criminal-responsibility/consult_view (last accessed 10 December 2016).
[150] *Ibid*.
[151] Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice* CRC/C/GC/10 (25 April 2010).
[152] Scottish Government, *Consultation on the Minimum Age of Criminal Responsibility*.

activity until the age of 17 years, and prohibits the drinking of alcohol until 18 years, yet children as young as 10 years are essentially held to have the necessary mental development to knowingly and intentionally engage in a criminal act.

We have learned from neurobiology in recent years that our brains do not reach full maturity until our mid-20s.[153] The research emphasises that across the teenage years, there is enormous capacity for change and development in the brain,[154] pointing to the potential, for example, to assist children who have suffered adversity in early life and consequently engage in offending, and to deflect them from such offending. Commentators have pointed to neurological evidence that children are generally not as capable as adults when it comes to decision-making because developments in the brain are ongoing into adulthood. Children are also more likely to make poor decisions on the spur of the moment (for example under peer pressure), than they are in an environment when they have time and support to make a good decision. Some have argued then, that the minimum age of responsibility for criminal acts should be set higher, rather than lower, compared to other types of autonomy rights (e.g. instructing a solicitor), as the context in which criminal acts are carried-out often involve spur of the moment decisions.[155]

We have an obligation to protect vulnerable children, and if a child has engaged in a serious offence such as murder or rape under the age of 10 years, it is clearly symptomatic of a serious child protection issue in the child's life. Furthermore, the fact that no child aged ten or 11 has been charged with such an offence under the relevant legislation is indicative of how unusual it would be for it to occur, and consequently the extent to which a child would be in need of assistance if he or she were engaging in this type of behaviour.

Yet the more important point is that there are those under the age of 18 who are being charged with and convicted of crimes, and they are being treated punitively rather than therapeutically or protectively. To argue that a high minimum age of criminal responsibility is to be set is not to suggest that nothing should be done when a child commits a crime, but instead to recognise the fact that children who commit crimes require assistance, rather than

[153] See e.g. Jay Giedd, "Structural Magnetic Resonance Imaging of the Adolescent Brain" 77 *Annals of the New York Academy of Sciences* 1021 (2004).
[154] See http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html (last accessed 10 October 2016).
[155] See e.g. Emily Buss, "What the Law Should (And Should Not) Learn from Child Development Research" 38 *Hofstra Law Review* 13 (2009).

punishment, not least to prevent them from offending again, which is in everyone's interests. There are many good examples internationally of systems that adopt the principle of assisting children rather than punishing them. The overriding principle in Sweden is that interventions should be based on the needs of the child rather than the crime.[156]

Ireland has been called upon repeatedly at UN level to amend the minimum age of criminal responsibility.[157] The Committee on the Rights of the Child has recommended in its recent report that Ireland set the age of criminal responsibility at 14 years for all offences.[158] In particular, the Committee on the Rights of the Child asserts that multiple ages of criminal responsibility, which at present exist in Ireland, whereby younger children will be held responsible for more serious crimes, is not permissible.[159] Ireland should change the age of criminal responsibility to at least the age of 14 years as advocated by the UN Committee on the Rights of the Child, and put in place adequate support both for children in conflict with the law, and victims of any crimes they may commit.

1.9.1 Recommendations

- *Consideration should be given to whether Ireland should implement a system modelled on Scotland's children's hearings system, with the ethos that all children coming to hearings require care and support.*

- *In Ireland the overriding principle in the youth justice system, as in Sweden, should be that interventions should be based on the needs of the child rather than the crime.*

- *In Ireland the age of criminal responsibility should be set at least at the age of 14 years for all offences, as recommended by the UN Committee on the Rights of the Child.*

[156] See further Youth Justice Board [England and Wales], *Cross-National Comparison of Youth Justice* (Youth Justice Board, 2008).
[157] See e.g. Human Rights Council, *Universal Periodic Review Report of the Working Group on the Universal Periodic Review: Ireland* A/HRC/19/9 (21 December 2011), at 21.
[158] Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, para. 72.
[159] Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*.

- *Adequate support should be made available to ensure that children who engage in criminal activity are provided with any support and care that may be required, and that adequate provision is also made for any victims of their crimes.*

SECTION 2:
GENERAL TRENDS FROM THE COURTS IN CHILD LAW

2.1 Introduction

This section examines developments in the last year emerging from the courts relating to the protection and welfare of children. The case law examined is that of the European Court of Justice, the Supreme Court, the High Court and the District Court. Whilst legislative and policy developments in child protection and welfare are important so too are developments emanating from the national and international courts. It is the courts that interpret and apply the law in respect of child protection and welfare and hence the need to monitor developments in that field.

2.2 The European Court of Justice

2.2.1 *Child and Family Agency v J.D.* [2016] EUECJ C-428/15

This case concerns a preliminary ruling under Article 267 from the Supreme Court of Ireland. The questions relate to issues arising in interpreting the law in respect of whether child care proceedings in Ireland concerning a young child should be transferred to the High Court of Justice of England and Wales pursuant to Article 15 of Council Regulation 2201/2003.

Article 15 of Regulation No 2201/2003, headed 'Transfer to a court better placed to hear the case', provides:

> By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:
>
> (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other member state in accordance with paragraph 4; or
>
> (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.
>
> ...
>
> The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

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

The questions asked of the Court were as follows:

(1) Does Article 15 of Regulation No 2201/2003 apply to public law care applications by a local authority in a Member State, when[,] if the Court of another Member State assumes jurisdiction, it will necessitate the commencement of separate proceedings by a different body pursuant to a different legal code and possibly, if not probably, relating to different factual circumstances?
(2) If so, to what extent, if any, should a court consider the likely impact of any request under Article 15[,] if accepted, upon the right of freedom of movement of the individuals affected?
(3) If the "best interests of the child" in Article 15(1) of Regulation No 2201/2003 refers only to the decision as to forum, what factors may a court consider under this heading, which have not already been considered in determining whether another court is "better placed"?
(4) May a court for the purposes of Article 15 of Regulation No 2201/2003 have regard to the substantive law, procedural provisions, or practice of the courts of the relevant Member State?
(5) To what extent should a national court, in considering Article 15 of Regulation No 2201/2003, have regard to the specific circumstances of the case, including the desire of a mother to move beyond the reach of the social services of her home State, and thereafter give birth to her child in another jurisdiction with a social services system she considers more favourable?
(6) Precisely what matters are to be considered by a national court in determining which court is best placed to determine the matter?

In answering the first question, the Court was clear that Article 15 of Regulation No 2201/2003 applies to public law care applications. The Court observed that if the result is that another member state will have to commence separate proceedings, by a different body, pursuant to different laws and possibly different circumstances, it follows from Article 15(1) that such an assumption of jurisdiction is subject to the condition that the court concerned has before it a request submitted either by the parties to the case, or by the court having jurisdiction in the first member state. Such a request is not subject to any procedural condition. The commencement of proceedings in the second member state can only occur after the court of the country normally having jurisdiction has decided to request the transfer of the case to another member state, and a decision has been made by that court to assume jurisdiction.

In answering the third, fourth and sixth questions the Court noted that guidance was sought on how the concepts of the court that is 'better placed' and of 'the best interests of the child', referred to in Article 15(1) of Regulation No 2201/2003, are to be interpreted, and how they are linked.

The Court noted that under the criterion in Regulation No 2201/2003, as a general rule, the jurisdiction of the courts will lie where the child is habitually resident at the time the courts are seised and Article 15 of that regulation permits a transfer of the case to the court of another member state provided certain conditions are met. Therefore, this is a special rule of jurisdiction which derogates from the general rule. Firstly, the Court stated:

> Against that background, Article 15(1) of Regulation No 2201/2003 must be interpreted as meaning that the court of a Member State that normally has jurisdiction to deal with a given case must, if it is to be able to request a transfer to a court of another Member State, be capable of rebutting the strong presumption in favour of maintaining its own jurisdiction, on the basis of that regulation, as stated by the Advocate General in point 90 of his Opinion.

The Court noted that in considering an application to transfer proceedings, if the list of factors considered in Article 15(3)(a) to (e) are lacking, then that would exclude the option of the transfer mechanism. The court found that in light of the 'nature' of the factors at Article 15(3) (a) – (e):

> "[I]t must be held that, when applying Article 15(1) of Regulation No 2201/2003 to a given case, the court having jurisdiction must compare the extent and degree of the relation of 'general' proximity that links it to the child concerned, under Article 8(1) of that regulation, with the extent and degree of the relation of 'particular' proximity demonstrated by one or more of the factors set out in Article 15(3) of that regulation that exists, in the particular case, between that child and certain other Member States.
>
> That said, the existence of a 'particular connection', within the meaning of Article 15(1) of Regulation No 2201/2003, relevant to the circumstances of the case, between the child and another Member State does not necessarily, in itself, prejudge either the question whether, in addition, a court of that other Member State is better placed to deal with the case than the court having jurisdiction, or, if that other court is in fact better placed, the issue whether the transfer of the case to that other court is in the best interests of the child.
>
> Consequently, it remains the task of the court having jurisdiction to determine, secondly, whether there is, in the Member State with which the child has a particular connection, a court that is better placed to hear the case.

> To that end, the court having jurisdiction must determine whether the transfer of the case to that other court is such as to provide genuine and specific added value, with respect to the decision to be taken in relation to the child, as compared with the possibility of the case remaining before that court. In that context, the court having jurisdiction may take into account, among other factors, the rules of procedure in the other Member State, such as those applicable to the taking of evidence required for dealing with the case. However, the court having jurisdiction should not take into consideration, within such an assessment, the substantive law of that other Member State which might be applicable by the court of that other Member State, if the case were transferred to it. If the court were to take that into consideration, doing so would be in breach of the principles of mutual trust between Member States and mutual recognition of judgments that are the basis of Regulation No 2201/2003.
>
> …
>
> Third and last, the requirement that the transfer must be in the best interests of the child implies that the court having jurisdiction must be satisfied, having regard to the specific circumstances of the case, that the envisaged transfer of the case to a court of another Member State is not liable to be detrimental to the situation of the child concerned.
>
> To that end, the court having jurisdiction must assess any negative effects that such a transfer might have on the familial, social and emotional attachments of the child concerned in the case or on that child's material situation.

In answering the second and fifth questions the Court held:

> Article 15(1) of Regulation No 2201/2003 must be interpreted as meaning that the court having jurisdiction in a Member State must not take into account, when applying that provision in a given case relating to parental responsibility, either the effect of a possible transfer of that case to a court of another Member State on the right of freedom of movement of persons concerned other than the child in question, or the reason why the mother of that child exercised that right, prior to that court being seised, unless those considerations are such that there may be adverse repercussions on the situation of that child.

2.3 The Supreme Court

2.3.1 *Child and Family Agency v C.J.* [2016] IESC 51

This case was an appeal from the Court of Appeal in respect of the procedure to be applied when the Child and Family Agency is applying to transfer proceedings from this jurisdiction to another European Member State jurisdiction pursuant to Council Regulation 2201/2003.

The facts in this case related to a child 'K' who was born in Scotland. When aged about 3 the child's name was put on the child protection register in Scotland and the mother was then subsequently served with papers for a Children's hearing. The mother left Scotland and moved to Ireland and was there on 8th November, 2014. On 12th November, 2014, a supervision order was made in the Scottish Courts in respect of K. The mother and K were located in Ireland and An Garda Síochána invoked its powers to remove K from the mother under section 12 of the Child Care Act 1991. The Child and Family Agency then applied in the District Court for an Emergency Care Order followed by an Interim Care Order. Shortly thereafter, the Child and Family Agency applied to the High Court in Ireland for inter alia, a declaration that K was habitually resident in Scotland, a declaration pursuant to Article 17 of Council Regulation 2201/2003 that the Courts of Ireland had no jurisdiction in respect of matters concerning parental responsibility, and in the alternative, an order pursuant to Article 15 of Council Regulation 2201/2003 transferring the proceedings to Scotland.

The High Court had found that it was the appropriate forum to discharge functions under the Regulation, and not the District Court, and made a declaration under Article 17 of the Regulation. The child was returned to Scotland but the matter was also appealed to the Court of Appeal. The Court of Appeal determined that the High Court had been mistaken in holding that the District Court did not have jurisdiction under Article 17 to declare that it had no jurisdiction as to the subject matter in the case. The Court of Appeal also addressed the subsidiary question as to whether the High Court itself had jurisdiction to make a more limited declaration that it did not have jurisdiction under Article 17. It held, that since an application had been made for an order returning the child to Scotland, that this was an order in relation to parental responsibility, over which the High Court did not in fact have jurisdiction (because the Court of Appeal held, that any such jurisdiction, which was doubted, was limited to circumstances where the return of the child was sought by order of a court having jurisdiction as to substance).

The Court of Appeal held that Article 20 did not permit the High Court in this case to make an order for the transfer of the child to the Scottish local authority. The Court of Appeal held that it was a matter for the courts of Scotland to determine whether or not K should be returned to Scotland in the short or longer term. In the absence of an order of the Children's Hearing or any other relevant Scottish court, requiring the return of K to Scotland which may be recognised by an Irish court under the Regulation, it did not appear that the High Court

had jurisdiction pursuant to Article 20 of the Regulation to make the orders permitting the transfer of K by the Child and Family Agency to Scotland. The Court of Appeal held as follows:

> As K remained habitually resident in Scotland in accordance with the division of jurisdiction between Ireland and Scotland under the Regulation in relation to parental responsibility for K, it was the courts of Scotland which had to determine whether or not it was in the best interests or welfare of K that he should be removed from his foster care in Ireland and transferred to the care of Dundee City Council Children's Services and back to live in Scotland. The High Court did not have jurisdiction to make that decision and [the] order made.

O'Donnell J. stated:

> It is clear that these proceedings have reached an unhappy point. If this Court of Appeal judgment is correct then orders were made erroneously in the High Court, and moreover, since a stay was refused, the courts of this jurisdiction are not in a position to correct an identified error. Furthermore, the issues raised by the CFA are very far-reaching indeed, and both the High Court judgment and the Court of Appeal judgments reached significant (if opposed) conclusions as to the manner in which transnational issues may be dealt with under the Regulation in the Courts of Ireland. Accordingly, the resolution of this matter will have significant implications for all proceedings involving children where the Regulation is a live issue. It is highly desirable that this matter is resolved and clear guidance given, but it is less than satisfactory that the party who has the most obvious interest in opposing the CFA's contention was not legally represented, although such representation was available.

In attempting to provide legal guidance for future cases, firstly O'Donnell J. stated that he agreed with the Court of Appeal that the District Court had jurisdiction to hear matters under the Regulation. He then went on to state:

> What ought to have happened?
>
> The legal importance of this case is to provide guidance for future cases. It may be useful therefore to set out my views on what ought to have occurred in the District Court, if the law and procedure had been properly applied. In this case an application was made to the District Court for an interim care order. Technically, the District Court had an obligation then to make an examination as to jurisdiction under Article 17. That would have readily established that the child was at that time habitually resident in Scotland, and therefore that the courts of Scotland had jurisdiction as to substance. It also follows that the jurisdiction of the District Court was limited to Article 20, at least at that time. The next step would be to make an order securing the child's position and to await any order from the Scottish Court. A number of possibilities arose. A party claiming they had a right to custody might have made an application to the Irish High Court for an order of return under Articles 10 and 11 of

> the Regulation. Another possibility was that an application would be made in the Scottish Courts and directions given as to the future care of the child, which may have involved an order requiring the return of the child to Scotland. Depending on the circumstances however, the Scottish Court might also have considered making an order under Article 15 allowing jurisdiction to be transferred to a court better placed. Finally, if nothing was done it was possible that habitual residence might change to Ireland, in which case the Irish Court would have jurisdiction as to substance. All of this was well within the competence, and jurisdiction of the District Court to deal with.

2.4 The High Court

2.4.1 *LON v District Court Judge Daly* [2016] IEHC 285

This was an application for orders of certiorari by way of Judicial Review of a decision by a District Court Judge to grant a care order until four children were 18. The applicant did not take issue with the fact that it had been proven in the District Court that the threshold criteria set out in s.18(1) of the Child Care Act 1991 had been met. The applicant did, however, argue that granting orders in respect of each of the children until they were 18 was not proportionate and therefore should be quashed. She submitted that care orders for only three years would have been more proportionate.

The Court was clear that in considering whether Judge Daly's decision in this case was amenable to judicial review, regard must be had to whether the availability of other remedies to the applicant operate as a bar to judicial review as was found in *State (Abenglen Properties Ltd) v Dublin Corporation.*[160]

Twomey J. stated that based on the decision in *EMI Records v The Data Protection Commissioner*:[161]

> [I]t seems clear to this Court that:
>
> > (i) where there is an adequate alternative remedy available and an applicant for judicial review fails to avail of that alternative remedy, the court is likely to exercise its discretion against the applicant;
> >
> > (ii) the default position, for a person who has a complaint about a decision taken by an administrative body or lower court, is that he must pursue a

[160] [1984] IR 381.
[161] [2013] 2 IR 669.

> statutory appeal rather than initiate judicial review proceedings since it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned;
>
> (iii) there will be cases exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review, which set of circumstances is not necessarily closed but the principal areas of exception are:
>
> > a. where the appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision e.g. because of constitutional difficulties or where the appellate body would not have jurisdiction;
> > b. where in all the circumstances the initial decision making process deprived the applicant of the reality of a proper consideration of the issues, such that confining them to an appeal would be in truth depriving them of two hearings.

Twomey J. continued:-

> On this basis, one can conclude that only in exceptional cases is an applicant entitled to judicial review, where there exists a statutory appeal or an adequate alternative remedy which will remedy the applicant's complaint. In considering whether this is such an exceptional case, one has to consider whether the justice of the applicant's case would not be met by confining her to the statutory appeal or other alternative remedy that may be available to her. For this purpose consideration needs to be given to the statutory appeal and alternative remedies available to her in this case.

The court held that not only did the applicant have a statutory right to appeal the decision of Judge Daly to the Circuit Court, but also noted that the applicant had a continuous right to apply to the District Court to seek to vary or discharge Judge Daly's Orders at any time under section 22 of the Child Care Act 1991. Twomey J. did, however, acknowledge that availability of alternative remedies was not the only consideration:

> Notwithstanding the availability of an appeal and alternative remedies, this Court must now consider whether this is an exceptional case where judicial review should still be available to the applicant. In doing so, this Court must first consider whether the applicant's case falls within the two specific exceptions identified by the Supreme Court in *EMI Records v. The Data Protection Commissioner*, noted above. This requires this Court to consider whether the appeal to the Circuit Court and other remedies, enable the applicant to adequately ventilate the basis of her complaint against the initial decision or whether the original decision deprived the applicant of

> the reality of a proper consideration of the issues such that confining her to an appeal, rather than judicial review, would deprive her of the entitlement to two hearings.

The court found that this was not an exceptional case. Proper consideration had been given in the District Court and it was possible to adequately ventilate the basis of the complaint by the applicant before the Circuit Court on Appeal. Therefore, the application for Judicial Review was refused.

It is worth noting that Twomey J. made some comments which must be considered obiter, in respect of the cost of these types of proceedings to the tax payer. He noted that regardless of whether the applicant wins or loses, that the State would have to pay three sets of legal teams High Court costs – the Legal Aid Board would pay the costs of the parent's lawyers and the Child and Family Agency would pay the cost of its own lawyers and those of the guardian *ad litem*. Twomey J. stated as follows:-

> There is no suggestion being made that the applicant was not perfectly entitled to seek and obtain legal aid for her application in this case. However, if the applicant were paying the legal costs personally, rather than being funded by legal aid, it is likely that she would have asked for her challenge to the duration of the Care Orders to be done in the most cost-efficient manner possible. If she had done so, she might have been advised to appeal to the Circuit Court or to seek to have her Care Order varied on the scheduled review in the District Court or to seek a variation to the Care Order in the District Court under s. 22 of the 1991 Act, all of which are likely to have cost the taxpayer a fraction of the costs of this High Court judicial review.
>
> Since the legal costs of this case are not being paid personally by the applicant, but by the taxpayer, it is possible that the legal costs were of little or no concern to her, in her decision to pursue this judicial review.
>
> However, in order to ensure that there is someone looking out for the taxpayers' interests, it is this Court's view that in an application for judicial review, where the applicant has not exhausted all remedies available to him or her, the legal costs to the taxpayer of the various remedies available to an applicant are a factor, which can be taken into account by this Court in exercising its discretion as to whether to judicially review a decision. This can be done by the Court asking; could the interests of justice be met by resolving the dispute at issue at a significantly lesser cost to the taxpayer?

2.4.2 *MM & Anor v Relevant Circuit Court Judge & Anor* [2016] IEHC 449

This was an application in the first of three applications for judicial review where the applicants were seeking a declaration that the Circuit Court is obliged to provide a written

record of its judgments and/or that as a matter of law a Digital Audio Recording (DAR) or other form of recording must be available in respect of all hearings before that Court in Child Care proceedings. It relates to a hearing before a Circuit Court in Cork where children of the applicant were brought into state care under the Child Care Act 1991.

By order of the District Court in July 2011 the applicants' three children were taken into care. This was after a 60-day hearing and the District Court Judge gave what he described as a long and considered hearing. The decision was appealed and following an 8-day hearing in the Circuit Court, the Judge gave an unwritten reserved judgment affirming the order of the District Court. The applicant argued that the absence of a written decision of the Circuit Judge was sufficient to justify an order of mandamus compelling a fresh hearing of the appeal. There was no suggestion that the Judge failed to give reasons, rather the suggestion was that his reasons were not documented by him.

Leave was granted to seek orders including inter alia a declaration that in a matter as serious as an order placing children in state care up to the age of majority or otherwise the parent(s) and children affected thereby are entitled to a written or audio record of the judgment setting out the reasons therefore and the rationale/reasoning applied. A declaration was also sought that where an order is made placing children in state care where the parties cannot agree as to what the findings and rationale/reasoning of the trial judge were, and where no DAR exists and where the trial judge is unable to provide a written judgment, that the applicants' rights to fair procedure and respect for their family rights require that they be entitled to a full rehearing of their case and to a written or audio recording of the judgment subsequently given.

The High Court in this case had to give consideration to the question of delay in bringing Judicial Review proceedings as the applicant brought this case well in excess of three months from the date of the Circuit Court decision. The applicant argued that it was not until almost a year and a half later that she realised that she required a verbatim record of the judgment and that no such record or DAR existed.

In considering the issue of delay in these types of proceedings the Judge considered that she must deal with the question of delay by reference to the provisions of s.31(5) of the Guardianship of Infants Act 1964 as amended which provides:

> In any proceedings to which section 3(1)(a) applies, the court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child.

The Judge stated:-

> That section relates directly to applications in relation to guardianship, custody and access to children and governs such private law applications, but the principle therein identified, namely that expedition is one procedural means by which the best interests of a child may be protected must guide my thinking.

The Judge did not agree with the applicants that time for the purpose of bringing a Judicial Review application only began to run once they realised the court had no record of the DAR of the decision. She stated that:-

> [I]t is quite clear that most of the relief sought by the applicants relates to the failure of the Circuit Judge to deliver a written judgment in October, 2013, and not to his decision, if it be a decision, on 2nd July, 2015, that he could not produce his personal notes at the hearing, not because he was unwilling or unable to produce notes but because there were no notes.

Lawyers for the applicants argued that the fact that two of the applicants were young children, that their mother had been seeking in the course of lengthy litigation to assert her right to custody and access to them, and the constitutional and statutory protection of the role in the life of a child of the mother, formed a basis on which the court might depart from the well-established principles regarding the extension of time. Counsel argued that the children had a right to know the reasons which guided the Circuit Court Judge in making his order.

The Court addressed the futility of making the orders sought in circumstances where the Circuit Court Judge had made it clear that he had no notes, and that he had no clear memory of the case. Therefore, the Court held it would be futile to order him to do something which he was not in a position to comply with. Further, the DAR did not exist, making an order to direct access to the DAR absurd. The Court indicated that it would refuse to grant certiorari where to do so would be futile.

The Court also found that there was no authority or argument by way of analogy from existing authority that would suggest that a court of local and limited jurisdiction, or indeed any court, is obliged to deliver a written judgment. The court noted that this is particularly so

in cases such as the present where the applicants were in the Circuit Court with counsel and solicitors when the Circuit Court delivered its judgment. It has long been the practice of lawyers to take a note of a judgment, and indeed that practice is one which is well rooted in good professional practice

The applicants argued that the decision of McMenamin J. in *P.P.A. & Ors v Refugee Appeals Tribunal & Ors*[162] assisted them. However, in this case the High Court held that it was clear that the Circuit Judge verbally articulated the reasons for his decision, the findings of fact made by him, and his reasoning and what McMenamin J. found is:

> ..what is necessary is that the law must be adequately accessible, to an applicant no less than to a citizen. He or she must be able to have an indication, adequate in the circumstances, of the legal rules applicable to a given case.

Baker J. in this case held:

> I consider that the applicants have not shown me any respect in which the applicants, who were represented by solicitor and junior and senior counsel, did not understand the legal rules applied by the Circuit Judge, and the legal principles formulated through eight days of hearing before him. I do not consider that the judgment of McMenamin J. assists the applicants in any way.

Baker J. then proceeded to consider an argument of the applicants that they needed the record of the judgment of the Circuit Court Judge in order to be able to present arguments before the District Court in respect of reviews of the care of the children, in particular in respect of access between the applicant and the children. Baker J. did not accept this point and stated as follows:

> The District Judge was required both as a matter of law and logic to have regard to the facts pertaining at the time he heard the application and not the facts which guided the determination of the Circuit Judge in 2013.

Baker J. supported this decision by reference to the views I express in *Child Law*[163]. She references page 744 of this text as follows: -

> [C]ustody and access decisions are "interlocutory" by nature. A decision is open to variation should altered circumstances, new information or the welfare of the child so

[162] [2005] IEHC 237.
[163] 2nd ed. Round Hall, 2010.

demand. He quotes from Denham J. in *C. v. B.* [1996] 1 I.L.R.M. 63, where giving the decision of the Supreme Court, she said:

> "Thus, s. 34(1) of the 1991 Act is entirely consistent with article 12 of the Luxembourg Convention. There is no conflict or ambiguity. The decision relating to custody of a child, especially a baby as in this case, is never final but evolves with the child,..."

For that reason, any order that I might make directing a rehearing of the appeal from the order of Judge O'Leary would result in a waste of court time and the resources of all of the parties to this unfortunate matter.

Baker J. refused all relief sought.

2.4.3 *VQ v Horgan & Anor* [2016] IEHC 631

The applicant in this case was the foster carer of a 14-year-old boy who had poor dental alignment, and it was believed he was bullied over this condition. It was accepted that it would be beneficial that orthodontic treatment be provided to correct the misalignment and that the treatment was not available through any publicly funded scheme. The treatment was privately funded by the foster carers in payments by instalment. The foster carers separately brought an application to the District Court seeking directions pursuant to s.47 of the Child Care Act 1991, in relation to the provision of dental treatment for the benefit of the child.

The Child and Family Agency objected on the basis that the standard foster allowance was considered to be sufficient to cover the expense of the treatment. The solicitor for the Child and Family Agency argued that the District Court did not have jurisdiction to grant the relief sought in that it was obliged to respect the separation of powers principle, and that a direction from the District Court that would involve the expenditure of money was one that could only be made by the Oireachtas or by a state body and not by the court. Reliance was placed in particular on the decision of the Supreme Court in *T.D. & Ors v Minister for Education & Ors,*[164] as establishing that the power under s.47 could not be used to direct the Child and Family Agency and the state in the exercise of its policy, or the distribution of resources, as this would breach the constitutionally recognised competence of the courts. It was also argued that, as the Oireachtas has formulated a policy on the provision of state funded orthodontic services, the courts ought not interfere with this policy by directing payment for private treatment in respect of persons whose needs do not satisfy the criteria of that scheme.

[164] [2001] 4 IR 259.

The District Court Judge refused the application. It was agreed by the parties that in coming to her decision, the following is a reflection of what the District Court Judge based her decision on: -

> The obligation of the executive is to determine how funding is spent. I accept they must balance the obligation to fund all children under the service, under their formula. [B] is in receipt of the treatment and it is not open to the court to direct the CFA to fund that treatment privately. The process we have gone through is outside the remit of this Court. With regret I refuse the application but I think that the foster parents deserve to be congratulated on the extent of their advocacy for [B] and their care which is acknowledged to be exemplary by the CFA.

It is unclear why reliance was not placed on the DAR in this case assuming it was available.

The applicant sought an order for Judicial Review quashing the decision of the District Court Judge. The applicant also sought declaratory relief that the District Court erred in declining to accept jurisdiction to determine the question under s.47 of the Child Care Act 1991.

The question raised in this case concerns the extent of the jurisdiction of the District Court in determining an application under s.47 of the 1991 Act. That section provides that:

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

Baker J. stated at paragraph 27:-

> The Oireachtas considered it desirable and necessary to put in place the statutory mechanism in s. 47 by which questions regarding the care and welfare of the child could be determined … there is no qualification on the statutory power, and the section empowers the District Court to make directions and to do whatever it deems appropriate to achieve the policy of the Act as a whole.

Further at paragraphs 39 – 41 she held:

> The District Court has an overall supervisory and directory jurisdiction in regard to the exercise by the CFA of its powers, and over the foster parents or other persons in whose care a child is placed. The case law has emphasised the far reaching and wide jurisdiction under s. 47, by which is vested in the District Court the power to make all

> decisions relating to the care and welfare of a child, subject only to the proviso that the court ought not interfere unless matters arise which require consideration of the welfare or interests of the child. The court will not generally make orders more properly characterised as day to day matters and thus cannot be said to exercise a role by which it interferes with reasonable and prudent decisions made by the CFA or the foster parents. The decision of the court may be required in matters where there is disagreement as to whether a particular course of action is in the interest of a child, or where the issue is one where it is difficult to assess where the best interests of a child might lie.
>
> The District Court may, under the section make orders regarding educational or medical needs or interests of the child, and in many cases the indirect effect of orders or directions given by the District Court under s. 47 of the Act may involve the CFA, or the foster parents, incurring expenditure. By way of example if a child under the care of the State requires life-saving medical treatment not publically available, I consider that the District Court must be viewed as having power under s.47 to determine that the treatment be provided and where. That this may involve expenditure by the State does not in my view mean that the District Court is deprived of jurisdiction to make a declaration. The question would be one regarding welfare, not a day to day matter.
>
> On the other end of the spectrum, if a child wants to go on a voluntary school trip the foster parents are not in a financial position to fund, the Court may well decline to grant a declaration unless it could be shown that the child's welfare would be adversely affected by not going on the trip.

Later the learned Judge stated:

> It is not correct to interpret the powers of the District Court under s. 47 as meaning that the CFA must, as a result of a declaration made under s. 47 be directed to fund treatment sought in respect of a child in care merely on account of the fact that it is found to be of some benefit to the child. The District Judge, exercising the jurisdiction pursuant to s. 47, may make orders relating to matters that "affect" the welfare of the child, and may have regard to various factors.
> …
>
> The Court must assess the welfare question, whether the treatment is one in the ordinary course of anticipated expenditure, whether the resources of the parents are sufficient to meet the costs, and whether there is a risk that the needs of the child may not be met if the treatment cannot reasonably be funded by the foster parents. The court has the power and the obligation to weigh these factors and make a determination in the individual case, and is the ultimate decision maker in regard to all such matters.

Baker J. considered arguments in respect of the much cited decision in this area of *T.D. & Ors v Minister for Education & Ors* which related to directions made in the High Court against the Minister for Education to provide facilities for disadvantaged children in need of

accommodation and *CFA v O. A.* ,[165] which considered whether a District Court Judge had the power to award costs against the Child and Family Agency. Baker J. stated as follows:

> A distinction is to be drawn between a decision which directs policy in general, and the decision in an individual case the practical effect whereof is that the financial resources of the State are impacted.

Baker J. held that the question raised in the section 47 application did not engage the separation of powers principle and therefore the District Court could have determined whether orthodontic treatment was merely desirable or necessary in the best interests of the child. In particular, the Court could have considered whether it was genuinely a matter in regard to which no real question of welfare arose; whether the foster care allowance paid to the applicant and her husband in respect of the young boy, on a construction of their contract with the CFA, did require that they meet the expenditure for orthodontic care from that funding, or; whether there were other considerations that might favour the provision from state funds of the money to meet the treatment. These considerations could include the fact that the discretionary fund available to the Child and Family Agency was small, or too small to meet the request as a matter of budgetary considerations in a given period.

2.4.4 *AO'D v O'Leary & Ors* [2016] IEHC 555

The applicant parent applied to the High Court for Judicial Review seeking an order of certiorari quashing an order made by the respondent District Court Judge wherein he ruled that the guardian *ad litem* in the case be appointed to represent the interests of her child, EOD, be entitled to instruct a solicitor or solicitor and counsel who might, with leave of the District Court, act as an advocate for her, the guardian *ad litem*, in the same way as an advocate of any party in the proceedings under the Child Care Act 1991, as amended, relating to the child. The applicant also sought declaratory relief that it was not within the power of a guardian *ad litem* appointed under the Child Care Act 1991 to become involved in the determination of facts which were disputed between the parents and the Child and Family Agency.

The guardian *ad litem* argued that the case was complex and that it was in the best interests of the child that she instruct a solicitor. The guardian *ad litem* also gave examples of factual

[165] [2015] IESC 52.

matters of which she says she should be entitled to give evidence, cross-examine and make submissions in the interests of the child. Moreover, she held that it was "irrational" to assume that she could advise the Court of the best interests of the child without "being permitted to enter into the disputed issues of fact regarding those best interests".

Two separate but related matters arose for consideration:

(i) Whether a guardian *ad litem* is entitled to be represented in the care proceedings;

(ii) Whether a guardian *ad litem* is to be considered to be a party to the proceedings.

The applicant argued that as s.25 of the Child Care Act 1991 makes specific provision for the payment of the legal costs of a child who has been made a party to proceedings, whilst s.26 does not have a similar provision in respect of a guardian *ad litem* appointed to the proceedings, that it was clear some real distinction was intended to exist between the role engaged by a guardian *ad litem* and that of a child acting as a party to the proceedings.

Baker J. engaged in an analysis of the difference between the two different sections and noted as follows:

> Part V provides a number of means by which the interests of a child may be protected in care proceedings: The means provided in ss. 25 and 26 are different. Section 25 permits the court, of its own motion or following application made to it, to determine if "it is necessary in the interests of the child and in the interests of justice" to join the child to proceedings. An order under s. 25 may confer on the child certain rights as a party for a part or all of the proceedings. When the child is not a party, the court may appoint a guardian *ad litem* under s. 26. These are intended to be, and are expressed to be, mutually exclusive processes by which the child engages with the proceedings.
>
> One difference apparent from the express words of the statute is that the child who is a party is entitled to be legally represented. Section 26 is silent as to whether the guardian *ad litem* may be so represented. The applicant argues that the difference represents the choice of the Oireachtas that the court does not under the existing s. 26 have such power to permit the guardian *ad litem* to engage legal representation.

In respect of the distinction between the two sections, and the fact that s.25 expressly outlines how and in what manner a child would be joined as a party and how his or her legal costs would be discharged, Baker J. stated :

> The child lacks legal capacity even if it is appointed a party to care proceedings, and may not lawfully incur a liability to pay costs, or enter into a contract to retain a

solicitor. Section 25(2) does not provide that the child himself or herself may appoint a solicitor, and the sub-section does not remove the contractual disability of the child. It is logical therefore, for this reason that the court may appoint a solicitor because the child cannot do so due to the disability caused by its minority.

For that reason, I am not persuaded that the power of the court to appoint a solicitor for a child who is a party to care proceedings must mean the guardian cannot engage a solicitor for the proceedings. The guardian may, and perhaps will be, appointed to a young child, who cannot for reasons of the understanding and age of that child be a party, or be afforded some of the rights of a party. The guardian will not suffer from the legal disability to which I refer, and has capacity to engage legal advice or representation.

The applicant argues that the appointment of a guardian *ad litem* under s.26 must be seen as providing a means of protecting a child in circumstances where it is deemed not to be necessary or in the interests of justice to join the child as a party, and that the level of involvement of the guardian *ad litem* appointed under s.26 will be less than that of a party in the true sense. To an extent then, the appointment must be seen as an alternative to giving full party status to a child. It is argued in those circumstances that the Act does not contemplate the engagement of the guardian as an adversary on disputed facts, or that she would act as advocate through a solicitor or solicitor and counsel, in the same way as a party may.

The guardian *ad litem* argues that a lacuna would readily be apparent in that a child of tender years, incapable of understanding or expressing his or her wishes, could be left without legal representation. It is argued that it would be absurd and not in accordance with the principles of fairness that only mature children would have the full panoply of procedural rights, and the children represented by a guardian *ad litem* would not, albeit those children would be at least as vulnerable, if not more vulnerable, than the older child, and might be less able to protect themselves.

I agree that an absurdity could arise if a younger and vulnerable child could not be as fully represented in care proceedings as the child with the age and capacity to be a party or to have some of the rights of a party. For that reason I consider that the power to appoint a guardian *ad litem* must be intended to be an alternative means by which a child can participate in the proceedings in such a manner as the District Court may deem appropriate. It does not impute a lesser status or a lower degree of participation.

Baker J. held as follows:

The legislation enables legal representation in a suitable case, in one case where the court, making the decision on behalf of a child who is a party, determines that legal representation is desirable, and in the other case where the guardian *ad litem*, himself or herself, an adult charged with representing the interests of the child, may make that decision.

Section 26(2) provides that the court may award to the guardian "any costs incurred by a person in acting as a guardian *ad litem* under the section", and the subsection goes on to provide for the measuring or taxing of "any such costs or expenses", thus

> envisaging different categories or classes of expenditure. This is a recognition that a guardian may not always consider that legal representation is necessary, may require legal advice short of representation at trial, or may consider that the circumstances do not require legal expertise or advice. The choice to be made by the guardian in whom is entrusted the role of representing the child, and the payment of costs or expenses is at the discretion of the court.

In respect of the order which appointed the guardian *ad litem* in these proceedings a party, Baker J. considered the comments of Lord Coleridge C.J. in *Ingram v Little*.[166] She noted that:

> The judgment of the divisional Court in *Ingram v Little* shows that the fact that a guardian *ad litem* is a "party" does not always impute to him or her all the obligations or rights of a party as are found in the Rules of Court. The role as thus understood did not make the guardian in the words of Lord Coleridge an "opposite party".
>
> …
>
> I consider that the order in the present case did not envisage that Ms K. was to be a "party" in the sense of an "opposite" or "opposing" party in the litigation, to borrow the language used by Lord Coleridge. I am accordingly not satisfied that the order was unlawful on the grounds that Ms K. was thereby constituted a "party" to the action.

Baker J. engaged in a detailed analysis of the arguments that the Child Care Act 1991 should be construed in accordance with fair procedures and the Constitution. She ultimately stated:-

> I consider that the Oireachtas intended the appointment of a guardian to be a means by which a child could engage in the litigation, and the appointment is an alternative to the appointment of the child as a party, or as a person with some of the rights of a party. That being so, the guardian *ad litem* must in my view in appropriate circumstances have the capacity to engage a solicitor or solicitor and counsel. It is not mandatory that such be so, but it is in my view a necessary implication from the scheme of the Act if one is to interpret it in the context of constitutional and natural fair procedures, and if a child who is represented by a guardian *ad litem* is to be treated as having full procedural rights to engage in the proceedings.
>
> …
>
> To describe the guardian *ad litem* appointed by the order in the present case as a "party" is neither accurate nor helpful. The authorities and the provisions examined by me suggest that the role of the guardian *ad litem* may depend on the context of the appointment and the extent of authority vested by an order. The order made by the District Judge provided that Ms K. may act as advocate through her solicitor only with the leave of the court. She would not need the leave of the court to act as advocate were she to be a party in the true sense, so some difference is to be discerned in the role envisaged by the order from the role that may be played by a full party, or a party who is in opposition to another in the proceedings. I do not therefore consider

[166] [1883] 11 QBD 251.

> that the guardian was permitted to act as a party to the extent or in the manner for which the applicant contends.

2.4.5 *F.G. v Child and Family Agency & Ors* [2016] IEHC 156

This case was an application for leave to bring Judicial Review proceedings in respect of Orders of a District Judge granting, inter alia, care orders pursuant to s.18(1) of the Child Care Act 1991, and Orders affirming those orders by a Circuit Court Judge. In making the care order, both the District and Circuit Court Judge left access at the discretion of the Child and Family Agency pursuant to s.37 of the Child Care Act 1991. The applicant also sought to judicially review a decision of the Child and Family Agency allowing her access only a few times a year for a period of approximately four hours and that the access be supervised. The applicant wrote to the Child and Family Agency seeking further access and Humphreys J. found that "the sole stated reason for refusing more access was that such access was contrary to the wishes of the children. At this point, the children are aged 4, 8 and 10".

The applicant was out of time to bring an application for leave in respect of the Order of the Circuit Court, however Humphreys J. extended her time to bring the leave application.

In considering whether there were arguable grounds to challenge the Circuit Court Order on the basis pleaded, such as interference with family rights, Humphreys J. held as follows:

> She has complained that "at the access on December 21st 2015 the social worker sat between [one of the children] and his mother". It is not hard to see how a social worker sitting between the parent and child could destroy any meaningful access and could create such tension and anxiety as to subvert the purpose of the access, so that allegation in particular appears to me to be arguable.
> …
> She also complains that "reports" (unspecified) were not handed over to her because "the Guardian *Ad Litem's* solicitor and Tusla's solicitor refused to allow [the applicant] to have access to those reports citing the In-Camera rule as the reason for non-compliance with the disclosure of evidence." I have not been given the respondent's version of this event but if any reliance was placed on the in camera rule in declining to give information to the applicant, it is clearly arguable that this would be misconceived in law.

On whether there were arguable grounds to challenge the Circuit Court Order on the grounds that it improperly abdicated or delegated to the Child and Family Agency the function of determining access, Humphreys J. held as follows:

> In addition to the specific points set out in her pleadings, I have noted above that it appears to me that the situation in which the applicant now finds herself, namely to be entirely at the mercy of the agency as to access, is caused or contributed to by the fact that the Circuit Court order leaves the question of access entirely at the discretion of the agency. It seems to me that as well as the arguable points specifically pleaded, it would also be desirable, in the interests of ensuring that the complaints made by the applicant are sufficiently clearly and fully presented for the benefit of the court hearing the substantive hearing, that the applicant should be given leave to expressly add as an additional ground the contention that the Circuit Court order should be quashed by reason of wholly delegating or abdicating the function to determine access to the agency itself. I would, therefore, give the applicant liberty to add that specific plea, as well as leave to pursue the challenge to the Circuit Court order.

In considering whether the letter of the Child and Family Agency refusing additional access was amenable to judicial review, Humphreys J. stated:

> Given the nature of the Circuit Court order, leaving access up to the agency, the agency's letter of 27th January, 2016, declining the request for additional access, clearly has legal effect. The determination of the agency as to what access is to be afforded is intended to be legally binding by virtue of the Circuit Court order which confers discretion on the agency which is not expressly limited in any way by the terms of the order. For that reason, if no other, the agency's refusal to provide further access dated 27th January, 2016, is amenable to judicial review.

Humphreys J. also examined whether the refusal of additional access was arguably invalid on the basis that it relied on the views of very young children. He found that the applicant had clearly made out an arguable case to challenge the legality of that letter, because of its reliance on the alleged views expressed by very young children as the sole basis for the decision to refuse additional access. Humphreys J. noted that when the Child and Family Agency was questioned on this, it sought to retreat from this as a basis for the decision and attempted to supplement the letter by reference to opinions of social workers as to the best interests of the children. The learned Judge stated:

> Secondly, the agency is now (when the arguable unsustainability of the reasons actually offered was raised with it) stating that it is relying on other grounds as to best interests which it did not see fit to communicate to the applicant in the letter actually sent to her by [the] Complaints Officer, on 27th January, 2016, conveying the position adopted by [the] Social Worker. I think it can fairly be said that this second aspect goes somewhat beyond mere arguability, because as I have noted, in the course of resisting the leave application, the agency put forward to the court the best interests of the children as a rationale for the denial of further access, and no amount of further argument at the substantive hearing can make this reason appear on the face of a letter to the applicant which does not include it. Why the agency issued a letter withholding major reasons for its decision can be explored at the substantive hearing; but the fact

> that it has done so is a conclusion that it will not be possible to avoid, unless the agency disclaims reliance on any such uncommunicated reasons. I need only observe that the provision of reasons by public bodies must be carried out with integrity, a principle which would preclude a process whereby major and operative reasons which could (and therefore should) have been articulated are withheld from the statement of reasons furnished to an applicant.

Humphreys J. then considered whether the refusal of additional access was arguably invalid on the basis that it failed to give effect to the intention of the court orders. In this regard, he held as follows:

> Separately from the foregoing, it is arguably implicit in the orders of the District and Circuit Courts that, insofar as they make reference to the need for the applicant to "engage with intensive therapeutic supports" and for the agency to "undertake structured parenting work with [the applicant] focussing (sic) on the content of access sessions", and that "an updated Parenting Capacity Assessment be undertaken in eighteen months", the intention was to extend her access as time went by. Otherwise there would be no need for her to develop parenting skills. If the applicant's version of events is ultimately upheld, the parenting course in which the applicant found herself was clearly unsuitable, and indeed on that premise, so much so that no reasonable person could have thought otherwise. It is arguable that the agency has not implemented the intention of the court orders in this respect, particularly given that the District Court orders put the onus on the agency to undertake parenting work with the applicant, and not on the applicant.

Counsel on behalf of the Child and Family Agency argued that the High Court should not grant leave for mandatory orders to increase the level of access as this would essentially have been a form of District Court Order by the back door. Humphreys J. in granting leave stated that in the event that the applicant is successful, a mandatory order to reconsider access (addressed to the Circuit Court and/or the agency) would be a more appropriate outcome than a mandatory order for particular access to be granted, given that judicial review is not an apt mechanism to determine exactly what access should be provided.

2.4.6 *L.N. v Judge Daly & Ors* [2016] IEHC 140

This was an application by a guardian *ad litem* to be joined as a notice party to an application by a parent for Judicial Review seeking an order of certiorari of a Care Order granted by the District Court pursuant to s.18 of the Child Care Act 1991. The applicant had been appointed as guardian *ad litem* to the four children the subject of the order. The hearing before the District Court had lasted seven days and it was noted that the views and interests of the

children were represented in the proceedings by the guardian *ad litem* who had indicated her support for the care orders.

In the course of his judgment McDermott J. held:

> The applicant in this case claims that as guardian *ad litem*, she ought to have been joined as a party in accordance with Order 84(2)(2A) or in the alternative on the exercise of this Court's discretion under Order 84 Rule 22(9) and/or 27(1). I am satisfied that when a party has a "vital interest in the outcome of the matter" or is "vitally interested in the outcome of the proceedings" or would be "very clearly affected by the result", it is appropriate that they be joined in judicial review proceedings as notice parties (*O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39 per Finlay CJ. at page 78; *Spin Communications T/A Storm F.M. v Independent Radio and Television Commission* [2001] IESC 12 and BUPA Ireland Ltd. supra).

McDermott J. later noted:

> The applicant is placed in a difficult position. Having been involved with the proceedings concerning each of the children throughout the case until the full care order was made on the 29th January, 2015 she was not regarded as a party to the original proceedings and consequently the order granting leave did not cite her as a respondent nor was any application made to the learned judge to join her as a notice party. It is accepted that the guardian *ad litem* was represented by a solicitor during the course of the District Court proceedings who cross-examined and made submissions during the course of the case, and that she performed her functions fully and properly within the meaning of section 26 of the Child Care Act 1991.

The court alluded to the fact that in *HSE v S.O. and Anor*[167] the District Court considered in detail the role of a guardian *ad litem* under s.26 of the Child Care Act 1991 and the court was not satisfied that a guardian *ad litem* was to be afforded party status in child care proceedings either in his/her own right (in the context of the child's welfare) or on behalf of a child (in the context of the child's expressed wishes). McDermott J. stated:

> However, assuming without so deciding that this submission is correct, the Court is still vested with jurisdiction under Order 84 Rules 22(9) and 27(1) to direct that any person who ought to have been served or who applies to be heard in opposition to the application for judicial review and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the application. In this case the Guardian has not been served with the papers and has a limited understanding of the specifics of the grounds relied upon. This is a handicap

[167] [2013] IEDC 19.

> in forming a view as to whether the application should be opposed for the purpose of making an application under Rule 27(1).

McDermott J. considered arguments from the parents that the guardian *ad litem* was appointed for the purpose of the District Court proceedings only and was discharged from her role in those proceedings upon delivery of a judgment by the District Court. It was submitted that the grounds upon which the proceedings were brought related to an absence of fair procedures and a failure by the learned Judge to apply his mind to the correct issues in making his decision. In particular, the grounds alleged a failure to apply the law in respect of proportionality: specifically, the impugned decision was deemed to have been disproportionate in all the circumstances of the case. It was therefore submitted that the judicial review proceedings related to procedural matters and matters of law in which the guardian *ad litem* had no interest or involvement.

McDermott J. also considered the application of Article 42A of the Constitution and concluded:

> The central issue to be addressed at the hearing of this judicial review application is whether the learned judge correctly applied and had regard to the law in respect of proportionality when making a determination that the four children should remain in care until they reach the age of majority, rather than the more limited period claimed by the applicant. This will inevitably involve the consideration of mixed questions of fact and law and a detailed review of the order and judgment of the learned judge. It will require a consideration of how the issues concerning custody and access to the four children were determined and the legal principles applicable to that determination. The decision of the District Court may be quashed. This would require a re-hearing. It is impossible not to view such a development as one in which each child has a vital interest. The future course of their young lives has been set out in the District Court ruling until they reach the age of majority. Of course they will be profoundly affected by any review of that order. Whether the guardian *ad litem's* appointment continues or not under section 26 following the District Court order, it is unrealistic to consider that the children are persons, who should not in the interests of justice be joined as notice parties in these proceedings. Clearly, any future proceedings in the District Court concerning their welfare will be guided by the decision of the High Court in this judicial review. It is also clear that the learned district judge intended that the guardian *ad litem* would be reappointed in respect of any future hearings or that another guardian would be appointed if she were not available at that time. I am satisfied that this Court has jurisdiction, if it considers it to be necessary and in the interests of justice and the welfare and best interests of the children, to direct that a guardian *ad litem* be appointed to the children to ensure that they are represented in respect of an issue which is so vital to their future lives and welfare. The legal issues under consideration in these proceedings are directly related to their best interests and welfare. Indeed, had one or all of the children been joined as

> a party under section 25 of the Act they would automatically have been joined as respondents in these judicial review proceedings. The interests of these children are no less important or vital in that respect than a child who might be joined as a "party" under section 25. I am therefore satisfied that the four children should be joined as Notice Parties in these proceedings and that O.R. should be appointed as their guardian *ad litem* for that purpose.

2.4.7 *P.H. & Ors v Child & Family Agency* [2016] IEHC 106

This case related to a new born baby. The mother had resided in England, and when made aware by social services in the UK that they would seek to apply to have her child taken into care from birth, she moved to this jurisdiction. When the child was born, the Child and Family Agency made an application for an Emergency Care Order, and then made an application for an Interim Care Order on 28th January, 2016. The District Court granted an interim care order on 28th January, 2016, without having been apparently able to hear complete evidence on that date. On 2nd February, 2016 following a more expansive hearing the care order was extended for 29 days until 1st March, 2016.

The applicants in this case sought leave to restrain a further hearing of an application for an Interim Care Order. Complaints were raised with the interim care order of 2nd February, 2016, including inter alia, an Interim Care Order had been granted by a District Court to 1st March, 2016, yet the Agency applied for a further Interim Care Order in the same District on 26th February, 2016. The Agency claimed it did so by reason of a potential infirmity in the first interim care order (which had been commented on in other High Court proceedings). That said, the Agency did not believe there was any ambiguity in the Order and held it had been appropriately extended to 1st March, 2016. The applicants argued that to allow the application for an interim care order to proceed on 26th February, 2016 would lead to an abuse of process in law. Humphreys J. granted the application for leave, but in so doing, he made a number of other comments in respect of the proceedings generally.

Firstly, the Court criticised the Agency for directly serving notice of the application for the Interim Care Order on the applicant mother in circumstances where the Agency knew the mother had duly appointed solicitors to act on her behalf in the proceedings before the District Court.

Secondly he considered an issue which had arisen in respect of the applicant mother recording interactions between herself and the Child and Family Agency and stated:

> The letter of 17th February, 2016 alleges that the agency directed the first named applicant that she was not entitled to record interactions between herself and the agency. That this is clearly an issue for the agency is demonstrated by its inclusion in a purported agreement with the first named applicant which I will address shortly. While I am sure that agency staff do not welcome being recorded, I do not consider it proper for the agency to attempt to direct the first named applicant not to do so. The reality of the situation is that there is a huge imbalance of power as between the first named applicant, a 23-year-old young woman alone in a new country and separated from her new-born child, on the one hand, and a State agency that has succeeded in removing that child with the benefit of a number of court orders and has clearly signalled that it intends to consider returning the child to the U.K., whose authorities have already indicated an intention to take that child into care, on the other. That the agency is denying certain of the claims of the first named applicant while, it is said, trying to prevent her from making a record which would support her account, can only rub salt in the wound of her powerlessness in this situation. Permitting persons the subject of the agency's attentions to record interactions with the agency is the least that can be done as a first step to attempt to redress the imbalance as between parties in such a situation. The agency should cease to object to recording by persons in such situations.

Thirdly the Judge considered an issue in respect of an allegation by the applicant mother that she had been made to sign an 'agreement' with the social workers. He notes:

> The matter has taken on a further dimension, suggestive of a general linkage with the other issues of direct contact with the first named applicant and a failure to reply to correspondence from her solicitors. The applicants now state as follows in supplementary submissions dated 24th February, 2016:
>
> > Mr. S. [solicitor for the Applicant] has just learnt from Ms. H. that instead of a reply being made to Mr. S. to his letter, the social workers, instead, required Ms. H. to write out on a piece of paper, at access, that she was in agreement that bottle-feeding was 'better' as the baby was being sick due to the mixing of 'breast and bottle'; that she is willing to have an assessment as she wants to get her daughter back and that she has agreed there will be no recordings of meetings, and required Ms. H. to write this out and sign it at an access [visit]; meanwhile directing Ms. H. not to write down the issue regarding Mr. C. being present/the breastfeeding comments.

The final sentence relates to a complaint which had been raised by the applicant in respect of a male social worker being present during access when she was breastfeeding. Humphreys J. continues:

> A copy of this agreement dated 18th February, 2016, which appears to be between the first named applicant and Ms. M. on behalf of the agency, has been produced to me. It clearly includes an agreement not to pursue the breast-feeding and recording issues, two matters the subject of the ignored solicitors' correspondence from the day before. The agency has not given any response to me to the suggestion that there was a direction not to include a complaint about Mr. C. being present, or to the suggestion that she was "*required*" to sign this agreement as opposed to being part of an informed and voluntary process of engagement, taken with the benefit of legal advice.
>
> If the latter undenied allegations are correct, it would be an abuse of power to direct the first named applicant to sign an agreement or to be silent as to complaints regarding Mr. C. Apart from that, the manner of the execution of this agreement behind the back of the first named applicant's nominated solicitor is clearly a breach of her constitutional right to be legally advised, in circumstances where these issues had already been raised in legal correspondence and were now being effectively shut down in some form of direct agreement with the first named applicant. That breach is particularly acute in the context of an agreement which records her position as essentially one of vulnerability *vis a vis* the agency, being that "*I want to get my daughter home"*. This is an egregious abuse of power by the agency. In such situations, the signature of such documents or agreements could convey the illusion that the agency is seeking to promote structured co-operation; but in reality there is little in it for the parent involved, with the possible exception of the agreement to an assessment. Accordingly it is to be inferred in such circumstances that it is much more likely that such documents are signed for the benefit and protection of the agency rather than the parent concerned. Even if the "agreement" was not in its contents abusive of the first named applicant, this is a case where she has nominated a solicitor to act. Where a party is legally advised, it is an abuse to ask that party to sign such an agreement, especially one touching on complaints made in solicitors' correspondence, without that party's solicitor being involved. Such a disregard of the rights of the first named applicant should not be without consequences. One immediate such consequence is that she should not be held to the agreement, but there may be others.

Having granted the order for leave he did note that the issue was very soon to become moot as the Agency would proceed with its application for an interim care order on 1st March, 2016. He availed of the opportunity to make comments on the proceedings generally:

> I would hope however that in further District Court proceedings, if they occur, there will be a focus on the level of current and prospective threat such as it is to the second named applicant rather than on some of the material which does not properly go to this issue but is relied on by the agency and indeed the English authorities. In particular, the fact that the applicant came to Ireland, sought to lie doggo, attempted to avoid official attention through the use of false names, checked herself out of hospital, may have been in pyjamas when doing so, moved address within Ireland, and so forth, is not so much suggestive of a propensity towards abuse and neglect as it is of a well-founded fear of the results of official attention. Such conduct by the applicant or, more generally, others so situated, is more properly understood as reflective of a wish to be permitted to parent one's child rather than of an incapacity to do so. That is not

to say that there is not other material that does go to the question of such a threat, and it is not to say that the first named applicant should not address some of the realities in this regard and take a more active and engaged approach to dealing with those issues. High-level objections to the extent to which the court can have regard to the best interests of the child will only take her so far. I would like to think that if she demonstrates a willingness to so engage, the agency and (if it comes to it) the English authorities will be capable of responding accordingly.

Article 42A of the Constitution, with its emphasis on the rights of the child and the paramountcy of best interests, does not take away from (indeed it enhances) the right of the child to the society of both of its parents, and the presumption that the best interests of the child lie in the child's enjoying such society. To that extent *N. v. H.S.E.* [2006] 4 IR 374 , a case that dealt with married parents, remains the position post-Art. 42A. Hardiman J. pointed out at p.504 that the natural rights of the child were already protected by the Constitution and that "*[a] presumptive view that children should be nurtured by their parents is, in my view, itself a child centred one".*

As concerns unmarried parents, the striking emphasis on non-discrimination introduced by the 31st Amendment (Art. 42A.1 applies to "*all*" children, and Art. 42A.2 acknowledges the rights of children in the context of the need for proportionate state action having regard to parental failures "*regardless of their marital status*") supports the position such a presumption should apply in favour of the child's best interests lying with the society of its parents, regardless of their marital status. Such a presumption may be displaced where there are compelling reasons that the welfare of the child cannot possibly be upheld in the society of its parents, or where proportionate state action becomes necessary in the exceptional case of parental failure of sufficient gravity as to trigger Art. 42A.2. However, as the concept of proportionality itself connotes, the greater the impact on the relationship between parent and child, the greater the need for compelling justification for the interference with that relationship.

Action cannot be proportionate if it is contrary to the legal, constitutional or ECHR rights of any of the parties. The Constitution itself describes the interference with the relationship between parent and child as "*exceptional*", and any such interference must not only be lawful and proportionate but must be conducted by public bodies with the utmost integrity, honesty, sympathy and transparency, at the level of objectively demonstrated substance rather than merely officially presentable appearance. Failure to do so in a context as supremely important as the separation of parent and child must be visited with significant consequences.

It will be a matter for the District Court to assess these matters on the already-appointed date of 1st March, 2016.

2.4.8 *T.S. v E.S* [2016] IEHC 231

The applicant in this case was a mother who was resident in England and Wales. The father was resident in Ireland, although he was incarcerated at the time of the hearing and the child was living with her paternal grandparents. The applicant mother applied for the return of the child who was 14 years old, to the jurisdiction of England and Wales, pursuant to Article 12 of the 1980 Hague Convention on the Civil Aspects of Child Abduction. The Judge stated that it was accepted that the removal of M. to Ireland was wrongful within the definition of the Convention as the applicant mother had rights of custody, was exercising those rights and did not consent to M. being brought to Ireland. The respondent raised the defences of "grave risk" and the objections of the child.

A professional carried out an assessment of the views and wishes of the child in accordance with Article 11(2) of Council Regulation (EC) 2201/2003 which provides that:

> When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

The assessment found that the child was an articulate mature child, she was close to her father, she did not have a good relationship with her mother and a concern was raised in respect of her mother's partner. The child alleged that he used inappropriate sexualized language with her and that her mother had not believed her when she was told. She also cited further difficulties in relation to her mother's use of alcohol and being left to care for her younger siblings. The child was clear in her wish and preference to stay living with her grandparents in Ireland. The child gave evidence to the court at the hearing, and the court was satisfied that she was mature and old enough to have given her views to the assessor and for those views to be taken into account.

The respondent deposed that he was concerned for the child's safety if she were to return to live with the applicant and her partner due to his alleged inappropriate sexual suggestions and advances on the child. The respondent, therefore, resisted the return of M. on the basis of M.'s strong and clear wishes to remain in Ireland and on the basis of the "grave risk" that had not been alleviated by "adequate arrangements" by the applicant.

Counsel for the applicant indicated that the Court must consider what can be done to negate or lower the risk if the issues raised by the child were true. She further stated that, normally, the applicant would give evidence to the effect, for example, that until the English courts deal with the case and resolve the fears of the child he/she will leave the child with another relative for his/her safety. Counsel for the applicant admitted that she did not have such evidence to give to the court on this occasion.

The court stated:

> This Court is of the view that, while there is discretion under the other defences, in particular, under the child's objection defence, if a grave risk arises and the Court is not satisfied by arrangements under Article 11(4) then the Court cannot order the child's return. From the wording of Article 11(4), if the arrangements have not been put in place the Court may not order the return of the child.

In refusing the Order for return, the court considered the child's views and its obligation to consider them:

> The Court accepts that it is the express wish of the child to stay in Ireland with her grandparents. Article 13 of the Hague Convention affords the Court a discretion not to return the child if the child objects to being returned and has attained an age of maturity at which it is appropriate to take account of these views. Article 13 provides as follows:-
>
> > "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."
>
> It is clear from the case law on the child's objection exception that the views of the child are not to be considered determinative of the order that the Court should make. The Supreme Court in *A.U. v T.N.U.* (Child Abduction) [2011] IESC 39 considered the proper approach to the exercise by the Court of this discretion.
>
> …
>
> This Court holds that, while not determinative, the objections of M. to being returned to her mother's care in England should be taken into consideration. M. is a mature 14-year-old girl who clearly voiced her views to the assessor and to the Court that she wished to remain with her grandparents in Ireland. The Court further holds that the level of "grave risk" could not be alleviated given that the applicant mother failed to give any undertaking, in writing or orally, to satisfy the situation.

2.4.9 *Child and Family Agency v Q* [2016] IEHC 335

The facts of this case relate to a fifteen-year-old girl known as "Q". She had been in special care for a period of approximately two years and she also had a very large number of residential care placements during parts of that period. The manner in which care was provided to Q, and the manner in which information pertaining to her care was disseminated to the court and appropriate professionals or rather how it wasn't, was criticised in this case. The judgment provides a review of the how and when the High Court should use its inherent jurisdiction to grant orders for special care in respect of minors and details criticisms that the court had in respect of how care was being provided.

Q's care history involved one where she first came to the attention of social services in 2013. Q then had spent time in out-of-hours' services, residential placements, out-of-hours foster placements and eventually in April 2014 she was detained in Coovagh House Special Care Unit under the inherent jurisdiction of the High Court. She was placed there until November 2014 when she began to move to a step down placement. This step down placement broke down, as did other short term emergency placements and eventually in January 2015 Q was placed back by Order of the High Court in Coovagh House Special Care Unit until November 2015. In November 2015 she was moved by Order of the High Court to Gleann Álainn Special Care Unit. Q was detained there until 29th January 2016 and on that date was moved to Ballydowd Special Care Unit.

Evidence was given that Q had no specific psychiatric disorder. That said, she did have a combination of ambivalent and avoidant attachment disorder. She displayed behaviours which were extremely difficult to manage. In respect of the provision of psychiatric services to the Special Care Units, or psychiatric oversight, various professionals gave detailed evidence to the court. Evidence was given in respect of whether each of the Special Care Units should have an 'embedded' psychiatric service. Many of the experts stressed that there was a national shortage of child and adolescent psychiatrists. The Health Service Executive advised the Court that it was attempting to hire child and adolescent psychiatrists across the country but was having difficulties with recruitment. Ultimately, no embedded psychiatric service in the Secure Care Unit was available to Q and evidence had been given that this was best practice and what Q needed.

Further evidence was given about Q absconding from Coovagh House in August 2015 and having been subject of an alleged sexual assault. The Judge held:

> The minutes from the professionals meeting on 11th August, 2015, indicated that there was a concern about potential PTSD (Post Traumatic Stress Disorder) and that Q. required psychological support at that point.

Q engaged in a number of incidents of self-harm and negative behaviour from August 2015 to November 2015. Q was eventually moved from Coovagh House Special Care Unit to Gleann Álainn in November 2015. The court became particularly concerned at that point at the lack of therapeutic input after the alleged sexual assault and the complete absence of any sense of urgency regarding same.

In January 2016 Q's behaviour escalated when in Glean Álainn. Her behaviour was threatening towards staff and she was placed on a "structured time away". When it was clear she had a razor blade, her status switched to "single separation". She continued to be observed by staff although it was not safe for them to enter the A Section that she was in. The Gardaí were called and assisted staff in moving Q from the A Section to the B Section on 11th January 2016. She remained in the B Section on a combination of "structured time away" and "single separation" depending on her behaviour. Unusually the guardian *ad litem* had not been consulted during this period, though it was accepted by the manager of Glean Álainn that the guardian *ad litem* should have been consulted and that it would have been prudent to make the High Court aware of the situation as this was a level of deprivation of liberty not contemplated by the Order of the High Court.

The Court considered the legal submission of the guardian *ad litem* in respect of when the High Court should use its inherent jurisdiction to grant secure care orders and stated as follows:

> It was emphasised that secure care orders are exceptional orders which ought to only be made when the life or welfare of a minor is at risk and when there is no less extreme means by which to protect the young person's life or welfare. The detention must, according to MacMenamin J. in *S.S. (a minor) v Health Service Executive* [2008] 1 I.R. 594 at 602:-
>
>> "have a rationale; [t]he purpose and objective of such detention must be educational, therapeutic and for the purpose and objective of protecting the life and welfare of such young person. The means

> adopted must be proportionate to the ends sought to be achieved, both as to duration, education and therapeutic care".

It was submitted on behalf of the guardian *ad litem* that, in order to ensure conformity with the requirements of the European Convention on Human Rights, it is clear that the rationale or justification for an order for detention of a minor in such circumstances must be clearly identified, and must have a therapeutic or welfare purpose, and be exercised only in circumstances where it is for the minimum duration, as per *D.G. v Ireland* [2002] 35 EHRR 1153 and *Boumar v Belgium* (Case No. 9106/80) (1987) 11 EHRR 1. It was further submitted on behalf of the guardian *ad litem* that the Court must be satisfied that the young person's position is sufficiently serious that he or she requires secure care. Evidence must also be put before the Court as to how, and over what period, therapeutic intervention is to take place to ameliorate that situation. It was accepted that there may be cases of such extreme urgency that there would not be an opportunity to provide such information to the court upon the special care order application. However, such information must be put before the court at the earliest opportunity.

The court also referred to legal submissions filed on behalf of Q's father:

An analysis of the law relating to special care was undertaken by counsel for the father. It was submitted that, because of the lack of provision in relation to special care in the Child Care Act 1991, the High Court has developed an inherent jurisdiction to protect and vindicate the rights of children. Reference was made to the fact that the Supreme Court upheld this in the case of *D.G. v. Eastern Health Board and Others* [1997] 3 I.R. 511 and it was stated by Hamilton C.J. at 522 that the court is "under an obligation to defend and vindicate the personal rights of the citizen" and therefore, the court has "the jurisdiction to do all things necessary to vindicate such rights". The issue of competing rights was central to this case as with the other special care cases and the Supreme Court held that the welfare of the child overrode his right to liberty.

D.G. appealed this decision to the European Court of Human Rights and was successful in the case of *D.G. v. Ireland* (2002) 35 E.H.R.R. 33. Article 5(1)(d) of the European Convention on Human Rights permits the detention of a minor as follows:-

> "(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority".

Counsel for the father submitted therefore that, in the context of special care, the detention of a minor will only be Convention compliant if it is for the purposes of educational supervision as provided for in Article 5.

It was submitted on behalf of the father that the European Court of Human Rights found in *Bouamar v. Belgium* (Case 9106/80) (1987) 11 EHRR 1 that, in principle, a minor could be detained in a manner which was not readily identifiable with educational supervision so long as any such detention was speedily followed by the implementation of a regime of supervised education. Educational supervision was given a broad definition by the ECtHR at para. 80:-

> "In the context of the detention of minors, the words "educational supervision" must not be equated rigidly with notions of classroom teaching: in the context of a young person in local authority care, educational supervision must embrace many aspects of the exercise by the local authority, of parental rights for the benefit and protection of the person concerned."

The court adopted these submissions made on behalf of the guardian *ad litem* and father. In its conclusions, the court reviewed the area of the inherent jurisdiction in respect of children in care and noted:

> The detention must … be subject to the safeguards of fair procedures and regular intensive welfare review in order to ensure that the minor's constitutional rights are in fact vindicated. This is also in conformity with the requirements of Article 5(1)(d) of the European Convention on Human Rights.

In respect of the series of events that arose over the course of Q's care, the High Court made a number of findings including inter alia:

> It is clear from all of the evidence heard that the level of the deprivation of liberty experienced by Q. when she was in Gleann Álainn Special Care Unit in January 2016 went beyond what was contemplated within the orders granted by this Court. The care staff in Gleann Álainn took steps in relation to the manner of her detention without reference to the guardian *ad litem* and indeed without reference to the High Court. The proper safeguards and procedures must be adhered to at all times, particularly in extremely difficult cases such as this one. The care staff failed to understand appropriately that detention for protective purposes alone is not permitted and that there must be an educational and therapeutic rationale for the detention. This educational and therapeutic rationale must be speedily implemented once the detention order is made and there is a continuous obligation throughout the detention of the young person in special care.
>
> …
>
> The evidence of the three psychiatrists … given on 18th March, 2016 gave clear guidance to the Court as to the nature of Q.'s many problems but it also gave great guidance to those concerned with her care as to how she might be helped going forward. It is the strong view of this Court that the problems of this young person, while not neatly fitting into the category of a detainable illness under the Mental Health Act 2001, was clearly one where psychiatric intervention, assistance and assessment were of vital importance. It is of concern that this Court had to make several orders before any proper psychiatric assessment occurred. The assistance of the child and adolescent psychiatrists would have greatly benefited this young person at an earlier stage and would have better informed those providing her with services and making decisions about her care.

The court noted and welcomed information provided to it which noted that the Department of Children and Youth Affairs was willing to recruit a consultant child and adolescent psychiatrist who was to be employed to attend each of the three special care units one day a week. Having heard the evidence in respect of psychiatric services engagement with these units the court stated:

> This Court adopts and intends implementing the best practice standard as expressed by Dr. D. and as outlined in what is referred to as the "O'Brien Principles". This is based on the evidence of Mr. Éanna O'Brien, Director of Children's Residential Services for the Child and Family Agency who gave evidence on the 2nd February, 2016 showing the potential role of a consultant psychiatrist in the special care area in one of three possible ways;
>
> 1) the psychiatrist would meet the young person, read the file and then decide that there is no role for psychiatry in their ongoing care plan, or
> 2) the psychiatrist would after meeting the young person and reading their file, decide that it is appropriate for a psychiatrist to have an advisory and supportive role for the staff in direct contact with the young person, or
> 3) the psychiatrist may decide that there is a discrete role for the psychiatrist in the care of the young person.
>
> It is now an accepted fact by the Child and Family Agency that there is a role for psychiatric involvement at one or other of the three levels (a), (b) or (c) above, for each young person who is admitted to a special care unit.

The court also noted, and appended to the judgment, an interim protocol which had been agreed between the Health Service Executive and the Child and Family Agency to alleviate the *lacunae* in psychiatric care provision which arose through the historical development of two parallel services. This interim proposal was to be in existence until the new psychiatrist was hired. The court noted from the protocol document that the High Court is entitled to seek a report from a psychiatrist and a second opinion if necessary. It stated:

> It is the understanding of the Court that once the Child and Family Agency have recruited this proposed child and adolescent psychiatrist then that will be the person who has clinical responsibility for the minors in special care and they will be carrying out all of the assessments and any treatment that may be required. This Court understands that the interim protocol agreed between the HSE and the Child and Family Agency will be further refined and will be reviewed again when the child and adolescent psychiatrist as now proposed by the Child and Family Agency is in place.

The court continued:

> This Court recognises that the public authorities must exercise their statutory authority. The inherent jurisdiction of the High Court supplements a gap in the law where same arises although the Court cannot direct the use of public resources in any particular way. However, this Court is also extremely mindful that detention of a minor in a secure unit is a very significant step and that for the inherent jurisdiction to be exercised in this way it must be understood that there is the necessary substratum of resources in place to ensure the vindication of the constitutional rights of the minor involved. In other words, the Court cannot detain a minor under the inherent jurisdiction if the therapeutic rationale is undermined by a lack of resources.
>
> This Court now expects that on the first ex parte application to place a young person in special care under the inherent jurisdiction of the High Court certain basic documents shall be provided to the Court. These documents together will be known as the "Programme of Special Care" and this is set out within the protocol document at appendix I. It is accepted by the Child and Family Agency and the Health Service Executive that these basic documents will be shared, as appropriate, with the young person, their parents, their guardian *ad litem*, the Child and Family Agency special care court liaison officer, the Court and others with the permission of the young person's allocated social worker. The following are the six documents which will be compiled and provided:
>
> 1) The first document shall be a care plan provided by a nominated social worker.
> 2) The second document shall be a placement plan provided by a named person within the special care unit.
> 3) The third document shall be a placement support plan also provided by a named person within the special care unit.
> 4) An individual education plan shall be produced and shall be signed off by a designated person from the special care school concerned.
> 5) The fifth document will be an individual therapeutic plan and shall be provided by a named person from the ACTS team.
> 6) The sixth document will be a psychiatric treatment/intervention plan and, under the interim protocol, be provided by the relevant HSE consultant psychiatrist. This element of the Programme of Special Care will only be provided where treatment and intervention are deemed necessary as per the third strand of the "O'Brien Principles".
>
> The ACTS person named shall be the clinical psychologist who will have responsibility for carrying out an assessment of the young person in accordance with these processes and for taking a lead role in the delivery of ACTS services for the duration of the placement. This model then shall continue to evolve through the placement and will specify when each agreed action is to be carried out and by whom. This Court recommends the adoption of this as the model for any and all future applications for special care orders that may come before the High Court. It is noted that p. 4 of the interim protocol document entitled "Programme of Special Care" sets this out in greater detail.

> As a matter of efficient case management it seems to this Court that the monthly intensive welfare reviews will receive each month, or more frequently as required depending on the particular case, updates of each of the six plans referred to above. It is apparent that the adoption of this protocol will involve an increase in paperwork, however, it is hoped that the extensive documentation will provide clarity and reduce the time spent in court. This system will be developed so that there can be electronic transmission of documents and the updated plans need not repeat the history to date of what has occurred but deal with what has happened since the last occasion in court and identify the issues, the responses to said issues and the proposals for the appropriate interventions. It is clearly understood from the protocol document that the young person, their parents and the guardian *ad litem* will be given an opportunity to consider and contribute (if appropriate) to all aspects of the Programme for Special Care in each Child in Care Review and as required in the intervening period.
>
> In an emergency situation, when documents (1) to (6) are not available at the original ex parte stage, it is expected that they shall be available to the Court within ten working days of a placement in special care. These documents shall accompany the social work court report at each interim stage thereafter in terms of updating documents.

2.5 The District Court

The publication of a number of very helpful District Court judgments has greatly enhanced our insight into the operation of the court with original jurisdiction in child care matters.

2.5.1 *Child and Family Agency v E.S. & A.J. (Interim Care Order Refused)* [2015] IEDC 08

This application by the Child and Family Agency was for an Interim Care Order in respect of two children aged four and six respectively. The grounds for the Interim Care Order were founded on a concern that the emotional welfare of the children was at risk by reason of the impaired insight by the mother into the impact of her mental ill health condition on the emotional health and development of the children. The Child and Family Agency was concerned that the mother lacked attunement to the children's age and stage of development and this exposed the children to risk of emotional harm. While it was acknowledged that the mother could meet their basic needs, the Child and Family Agency was of the view that she could not meet their emotional needs. The Agency was concerned that because she had rejected its assistance and services and was hostile and aggressive towards it, the Agency could not safely discharge its statutory function.

The children's social worker gave evidence that it was her assessment that the mother behaved inappropriately in the presence of her children and that the mother had no motivation to change despite intensive support by the Child and Family Agency. In her view the children needed therapeutic support in light of being exposed to violence which included an assault on the mother and aggression by the mother. She also viewed them as needing therapeutic support by reason of the 'on-off' interpersonal relationship of the parents and inconsistent parenting. She expressed concerns about reports that the children had been exposed to sexual encounters of the parents. While she did not feel that child "A" should attend a sexual abuse assessment unit arising from the exposure she considered that he would benefit from art therapy.

The court made findings of fact inter alia that:

(a) The mother's schizophrenia had been stabilized. When she went into crisis, she appropriately sought outside help. Her illness was not cured and the risk of relapse was always present, but on the basis of the illness alone, the children were not at risk.
(b) The mother and the father had a troubled relationship, which was neither committed nor stable, but they appeared to have worked out a consensual access regime for now and the mother facilitated access informally. In this regard the Judge found that they were no different than many couples. On the basis of relationship discord and difficulties in working out arrangements for parenting separately, the children were not at risk.
(c) The mother had difficulties with neighbours and the Housing Authority. The evidence adduced indicated that the source of these difficulties could be characterised as nuanced.
(d) The mother had been arrested for public order offences. However, in isolation this, the Judge found, was not a reason to take children into care.
(e) The level of Child and Family Agency visitation coupled with mental health visitation from 2013-2015 was perceived by the mother as cumulatively oppressive. No evidence of risk to child "A" or child "B" was adduced which established a risk by reason of the mother's diagnosis of paranoid schizophrenia in this period. This does not mean that the Child and Family Agency concerns were not founded in reality; they were.

(f) While the mother perceived the visitation of the Mental Health Nurse as helpful, purposeful and beneficial she viewed the visitation of the Family Social Service and Social Work Department as oppressive and fault finding. This does not mean that the mother's engagement with Social Workers and Family Support Workers was appropriate and measured; it was not.

(g) This is not to say that the mother's concerns were not reasonable, even if not entirely accurate. The Judge found that there was nothing wrong with the mother advocating a change in Child and Family Agency policy or questioning the validity of or type of interventions proposed by the Child and Family Agency. The mother became hostile to social work intervention when the Child and Family Agency insisted that one of her children should engage in non-directive art therapy to explore and re-mediate any emotional harm he may have suffered arising from the mother's failure to isolate him from hostilities with neighbours, Social Workers and Family Support Workers. The Agency also sought her agreement to open her home to the OARS service. The mother declined both services and viewed the array of interventions designed to support her in her parenting role as over intrusive and non-supportive. The court noted that the mother was not obliged to accept all services offered unless they were necessary and demonstrably served a child protection need. The Judge noted that the granting of an Interim Care Order also carried a risk of emotional damage for the children through separation from their mother.

(h) The court found that the mother's lack of understanding of how exposure to violence posed a potential risk to the emotional welfare of her children was another issue. Her engagement in her local community had been troubled even if she was 'more sinned against' in this context. Her engagement with Social Workers and Family Support Workers had been aggressive when dialogue failed to establish a mutually satisfactory resolution. The mother's defiant and argumentative attitude was not transitory, but appears to have been part of her personality. However, on the evidence before the court it was found that this fell far short of a conclusion that these children needed to be taken into care for this reason alone.

(i) The suggestion of social isolation was not established on the evidence before the court and the court accepted that one child was engaged in a summer camp and the other was due to commence school.

In the course of her judgment President Horgan found that whilst the nature and extent of the risk to the emotional health of the children had been set out to the court, "the nature of the risk to the children's health or welfare, which requires them to be removed from the care of their mother at this time, is less clear."

In considering the law, President Horgan expressly noted the essential difference between the threshold criteria set out in s.17 of the 1991 Act (interim care order) and s.18 of the 1991 Act (care order). She noted that:

> To justify interference by the State in private family life section 17 of the Act of 1991 is very specific in its requirements.
>
> Firstly the Court must be satisfied that there are reasonable grounds for believing that circumstances with respect to each child as set out in section 18 (1) exists or has existed with respect to the child.
>
> Secondly the Court must be satisfied that it is necessary for the protection of the child's health or welfare that they be immediately separated from their parent or parents and placed in the care of the Agency until the application for a care order is determined.
>
> Lastly the Court must be satisfied that removal is a necessary proportionate interference with the child's and other relevant persons' rights under Article 42A and rights to private and family life as contained in Article 8 ECHR.

On the evidence, President Horgan found that she had reasonable cause to believe that the Child and Family Agency had made out that circumstances under s.18(1)(a) or (b) exist or have existed with regard to the children which necessitated the Orders the Child and Family Agency sought. She found that the children were bright and happy. The Court noted that the children attended school and crèche regularly, had met all of their development milestones and had been seen very regularly by both Health Care professionals and Family Support Workers and Social Workers. The court found that the evidence adduced supported the view that the mother's mental health was at that time not a concern impacting on her parenting and the mother had fully engaged in maintaining her mental health through active co-operation with her treating psychiatrist and mental health team. President Horgan stated:

> I am however satisfied on the balance of probabilities that the evidence adduced gives reasonable cause to believe that the children's health, development or welfare is likely to be avoidably impaired or neglected through unintentional exposure to conflict both within and outside of the home.

That said, the learned Judge held as follows :

> I have received no evidence of physical harm; on the contrary, the evidence was that the children are thriving. I have received no cogent evidence that the apprehended risk of future harm in this context is significant or indeed of a greater or lesser order than the harm which the children would experience through abrupt separation from their primary care giver on an interim basis. Accordingly I am not satisfied that the children require care or protection which they are unlikely to receive unless the Court makes an Interim Care Order to protect their health and welfare by separating them from their primary care giver who has otherwise met all of their basic needs and nurturing needs.

On that basis the President refused the application for an Interim Care Order.

2.5.2 *Health Service Executive v JC* [2015] IEDC 13

This case relates to an application made by a Dr. CC in the within proceedings for access to "relevant court documents" for the purposes set out in s.29(5) of the Child Care Act 1991 (as amended) in accordance with Order 61A of the District Court Rules (2014). Dr. CC sought access on her own behalf and on behalf of the Child Care Law Reporting Project members (as approved by the Minister for Children and Youth Affairs) to "relevant court documents".

Dr. CC sought access to "relevant court documents" and it was submitted on her behalf that the meaning of "any relevant court documents" in s.29(5)(ii) of the Child Care Act 1991 as inserted by s.3 of the Child Care (Amendment) 2007 Act includes access to Social Work, guardian *ad litem* and other professional reports which are created for the purposes of the child care proceedings and filed in Court, and in respect of which the authors of the report swear that the contents of same are accurate and true and represent the basis of their professional opinion.

The Child and Family Agency and the parents took a neutral position in respect of whether the documents should be released. The guardian *ad litem* objected to the documents being released.

Counsel for the guardian *ad litem* contended that the plain meaning of "court document" refers to official court documents, in terms of the ordinary understanding of this phrase and not to every document produced to a court or lodged with the court or included in a book of pleadings, in the course of the proceedings.

The learned Judge held as follows:

> Dr. CC has a prima facie statutory right to seek access to "relevant court documents" such as the Application, Statutory Declarations of Service, grounding Affidavits setting out the basis of the application as required by S.I. 143/2015.
>
> …
>
> I am not persuaded by the submissions of the Applicant that on a plain reading of the Act and Rules of Court that she has a statutory right in the context of Child Care proceedings to seek access to Social Work, Guardian ad Litem or other professional reports.

2.5.3 *Child and Family Agency v M.C.* [2015] IEDC 10

This case concerned an application by the Child and Family Agency for a care order pursuant to s.18 of the Child Care Act 1991. The case related to two children, one aged 16 and one aged 15, who had been in care since infancy. The mother was described as having "an enduring and serious mental health illness and her functional capacity waxes and wanes however, she can become very unwell. She has periods of lucidity." Until these proceedings were brought, the children had been in care pursuant to a voluntary agreement under s.4 of the Child Care Act 1991. The care order was ultimately consented to by the respondent mother and was granted by the Court.

In the course of the proceedings, the guardian *ad litem* for the children sought findings and directions pursuant to s.47 of the Child Care Act 1991, which would reflect the effect on each of the children of the Child and Family Agency's delay in seeking a formal care order for each child in this case. In respect of this relief as sought, President Horgan set out in her judgment the legal position pertaining to s.4 of the Child Care Act 1991:

> Section 4 of the Child Care Act 1991 provides for the voluntary reception into care of children, with the consent of their parents, where the Agency conclude that they require care and protection and are unlikely to receive it unless they are taken into care. However, section 4 also recognizes that the Agency has no right to keep a child in its care if the parent or the Guardian does not also agree to that position. If the Agency and the parent disagree on the need for care and protection and the parent seeks the return of the child to their care then the Agency must apply to Court for a Care Order or Supervision Order. Where a child is in the voluntary care of the Agency they remain in the custody of the parent. Section 4 (3)(b) of the Child Care Act 1991 provides that the Agency must have regard to the wishes of a parent or person acting in loco parentis while the child is in voluntary care. The parent must therefore be consulted on many care decisions for their child. Parental consent must be sought for medical treatment deemed necessary for the child, for educational decisions such as

> signing forms consenting to school trips at home and away, for a child to have a passport etc. Therefore a parent who has voluntarily relinquished day to day child care responsibilities for a child must still be consulted and their consent sought for the many child rearing decisions. The legal control and responsibility for the child is fragmented when a child is in foster care.

She also noted at paragraph 17:

> Section 16 of the Child Care Act 1991 Act places a duty on the Agency to apply for a Care Order where it forms the view that a child requires care or protection which they are unlikely to receive unless a Court makes a Care Order or a Supervision Order. The Act itself is silent as to the optimal timing for such a decision; however section 24 of the Act provides that the welfare of the child is the first and paramount consideration.

The guardian *ad litem* in this case was seeking the findings and directions under s.47 of the Child Care Act 1991 as she was of the view that the Child and Family Agency ought to have applied for a care order in respect of these children at a much earlier stage. It was also her view that the children's health, development and welfare were negatively impacted by the delay in seeking a care order in this case. The guardian *ad litem* gave examples of the children having to await medical treatment whilst parental consent was sought, which took time, there were also delays in obtaining consent, or refusal to provide consent in respect of school trips and passports. The guardian *ad litem* also questioned the tacit decision of the Child and Family Agency to accept a 'voluntary consent' from a parent who has fluctuating capacity to consent. The initial consent form was for three months and was never updated or renewed.

In her judgment President Horgan accepted evidence that the mother had sufficient functional capacity to sign the initial form of consent to voluntary care for her children. She also stated that she was satisfied that the mother's functional capacity to consent to voluntary care had fluctuated in the intervening years and that she has been very unwell at times.

In respect of the application for findings and directions pursuant to s.47 of the Child Care Act 1991, which would reflect the effect on each of the children of the Child and Family Agency's delay in seeking a formal care order for each child in this case, the court held as follows:

> This Court has no role in determining whether the Agency has or has not failed in its statutory responsibility to Child 1 and 2 under section 16 of the Child Care Act 1991. The question of whether the Agency allowed Child 1 & 2 to drift in voluntary care or whether it failed to provide consistent care planning for Child 1 & 2 is not a question for this Court to determine. Any alleged breach of rights or of maladministration must be determined in a different forum.

2.5.4 *CFA v I & Anor* [2016] IEDC 02

This case related to an application by the Child and Family Agency for care orders for three children [A (over 10 years old), B and C (both under 10 years old)]. The orders were sought until the date of each of the children's 18th birthdays. The case was heard over a period of 15 days. There was an application to admit statements made by children pursuant to s.23 of the Children's Act 1997 – the parent's consent to the statements being admitted subject to the court deciding what weight should be attached to the evidence.

A previous application for an interim care order had been made which was grounded on allegations made by child A of physical punishment – the care order was not granted on the basis that undertakings were given to the court that the parents would not physically chastise the children and that they would accept various parenting supports. In support of this application for a care order, a number of witnesses gave evidence including, Gardaí, doctors, social workers and a psychologist who was of the opinion, having carried out a Parenting Capacity Assessment in relation to a possible reunification of the parents with Child B and Child C, that reunification should not occur and that the children needed to remain in care for the duration of their minorities with a review by the court. The parents, friends and family members and a member of staff from the Migrant Family Support Service gave evidence on behalf of the respondents. The guardian *ad litem* supported the application for the care order until each of the children turned 18. However, the guardian *ad litem* had noted the evidence of both parents in the proceedings and opined that more openness and frankness had been evidenced in the parent's evidence to the court and reunification must always be considered for this family.

The court made a variety of findings of fact in respect of the care provided by the parents to the children including that the parents had been domestically violent towards each other and to the children, that the father had issues with anger and aggression which he needed help to overcome and the mother did not act as a protective factor in the children's lives. The court

also found that neither parent was attuned to the emotional needs of their children and that there had been emotional abuse of all three children. The court also accepted evidence of both parents that they were reared with physical chastisement. The court found that the basic needs for food and shelter had been met by the respondent parents, but the need to feel secure, safe and not in danger or threatened in their own home had not been the experience of these three children.

The Judge ruled that she was satisfied to make care orders in relation to the three children and was satisfied that the threshold for state intervention had been reached in relation to all three children pursuant to s.18(1)(b) and (c) of the 1991 Act and that they required the care and protection of a care order as necessary to secure their protection and welfare at that time. That said, having regard to the proportionality of the length of the order, the learned Judge held as follows:

> However, it is now necessary to consider the proportionate response in light of the facts I have found. I am mindful that these three children are of tender years. The Social Worker has confirmed that it is unlikely Child A will heal while she remains in care. Both Child B and Child C have expressed a clear wish to return home.
> …
> I am mindful that the best place for children to be reared if it is in accordance with their welfare is in their own home with their own family.
>
> I have come to the view that these children are entitled to expect this Court to give their parents an opportunity to remedy the situation. I believe that this Court's duty to the children necessitates the Respondent parents being afforded an opportunity to engage meaningfully with therapeutic supports to gain the empathy and understanding which they must possess to parent their children safely. Also, the Respondent parents need a period of time to reflect on whether they will parent together or separately.
>
> A proportionate Order therefore that is appropriate for each child taking into account the individual needs of each child and noting that reconciliation with Child A will be a real indicator of the progress required in relation to empathy and understanding that would lead to the return of all of the children to the care of their parents.

In the circumstances, the Judge made an order in respect of each of the children for 18 months. The Judge also made directions for therapy referral to be made for the father regarding anger management therapy and for the mother regarding gaining insight into her children.

2.5.5 *Child and Family Agency v J & P* [2016] IEDC 13

In this case the Child and Family Agency was applying for a care order pursuant to s.18 of the Child Care Act 1991 in respect of a 17-year-old girl (Child 1) who was a national of another EU member state. Child 1's parents executed a Notarised Declaration by which they authorised an older gentleman to take their daughter from her country of origin to Ireland on a tourist visa for a period of a year and further authorised him to represent Child 1 to the authorities. Child 1 had been taken into care originally pursuant to s.12 of the Child Care Act 1991 by An Garda Síochána in circumstances where they had been contacted by Interpol who apprehended that Child 1 was in the physical care and custody of a much older gentleman.

At all times the older gentlemen stated that his relationship with Child 1 was an intimate one which was consensual and planned by arrangement with Child 1 and her parents. A social worker met with Child 1 and she corroborated the gentleman's story. She also stated she did not want to return to her country of origin.

The evidence of Child 1 was that she met the gentleman on social media and at all times it was clear to both her and her parent's that she and the gentleman would enter into a consensual relationship. Her parents were to gain a financial benefit from this arrangement and money passed in this regard. She was well cared for and properly treated by the gentleman and she had the benefit of language classes. She had intended to work as a babysitter in Ireland also, but since coming into the care of the Child and Family Agency she had the benefit of further education and now wished to finish secondary education.

The court outlined the necessity for an examination of jurisdiction in accordance with Article 17 of Council Regulation 2201/2003 and the court proceeded to make an emergency care order and then an interim care order under Article 20 of Council Regulation 2201/2003 to ensure protective measures were taken pending such jurisdictional examination. The interim care order was extended from time to time pending a fact finding hearing on the circumstances of Child 1's presence in Ireland so that the court could determine its jurisdiction under Council Regulation 2201/2003.

The Judge found that in respect of the jurisdictional point:

> Article 8.1 of Council Regulation 2201/2003 provides: that the Courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the Court is seised. Article 9 provides that where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the Courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

Reference was made to the judgment in Case C-532/07 and in particular the following paragraph:

> [T]he concept of 'habitual residence' under Article 8(1) must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in the social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay in the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration when determining the habitual residence of a child. It is for the National Court to establish the habitual residence of the child, taking into account all the circumstances specific in each individual case.

Furthermore, this case highlighted that the 'habitual residence' of a child, within the meaning of Article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case. This is accordingly a question of fact to be determined by a court.

The Judge also cited *Mercredi v Chaffe*[168] which highlighted:

> …the interplay between Articles 8 and 10 of the Regulation. It also outlined how to properly interpret the concept of 'habitual residence' for the purposes of those Articles and the Regulation so as to determine which court has jurisdiction to make relevant orders in matters relating to rights of custody.
>
> …
>
> This case highlighted that the test for habitual residence was "the place which reflects some degree of integration by the child in a social and family environment". Habitual residence must be assessed with this in mind and it will be highly unusual for a child not to acquire habitual residence in the country to which she travels lawfully to live with a parent, however the requirement for integration permits some flexibility.

[168] C 497/10 PPU.

The Judge further held:

> The concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that Child 1's residence should correspond to the place which reflects some degree of integration by her in a social and family environment. If that is this jurisdiction then it is for an Irish Court to establish the habitual residence of Child 1, taking account all of the circumstances of fact specific in the particular case.
>
> …
>
> The decision of *A (Children) (AP)* [2013] UKSC 60 is authority for the proposition that a child's habitual residence is not automatically that of his or her parents. The test for determining whether a child is habitually resident in a given place is whether there is some degree of integration by the said child in a social and family environment in the given jurisdiction which in essence is a purely factual question.

The Judge also considered Article 46 of Council Regulation 2201/2003 in attempting to decide whether it could recognise the notarised declaration by which Child 1's parents authorised an older gentleman to take their daughter from her country of origin to Ireland on a tourist visa for a period of a year and further authorised him to represent Child 1 to the authorities. Article 46 of the Regulation provides for the recognition of documents which have been formally drawn up or registered as authentic instruments enforceable in one Member State being recognised and declared enforceable under the same conditions as judgments. It is common case that the Notarised Declaration was validly executed. However, Child 1's parents subsequently indicated that they entered into this agreement mistakenly.

Child 1's parents also commenced legal proceedings to annul the Notarised Declaration signed by them, however as the gentleman did not enter an appearance, their proceedings didn't result in a court determination. The parents denied that they made arrangements with the gentleman to facilitate him leaving the jurisdiction with their daughter to cohabit as a couple, as well as to work as a babysitter, as claimed by both the gentleman and Child 1. The court found that in the absence of any jurisdictional court order nullifying the validity of the Notarised Declaration the court had to take the notarized agreement at face value. The court found that Child 1 came to Ireland lawfully when she was a mid-adolescent and within a period of weeks, prior to Child 1's lawful entry to this jurisdiction her parents sought to impugn the lawfulness of the Notarised Declaration.

In deciding on the jurisdictional issue, the court found that in order to do so it needed to examine whether the habitual residence of Child 1 shifted between the date of the Notarised Agreement and the date of the application in the other EU jurisdiction adduced before the court.

The court held as follows:

> Child 1 is a National of another EU member state, who lawfully came to Ireland with a non parent by virtue of a Notarised Declaration, made in Child 1's country of origin, which was used to ensure her lawful entry to this jurisdiction. The gentleman, named in this Notarised Declaration, was authorised to represent the interests of Child 1 in this jurisdiction.

Counsel for the parents argued that Child 1 was wrongfully retained in Ireland against the will of her parents and, therefore, her habitual residence was her country of origin and not Ireland. Consequently, it was argued, the court did not have jurisdiction to determine the care order proceedings and it was for the court of the other Member State to determine Child 1's habitual residence.

President Horgan stated:

> I am satisfied on the evidence of Child 1 and the Social Worker(s) that Child 1's intention and state of mind when she left her country of origin for Ireland was that she intended to reside with the gentleman in an intimate and committed relationship of her choosing and that they would live in Ireland. She had the opportunity of returning to her country of origin when her sister came to Ireland before the commencement of the care proceedings. She declined to return to her country of origin at that time. Child 1 is a mature minor who was capable of and did express her own views to the possibility of returning to her country of origin at that time and subsequently and has been consistent in this context. Accordingly, I am satisfied that this case meets the 'unusualness' threshold outlined in *A (Children) (AP)* [2013] UKSC 60, and the quality of 'stability' test outlined in *AR v RN (Habitual Residence)* [2015] UKSC 35, [2015] 2 FLR 503. This is a case where the "see-saw analogy" set out in *Re B (A child)* [2016] UKSC 4 arises and so I am satisfied that Child 1 lost her habitual residence as she put down the first roots in Ireland, prior to the commencement of these proceedings, and established the requisite degree of integration in the environment of the new state, namely Ireland within weeks of her arrival in Ireland.

In the circumstances, the Judge found she had jurisdiction to make a care order pursuant to s.18 of the Child Care Act 1991 and found that there was sufficient evidence to ground that application.

SECTION 3:
COMMENCEMENT ISSUES AND PATHWAYS TO PARENTAGE IN THE CHILDREN AND FAMILY RELATIONSHIPS ACT 2015

3.1 Introduction

The Children and Family Relationships Act 2015 (the "2015 Act") was passed by the Dáil in April 2015. One of the most significant family law developments in Ireland in decades, the 2015 Act heralds a move away from the exclusive concept of the family based on marriage to ensure that the law in this jurisdiction also places protection around the diverse types of modern families that exist in Irish society today. At this point, however, only certain sections of the 2015 Act have been commenced. On 12th January 2016, the Tánaiste signed the Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order 2016.[169] This commencement order appointed 18th January 2016 as the day upon which various provisions of the Act were to come into operation. Among the important sections that have been commenced are the guardianship provisions, the reforms in relation to access and custody, the enforcement order regime, the new maintenance obligations and the "best interests" provisions.

Those parts of the 2015 Act relating to donor-assisted human reproduction remain to be commenced. In essence, this refers to Parts 2, 3 and 9 of the Act and any other separate sections dealing with matters relating to assisted human reproduction. The 2015 Act confers the power to commence Parts 2 and 3 on the Minister for Health.[170] All references to the Minister in Parts 2 and 3 are references to the Minister for Health.

The purpose of this section of the report is to identify issues that need to be considered and to identity steps that may need to be taken in advance of commencement. Additionally, this section identifies some aspects of the 2015 Act that should be amended by primary legislation in due course.

[169] S.I. 12 of 2016.
[170] Section 1(6), 2015 Act.

3.2 Assisted Human Reproduction and the 2015 Act

The key point to recognise in relation to the 2015 Act is that it does not provide a comprehensive scheme of regulation for assisted human reproduction. The current legal position is that assisted human reproduction is entirely unregulated by Irish law, other than by regulations which implement EU Directives on basic standards for quality and safety of tissues and cells.[171] These regulations have no ethical component. The 2015 Act regulates only certain aspects of assisted human reproduction. In short, Part 2 of the Act establishes a scheme for the attribution of parental status where a child is born through donor-assisted human reproduction ("DAHR"). Part 3 of the Act establishes a scheme which requires that only gametes (eggs and sperm) from identifiable rather than anonymous donors may lawfully be used in Ireland, and sets out general obligations of DAHR facilities.

There are large swathes of the field of assisted reproduction activities which will remain entirely unregulated even after these sections of the 2015 Act are commenced. A full discussion of those practices is beyond the scope of this report. However, some of those activities should be noted, to provide context for the 2015 Act.

Surrogacy falls entirely outside the scope of the 2015 Act. In very early drafts of the Children and Family Relationships Bill, provisions regulating surrogacy were included, but were subsequently removed.[172] In Part 2 of the 2015 Act, "mother" is defined as the woman who gives birth to the child,[173] and the Act contains no express provision allowing for the transfer of maternal status. As such, the 2015 Act is clearly not intended to take on the challenge of establishing a scheme of regulation for surrogacy. It is increasingly common for Irish couples to travel abroad to avail of surrogacy services, often on a commercial basis. Generally speaking, such couples return to Ireland with the surrogate-born child, and use the general provisions of Irish family law to establish parental status and guardianship rights on the part

[171] 2004/23/EC 'on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.' This is accompanied by two implementing directives: Directive 2006/17/EC and Directive 2006/86/EC. These were transposed into Irish law by the European Communities (Quality and Safety of Human Tissues and Cells) Regulations 2006. The Regulations set down requirements for establishments that may deal with human tissues and cells, requirements for quality management, donor selection, traceability, testing and the import and export of human tissues and cells. These regulations are purely technical, with no ethical component. The Health Products Regulatory Authority (HRPA) is designated as the competent regulatory authority in Ireland.

[172] See Children and Family Relationships Bill 2013, Heads of a Bill published by the Department of Justice for consultation.

[173] Section 4, 2015 Act.

of the commissioning father, where he is the genetic father. Surrogacy is clearly a further aspect of assisted reproduction which needs to be regulated by law in Ireland.

The 2015 Act makes no provision for the regulation of the scientific or laboratory-based aspects of assisted human reproduction. Nor are these aspects of assisted reproduction regulated by any other provision of Irish law. As such, there is no Irish law on how long embryos may be cultured in a laboratory, on how many embryos may be implanted in a woman's uterus at one time, or how fertility clinics should deal with embryos created in the course of IVF but not used. Furthermore, there is no Irish law on highly sensitive ethical practices such as pre-implantation genetic diagnosis, colloquially known as embryo screening. Regulation of these practices is closely linked to the practice of embryonic research, which is also unregulated in Ireland.

After the relevant sections of the 2015 Act are commenced, there will still be significant legislative work to be completed in the field of assisted human reproduction. This work is believed to be in train. It is important that the 2015 Act, and the commencement of these provisions, fits coherently into this broader legislative project. While the 2015 Act must fit in with this broader legal regime, there is no reason why the relevant parts cannot be commenced in advance of that scheme being finalised.

In the absence of legislation for parental status in assisted reproduction there is no legal regime in place to govern donor-assisted human reproduction and protect the rights of all involved, including any child conceived. The lack of legislation in the realm of assisted reproduction was highlighted by the Supreme Court decision in *M.R. & D.R. v An tArd Chlaraitheoir & Ors.*[174] While surrogacy was at issue in that case, the court held that legislation in this area would, by its nature, be in the realm of the Oireachtas. Citing the separation of powers, Denham C.J. stated as follows:

> Any law on surrogacy affects the status and rights of persons, especially those of the children; it creates complex relationships, and has a deep social content. It is, thus, quintessentially a matter for the Oireachtas…There is a lacuna in the law as to certain rights, especially those of the children born in such circumstances. Such lacuna should be addressed in legislation and not by this Court. There is clearly merit in the

[174] [2014] IESC 60.

> legislature addressing this lacuna, and providing for retrospective situations of surrogacy.[175]

Therefore, while the courts have expressed great discontent at the lack of legislative progress in this area, they have also made it very clear that it is not the place of the courts to fill the legislative lacuna.

Similarly, in *McD v L*,[176] the failure to regulate for donor-assisted reproduction was highlighted. In that case, a guardianship and access application brought by a homosexual man who donated his sperm to a lesbian couple under the agreement that he would assume the part of a "favourite uncle" was considered by the court. The Supreme Court held, inter alia, that a sperm donation agreement was generally unenforceable. This emphasised the difficulties that arise in DAHR cases which take place in an unregulated setting without clear laws in respect of parentage.

Despite the problematic legal situation, assisted human reproduction is widely practised in Ireland, with many clinics in operation in larger cities and provincial towns throughout the country. Egg, sperm and embryo donation are commonly available. In the absence of a legislative regime, fertility clinics are largely self-regulated, and not necessarily in any uniform fashion. The longer fertility clinics are left to operate in a legislative vacuum, the more difficult it will be to draft and implement functioning regulation in this area.[177]

3.2.1 Recommendations

In view of the fact that the 2015 Act regulates, for the first time, a field that has developed in an entirely unregulated manner, there are certain steps that will need to be taken prior to and alongside the commencement of the relevant parts of the 2015 Act. The following actions are recommended to be undertaken in advance of commencement of those parts of the 2015 Act.

[175] [2014] IESC 60, per Denham C.J. at paras. 113-116.
[176] [2009] IESC 81.
[177] Useful comparisons may be drawn with Italy, which was for some time the 'Wild West' of assisted reproduction. Sauer, "Italian Law 40/2004: A View from the 'Wild West'" (2006) 12(1) Reproductive Biomedicine Online 8.

First, the 2015 Act requires that certain infrastructure be established in advance of commencement. In particular, the 2015 Act requires the establishment of a National Donor-Conceived Person Register.

Second, there is a need for departmental engagement with fertility clinics. It is essential that the clinics are assisted in achieving compliance with the new regime, and it is undoubtedly in the best interests of intending parents and their children (current and future) that the clinics become compliant as soon as possible.

Third, there is a need for public awareness activities in relation to the 2015 Act. Intending parents, and parents who already have donor-conceived children, should be informed about their legal position.

Fourth, there are some instances in which it may be advisable to provide further detail on the 2015 Act via secondary legislation. Section 41 of the 2015 Act enables the Minister for Health to make regulations prescribing any matter or issue which is referred to in Parts 2 or 3 as prescribed or to be prescribed. Regulations under Part 2 or Part 3 may contain such incidental, supplementary and consequential provisions as the Minister considers necessary or expedient for the purposes of the regulations.

Fifth, in some instances it may be appropriate for the relevant Minister to provide informal advice to clinics in the form of a guidance document. This has previously been used in the field of assisted reproduction; in 2012 the then Minister for Justice issued a guidance document on surrogacy arrangements entered into outside the State.[178]

3.3 Consent Regime for Parental Status

The 2015 Act is revolutionary in that it makes provision for the establishment of parental status based on the giving of informed consent on the part of the intended parent, and the revocation of parental status on the part of the egg or sperm donor. It should be reiterated that

[178] See Department of Justice, *Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children born as a Result of Surrogacy Arrangements Entered into Outside the State* (21 February 2012). Available at http://www.justice.ie/en/JELR/20120221%20Guidance%20Document.pdf/Files/20120221%20Guidance%20Document.pdf.

the 2015 Act defines mother as the woman who gave birth to the child. Even where a woman becomes pregnant using a donated egg or embryo, she is automatically the mother of the resulting child. The 2015 Act makes provision for the establishing of parental status on the part of the second parent. The second parent may be the mother's spouse, civil partner or cohabitant.[179]

Section 5 of the 2015 Act provides that the parents of a donor-conceived child are the mother, and her spouse, civil partner, or cohabitant, where the necessary consents have been provided. This parental status operates for the purposes of "any enactment."[180] Section 5 further provides that a donor of a gamete or embryo is not the parent of the resulting child and has no parental rights or duties in respect of that child. Moreover, this provision only operates in circumstances where the necessary consents are obtained.

The obtaining of consent in accordance with section 5 is essential to the establishment of parental status under the 2015 Act. Section 93 of the 2015 Act amends the Civil Registration Act 2004 to provide that the registration of a child as donor-conceived requires a statutory declaration stating that parental consent was provided in accordance with section 5 of the 2015 Act, and the provision of a certificate issued under section 27(5) of the 2015 Act. Certificates under section 27(5) are to be issued to parents of a child born as a result of a DAHR procedure, where certain requirements are fulfilled. Section 27(5) states that such certificates are to be in such form as may be prescribed and sets out the information that they should record.

3.3.1 Recommendation

The form for these certificates should be prescribed by ministerial regulation in advance of the commencement of Parts 2 and 3 of the 2015 Act.

3.3.2 Definition of DAHR Procedure

The 2015 Act defines a 'DAHR procedure' as:

[179] Cohabitant is to be construed in accordance with section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. The word "spouse" was inserted in place of the word husband by section 23 of the Marriage Act 2015.
[180] Section 5(4), 2015 Act.

> [B]eing any procedure performed in the State with the objective of it resulting in the implantation of an embryo in the womb of the woman on whose request the procedure is performed, where—
>
> (a) one of the gametes from which the embryo has been or will be formed has been provided by a donor,
> (b) each gamete from which the embryo has been or will be formed has been provided by a donor, or
> (c) the embryo has been provided by a donor.

It should be noted that the definition of DAHR procedure is restricted to procedures performed in the state. This means that couples who travel abroad for egg and sperm donation services cannot avail of the 2015 Act, even in circumstances where the procedure is one which if performed in Ireland, would be lawful under the 2015 Act, when commenced. It is not clear whether this is a policy choice that has consciously been made by the legislature, or whether the exclusion of such arrangements is inadvertent. There may, however, have been a clear decision to limit the jurisdictional scope of the 2015 Act to procedures carried out in Ireland. If that is the case, consideration might be given in the future to establishing a regime whereby intending parents who engage in DAHR procedures overseas can establish their parental status. Such procedures would, presumably, be limited to DAHR arrangements which would be lawful if carried out in Ireland.

Furthermore, a lacuna might arise in respect of some egg donation procedures carried out by Irish fertility clinics. Some Irish clinics arrange egg donation using egg donors from other jurisdictions. Because eggs are delicate, and difficult to store or transport without damaging them, the fertilisation of the egg and culturing of the embryo is often carried out overseas, and the resulting embryo transported back to Ireland. The definition of DAHR procedure may still capture this procedure if the implantation of the embryo is carried out in Ireland.

Under section 26 of the 2015 Act DAHR facilities are prevented from using gametes or embryos for which the necessary consent requirements have not been fulfilled.

3.3.3 Recommendation

Consideration might be given in the future to establishing a regime whereby intending parents who engage in DAHR procedures overseas can establish their parental status. Such

procedures would, presumably, be limited to DAHR arrangements which would be lawful if carried out in Ireland.

3.3.4 Outline of Consent Requirements

3.3.4.1 Consent of Donors of Gametes and Embryos

Sections 6 and 7 of the 2015 Act deal with the consent of the donor to the use of his or her gametes in a DAHR procedure. The donor must be over 18 to consent to the use, in a DAHR procedure, of his or her gametes and prior to their donation, he or she must make a declaration of consent in writing, signed, dated and witnessed by a person authorised by the operator of the DAHR facility. Such a declaration must confirm that the person: consents to the use of his/her gamete(s) in a DAHR procedure; is aware that he/she shall not be the parent of any child born as a result of the procedure; consents to certain information about himself/herself being recorded in a register; and understands that a child born through the use of his/her gamete may access this information and seek to contact him/her.

Notably, the donor is merely advised that it is desirable that he or she take steps to keep his or her information up to date. No requirement is imposed on donors to keep their information up to date.

Section 8 provides that donors are entitled to revoke their consent, but only until the point where the donated gamete is used in the formation of an embryo.

Sections 14 and 16 provide for the giving of consent by the donors of gametes used to produce embryos. Section 15 and section 17 set out the information to be provided under sections 14 and 16 respectively. Similar consent requirements, and provisions regarding revocation, apply in the case of embryo donation.

3.3.4.2 Consent of Intending Mother and the Second Parent

Section 9 deals with the consent of an intending mother to a DAHR procedure. Prior to the procedure being performed the intending mother must have attained the age of 21 and must

have received the information set out in section 13 of the 2015 Act. In addition, she must sign a declaration in writing in the presence of a person authorised by the operator of the DAHR facility attesting to her consent to the performance of the DAHR procedure; her knowledge that the donor will not be the parent of the child; that she shall be the parent of the child, and attesting to her consent to the recording of certain information on the national donor-conceived person register. Where applicable, she must also declare her consent to her spouse, civil partner or cohabitant being the other parent to the child.

The mother can revoke her consent pursuant to section 10 but such a revocation shall have no effect where the DAHR procedure has already taken place.

Section 11 deals with the consent of the second parent of the intending mother, who must make a similar written declaration as to consent to be the child's parent. Similar provisions regarding revocation apply, and are set out in section 12.

Section 13 of the 2015 Act sets out the information to be provided to the intending mother and the second parent to secure the validity of their consent. This includes informing the mother or intended second parent of his or her obligation to provide information to the DAHR facility in respect of the birth of a child as a result of the procedure, and informing them that the donor-conceived child will be entitled to contact the National Donor-Conceived Person Register to seek information regarding his or her donor.

3.3.4.3 Actions to be Taken with Regard to Consent Provisions

With regard to the declarations of consent referred to in sections 6, 9 and 11, each is stated to be in the form as "may be prescribed." As such, it will be necessary to make regulations in accordance with the power under section 41(1) prescribing the form of the consent to be used by fertility clinics. The issue of liability will need to be carefully explored in drafting these regulations.

While the 2015 Act does not specify that the information to be provided to each party is to be in the form as "may be prescribed" it is advisable that guidance be provided to the clinics as to the form in which this information be provided.

3.3.5 Recommendation

It is advisable that fertility clinics be provided with guidance as to the form in which information is to be provided to donors in order to ensure substantive consent in the form required by the 2015 Act is obtained.

3.3.6 Consent and the Acquisition of Gametes from Abroad

The 2015 Act appears to be premised on the assumption that the majority of gametes used in DAHR procedures in Ireland are donated in Irish fertility clinics. Anecdotally, it appears that this is not the case. In the case of donor sperm, much of it is imported from Denmark. Many donated eggs are provided by clinics in the Ukraine, Spain or the US.[181] In some instances when egg donation is carried out, the embryo is formed overseas (using the sperm of the intended father or of a donor) and then transported back to the clinic in Ireland, where it is implanted in the uterus of the intending mother. Accordingly, these clinics do not necessarily obtain consent directly from donors.

Where a clinic acquires a gamete from outside the state, it is governed as regards the issue of donor consent, by the provisions of section 26(1)(b)(ii) of the 2015 Act. This provides that a DAHR facility is only entitled to use an acquired gamete where the donor of that gamete has consented to the use of the gamete in a DAHR procedure *"where that consent is <u>substantially the same</u> as that provided for in section 6."*[182] The section provides no further guidance on the definition of "substantially the same." This may be an appropriate subject for ministerial guidance, as clinics will need to ensure compliance with this section in the course of their activities.

The question of the liability of an Irish clinic using foreign gametes should be explored e.g. presumably a mother would seek to avoid any obvious genetic defect being passed on to a child born through Assisted Human Reproduction ("AHR").

[181] See for example, procedures at Cork Fertility Clinic http://www.corkfertilitycentre.com/Egg%20Donation, and Sims IVF http://www.sims.ie/treatments-and-services/donor-programmes.959.html.
[182] Emphasis added.

3.3.7 Recommendations

Section 26(1)(b)(ii) of the 2015 Act governs the issue of donor consent where a fertility clinic in Ireland acquires a gamete from outside the state. This provides that a DAHR facility is only entitled to use an acquired gamete where the donor of that gamete has consented to the use of the gamete in a DAHR procedure "where that consent is <u>*substantially the same*</u> *as that provided for in section 6." The section provides no further guidance on the definition of "substantially the same." This may be an appropriate subject for ministerial guidance, as clinics will need to ensure compliance with this section in the course of their activities.*

The question of the liability of an Irish clinic using foreign gametes should be explored e.g. presumably a mother would seek to avoid any obvious genetic defect being passed on to a child born through AHR.

3.3.8 Payment of Reasonable Expenses

Section 19 of the 2015 Act is very short, but deals with an important aspect of donor-assisted human reproduction: payment in respect of donated eggs or sperm. Section 19 provides that consent to donation of eggs or sperm is not valid under sections 6, 14 or 16, where it is provided for financial compensation in excess of reasonable expenses. Reasonable expenses is defined as meaning the donors:

(a) travel costs,

(b) medical expenses, and

(c) any legal or counselling costs.

This is an exhaustive definition. It appears that payment of any sum in excess of this will render consent invalid. Under section 26 of the 2015 Act, DAHR facilities are prevented from carrying out a DAHR procedure using a gamete that has been provided without the necessary consent being provided. As such, the use of a gamete provided for the payment of any sum in excess of the expenses specified is unlawful.

While the issues around donor anonymity have been far more widely discussed, achieving compliance with this provision is also likely to create difficulty for fertility clinics. It imposes a very strict limit on what may be paid to donors, and it makes no distinction between payment to egg donors and payment to sperm donors. While information on payment to

donors by Irish fertility clinics is not generally publicly available, it seems very likely that both egg and sperm donors are paid for the donation and in certain cases may be paid a fee that exceeds the strict limits set out in section 19.

The payment of gamete donors is a controversial issue in the regulation of assisted reproduction worldwide, and one on which varying approaches have been adopted. Most US states, for example, permit a free market in eggs and sperm. As a result, higher prices may be charged where gamete donors are especially intelligent, successful or attractive. In other jurisdictions, fees paid to donors are capped at reasonable expenses. In reality, however, the cap may be described as "reasonable expenses" but in actual fact operate as a fee that is more than mere expenses but still far less than might be paid in an open market.

The UK approach is instructive. There, the fee payable for egg donation is up to £750 per cycle with provision to claim an excess fee for expenses such as childcare, travel and accommodation. The fee payable to sperm donors is up to £35 per clinic visit, again with an excess to be claimed on the same basis. Therefore, while the payment of egg and sperm donors is prohibited, in reality it is remunerated but at a very low rate. Importantly, the UK regime, like many others, permits for higher payments in respect of egg donation than sperm donation. This is to reflect the fact that egg donation is significantly more onerous and risky than sperm donation. Egg donation involves undergoing hormone treatment to stimulate the production of eggs and surgical egg retrieval, which entails a small but significant risk of Ovarian Hyperstimulation Syndrome, a condition which can in some cases be fatal.[183]

3.3.9 Recommendation

The issue of payment of egg and sperm donors raises issues of an ethical nature. Engagement with fertility clinics is necessary. It may be the case that some Irish clinics may use gametes provided for sums of money in excess of the reasonable expenses specified.

[183] James M Goldfarb, Cynthia Austin, Nina Desai, Hanana Lisbona and Barry Peskin, "Complications of Assisted Reproductive Technologies" in Falcone and Hurd (eds.) Clinical Reproductive Medicine and Surgery (Mosby/Elsevier 2007) at chapter 40.

3.3.10 Consequences of Inadequate Consent

The parental status provisions as set out in section 5 of the 2015 Act are fundamentally premised on the informed consent of the intended parents.[184] That consent must be written consent as prescribed under Part 2 of the 2015 Act. If such consent is not obtained, the mother alone is the legal parent, even where the child is born as a result of a DAHR procedure.[185]

Somewhat more complex is the question of the effect of inadequate consent on the part of a donor. There is no provision of the 2015 Act that specifically provides that the parental status provisions do not operate where the donor's consent is inadequate. Section 5(8) provides that those DAHR procedures which establish parental status on the part of intending parents are ones in which both intending parents have provided consent under sections 9 and 11 respectively. On the face of it, it seems that as long as the parental consent of the intending parents is in order, then section 5 will take effect. There is, however, some basis on which it might be argued that this is not the case.

First, the provision of a certificate pursuant to section 27(5) requires a DAHR facility to record the basis of consent to use of a gamete or embryo, in accordance with the DAHR facility's obligations regarding donor consent under section 26. Section 27(5) does not expressly prohibit DAHR facilities from providing a certificate where section 26 was not complied with, but this does seem to be strongly implied from its general scheme.

Second, consents provided under sections 9 and 11 of the 2015 Act both refer to the child's right to access identifying information from the Donor-Conceived Person Register. If the DAHR procedure in question involved the use of anonymously donated sperm and the intending parent is aware of that, then the intending parent cannot be said to have provided consent pursuant to section 9 or 11.

Third, sections 5(1) and 5(8) refer to a DAHR procedure in setting out the rules on parental status. DAHR procedure is defined, in turn, to refer to a 'donor'. 'Donor' is defined as only

[184] Sections 5(1), 5(8), 2015 Act.
[185] Section 5(2), 2015 Act.

including those people that have provided informed consent as required by Part 2 of the 2015 Act.

3.3.11 Recommendations

It is advisable to clarify the position as to the extent, if at all, section 5 of the 2015 Act operates where the consent of the donor is incomplete, especially as there may very well be circumstances in which adequate consent is provided by the intending parents, but the consent of the donor is flawed. This would arise, for example, if anonymous eggs or sperm were used, or if the donor was paid in excess of reasonable expenses.

Clear guidance should be provided to both fertility clinics and intending parents as to the consequences of inadequate donor consent.

3.4 Retrospective Attribution of Parental Status

Sections 20 to 22 of the 2015 Act make provision for the establishment of parental status in respect of children who were born before the commencement of Parts 2 and 3 of the 2015 Act. This includes procedures performed outside the state where the person who performed the procedure was authorised to do so under the law of the place where the procedure was performed.

Section 20 provides that these provisions can only be availed of in circumstances where the donor of the gamete was unknown to the mother of the child. This proviso is clearly included with the intention of excluding known donor situations such as that in *JMcD v BL*, discussed above. "Unknown" does not mean, however, that the donor is not identifiable, i.e. that the donor is anonymous. It would appear that these provisions can be availed of even where the donor was an identifiable donor, as long as the donor was not known to the mother. However, section 20 requires that the donor remain unknown to the mother and the intended second parent when the matter is dealt with in court.[186]

[186] This could be problematic in the unlikely event that the intending parents succeeded in making contact with the donor, and forming a relationship with him or her.

3.4.1 Recommendations

The key action that needs to be undertaken in respect of sections 20 to 22 of the 2015 Act is in relation to public awareness. These sections will only have the desired effect if the parents of donor-conceived children are made aware of them. In this instance, a public awareness campaign for family law solicitors would also be appropriate, given that most parents will not want to make these court applications in the absence of legal representation. It would also be appropriate to disseminate this information to fertility clinics. For most parents of donor-conceived children, they would be the first point of contact.

A further action that should be undertaken in relation to these sections is to enact amendments to the rules of the District Court and Circuit Court setting out the proofs as required in the 2015 Act, and any other practical rules that might assist the courts in streamlining applications of this kind. Section 21(1) expressly states that an application to the District Court shall be in such form as may be prescribed by rules of court.

3.5 Donor Identification Regime

One of the most distinctive aspects of the 2015 Act is its provisions regarding donor anonymity.

3.5.1 The Anonymous Donation Debate

The ethics of anonymous donation is one of the most hotly debated issues in assisted reproduction worldwide.[187] Opponents of anonymous donation argue that knowledge of genetic heritage is essential to the development of personality and self-understanding. They point to the general trend away from 'closed' adoption, in which the genetic parents were entirely cut out of the child's life, and toward 'open' adoption, which favours the maintenance of some relationship between the child and the genetic parents. Proponents of

[187] See N. Cahn, "Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank" (2009) 12 *DePaul Journal of Health Care Law* 203. For the opposite view see I. Glenn Cohen, "Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands" (2012) *Georgetown Law Journal* 431. Generally, see D.R. Beeson, P.K. Jennings and W. Kramer, "Offspring searching for their sperm donors: how family type shapes the process" (2011) *Human Reproduction* 26(9) 2415–2424.

anonymous donation contest the importance of genetic heritage, and argue that the commissioning parents are best placed to guarantee the best interests of the resulting child.

Anonymous donation is often opposed on the basis that it interferes with the child's fundamental right to know his or her genetic heritage, or the child's right to identity, and that therefore it breaches international human rights norms. A number of articles of the United Nations Convention on the Rights of the Child ("CRC") are of relevance to the anonymous donation debate. The CRC protects a number of rights that deal directly with the relationship between parents and children, and these may be of special relevance to children born through gamete donation. Article 7 protects the right of the child to know and be cared for by his or her parents, but this right is protected in qualified terms: states are only obliged to guarantee it "as far as possible."[188] Article 8 deals specifically with the child's right to preserve his or her identity without unlawful interference.[189] This includes nationality, name and family relations. Article 9 protects the right of the child not to be separated from his or her parents except where that separation is in the best interests of the child. It is significant that the UN Committee on the Rights of the Child has specifically welcomed measures that enable donor-conceived children to identify their donors.[190] It has also noted the existence of a possible conflict between the practice of anonymous donation and Articles 3 and 7 of the CRC.[191]

Some jurisdictions, such as Spain, strongly protect the privacy of donors,[192] while others, such as the UK, prohibit anonymous donation entirely. The example of the UK is particularly instructive. Originally, the guidelines issued by the Human Fertilisation and Embryology Authority ("HFEA") allowed for anonymous sperm and egg donation. Largely in response to

[188] Breen notes the qualified nature of this right and observes that it dates from concern for the protection of anonymity in adoption. Breen, "Poles Apart? The Best Interests of the child and assisted reproduction in the antipodes and Europe" (2001) 9 *International Journal of Children's Rights* 157 at 163.

[189] On Articles 7 and 8 see Samantha Besson, "Enforcing the Child's Right to Know her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights" (2007) 21 *International Journal of Law, Policy and the Family* 137.

[190] United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: Switzerland* CRC/C/15/Add.182 7 June 2002 (United Nations, 2002).

[191] United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations: United Kingdom of Great Britain and Northern Ireland.* CRC/C/15Add.188 9 October 2002 (United Nations, 2002).

[192] I De Melo-Martín "Assisted Reproductive Technology in Spain: Considering Women's Interests" (2009) 18 *Cambridge Quarterly of Healthcare Ethics* 228-235. Doi:10.1017/S0963180109090379. J. Vidal Martinez, "The Regulation of Assisted Reproduction in Spanish Law. The Ruling of the Spanish Constitutional Court of 17 June 1999" (2002) 9 *European Journal of Health Law* 121.

the complaints of donor-conceived people, and in response to the threat of litigation,[193] this was amended by the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004. These require that the HFEA provide donor-conceived children born after March 2005 with identifying information about their gamete donor.[194]

The practice of anonymous donation was strongly condemned by the Irish Commission on Assisted Human Reproduction, which considered the child's right to identity at some length. The Commission recommended that any child born through gamete donation should, on reaching maturity, be able to identify the donor(s) involved in his or her conception. It extended this right to the right to identify one's surrogate mother.

3.5.2 Prohibition on Use of Anonymously Donated Gametes

Following the recommendation of the Commission on Assisted Human Reproduction, the 2015 Act prohibits the use of anonymously donated gametes. As set out above, requirements referring to donor-identifiability are built into the consents required for donors under the Act.

Section 24 of the Act governs acquisition of gametes or embryos by DAHR facilities. It provides that DAHR facilities shall not acquire gametes or embryos unless they also acquire certain specified information in relation to them. This information is, in respect of the donor:

(a) his or her name;
(b) his or her date and place of birth;
(c) his or her nationality;
(d) the date on which, and the place at which, he or she provided the gamete;
(e) his or her contact details.

Section 26 provides that the operator of a DAHR facility shall not use or permit to be used in a DAHR procedure a gamete provided by a donor unless it has been acquired in accordance

[193] See J. Rose, 'The Response of an Adult Donor Insemination Offspring to the Article "The Psychology of Assisted Reproduction: or Psychology Assisting its Reproduction?"', (1999) 34 *Australian Psychologist* 220, Jackson, *Medical Law*, 2010 p.786. In *R (on the application of Rose) v Secretary of State for Health* [2002] EXHC 1593 Admin. the applicant claimed that her right to know her genetic parentage was protected by the Human Rights Act 1998. The court accepted that this engaged Article 8 rights but the case never went to full trial because the regulations prospectively prohibiting anonymous donation were passed. On the child's right to identity in assisted reproduction in an Irish context see Shannon, *Child Law* 2010 p.591.
[194] The donor-conceived person must have reached the age of 18 to be permitted to apply.

with section 24(1) and the donor consented to the use of the gamete in accordance with section 6. As mentioned above, where the gamete comes from outside the State, section 26(1)(b)(ii) requires that the consent provided be "substantially the same" as that under section 6.

These requirements apply equally to circumstances where the gametes are acquired from clinics overseas. As noted above, it is believed that the great majority of donor gametes used in Irish fertility clinics are acquired from donors outside of Ireland, usually via clinics or sperm banks based in those jurisdictions. After the commencement of Parts 2 and 3, acquisition of gametes from overseas will only be lawful if DAHR facilities also acquire the information set out at section 24(3) of the 2015 Act.

3.5.3 Ensuring Compliance with Donor Anonymity Regime

Currently, Irish fertility clinics offer gamete donation services on both an anonymous and an identifiable basis. As such, moving to an identifiable-only regime will be one of the most significant challenges that fertility clinics will face in achieving compliance with the 2015 Act. There was very significant opposition to this aspect of the 2015 Act from fertility clinics, who maintain that parents should be entitled to choose to use anonymous gametes and argue that prohibiting anonymous donation will lead to an egg and sperm shortage.[195] However, the Act was passed despite this opposition and the clinics have been on notice of this change in the law since at least March 2015, giving them ample time to change their procedures for the obtaining of donor sperm and eggs. In most cases, clinics already offered identifiable as well as anonymous donation, so they clearly have access to sources of identifiable gametes.

3.5.4 Recommendation

It is important that there is engagement with the clinics to provide guidance on the donor identification regime established by the 2015 Act. In particular, clinics will need guidance on the acquisition of gametes from identifiable donors overseas and whether their current practices for identifiable donation comply with section 24 of the 2015 Act.

[195] See, for example, J. Waterstone "Why it's wrong to ban anonymity for egg and sperm donors" *The Irish Times*, 5 March 2015. Dr John Waterstone is medical director of the Cork Fertility Centre and vice president of the Irish Fertility Society.

3.6 Obligations on DAHR Facilities

3.6.1 General Obligations

Sections 25 and 26 of the 2015 Act set out the general obligations of DAHR facilities as regards the performance of DAHR procedures. Section 25 states that a DAHR procedure may only be carried out where the intending mother and the intended second parent have given the necessary consent. Section 26 states that operators of DAHR facilities shall not permit to be used in a DAHR procedure a gamete or embryo provided by a donor unless the required consents have been obtained.

To a large extent, therefore, the 2015 Act places a burden on fertility clinics to apply the rules relating to donor consent. It is the clinic, rather than the intended parents, that are prevented by law from using gametes donated in the absence of adequate consent. Therefore, it is essential that there is engagement with clinics in relation to these requirements to ensure compliance.

3.6.2 Transitional Provisions

The 2015 Act provides for two exceptions to the Act's strict consent regime for donor gametes. Under section 26(5) clinics are permitted for a period of three years from the date of commencement, to use a gamete acquired before the date of commencement in a DAHR procedure, where the intending parent is already the parent of a child born as a result of a DAHR procedure using a gamete from the same donor.

The purpose of this exception is to allow parents who already have a donor-conceived child to use gametes from the same donor to try and conceive a child that is a genetic sibling. The purpose of the section appears to be to allow the use of gametes that have already been acquired by the date of commencement, even if acquired on an anonymous basis or in exchange for the payment of more than reasonable expenses. However, some ambiguity arises from the requirement in section 26(5)(b) that the donor in question has consented to the use of the gamete in a DAHR procedure. If consent was to be interpreted in line with Part 2 of the Act then that consent would have to include consent to being recorded on the National Donor-Conceived Person Register. This clearly would not have been provided in the case of

gametes acquired before the commencement of the Act. It seems, therefore, that consent in this instance must mean consent in a more general sense. It might be advisable to consider clarification of this provision via primary legislation in the future.

The second transitional provision permits to use in DAHR procedures embryos that were formed before the date of commencement. This is provided for in sections 26(6) to (8). Some ambiguity arises from the requirement in sections 26(6)(c) and 26(8)(b) that the donor of the embryo, or each donor of the embryo, or the donor of the gamete formed in the creation of the embryo, have consented to its use in a DAHR procedure. It appears that the purpose of this transitional arrangement was to allow for the use of embryos that have already been created, and avoid the creation of an implicit legal obligation to either not use them or destroy them. If consent is understood in these provisions as meaning consent as required in Part 2 of the Act, then this would render many embryos unusable. It seems to me that some more general definition of consent must be in contemplation here and primary legislation may be required to clarify the position.

3.6.3 Recommendation

Clarification is required as to consent required for the purpose of sections 26(5)(b), 26(6)(c) and 26(8)(b) of the 2015 Act. Primary legislation may be required to provide the requisite clarification.

3.6.4 Record-Keeping and Reporting Obligations of DAHR Facilities

One inherent difficulty that arises in the regulation of assisted reproduction is the challenge of monitoring the number of pregnancies that result from treatment. In general, couples who engage in assisted reproduction only attend the fertility clinic for treatment leading to the commencement of pregnancy and then attend a separate medical institution or professional for obstetric care for the remainder of the pregnancy. Section 27 of the 2015 Act attempts to address this. It provides that the intending parent must inform the operator of a DAHR facility whether the procedure has led to the pregnancy of the intending mother, subsequently whether the pregnancy resulted in the birth of a live child, and the name, date, place of birth, sex and address of that child. Where intending parents do not comply with this requirement,

section 27(3) requires the operator of the DAHR facility to contact them to obtain that information.[196]

Section 27(3) does not set out the steps that operators of facilities are required to take to obtain information from the intended parents. This is likely to be a concern raised by DAHR facilities in seeking clarification of their legal obligations. Under section 28, the DAHR operator is only required to provide this information to the Minister where that information is known to the DAHR operator. This indicates that the Act contemplates a situation whereby a DAHR procedure is carried out but the operator of the DAHR facility is not in possession of information as to whether or not it resulted in a live birth. As such, the obligation on DAHR operators under section 27 to contact intending parents would seem to be relatively limited. Guidance should be provided to clinics on this issue.

Section 28 imposes obligations on DAHR operators to retain information regarding DAHR procedures and to pass certain information on to the Minister. This information includes records of all written consents, revocations, identifying details of donors, and details of intending parents. The operator of the DAHR facility is then required to pass on to the Minister for Health details collected in relation to donors and intending parents, information as to whether DAHR procedures have been performed and whether those procedures resulted in live births. Section 28(7) imposes an open-ended obligation on operators of DAHR facilities to inform the Minister of errors in the said information where such errors are discovered.

Notably, the obligation on DAHR facilities to retain records of consents and revocations is an indefinite obligation. This information is not passed on to the Minister. Assuming this is intended to be an indefinite obligation, this should be made clear to the fertility clinics as they will likely be eager to understand the extent of this obligation. Given that most fertility clinics are private organisations, which are liable to terminate at any time, consideration should be given to what should be required of clinics as regards records in the event that they cease operation. It might be appropriate for clinics to pass on this information to the Minister in

[196] The furnishing of this information to the DAHR facility allows the clinic to grant a certificate to the intending parents which enables them to have the child's birth registered pursuant to section 93 of the 2015 Act and the status of the second parent recognised.

such circumstances. Guidance could be provided to the clinics in this regard, or a legal obligation could be imposed in the form of primary legislation in the future.

3.6.5 Recommendations

Guidance ought to be given to DAHR facilities as to the steps required to be taken in obtaining information from intended parents to assist in such facilities complying with their legal obligations in that regard.

The 2015 Act suggests that DAHR facilities are under an indefinite obligation to retain records of consents and revocations. As many DAHR facilities are private organisations capable of being terminated at any time, consideration should be given to what should be required of clinics as regards records in the event that they cease operation. It might be appropriate for clinics to pass on this information to the Minister in such circumstances. Guidance could be provided to the clinics in this regard, or a legal obligation could be imposed in the form of primary legislation in the future.

3.7 National Donor-Conceived Person Register

The aspect of the 2015 Act which most clearly requires infrastructural development is the establishment of the National Donor-Conceived Person Register, which pursuant to section 32 of the 2015 Act, the Minister is required to establish and maintain. Donor-conceived children over the age of 18 years are entitled to request from the Minister the information and contact details of their donor, as collected from the fertility clinic. The Minister is required to send to the donor a notice of this request and the donor is entitled to make representations to the Minister outlining his or her objections to the information being provided. These objections must be based on concern for the safety of the relevant donor or the donor-conceived child, or both. If the Minister is satisfied that "sufficient reasons" exist to withhold the information requested he or she is entitled to refuse the request. The section provides no further guidance on the meaning of "sufficient reasons" but given that the donor is only entitled to object on the basis of alleged risk to the safety of the donor, or donor-conceived child or both, sufficient reasons would seem to be confined to reasons of this nature. Furthermore, the Minister is expressly required to make the decision "having regard to the

right of the donor-conceived child to his or her identity."[197] The donor-conceived child enjoys the right to appeal this refusal to the Circuit Court. The donor does not enjoy a statutory right of appeal, but the Minister's decision could, of course, be challenged by way of judicial review.

Given the child's right to know his or her identity and origins, it is anticipated that this provision may give rise to litigation. As a result of same, the courts may be required to give their interpretation as to what amounts to "sufficient reasons" to withhold the donor's identifying information from the donor-conceived child. In this regard, to ensure a clear application of the Minister's power to refuse to release identifying information, it may be advisable to create a policy document giving clearer guidance on the safety or well-being grounds in respect of which the Minister may conclude that there are sufficient reasons to withhold this information. While it can be anticipated that each individual application for information will be decided on its own particular facts and merits, further guidance as to what may amount to a "sufficient reason" to withhold this information would be of assistance to the relevant persons.

The National Donor-Conceived Person Register also has obligations with regard to the provision of information regarding the donor-conceived child to the donor and to the provision of information to and regarding genetic siblings of donor-conceived children, where those children share a donor. Such information may only be provided with the consent of the donor-conceived person.

Section 33 of the Act requires the Minister to make an entry in the Register with respect to each child born in the State as a result of a DAHR procedure. This entry must contain certain information including the name, address, date and place of birth and sex of the child. Section 33(4) provides that the Minister may prescribe the manner in which this information is to be recorded on the Register. For the avoidance of doubt, this might be undertaken by way of regulations in advance of the commencement of these provisions. In addition, it might be prudent to include in such regulations the length of time in respect of which such information must be maintained on the Register. The Act is silent on how long records regarding donors, donor-conceived children and donor-conceived siblings will be kept and available under the

[197] Section 35(3), 2015 Act.

Register. Regard may be had to the New Zealand Assisted Reproductive Technology Act 2004 for guidance on this matter. In New Zealand, section 48(3) of the Human Assisted Reproductive Technology Act 2004 provides that where the donation results in the birth of a child, the provider must keep a record of all donor information for 50 years after said child's birth. On the expiration of 50 years, the provider must give the information to the Registrar General, who must keep all information given indefinitely.

There is no doubt that the experience of making contact with one's donor, donor-conceived child, or donor-sibling can be a very emotional and even traumatic experience. In recognition of this, section 38 of the 2015 Act provides that the Minister for Health will not release identifying information to any party under these provisions, unless he/she is satisfied that the person has received counselling. There is, therefore, a positive obligation on the Minister to ensure counselling has been provided concerning the implications of the receipt of such information prior to any information being divulged. Although it does not appear from the wording of this section that the obligation is on the state itself to provide such counselling, on a practical level it will be necessary for counselling on DAHR issues to be available to the relevant people in their local health centres in order to ensure that proper regard is given to section 38 and its protective stance to the disclosure of identifying information. Steps therefore should be taken to ensure the availability of counselling on these complex issues.

3.7.1 Recommendations

On receipt of a request for information and contact details of a donor or donor-conceived person, the Minister for Health may refuse the request if "sufficient reasons" justify so doing. While it can be anticipated that each individual application for information will be decided on its own particular facts and merits, further guidance as to what may amount to a "sufficient reason" to withhold this information would be of assistance to the relevant persons.

The 2015 Act imposes a positive obligation on the Minister for Health not to release such information unless satisfied that the person has received counselling. Steps should be taken to ensure the availability of appropriate counselling on this complex issue.

3.7.2 The National Donor-Conceived Person Register and the Register of Births

Perhaps the most controversial aspect of the 2015 Act is the provision it makes in relation to a donor-conceived person's birth certificate. Section 39 of the 2015 Act requires the Minister to notify An t-Ard-Chláraitheoir that the Minister holds a record in respect of a donor-conceived child. Where a donor-conceived child reaches the age of 18 years and he or she applies for a copy of his or her birth certificate, he or she will be informed that further information is available about him or her from the registrar. He or she will then be able to find out that he or she was donor-conceived.

Notably, there is no requirement under this section for An t-Ard Chláraitheoir to ensure that a person who is informed that he or she was donor-conceived is provided with the opportunity to avail of counselling services. Counselling would seem to be even more important in circumstances where a person may be deeply shocked at finding out that he or she was donor-conceived. Steps should be taken to ensure that counselling services are available to people who find themselves in this situation, and that An t-Ard Chláraitheoir has procedures in place to deal with the delivery of this highly sensitive information.

More broadly, it is important to appreciate the purpose and effect of section 39 of the 2015 Act. It should be noted that section 39 evinces an extremely robust approach to the right to identity. Ireland is highly unusual, even among jurisdictions that prohibit anonymous donation, in choosing to record a person's donor-conceived status on the register of births. Section 39 is designed to tackle the widely recognized problem that even where a donor-conceived person's register exists, donor-conceived people can only use that register if they know they were donor-conceived in the first place. Unfortunately, research has shown that there is still considerable reluctance on the part of intending parents to tell their children that they were donor-conceived.[198]

The purpose of section 39, therefore, is clearly to ensure that even where the intending parents of a donor-conceived person have chosen not to inform him/her that he/she is donor-conceived, he or she will be able to find out this information when he or she applies for a

[198] Lycett et al "School-aged children of donor insemination: a study of parents' disclosure patterns" (2005) 20 Human Reproduction 810, House of Lords and House of Commons, Joint Committee on the Human Tissue and Embryos (Draft) Bill. Volume I: Report (London: House of Lords and House of Commons, 2007), at para. 268.

birth certificate. Laudable as this goal is, in view of the importance of vindicating the child's right to identity, it is far from ideal that a child should learn this information from an official of An t-Ard Chláraitheoir. It is essential that this provision is used as a way to persuade intending parents to be open with children about their genetic heritage from the outset. This culture of openness needs to be built into the general practice of donor-assisted reproduction in Ireland. Engagement with clinics is vital in this regard. Parents should, from the point of treatment, be informed that it is in the child's best interests to be open and direct and that in the event that they are not, they leave open the possibility that the child will have to learn this essential information when he or she applies for a birth certificate.

3.7.3 Recommendations

Steps should be taken to ensure that counselling services are available to people who apply for a birth certificate and are informed that further information is available about him or her from the registrar. Appropriate sensitive procedures also need to be put in place for the dissemination of this information to such a person.

A culture of openness needs to be fostered in the general practice of donor-assisted reproduction in Ireland. A child ought not to find out that he or she was conceived by way of donor-assisted reproduction from a state official. Rather, the parents of such a child should provide this information when appropriate.

3.7.4 Substantive Vindication of the Child's Right to Know its Genetic Heritage

The 2015 Act is clearly intended to ensure that a donor-conceived child has the opportunity to contact his or her donor. Concerns arise, however, as to the efficacy of the 2015 Act in this regard. First, the Act requires only that the DAHR facility acquire a donor's current contact details. Pursuant to the consent provided under Part 2, donors are advised of the importance of keeping those contact details up to date and of engaging with the National Donor-Conceived Person Register for this purpose, but no legal obligation is imposed on them. As a result, it may be the case that when a donor-conceived person tries to find his or her donor, he or she will not be able to do so because that person's contact details are long out of date.

It may not be feasible to impose any legal obligation on the donor with regard to updating of the Donor-Conceived Person Register, but some consideration should perhaps be given to ways of incentivising donors to do this. Persuading donors to assist in the creation of a culture of openness is an essential complement to the need to persuade intending parents to be open with donor-conceived children about their genetic heritage. Public awareness campaigns are essential in this regard.

A more significant problem arises with regard to substantive vindication of the child's rights where the donor gametes were acquired from abroad. In the first instance, there would seem to be more significant practical difficulties for the child in using the contact details provided to find the donor. If the child does successfully find the donor, language and/or cultural difficulties may result in difficulty having any meaningful interaction with the donor. It is by no means assumed that donors and donor-conceived people will want to develop a sustained relationship if they do make contact, but if the policy of traceable donation is to have any substance, donor-conceived people must be enabled to make contact with their donors in a way that provides them with some real value.

Assuming that the acquisition of gametes from abroad is to remain lawful, some consideration should be given to putting in place infrastructure to assist donor-conceived people overcome the difficulty of making cross-border contact.

3.7.5 Recommendations

Donors ought to be encouraged to maintain up to date contact details with the Donor-Conceived Person Register.

Infrastructure should be put in place to facilitate donor-conceived persons make cross-border contact with donors resident abroad.

3.8 Countering a Possible Decline in Donation

Notwithstanding its considerable progress in legislating for donor-assisted reproduction, the 2015 Act has been criticised due to a perceived belief that it will create a barrier to donation of gametes as donors will be unwilling to provide their genetic material due to the provisions

that enable donor-conceived children to trace their origins. As noted above, this criticism was voiced loudly from Ireland's fertility clinics during the 2015 Bill's journey through the Oireachtas.

Claims of a possible reduction in donor numbers as a result of the commencement of the DAHR provisions in the Act should be assessed by reference to trends in other jurisdictions. Particular attention should be paid to the Swedish experience. Sweden was the first country to prohibit anonymous donation. Research carried out subsequent to the ban indicates that the sperm donor population has changed in character from being predominantly financially-motivated to participating for other reasons. This involved fewer younger men engaging in donation and more older men becoming donors, regarded as a positive development as older men may be better able to deal with the reality of being approached by a donor-conceived child seeking contact.[199] Figures from the United Kingdom indicate that the number of new sperm and egg donor registrants has not declined, although imported sperm is being relied upon.[200] Laura Witjens, CEO of the British National Sperm Bank, and formerly chair of the National Gamete Donation Trust argues that the rules on donor anonymity did not cause a decline in sperm donation, but rather that there have never been enough gamete donors in the UK to meet demand. She argues that the problem is one of awareness and believes that public information campaigns are vital to addressing the shortfall.[201]

3.9 Enforcement

One highly complex aspect of the 2015 Act is its enforcement provisions. Notably, these centre around enforcement of the obligations of DAHR facilities under section 28 of the Act. As set out above at **3.6.4**, section 28 imposes obligations on DAHR facilities to retain certain information and provide certain information to the Minister.

[199] See study of Swedish attitudes to sperm donation in: G Sydsjö et al, "Who becomes a sperm donor: personality characteristics in a national sample of identifiable donors" (2012) 119(1) BJOG 33-39.
[200] The number of new donor registrations in the UK did not decline after anonymous donation was banned in 2005. In fact, it steadily increased. See statistics at http://www.hfea.gov.uk/3411.html.
[201] Witjens, "Recruiting Sperm Donors: Why it's Time for a New Approach" *BioNews* (4 April 2007), Elgot, "UK sperm bank has just nine registered donors, boss reveals" *The Guardian* (31 August 2015).

3.9.1 Appointment of Authorised Persons

Section 30 of the 2015 Act allows the Minister to appoint appropriate persons as "authorised persons" who are tasked with the role of ensuring the operator of a DAHR facility complies with the obligations under section 28. Pursuant to section 30 these authorised persons may enter and inspect DAHR premises, take copies of records and require the operator or any person at the premises to provide them with information or produce such books, documents or other records that they may require for the purposes of their functions under the Act. These authorised persons may not enter a dwelling unless they either have the consent of the occupier or they have obtained a warrant upon giving sworn information to a District Court Judge. Regulations are required to designate certain persons as those "authorised persons" with the aforementioned responsibility under the Act. In order to ensure strict compliance with the Act by DAHR facilities from the outset, it would be prudent to have already appointed these persons who are tasked with policing compliance in advance of any commencement order being made.

It is an offence to obstruct an authorised person or member of An Garda Síochána in the course of exercising powers under the 2015 Act. Furthermore, it is an offence to refuse to comply with requests, or to refuse to answer questions, or to provide false information in relation to the powers conferred by section 28 of the 2015 Act.

3.9.2 Recommendation

It would be prudent to have authorised persons appointed and in place prior to commencement of those provisions of the 2015 Act regulating DAHR facilities.

3.9.3 Ministerial Enforcement Powers and Circuit Court Orders

Section 29 provides that the Minister may require the operator of a DAHR facility to provide him or her with any information he or she needs to determine whether the DAHR facility is in compliance with section 28. Section 32 provides that where the Minister is satisfied that the operator of a DAHR facility is not in compliance with his or her obligations under section 28, the Minister may direct that person to comply with an obligation. Alternatively the Minister

may apply to the Circuit Court for an order directing that person to comply with his or her obligations under section 28.[202]

Where the Minister is satisfied that a person who is the subject of such an order is not in compliance with his or her obligations under section 28, he or she may apply to the Circuit Court for an order prohibiting or restricting the performance of DAHR procedures at the DAHR facility until such time as the DAHR facility satisfies the Court of its ability to comply with the said obligations. The operator of a DAHR facility enjoys the right to appeal on a point of law to the High Court within 21 days.

It should be recognised that the Circuit Court jurisdiction to prohibit or restrict the performance of DAHR procedures is a very significant power. The impact of an order of this nature on DAHR facilities would be immense. In general, clinics are private businesses and a restriction or prohibition of DAHR procedures would substantially affect their financial position in the short term, as well as negatively impacting their reputation in the longer term. Orders made under this section are very likely to be challenged by way of litigation, whether on appeal on a point of law to the High Court, or by way of judicial review. In view of this, it is imperative that this power be exercised with due regard for the demands of natural and constitutional justice.

Furthermore, circumstances might arise where a DAHR facility may have breached its obligations under section 28, and it is not possible to take steps to comply with those obligations. Take, for example, a situation where a DAHR facility lost a consent required to be retained under section 28(1). It is conceivable that the DAHR facility might not be able to recover it. On a strict reading of section 32(5), a Circuit Court order could remain in place indefinitely, because the DAHR facility might never be able to find the required consent, and therefore would never have "the ability to comply with its obligations". This interpretation would seem to lead to a disproportionately harsh sanction for a DAHR facility if one mistake were to lead to an indefinite restriction or prohibition. This interpretation may even be liable to challenge on the basis of interference with the constitutional right to earn a livelihood.

[202] If the Minister initially issues a direction, and it is not complied with, he or she can proceed to apply to the Circuit Court for an order. Section 32(2), 2015 Act.

A better interpretation of section 32(5) would be to state that the DAHR facility could satisfy the Circuit Court of its "ability to comply with its obligations" if it could show that it had the ability to comply with its obligations under section 28 as regards future cases, even if it irremediably failed in its obligations as regards one specific case.

3.9.4 Limited Nature of Enforcement Provisions

An unusual aspect of the 2015 Act is that the Ministerial and Circuit Court enforcement powers are expressly limited to enforcing obligations under section 28 of the 2015 Act. In particular, it is important to note that these enforcement provisions do not apply to sections 24 to 26 of the 2015 Act, which govern the acquisition of gametes and embryos, the performance of DAHR procedures, and the use of gametes and embryos in DAHR procedures respectively. All three of these sections impose obligations on operators of DAHR procedures in "shall not" language, and yet none of them are directly subject to ministerial enforcement powers.

Certain aspects of these provisions are indirectly enforceable via section 28. For example, a DAHR facility must retain copies of consents provided by donors and intending parents. These consents would presumably not be in the possession of the DAHR facility if it had not refrained from using gametes or embryos donated in the absence of the necessary consents. If it fails to retain consents and donor information, then the DAHR facility has also breached its obligations under sections 24 and 26 to obtain consents and donor information. However, sections 24 and 26 are only enforceable via section 28 if the obligation to retain written consents and information can be interpreted to comprise an obligation to obtain those consents and information in the first place.

As the 2015 Act's enforcement provisions are targeted at section 28, there may be important aspects of the Act that lie outside the enforcement remit. For example, pursuant to section 19, consent provided in return for the payment of more than reasonable expenses renders donor consent invalid. The 2015 Act does not permit enforcement action by the Minster or by the Circuit Court to prohibit a clinic from paying in excess of reasonable expenses for donor gametes. However, if consent provided in return for payment of more than reasonable expenses is to be considered invalid, then one could argue that the retention of such consents

could not be considered to comply with the DAHR's obligations of retention under section 28. Section 19 may, therefore, be indirectly enforceable by the Minister.

In summary, it is possible that certain sections of the 2015 Act may be enforced indirectly via section 28, but consideration might be given to amending the 2015 Act via primary legislation to provide for the express extension of enforcement powers to other sections of the Act.

3.10 Summary and Conclusion

Parts 2 and 3 of the 2015 Act represent a significant leap forward in Irish family law, and a very important first step in tackling the project of regulating assisted human reproduction. It is essential that fertility clinics are provided with clear guidance on the new regime, in particular as regards the payment of reasonable expenses to donors, the acquisition of gametes from abroad, and the prohibition on the use of anonymously donated gametes. Direct engagement with fertility clinics is essential to ensure that commencement of the Act is smooth and effective. The attribution of parental status under the 2015 Act is fundamentally premised on the provision of adequate informed consent by donors and intended parents. Guidance must be provided to clinics on the consequences of flawed consent on the part of either intended parents or donors.

Public awareness campaigns regarding Parts 2 and 3 are also highly important. The advantages that these Parts confer on donor-conceived children can only be enjoyed with the cooperation of intended parents, so engaging this group of people is essential to protecting the best interests of the child in this field.[203] Additionally, public awareness campaigns can contribute to creating a culture of openness around gamete donation that is central to vindicating the child's right to identity, and encouraging donor engagement with the National Donor-Conceived Person Register.

The 2015 Act requires the establishment of certain infrastructure, in particular the National Donor-Conceived Person Register, and attendant counselling services. Ministerial regulation can be used to address other technical needs arising from the 2015 Act. In the longer term,

[203] For example, parents need to apply for the section 27(5) certificate.

certain amendments via primary legislation outlined in this chapter of my report should be considered.

SECTION 4:
CHILD PROTECTION AND THE CRIMINAL JUSTICE SYSTEM

4.1 Introduction

This section addresses a number of developments in child protection in 2016, with a particular focus on legislative developments in the criminal justice sphere. As shall be seen, this section follows on from observations made in my report of 2015 noting the implementation of recommendations I have previously made but also the failure to progress substantive reform over the course of the last year. The child protection concerns that our society faces continue to evolve and develop. It is of the utmost importance that our criminal justice system also evolves and develops in order to keep apace with real threats to the safety and protection of children in our society. Our child protection ethos needs to be proactive and not reactive.

4.2 The Criminal Law (Sexual Offences) Act 2017

In February 2017, the Criminal Law (Sexual Offences) Act 2017 was passed by Dáil Éireann demonstrating Ireland's commitment to better protecting its children from online predators. With technological advances continuing and internet usage amongst children in Ireland exceeding the European average, the requirement for legislation to be introduced to protect children online had been highlighted as being a crucial and pressing concern.[204] The Criminal Law (Sexual Offences) Act 2017 comprehensively addresses this concern and its passage is very much welcomed. It seeks to create a wide range of new criminal offences in relation to child pornography and the grooming of children for sexual exploitation and in particular, it addresses the role of Information and Communication Technology (ICT) in committing such offences.

In my Ninth Report (2016), I examined the provisions of the then Sexual Offences Bill in detail, making recommendations and proposing clarifications that would serve to ensure that the Bill, in its final form, realised its full potential to sufficiently protect one of the most

[204] See Dr. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014).

vulnerable groups in our society.[205] While the passing of the Act is to be commended, some issues which I previously raised in connection with the Act have yet to be addressed.

4.2.1 Increased powers of An Garda Síochána

A number of new offences concerning the solicitation and grooming of children have been introduced in sections 3 to 8 of the 2017 Act. These provisions vastly expand upon existing legislation of this kind, better protecting children from predators. In light of these new offences, it is submitted that further powers need to be granted to An Garda Síochána. It cannot be denied that mobile devices are now very powerful computers with the memory capacity to contain many thousands of images, text and video files that constitute child pornography, along with ICT evidence of grooming, solicitation, sexual exploitation and important evidence relating to contact sexual offences (e.g. images and chat/SMS messages discussing the incident). To reflect this modern situation, An Garda Síochána should be provided with a power similar to section 23 of the Misuse of Drugs Acts. The historic position whereby child pornography was often stored on an offender's computer in his or her home does not reflect the reality of modern technology.

Also in this vein, it must be recognised that Facebook, Google, Yahoo, Adobe and Microsoft are some of the non-Irish companies with offices in this country. Many of them store their Irish data in Ireland but some of them claim it is stored in the US or elsewhere. For the investigation of child pornography and sexual offences cases against children where ICT is involved, An Garda Síochána should be provided with the power to obtain a production order in respect of data that is either "held or accessible" by content providers based in Ireland. This order could then be served on any such provider registered in Ireland requiring production of ICT evidence – photos, chat, account information and IP Addresses. An order similar to that provided for in section 15 of the Criminal Justice Act 2011 for fraud and banking is worthy of consideration. It seems anomalous that powers introduced to deal with the banking crisis should not be available to protect vulnerable children.

[205] See Dr. Geoffrey Shannon, *Ninth Report of the Special Rapporteur on Child Protection* (2016).

4.2.2 Jurisdiction

Part 7 of the Criminal Law (Sexual Offences) Act 2017 vastly extends Ireland's jurisdiction over offences committed outside the State. Previously, the Sexual Offences (Jurisdiction) Act 1996, as amended, provided that the State had jurisdiction over offences committed outside the State if certain criteria were fulfilled, namely that the behaviour constituted an offence in the place in which it was committed and would constitute an offence in Ireland if it had been committed in this jurisdiction. Furthermore, the offence had to be one listed in the Schedule to that Act and notably, the production, distribution or possession of child pornography was not included in said Schedule. A number of amendments were made to the 1996 Act by Part 7 of the 2017 Act. Firstly, section 41 of the Act increases the upper age threshold for the purposes of the 1996 Act from 17 to 18 years of age, ensuring that Irish legislation conforms to the general international standard of protecting persons under 18 against exploitative sexual acts. In addition, the offences listed in the Schedule to the Act are expanded to include offences updated and created by the 2017 Act, such as possession of child pornography and the offences contained in sections 5, 6, 7 and 8 of the Criminal Law (Sexual Offences) Act 2017. It is therefore an offence for a citizen of the State, or person ordinarily resident in the State, to do an act, in a place other than the State, against or involving a child which would constitute an offence under the law of that place, and if done within the State, would constitute an offence under or referred to in an enactment specified in the Schedule to the 1996 Act.

Pursuant to section 42 of the 2017 Act, for certain child sexual offences, the dual criminality rule, applicable under section 41, will not apply. Where a person who is an Irish citizen or ordinary resident in the State does an act against a child abroad that if done in Ireland would constitute rape, sexual assault or any of the child prostitution offences, he or she is guilty of an offence. This behaviour no longer has to constitute an offence in the place in which it is committed – thereby signalling a relaxation of the dual-criminality rule. The 2017 Act therefore ensures that Ireland will permit the exercise of jurisdiction based both on the territoriality principle and based on nationality or ordinary residence. Despite the aforementioned developments, however, a victim-centred jurisdiction rule is still absent from Irish legislation, with no provision for same being included in the 2017 Act. Article 17(2) of the 2011 Directive permits Member States to establish jurisdiction where the offence is committed against one of its nationals or a person who is a habitual resident in its territory.

This would close certain jurisdictional loopholes that may arise. For example, in relation to the grooming offence in section 7 of the Act, a situation may arise where a foreign national residing abroad grooms an Irish child and makes a proposal to meet the child abroad. Section 41 of the Act may not apply if that foreign national's actions would not constitute an offence under the law of his or her country. Allowing a victim-centred jurisdictional rule would protect Irish children against foreign predators and bring Irish law in line with Article 25(2) of the Lanzarote Convention which provides that each convention State shall endeavour to establish jurisdiction over an offence whether that offence is committed against one of its nationals or a person habitually resident in its territory. It must therefore again be emphasised that consideration should be given to amending the jurisdictional remit of the Irish Courts so as to adopt a victim-centred approach, thereby establishing jurisdiction over an offence if perpetrated against an Irish national or person habitually resident in Ireland. In addition, further consideration might be given to Article 17(3) of the Directive, whereby offences committed using ICT are regarded as coming within the jurisdiction of the State where the technology is accessed, thereby preventing a situation where material is accessed from within the EU, but it hosted on a server located outside the EU. As in the Seventh Report, I believe that the broadest possible approach should be taken towards the matter of jurisdiction, in order to ensure the prosecution of those who commit these offences regardless of the location of their internet server.[206]

4.2.3 Statutory Definition of Consent

In my Ninth Report, I highlighted that the vague nature of the current rules on consent was unsatisfactory. It was recommended that the opportunity be taken in the Criminal Law (Sexual Offences) Act 2017 to set out a positive statutory definition of consent, although such a definition was not included in previous drafts of the Bill. I noted that in other jurisdictions, with a similar common law tradition to that in Ireland, a legislative definition of consent had been provided for and that the creation of a definition of consent would obviate the need for the presence or absence of consent being determined by the judge and jury, having regard to the particular circumstances of the case.

[206] See Dr. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014) at p.140.

Fortunately, this recommendation has been followed in the 2017 Act as enacted by Dáil Éireann. Section 48 of the 2017 Act inserts a new section 9 into the Criminal Law (Rape)(Amendment) Act 1990. It provides:

> (1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.
> (2) A person does not consent to a sexual act if—
>
> a. he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,
> b. he or she is asleep or unconscious,
> c. he or she is incapable of consenting because of the effect of alcohol or some other drug,
> d. he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act,
> e. he or she is mistaken as to the nature and purpose of the act,
> f. he or she is mistaken as to the identity of any other person involved in the act,
> g. he or she is being unlawfully detained at the time at which the act takes place,
> h. the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.
>
> (3) This section does not limit the circumstances in which it may be established that a person did not consent to a sexual act.
> (4) Consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place.
> (5) Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act.

The definition of consent set out above which has been introduced into Irish law for the first time is a welcome development.

4.2.4 Child Prostitution and Trafficking

In a number of my previous reports, the issues of child trafficking and prostitution have been discussed at length.[207] The sexual exploitation of children is one of the main purposes of child trafficking and stringent legislation has been called for to attempt to eliminate the demand for this. In particular, my Fourth Report specifically recommended that consideration be given to the position in Sweden and Norway, in which the purchase of sexual services has

[207] See Dr. Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010), section 4; and Dr. Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2012), section 5.

been penalised, with a view to introducing a similar system in this country.[208] The Criminal Law (Sexual Offences) Act 2017 does just this – creating new offences regarding the purchase of sexual services and addressing recommendations of the Joint Committee on Justice, Defence and Equality in its Report on the Review of Legislation on Prostitution (June 2013). These new offences target the persons who are purchasing rather than those who are selling the sexual services and are described by Minister Fitzgerald as sending "a clear message that purchasing sexual services contributes to exploitation."

Section 25 of the 2017 Act introduces a new section 7A into the Criminal Law (Sexual Offences) Act 1993, criminalising paying for sexual activity with a prostitute. This provides that it shall be an offence where, in the context of prostitution, a person pays money or any other form of remuneration or consideration for the purpose of engaging in a sexual activity with a prostitute. It also is an offence to promise payment for sexual activity with a prostitute. This section expands the law whereby it is only an offence to solicit or importune another person for the purposes of prostitution in a street or public place.[209] Section 26 amends section 5 of the Criminal Law (Human Trafficking) Act 2008, making it an offence to pay money or any other form of remuneration or consideration in exchange for sexual activity with a person, for the purpose of prostitution, where it is known that person was trafficked. These provisions are to be welcomed as a positive development.

For a person to be found guilty of an offence under section 5 of the 2008 Act (as amended by section 26 of the 2017 Act) that person must knowingly purchase a sexual service from a trafficked person for the purposes of prostitution. It is a defence for the defendant to prove that he or she did not know and had no reasonable grounds for believing, that the person in respect of whom the offence was committed was a trafficked person. This provision provides for tougher sentences for those who purchase these services from trafficked persons as opposed to non-trafficked persons. Users are threatened with terms of imprisonment, compared with section 25 of the Act where fines are proposed as the penalty. This is designed to address the trafficking and exploitation associated with prostitution, reducing demand.

[208] Dr. Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010) at p.114.
[209] Criminal Law (Sexual Offences) Act 2017, section 7.

One problem, however, may arise in the course of prosecutions under section 5 of the 2008 Act, as amended by the Criminal Law (Sexual Offences) Act 2017. As I highlighted in my Ninth Report, it is a defence to the offence for the accused to prove that he or she did not know and had no reasonable grounds for believing that he or she had purchased the sexual service from a trafficked person. While the onus is on the defendant to prove that he or she did not have knowledge, a purchaser is likely to avoid making any enquiries as to whether trafficking has taken place and direct knowledge of trafficking is unlikely. Instead, as discussed in my Sixth Report, it may have been preferable to criminalise the purchasing of sexual services from trafficking victims where a user ought to have known or had a reasonable suspicion that it involved trafficking.[210] This may have been a more practical way to achieve the aims sought by the implementation of these provisions and to fulfil the purpose of Article 18 of the Trafficking Co-operation Directive.[211] Should such prosecutorial problems arise under this section, it is recommended that further amendment in the vein suggested above be considered.

4.2.5 Immediate commencement

Unfortunately at the date of publication hereof, the legislation had not been fully commenced. Minister Fitzgerald, in welcoming the passage of the Criminal Law (Sexual Offences) Bill 2015 through both Houses of the Oireachtas, said the following: *"This is one of the most comprehensive and wide ranging pieces of sexual offences legislation ever to be introduced and has been a priority for me as Minister for Justice and Equality. It is an essential piece of legislation that brings additional protections to some of the most vulnerable people in our community. It contains the right laws for these times, laws that will protect victims of the most vicious and depraved crimes. The provisions of this Bill enhance and update laws to combat the sexual exploitation and sexual abuse of children. It widens the range of offences associated with child pornography to ensure that no one who participates in any way in the creation, distribution, viewing or sharing of such abhorrent material can escape the law. Also, the Bill provides greater clarity in relation to the definition of sexual consent for the first time."* Given the clear advantages of the introduction of the Act as set out by the Minister, it must be stressed that it is imperative that this important piece of legislation ought

[210] Dr. Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2012) at pp.226-227.
[211] Council Directive 2004/81/EC; Article 18 sets out the obligation of Member States to prevent trafficking and obliges them to consider taking measures to criminalise the use of services where there is knowledge that the person is a victim of a trafficking offence.

to be fully commenced as soon as possible and efforts should be made to ensure same forthwith. This will secure an effective response to sexual offending perpetrated against children, especially through the use of the internet and social media, bringing Irish law in line with the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.

4.2.6 Recommendation

The Criminal Law (Sexual Offences) Act 2017 should be fully commenced as soon as possible in order to secure an effective response to sexual offending perpetrated against children, especially through the use of the internet and social media, bringing Irish law in line with the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.

4.3 Fagins's Law – Grooming Children for Crime

The Criminal Law (Sexual Offences) Act 2017, discussed above and in extensive detail in my Ninth Report, deals with the grooming of children by adults for sexual exploitation – seeking to introduce new offences to prohibit this behaviour where previously the criminal law has fallen short. Grooming of children of an entirely different nature can also exist. A situation can often arise where adults groom children into committing crimes. One common example of this behaviour is where criminals tell young people to steal items for them and bring these stolen goods to them for payment. This has recently been widely discussed in Victoria, Australia. In this vein, the Victorian Government announced in December 2016 that it will be introducing a new criminal offence, specifically designed to target adults who are procuring juveniles to carry out criminal behaviour on their behalf.[212]

With the aim of reducing criminal behaviour by juveniles, the proposed new law is planned to be introduced to State Parliament early in 2017. It comes in the wake of a series of highly publicised incidents involving young persons in the State. Dubbed "Fagin's Law", the new offence is to carry a maximum sentence of 10 years imprisonment upon conviction. The

[212] See BBC News, *'Fagin's Law' to target crime ringleaders in Australia*, accessed at http://www.bbc.com/news/world-australia-38204048 (December 10, 2016).

motivation is clearly to send a strong message to adult offenders not to involve young persons in their criminal activities.

Discussing the proposed new offence, Attorney-General Martin Pakula noted that there already exists an offence for incitement in Victoria. This, however, requires police and prosecutors to prove that a specific crime has been procured. In respect of the new offence, he stated; *"…it is more general, this is about criminals who, for example, just tell young people to steal things and bring them to them for payment".* Mr Pakula stated that the proposed new offence will cover a gap in the present law, where currently there is nothing to deal with this type of behaviour. It aims to give police the power to better protect the community by targeting those who are procuring juveniles to commit multiple criminal offences.

In Ireland, existing law similarly criminalises incitement, which involves trying to get another person to commit a crime. A person who commands, encourages or requests another to carry out a criminal act with the intention that the act is carried out will therefore be guilty of an inchoate offence. Primarily based on common law and not in statute, incitement can apply in respect of all offences – for example a person can incite another to commit a robbery, or an assault, or a murder. Whether or not the offence is actually carried out, the person who encourages, commands or requests its commission can still be convicted of incitement. There are, however, certain problems with the operation of the offence of incitement. A specific crime needs to be incited – as is the position in Australia. Prosecutorial difficulties especially can arise if an incitement is general in nature and is not directed toward the commission of a specific crime. Furthermore, there may be circumstances where the incited act, if carried out, would objectively amount to criminal behaviour, but for some reason, the person who would perform the act could not be held liable for its commission. This can occur in circumstances where the incitee is under the age of criminal responsibility for example. The Law Reform Commission, in its *Report on Inchoate Offences* (2010), recognised this particular difficulty with incitement and recommended putting incitement formally on a statutory footing, including an exception to the effect that a defendant can still be found guilty of incitement notwithstanding that the person incited is exempt from liability for the offence.[213]

[213] LRC 99-2010 Report on Inchoate Offences at p.128.

While the Commission's approach is commendable, this and the other proposed reforms relating to the definition of incitement contained in its Report cannot be said to specifically address the situation envisaged above by Fagin's Law. I believe that in order to explicitly target adult criminals who are bringing children into criminal groups and encouraging their commission of offences, the introduction of a law of a similar nature to that proposed in Victoria should be considered in this jurisdiction. Specifically addressing the grooming of children into committing offences in a stand-alone criminal offence is necessary to send a message to those involved that this type of conduct is reprehensible, that it will not be accepted in our society and that harsh penalties will be imposed on those who are found guilty of same. In this regard, a close eye should be kept on imminent developments in Victoria. When published in early 2017, the precise scope and definition of "Fagin's law" should be reviewed and considered by the Irish legislature with a view to the introduction of a similar offence here. Undoubtedly, welcome developments which address the grooming of children for sexual exploitation in Ireland are coming to fruition in this jurisdiction. The next step is for this alternative form of grooming – "grooming for criminal profit" - to be debated and deliberated with the aim of filling the lacuna in Irish law which fails to cover same.

4.3.1 Recommendation

A statutory offence targeted at adults who groom children to carry out criminal offences on their behalf ought to be introduced in this jurisdiction. A lacuna presently exists in that regard and the development of "Fagin's Law" in Victoria, Australia provides a useful comparator from which our legislature can develop an appropriate statutory provision in this jurisdiction.

4.4 The Criminal Justice (Victims of Crime) Bill 2016

In July 2015, the Heads and General Scheme of the Criminal Justice (Victims of Crime) Bill 2015 were published after a lengthy wait for significant development in the area of victims' rights. Since then, the momentum for progress has been maintained and the Criminal Justice (Victims of Crime) Bill 2016 was published by Minister Frances Fitzgerald in December 2016. Strengthening the rights of victims of crime and their families, the Bill demonstrates a desire to put the rights of victims of crime on a statutory footing and explicitly recognises the place of victims in the criminal justice system. This welcome development follows a definite

movement on the part of the State in recent years towards greater acknowledgement of the victim within the criminal process. It also mirrors significant developments in this regard at EU level and specifically, the Bill aims to transpose into Irish law Directive 2012/29/EU (Victims' Directive) of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime.[214]

4.4.1 Irish position

In Ireland at present, pending the enactment of the 2016 Bill, victims of crime have few statutory rights. Instead, a number of voluntary and government agencies operate to assist individuals through the criminal justice process and to support those enduring any financial or emotional difficulties arising from criminal behaviour, such as the Commission for the Support of Victims of Crime and the Victims of Crime Office. In 2010, the *Victims Charter and Guide to the Criminal Justice System* was published by the Victims of Crime Office. The Charter describes the criminal justice system from a crime victim's point of view. It sets out victims' rights and entitlements to the services given by the various state agencies working with crime victims. The Victims' Charter, however, is not a legally binding document and it provides no legal entitlements or rights to victims. There have been increasing calls, therefore, for victims' rights to be reflected in legislation and the need for reform has long since been recognised.

Victims' rights are currently protected in existing statues only to a limited extent. Part 3 of the Criminal Evidence Act 1992, for example, allows certain vulnerable persons to give evidence in criminal proceedings via video-link, through the use of an intermediary or by having a pre-recorded statement submitted as their evidence-in-chief. At the sentencing stage of the criminal process, section 5 of the Criminal Justice Act 1993 provides for Victim Impact Statements to be given to the court in respect of certain serious offences. This allows the injured party to explain the effect that the crime has had on him or her. Other pieces of legislation designed to protect victims include section 3 of the Criminal Law (Rape) Act 1981 which restricts the cross-examination of complainants with regard to their previous sexual

[214] See Dr. Geoffrey Shannon, *Ninth Report of the Special Rapporteur on Child Protection* (2016) for a full discussion on Directive 2012/29/EU (Victims' Directive) of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime.

history, save with the leave of the trial judge, and section 6 of the Criminal Justice Act 1993, which permits courts to make orders for the compensation of victims.

Despite the piecemeal protection for victims already in place, widespread reform is necessary in this jurisdiction as Ireland is required to transpose Directive 2012/29/EU into domestic law. The Directive is expected to have a significant effect on how the Irish criminal justice system approaches the treatment of crime victims. In accordance with Article 27 of the Directive, Member States must have brought into force the laws, regulations and administrative provisions necessary to comply with the Directive by 16 November 2015. Ireland has generally been slow to take action with regard to these international standards. In particular, a 2004 Report from the European Commission in relation to the implementation of the 2001 Framework Decision criticised Ireland for failing to put any of the provisions in the Victims' Charter into statute.[215] The new Criminal Justice (Victims of Crime) Bill 2016 is designed to alter this unsatisfactory position. While the Directive is directly effective in Irish law as of 16 November 2015, its implementation is to be carried out through the Victims of Crime Bill and Minister Fitzgerald, upon the publication of the Heads and General Scheme confirmed that the Bill is designed to transpose the Victims' Directive into Irish law.

4.4.2 General Scheme of the Victims of Crime Bill 2015

Regard may be had to my Ninth Report for analysis of the Heads and General Scheme of the Victims of Crime Bill and to view recommendations made in relation to same, most notably in relation to children as a category of particularly vulnerable victims. The 2016 Bill broadly replicates the Heads contained in the 2015 General Scheme, however some amendments and further detail have been included that warrant specific consideration below.

4.4.3 The Criminal Justice (Victims of Crime) Bill 2016

Section 2 of the 2016 Bill contains a broad definition of a "victim", transposing the definition of same contained in the Directive. It means "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by an offence". Interestingly, Head 2 of the General Scheme specifically provided that the status

[215] 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.

of a victim would not be dependent upon whether a complaint had been made to the appropriate authority in relation to the offence or whether the offender had been apprehended and prosecuted. There is no such provision in section 2 of the Bill and notably, the Bill is silent on this matter. While there is nothing in section 2 to suggest that in order to come within the definition of a victim, the person in question must have made a complaint alleging the commission of an offence or that the offender has been identified, apprehended, charged or convicted, arguably it is worth clarifying that this is not the position. For the avoidance of doubt therefore, it is recommended that that the inclusion of a provision akin to that which was contained in Head 2 of the General Scheme on this issue is warranted.

Pursuant to section 2(3) of the Bill, a reference to a "victim" in the Bill is also to be construed as a reference to a family member of a person whose death was directly caused by an offence, provided that the family member concerned has not been charged with, or is not under investigation, for an offence in connection with the death of that person. This means that not only the person who has suffered harm as a result of an offence will be considered a victim. If he or she has died, his or her family members may also be regarded as victims for the purposes of the Bill. Overall, the Bill demonstrates an appropriately wide approach to the definition of a "family member". It means, in relation to a person whose death was directly caused by a criminal offence, that person's spouse, civil partner, cohabitant, child, step-child, parent, grandparent, brother, sister, half-brother, half-sister, grandchild, aunt, uncle, nephew or niece. It also includes any other person who was dependent on the victim or who a court, a member of An Garda Síochána, an officer of the Ombudsman Commission, the Director of Public Prosecutions, the Irish Prison Service, a director of a children detention school or a clinical director of a designated centre, as the case may be, considers has had a sufficiently close connection with the victim as to warrant his or her being treated as a family member. As there is the potential for a large number of family members to be considered "victims" for the purposes of this Bill, section 3 of the Bill provides for the nomination of family members. This is a novel provision that was not present in the General Scheme. In essence, in circumstances where more than one family member seeks to avail himself or herself of a right under the Act, either An Garda Síochána, the Ombudsman Commission, the Director of Public Prosecutions, the Irish Prison Service, the director of a children detention school or the clinical director of a designated centre, as the case may be, may –

- request that the family members concerned nominate one of them to avail of the right, or;
- where the family members are unable to reach agreement, nominate one or more of them for the purposes of availing of the right concerned, having regard to the degree of relationship between the family members and the victim.

This is a practical measure that recognises that in some instances, it is not useful or workable for each and every family member to exercise their rights under the Bill with regard to the death of their loved one and that in some cases, it is more appropriate for a nomination to be made.

From a child protection perspective, the inclusion of section 2(3) of the Bill is to be commended. As will be discussed below, special victim protection measures can apply to certain vulnerable victims, including children – meaning a person under the age of 18. To ensure that all children may, where applicable, avail of these special measures and benefit from same, subsection 3 provides that where the age of the victim is uncertain but there is reason to believe that the victim is a child, he or she shall be presumed to be a child for the purposes of this Act, unless the contrary is proven. This therefore ensures that where there is doubt as to whether a victim is or is not under the age of 18, he or she shall be treated as if he or she is under 18. It is anticipated that this will serve to protect children on the cusp of adulthood and promote an attitude of caution when dealing with young persons.

4.4.4 Provision of Information

Part 2 of the Criminal Justice (Victims of Crime) Bill covers the victim's right to information and governs the provision of such information. Section 6 outlines the information a victim is entitled to receive when he or she first makes contact with An Garda Síochána or the Ombudsman Commission in relation to an alleged offence. It ensures that a victim will be offered comprehensive information on the criminal justice system and his/her role within it. It also ensures that victims of crime will be made aware of the range of services and entitlements that they may access from their first initial contact with An Garda Síochána. It provides that where a victim first contacts a member of An Garda Síochána or is contacted by him or her in relation to an alleged offence, he or she shall be offered information regarding the procedures for making a complaint; services which provide support for victims of crime; where any enquires he/she has relating to a complaint may be addressed; protection measures

available for victims; services which provide legal advice and legal aid; and information concerning any scheme relating to compensation for injuries suffered as a result of a crime, including the power of the court to make a compensation order. Victims of a criminal offence are to be made aware of their entitlement to assistance in the form of interpretation and translation, their entitlement to expenses arising from participation in the criminal justice process and their entitlement to inform the trial court of how they have been affected by the offence. Information must also be offered on the procedures for victims who are resident outside the State and the available grievance procedures.

Section 7 of the Bill is similarly an important provision concerning the dissemination of sufficient information to victims. While section 6 deals with the provision of information to a victim from his or her first contact with An Garda Síochána, section 7 sets out the information a victim is entitled to receive during and after any investigation or criminal proceedings. Pursuant to section 7, a positive obligation is placed on a member of An Garda Síochána or an officer of the Ombudsman Commission who is investigating an alleged offence where a victim of the offence in question is identified. The member or officer must inform the victim of his or her right to make a request for information under s.7(2), of his or her right to amend that request and of the relevant procedures for making such a request or amended request. Subsection (2) entitles the victim to request from the relevant body – for example An Garda Síochána or the Director of Public Prosecutions – a significant amount of information, including in particular the following:

- information relating to any significant developments in the investigation of the alleged offence;
- a copy of any statement or submission made by the victim during the course of the investigation or under section 5 of the Criminal Justice Act 1993 (i.e. a victim impact statement);
- information regarding a decision not to proceed with, or to discontinue, the investigation and a summary of the reasons for the decision;
- information regarding a decision not to institute criminal proceedings in respect of the alleged offence and a summary of the reasons for the decision;
- information on the victim's right to request a review of a decision not to institute criminal proceedings;
- information regarding a decision to deal with a person otherwise than by trial and a summary of the reasons for the decision;
- where a person is charged in respect of the offence, information regarding the nature of the offence with which he or she is charged and the date and place of his or her trial;
- where a person is convicted in respect of the alleged offence, information on the date of sentencing and the date and place of any appeal;
- information regarding a final decision in any trial of a person;

- where a person is arrested and detained in custody; remanded in custody; or in custody serving a sentence of imprisonment; information regarding any release or escape of the person from custody;
- where a person has been convicted and a sentence of imprisonment is imposed on him or her, information regarding the expected date of release from prison and if temporarily released, any conditions attached to such release that relate to the victim.

In essence, section 7(2) sets out the information which the victim may request and s.7(1) ensures that victims are informed of their right to request such information. Without s.7(1), the victim might not be aware of his or her entitlements under subsection (2), thus the introduction of both provisions will be crucial to ensure that victims' rights regarding the provision of information can be assessed effectively, efficiently and with ease. Where a request for such information in made, the relevant body or person – whether An Garda Síochána, the DPP, the Ombudsman Service, the director of a children detention school or the clinical director of a designated centre – must make a record of the information requested and provide same to the victim as soon as practicable. The obligation to provide information to victims, however, is subject to a general exception contained in section 10 of the Bill. This section provides that nothing in the Act shall be construed as requiring the disclosure of any information the disclosure of which could interfere with the investigation of an alleged offence, prejudice ongoing or future criminal proceedings in respect of an alleged offence, endanger the personal safety of any person or endanger the security of the State. This is an appropriate limitation as it is reasonable to expect that victims' rights with regard to the provision of information should be limited if the abovementioned circumstances apply.

The provision of such information as set out in sections 6 and 7 will serve to address the common complaint that victims are not kept up-to-date with regard to the progress of their investigation and will ensure that victims are properly apprised of their role within the system from the outset and throughout. While Family Liaison Officers (FLOs) are currently assigned to cases to deal with such issues, these officers are only involved in certain serious cases. At present, there are 474 trained FLOs who are appointed to victims and their families in relation to crimes such as murder and false imprisonment with the principal role of keeping victims informed during the investigation and to provide them with support information.[216] The duty to provide information in section 6 of the Bill is not limited to serious cases and the aforementioned information must be offered once a person first contacts a member of An

[216] See http://www.garda.ie/Controller.aspx?Page=1662.

Garda Síochána stating that he or she has been the victim of a criminal offence. Similarly, where a victim requests certain information regarding the progress of an investigation or prosecution, section 7 obliges the appropriate body/person to provide him or her with that information as soon as practicable, irrespective of the type of offence alleged or the severity of same. Section 8 of the Bill also concerns the provision of information to victims. It states that where, pursuant to section 7, a victim is told about a decision not to institute or proceed with criminal proceedings in respect of an alleged offence, An Garda Síochána or the DPP must inform the victim of his or her right to request a review of the decision and must inform him or her of the procedure through which this may be done. In this way, Part 2 of the Bill ensures all victims are given corresponding statutory rights to information for the first time in Irish law, whether at first contact, during the course of the investigation or following a decision not to proceed with criminal proceedings, and it is anticipated that these provisions will significantly strengthen the position of victims within our criminal justice system.

It is worth noting that section 21 of the Bill provides where An Garda Síochána, the Ombudsman Commission, the DPP, the Courts Service, the Irish Prison Service, the director of a children detention school and the clinical director of a designated centre, are dealing with a victim, they must ensure that any oral or written communications with the victim are in simple and accessible language and take into account the personal characteristics of the victim, including any disability, which may affect the ability of the victim to understand or be understood. This provision not only ensures that the information is provided, but ensures that it is understood – reflecting the tenor of the Directive and enhancing the practical benefits of Part 2 of the Bill. Unfortunately, with regard to the provision of information, there is no specific arrangement set out in the Bill in its current form in relation to children. In the General Scheme of the Bill, Head 17(3) stated that for child victims, the information being provided to him or her shall also, where practicable, be furnished to a parent or guardian of the child. The 2016 Bill does not include this stand-alone obligation in respect of child victims and it is notably absent. Particularly where children are in their younger years, allowing their parent or guardian to also receive the information in question, where necessary, is a practical approach to guarantee that the information provided is not "falling on deaf ears". A parent or guardian would be in an appropriate position to review the information in question and explain same to the child if required. It is recommended therefore that a similar provision to Head 17(3) be included in the Bill, subject to the caveat that such information should not be furnished to the parent or guardian of the child where said parent

or guardian has been charged with, or is under investigation for, an offence in connection with the victim.

4.4.5 Decision not to Prosecute and Right to Review

As set out above, section 7 of the Victims of Crime Bill creates a statutory right for victims to be informed, where they request, of any decision not to proceed with or to discontinue an investigation into the offence alleged and any decision not to prosecute an alleged offender. Furthermore, it states that the victim is to be given a summary of the reasons for said decision.

This is a wide-ranging development that will serve to bring considerable transparency to all prosecutorial decisions. Traditionally, where the DPP decided not to prosecute, the reasons for making this decision were only given to the Gardaí who investigated the case. This changed in 2008, when a new policy was adopted by the DPP creating an exception to the general rule in relation to homicide cases only. In such fatalities, where the death took place on or after 22 October 2008, the DPP gave her reasons for a decision not to prosecute to the deceased's family. In all other cases, no reasons for such a prosecutorial decision were provided. Due to the directly effective nature of the Victims' Directive in Irish law as of 16 November 2015, however, a new stance has recently been taken on this issue. To avoid being in breach of EU law by awaiting the enactment of the Victims of Crime Bill, in July 2015 the DPP established a new Communications and Victim Liaison Unit.[217] This Unit is responsible for developing the structures and procedures required to ensure that the rights of victims and their families, as set out in the Directive, are implemented. In particular, it will process requests for reasons for decisions in line with section 7 of the Bill. For all crimes, including District Court prosecutions, therefore, reasons are now available upon request. The approach taken by the office of the DPP in advance of the enactment of domestic legislation is appropriate given the direct effect of the Directive.

Section 9 of the Bill provides for the procedure that is to be put in place with respect to these rights. It allows a victim to review a decision not to prosecute. Section 9(1) states that where a victim is informed of a decision not to institute, or proceed with, criminal proceedings in

[217] Barry Donoghue, Deputy Director, Public Accounts Committee Meeting 12 November 2015.

respect of an alleged offence, he or she may, within 28 days after receiving this information, submit a request either to An Garda Síochána or the DPP, as the case may be, for a review of the decision concerned. Where the original decision not to prosecute was made by a member of An Garda Síochána, the review is to be carried out by another member of An Garda Síochána who is independent of the decision which is the subject of the review. Where it was made by the Director of Public Prosecutions, section 9(5) provides that the DPP shall carry out the review or arrange for a review to be carried out. While it is specifically stated in respect of a decision by a member of the Gardaí that the review should be conducted by another member who is independent of the original decision, there is no such requirement for independence in respect of decisions made by the DPP. As already stated, s.9(5) merely provides that the DPP shall carry out the review or arrange for it to be carried out. The different treatment for reviews of decisions made by An Garda Síochána and the DPP is anomalous. Furthermore, the importance of independence in a review cannot be underestimated, not only for justice to be done but for justice to be seen to be done. It is therefore recommended that s.9(5) specifically state that where the decision not to prosecute has been made by one of the Director's professional officers, the review may be carried out by the Director or by another of the Director's professional officers nominated by the Director, and who is independent of the original decision not to prosecute.

The developments in sections 7, 8 and 9 create statutory rights for all crime victims to be given reasons for a decision not to prosecute, to be informed of his or her right to request a review of this decision and to receive information on the procedure by which this may be done. Furthermore, these developments enable victims to actually review such a decision. The approach taken in the Bill is a significant departure from the existing position in Irish law as set out in *State (McCormack) v Curran*,[218] where it was held that the DPP was under no obligation to give reasons in respect of a decision not to prosecute. The reform proposed in the Bill ensures that victims are given an explanation for the prosecutorial decision in their case and in this way, prevents them from being left in the dark - unaware as to the potential difficulties in prosecution or other realities that may have informed the DPP's decision. While at present, decisions of the DPP are judicially reviewable in principle, the court will only review same if it can be demonstrated that a decision was made mala fide or influenced by an improper motive or policy. There are no such restrictions placed on the review

[218] [1987] ILRM 225.

procedure provided for in section 9 which permits a review to be carried out without any necessity for an allegation that any mala fides were involved. Indeed, no limitations whatsoever are attached to the right to review in the Bill. Whether judicial review of this process will become a regular occurrence is a matter which will become apparent in time.[219]

4.4.6 Support for Victims in Criminal Investigations

Certain provisions are set out in the Victims of Crime Bill 2016 which serve to give support for victims of crime through the investigation stage of the criminal process. Section 6(4), for example, states that a victim, when contacting An Garda Síochána for the first time in respect of an alleged offence, may be accompanied by a person or persons of his or her choice, including his or her legal representative. Section 11(1) similarly provides that a victim may be accompanied by a person or persons of his or her choice, including his or her legal representative, when making a complaint, and section 13(2) allows a victim to be so accompanied during an interview with An Garda Síochána. Having a familiar person present at the initial contact with the Gardaí, at the time of making a complaint and for interviews will undoubtedly give emotional support to the victim in these difficult situations. If the victim choses to bring his or her legal representative, that representative will be able to guide him or her through the process of making a complaint, informing him or her of the procedure involved and reducing the intimidation or fear that a victim is likely to feel. That person will not be allowed accompany the victim, however, where the member taking the complaint reasonably believes his or her presence would be contrary to the best interests of the victim or would prejudice any investigation or proceedings regarding the alleged offence.[220] This would, for instance, prevent a person being present who the member in question believes would unduly influence the victim or exert pressure on him or her.

Section 13 of the Bill covers the conduct of interviews and medical examinations. It provides that the member in charge of the investigation must ensure that where the victim of an alleged offence is resident in a Member State other than Ireland, the victim may make a statement immediately after the complaint is made or at such other time as may be agreed with the victim. This recognises the practical difficulty involved where the victim resides in another

[219] See Brendan Grehan SC "Balancing Rights in the Sentencing Process: Recent Developments in EU and ECHR Law".
[220] Sections 6(5), 11(2) and 13(3) of the Bill.

country and seeks to avoid him or her having to remain in this jurisdiction for any longer than necessary. With regard to all other victims, s.13(1) obliges the member in charge of the investigation to ensure that any interviews of a victim that may be required in respect of a complaint are carried out as soon as practicable after the complaint is made and that interviews are only carried out where necessary for the purposes of investigation of the alleged offence. In addition, medical examinations of the victim for the purposes of the investigation of the offence alleged are limited to those which are strictly necessary for the purpose of the investigation concerned.

While Part 3 of the Criminal Justice (Victims of Crime) Bill 2016 deals with the protection of victims during investigations and throughout criminal proceedings and while it contains helpful provisions as set out above, it is almost silent on the issue of staff training. The only reference to training is that contained in section 16 of the Bill. Section 16 provides, in relation to those victims with special protection needs only, that any interviews be carried out by persons who have specifically been trained for that purpose. There is no other reference to training elsewhere in the Bill. There is nothing in the Bill that imposes a general duty on state bodies to provide training to all members of staff who are required to liaise with victims on how to engage with them appropriately and considerately. Such an obligation was contained in the General Scheme of the Bill. Head 20 stated that in order to ensure that persons involved with victims are properly qualified in this area, An Garda Síochána, the Director of Public Prosecutions, the Irish Prison Service, the Courts Service and the Garda Ombudsman shall provide training to their staff members who have contact with victims in the course of their official duties to a level appropriate to that contact. The aim of such training was specifically stated as being to "…increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner." This provision is in line with Ireland's obligations under the Directive. It is recommended therefore that an obligation akin to that which was set out in Head 20 be included in the 2016 Bill, ensuring that the officers who liaise with victims during the criminal process are appropriately trained to ensure victims obtain proper support and are properly treated.

4.4.7 Assessment of Victims and Special Measures for Certain Victims

In line with Article 22 of the Victims' Directive, section 14 of the Victims of Crime Bill places a duty on An Garda Síochána or the Ombudsman Commission when investigating an offence to carry out an assessment of the victim. The objective of this assessment is as follows:

(a) to identify, if any, the protection needs of the victim;
(b) to ascertain whether and to what extent the victim might benefit from protection measures; and
(c) to ascertain whether and to what extent the victim might, due to his or her particular vulnerability to secondary and repeat victimisation, intimidation and retaliation benefit from –
    (i) special measures during the course of an investigation of the alleged offence, and
    (ii) special measures during the course of any criminal proceedings relating to the alleged offence.

There are therefore two different types of measures envisaged by the Bill - protection measures and special measures. According to section 2 of the Bill, "protection measures" may include advice as to personal safety of the victim or the protection of property; advice regarding safety or barring orders; advice on the making of an application to remand the alleged offender in custody; and advice on seeking to have conditions attached to the offender's bail. A "special measure", on the other hand, means a measure referred to in section 16 of the Bill or a measure which may, at the discretion of the court or pursuant to an application to it under section 18 or Part III of the Criminal Evidence Act 1992, be applied in respect of a victim during the course of any criminal proceedings relating to an alleged offence. In carrying out this assessment, regard should be had to the following:

(a) the type and nature of the offence alleged;
(b) the circumstances of the commission of the alleged offence;
(c) whether the victim has suffered considerable harm due to the severity of the alleged offence;
(d) the personal characteristics of the victim, including his or her age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, communication difficulties, relationship to, or dependence on, the alleged offender and any previous experience of crime;
(e) whether the alleged offence appears to have been committed with a bias or discriminatory motive, which may be related to the personal characteristics of the victim referred to in *paragraph (d);*
(f) the particular vulnerability of victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crimes and victims with disabilities.

The mandatory assessment that is required by s.14 is a novel provision in Irish law. It obliges members of An Garda Síochána to consider the specific needs of the individual victim, ensuring that from the outset of the criminal process, the victim's individual circumstances are given due consideration. The sole focus is thereby moved away from apprehending and successfully prosecuting the offender and the importance of protecting the victims of crime is promoted. It is unclear, however, at what point in the criminal process must the assessment be carried out. Section 14(1) merely states that the member, when investigating the offence, shall carry out an assessment – it does not specify *when* this assessment must be conducted. It is recommended that further consideration is necessary in this regard and clarity should be introduced into section 14. Obviously, such an assessment should not be conducted too far into the investigation that the opportunity for protection or special measures to be availed of has passed. It is recommended therefore that s.14 designate the point in the criminal process at which the assessment must be commenced – whether at the time of first contact, at the time of the making of the complaint or in advance of the first interview with the victim.

As discussed above, the purpose of the assessment is, inter alia, to ascertain whether the victim as a person would benefit from any of the special measures during the investigative process, as contained in section 16 of the Bill, or any other special measures to be employed during the course of criminal proceedings as envisaged by section 18 and Part III of the Criminal Evidence Act 1992. Of particular relevance from a child protection perspective is section 14(7). This provides for a presumption that child victims have protection needs. Despite the aforementioned presumption, an assessment must still be carried out on children to determine whether and to what extent the child might benefit from protection measures or special measures, having regard to the best interests of the child; any views and concerns raised by the child taking into account his or her age and level of maturity; and any views and concerns raised by a parent/guardian of the child or any other person duly authorised to act on his or her behalf once that parent/guardian/authorised person is not charged with or under investigation for an alleged offence relating to the child. It is submitted that s.14(7) in relation to child victims is not as strong as the presumption that was contained in Head 17 of the General Scheme, namely "a victim who is a child shall be presumed to require the special measures…". While s.14(7) appropriately recognises the vulnerable status of children within the criminal justice system, it is submitted that it fails to go far enough in this regard. It does not contain a presumption that children who are victims will be entitled to the special measures set out elsewhere in the Bill. It merely states that they "shall be presumed to have

protection needs". In this regard, the sentiments set out in the Preamble to the General Scheme; namely that "…it is appropriate to provide that the best interests of a child who is a victim of a crime are regarded as a primary consideration by the criminal justice system", are not adequately addressed in the Bill in its current form. Further consideration is therefore required on this aspect of the Bill to prioritise a system of heightened protection for children who are the victims of crime and to minimise the impact of the criminal process upon them.

Section 16 of the Bill relates to special measures for certain victims during the investigation stage of the criminal process. Where a victim has been assessed, the member who carries out the assessment is to report the results to another member not below the rank of superintendent. The member to whom the report has been submitted shall direct the Garda in charge of the investigation to implement all or part of any protection measures and special measures that are identified in the report during the course of the investigation of the alleged offence. The measures set out in s.16 predominantly concern the procedures in place for interviews with the victim, namely that any interview with the victim be carried out in premises designed or adapted for that purpose; that any interview be carried out by or through persons who have been trained for that purpose, and that where there is more than one interview, where possible it be carried out by the same Garda each time. In addition, it provides that where the offence alleged involves sexual violence, gender-based violence or violence in a close relationship, that the victim be informed of his or her right to request that the interviews are carried out by a person of the same sex as him or her. The special measures are to be made available unless legal, operational or practical constraints render it impossible to do so; where there is an urgent need to interview the victim to prevent harm to him or her or another person; where the application of the special measure would be prejudicial to a criminal investigation or criminal proceedings; or where the application of the special measure would be otherwise contrary to the administration of justice. These measures, therefore, may not apply where it is not possible "for legal, operational or practical constraints" to use that measure. This exception raises some concern, given that there is no explanation in the Bill as to what "legal, operational or practical constraints" might entail. Such a provision might encourage a sub-optimal attitude to the implementation of special interview measures and allow minor practical problems, easily remedied, to circumvent the benefits envisaged by section 16. Clarification as to what these "legal, operational or practical constraints" might entail is therefore required.

While section 16 of the Victims of Crime Bill deals with the special measures that may be put in place during the investigative process, section 18 concerns special measures that may be employed during the course of criminal proceedings. It obliges a prosecutor to have regard to an assessment carried out under s.14 in considering whether a victim requires special measures during court proceedings. New special measures are proposed in the Bill for use during the trial process to specifically offer heightened protection for victims. This includes the court's power, pursuant to s.19 of the Bill, to exclude members of the public from proceedings where there is a need to protect the victim from repeat victimisation, intimidation or retaliation. In addition, under s.20 of the Bill, the court has the power to restrict questioning regarding a victim's private life, where the nature or circumstances of the case are such that there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and it would not be contrary to the interests of justice.

Section 26 of the Bill is also particularly relevant with regard to special measures for certain victims. This provision significantly expands existing legislation which deals with vulnerable witnesses giving evidence at trial. As previously stated above, Part III of the Criminal Evidence Act 1992 allows certain vulnerable persons to give evidence in criminal proceedings via video-link, through the use of an intermediary or by having a pre-recorded statement submitted as their evidence-in-chief. It currently only applies to sexual offences, offences involving violence or the threat of violence to a person, and certain specific offences under the Child Trafficking and Pornography Act 1998 and the Criminal Law (Human Trafficking) Act 2008. Section 26 of the Bill proposes the extension of the application of Part III from the current list of specified offences to victims of all offences. This creates a whole new category of persons who may avail of the provisions in Part III. For children, therefore, it is important to recognise that this provision makes it very likely that any child under 18 who is the victim of any offence will have the option of these alternative methods of giving evidence, thereby reducing the possibility of secondary trauma. The limitations of section 16(1)(b)(i) that the child be under 14 and the offence be one of a violent or sexual nature will no longer be applicable. In this way, it is likely that section 26 will reduce the necessity for child victims to give evidence in open court and enable further reliance on the special measures in Part III of the 1992 Act for children. The new section 16(1)(b) therefore provides that a video-recording of any statement made by any person under 18 during interview may be admissible in evidence, where the offence alleged is an offence to which

Part III of the Act applies. These developments will serve to significantly benefit children who are required to give evidence at trial and give explicit recognition to their vulnerabilities. It is worth noting that there is nothing in suggested amendments to the 1992 Act that would allow the victim in a case to make an application to court to give evidence through one of the special measures. Consideration might be given to amend Part III further to give the court jurisdiction to direct the use of these measures of its own volition and to allow a victim seek the assistance of same, where the prosecutor fails or refuses to make an application on his or her behalf.

One further special measure with regard to victims giving evidence at trial is introduced in section 26 of the Bill. This proposes the insertion of section 14A into the Criminal Evidence Act 1992 to allow for evidence to be given in court from behind a "screen or other similar device" to prevent the victim from being able to see the accused. This provision is applicable only where the offence is one to which Part III of the 1992 Act applies and it will only be used where the court has not made an order providing for evidence to be given by a live television link. While a screen or equivalent arrangement may be a viable alternative for adults giving evidence at trial, the implementation of the proposed section 14A for children may prove problematic. The provision of a screen means that the child still has to attend the intimidating atmosphere of a courtroom and remain there for the duration of his or her evidence, knowing the accused is only a few feet away. This is hardly a desirable situation and should be employed only as a last resort. Yet, there is no real guidance in the Bill as to when a screen would be used, except vaguely stating that a screen may be used in circumstances where the court has not made an order for evidence to be given via a TV link. It is hard to imagine circumstances where using a screen for a child would be preferable to a live TV link, except on the rare occasion that a child wishes to opt out of giving evidence by a TV link. If, say for a technical reason, the TV link system was not operational on the day of a trial when the child is due to give evidence, using a screen should not be seen as a viable alternative – the child's evidence should be postponed until the problem is fixed. The uncertainty of the proposed section 14A could lead to situations where a screen is being used out of habit because it is the easier option. In all the circumstances, therefore, it is recommended that section 26 be revised.

4.4.8 Victim Personal Statement

At the sentencing stage of the criminal process, section 5 of the Criminal Justice Act 1993 provides for Victim Impact Statements to be given to the court. This section only applies to certain criminal offences; sexual offences, offences involving violence or a threat of violence to a person, offences under the Non-Fatal Offences Against the Person Act 1997 and offences under sections 2, 3 or 4 of the Criminal Justice (Female Genital Mutilation) Act 2012. Section 5(2) provides that when imposing sentence on a person for such an offence, the court shall take into account, and may, where necessary, receive evidence or submissions concerning, any effect (whether long-term or otherwise) of the offence on the person in respect of whom the offence was committed. Where, as a result of the offence, the victim has died, is ill or is otherwise incapacitated, the "person in respect of whom the offence was committed" includes a family member of that person. In sentencing the offender, a court must, upon application by the victim, hear the evidence of the victim, or family member as applicable, as to the effect of the offence on him or her. At present, therefore, section 5 of the 1993 Act is utilised to ensure that the victim of certain serious offences is heard prior to the determination of the appropriate sentence.

Section 27 of the Victims of Crime Bill broadens the right of a victim to be heard in criminal proceedings as emphasised in the Victims' Directive. It provides for an expansion of the right to make a victim impact statement to all natural persons in respect of whom the offence has been committed who have suffered harm, including physical, mental or emotional harm, or economic loss, which was directly caused by that offence. This aspect of the Victims of Crime Bill is a welcome development which seeks to ensure that victims of other types of crimes also have an opportunity to put before the court an account of how the offence in question has affected them. This recognises that other types of offences, such as those involving dishonesty or fraud, may have significant effects on a victim but there is currently no provision to demonstrate this to the court as such crimes do not come within the category of offences set out in section 5 of the 1993 Act at present. Section 27 of the Bill therefore closes a lacuna in current legislation and allows for the expansion of the right to make a victim impact statement to all victims who have suffered harm directly caused by an offence, considerably strengthening the voice of victims at the sentencing stage.

4.4.9 Conclusion

At present, victims' rights in Ireland are governed by the Victims Charter. This is not legally binding and it provides no legal entitlements or rights to victims. It is thus recommended that the Criminal Justice (Victims of Crime) Bill 2016 be expedited and treated with priority as it moves through the Oireachtas to ensure that the existing uncertain status of victims be ameliorated as soon as possible. This is particularly important in light of Ireland's obligation to transpose Directive 2012/29/EU. In accordance with Article 27 of the Directive, Member States were to have brought into force the laws, regulations and administrative provisions necessary to comply with the Directive by 16 November 2015. The deadline has therefore passed some time ago and Ireland must begin to rectify this unacceptable delay.

4.4.8 Recommendation

Pursuant to Directive 2012/29/EU (Victims' Directive) of the European Parliament and of the Council, Ireland is under an obligation to transpose same into national law by 16 November 2015. In July 2015, the Heads and General Scheme of the Criminal Justice (Victims of Crime) Bill 2015 were published and the government approved the drafting of a Criminal Justice (Victims of Crime) Bill along the lines of this General Scheme. The Criminal Justice (Victims of Crime) Bill 2016 was published in December 2016. For as long as this Bill remains unimplemented, Ireland is in default of its obligations under Directive 2012/29/EU. It is imperative, therefore, that the Criminal Justice (Victims of Crime) Bill 2016 be progressed to the point of enactment expeditiously.

4.5 Pilot Bail Support Scheme

The importance of protecting the welfare of young offenders has long since been recognised and in both international law and domestic law, the age-appropriate treatment of children who commit criminal offences is widely prioritised. Article 37(b) of the United Nations Convention on the Rights of the Child provides that the arrest, detention or imprisonment of a child shall be in conformity with the law and shall only be used as a measure of last resort and for the shortest appropriate period of time. The principle that the detention of a child should be only a measure of last resort is similarly well-established in this jurisdiction. Section 143 of the Children Act 2001, as amended by s.158 and Sch.4 of the Criminal Justice

Act 2006, provides that detention cannot be imposed unless the court is satisfied that it is the only suitable manner of dealing with the child and a place in a children detention school is available.

In line with the aim of avoiding the detention of young persons, the vast majority of child offenders are remanded on bail, rather than in custody, while they await the outcome of their case. Quite often, conditions may be attached to their bail bond. This may include a requirement to sign on in a local garda station, curfews or restrictions on movement. In circumstances where bail conditions are breached, the accused offender may consequently be remanded in custody. Remanding any child in custody ought to be avoided if at all possible, particularly as the majority of crimes committed by children are relatively minor, namely offences under the Public Order Act 1994 and the Criminal Justice (Theft and Fraud) Act 2001.[221] The prison environment can enhance negative behaviour and have a damaging effect on the child. Therefore, it was previously recommended that efforts be taken to prevent the pre-trial detention of children.[222]

To avoid such detention of young offenders pending the hearing of their cases, in my Fourth Report, I proposed that a Bail Support Scheme be introduced in Ireland.[223] Such a scheme would deliver a method of engaging with young offenders who are on bail, providing support for them, thereby ameliorating the current position in which no assistance is available for young persons who are remanded on bail. The aim of a bail programme would be to give child offenders practical supports based on their specific needs in order to assist them during the court process and to aid them in complying with their bail conditions. It was suggested that the Bail Support Scheme involve the supervision of an offender's court attendance, work with the child's family and monitor any substance use treatment required. In this way, it may assist children on bail to make positive behavioural changes, within the regime of strict supervision of bail conditions imposed by the court. Looking at such schemes in place in other jurisdictions, it appears that they have the capability to reduce the number of young people re-offending while on bail and the number detained on remand.

[221] See Barnardos, Submission into the Court Service Statement of Strategy 2012-2014, August 2011.
[222] See Dr. Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010).
[223] See Dr. Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010).

I noted positively in my Ninth Report that the Department of Children had indicated its intention to implement a Bail Support Scheme in line with recommendations I had previously made. Action has now been taken on foot of this intention, which is most welcome. In January 2016, the then Minister for Children and Youth Affairs, Dr James Reilly TD, announced that he had instructed his Department to develop a new "bail supervision scheme" on a pilot basis by mid-2016. In essence, the scheme will serve to provide more therapeutic supports in the community for children who are subject to bail conditions. Its overall objective is to reduce the need for the court to place young people in custody pending trial – a critical aim given that at any one time approximately 50% of places in the children detention school system are taken up by children remanded in custody.

Extern, the social justice charity, was awarded the contract to deliver the Bail Supervision Scheme in April 2016. The pilot scheme has commenced in the Dublin court area and Multisystemic Therapy (MST), an evidence-based approach which seeks to understand the factors that contribute to the young person's behaviour, has been employed in the operation of the scheme. The introduction of a bail supervision scheme is to be widely welcomed and it can be recognised as a positive development in support of the principle that custody should be a last resort for children. Efforts should be made in the implementation of this scheme to monitor results closely, thereby ensuring the practical effectiveness of the scheme. Care should also be taken to learn the necessary lessons regarding the operation of such a programme that will assist in rolling out a nationwide version of the scheme on a permanent basis as soon as possible, to ensure this essential support system can assist all young offenders – not just those based in the Dublin region.

4.5.1 Recommendation

The pilot Bail Supervision Scheme in Dublin needs to be monitored closely to ensure its practical effectiveness with a view to rolling out such a scheme on a nationwide basis at the earliest opportunity.

4.6 Suspended Sentences

In respect of child offenders, where a child pleads or is found guilty of a criminal offence, there are a number of sentencing options available to the trial judge. One such sentencing

option is the mechanism of the suspended sentence. This enables the court to impose a sentence of a term of imprisonment, but make an order suspending the execution of the sentence in whole or in part, once the offender enters into a recognisance to comply with such conditions that may be attached to the order. Section 99 of the Criminal Justice Act 2006 concerns the imposition and operation of suspended sentences, which applies to both adult and juvenile offenders alike. Subsection (1) provides that where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with conditions imposed in relation to the order. The person must keep the peace and be of good behaviour and other conditions, such as a requirement to abide by the recommendations of the Probation Service, may also be attached to the order.

In my Ninth Report, I highlighted the numerous difficulties that have plagued the suspended sentence regime under s.99.[224] In light of these problematic issues, I recommended that further legislative intervention take place to ensure that one comprehensive statutory regime is enacted to govern effectively the use of suspended sentences.[225]

Further issues have arisen in recent months concerning section 99 of the 2006 Act in addition to those addressed previously. This again emphasises the requirement for the widespread reform of this sentencing option. On 19 April 2016, Moriarty J. in *Moore & Others v DPP*,[226] declared unconstitutional ss.99(9) and 99(10) of the 2006 Act in the context of judicial review proceedings. There were six individual cases at issue in this decision, which were listed and heard together. Each applicant had been convicted of offences, including public order offences, attempted robbery and violent disorder, and had suspended sentences previously imposed against them that remained operative at the time of these "triggering" convictions. They judicially reviewed the revocation of their suspended sentences, which took place without them having been permitted to appeal the "triggering" conviction.

Section 99(9) of the 2006 Act, as amended, provides as follows:

[224] See also Dwyer, ""99|9: Nine Issues with Section Ninety-Nine" (2015) 5 *The Bar Review* 105.
[225] See Dr. Geoffrey Shannon, *Ninth Report of the Special Rapporteur on Child Protection* (2016).
[226] [2016] IEHC 244.

> Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, the court before which proceedings for the offence were brought shall, after imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order.

Subsection (10) goes on to state:

> (10) A court to which a person has been remanded under subsection (9) shall revoke the order under subsection (1) unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody (other than a period during which the person was serving a sentence of imprisonment in respect of an offence referred to in subsection (9)) pending the revocation of the said order.

In Mr Moore's case, for instance, it was argued that he wished to appeal his recent conviction in the District Court and have the outcome of those appeal proceedings pronounced prior to any hearing in the Dublin Circuit Criminal Court concerning the reactivation of the pre-existing suspended sentence. It was pointed out that the opportunity to do so appeared to be precluded in view of the amended wording of s.99. The Circuit Court could thus proceed and determine whether to reactivate the suspended sentence in advance of any appeal. If it were to so reactivate, Mr Moore argued that he would serve considerable time in prison prior to his appeal hearing, and should the appeal against the District Court conviction ultimately prove successful, he would therefore have served a period of time in custody without justification. Essentially, it was submitted that he was being unfairly precluded from challenging the basis for reactivation of his sentence. On this ground, and others, the six applicants argued that the procedure for activating suspended sentences was an unfair and unwarranted interference with their rights, including their right to appeal District Court orders, and their right to liberty and equality of treatment before the law.

Moriarty J., deciding Mr Moore's case and that of the five other applicants, determined that ss.99(9) and (10) of the 2006 Act are unconstitutional. He stated that they allow for significantly different treatment of persons before the law as far as their rights of appeal are concerned. He concluded:

> In all the circumstances of the case, and having given the matter as much careful consideration as I can, I am persuaded that notwithstanding the presumption of constitutionality that exists in relation to enactments, and the regard and respect that Courts must show to enactments of the Oireachtas, the subsections under review of s. 99 fall to be viewed as unconstitutional in the context of the facts reviewed and the arguments made.

To deal with the impact and serious implications of this recent decision, a Bill was presented to the Oireachtas in July 2106 which, if passed, will amend section 99 of the Criminal Justice Act 2006. In essence, the Criminal Justice (Suspended Sentences of Imprisonment) Bill 2016 is designed to clarify the procedures to be followed by the courts in relation to the activation of a suspended sentence in the event of the commission of another offence by a person who is subject to a suspended sentence. In the Bill's Explanatory Memorandum, it is specifically recognised that the need for this amending legislation arises from the above-mentioned High Court judgment.

The Bill, not yet enacted, amends the analogous situation that pertained in *Moore & Others v DPP*. It seeks to ensure that where a person who is subject to an order for a suspended sentence commits a subsequent "triggering" offence during the period of the suspended sentence and is convicted of that triggering offence either during or within a certain period of the suspended sentence, he or she will, following sentencing for the triggering offence, be returned to the court which imposed the order for the suspended sentence to have the matter of activation of the suspended sentence dealt with. If he or she appeals the conviction or sentence of the triggering offence, the court which imposed the order for the suspended sentence will not consider the revocation of the order and will adjourn the proceedings until the appeal for the triggering offence has been determined. This ameliorates the unsatisfactory position originally created by s.99, which could have led to unwarranted periods of imprisonment for juveniles whose suspended sentences were reactivated unfairly prior to their conviction being quashed upon appeal. Its proposed introduction is clearly crucial in light of the recent High Court decision and ensures that juveniles in positions such as those pertaining in *Moore & Others v DPP* have their right to appeal adequately protected.

The Bill also proposes a further clarification which is welcome in light of concerns I have raised in my previous Reports in respect of the revocation of suspended sentences in part only. Pursuant to s.99 of the 2006 Act, the court is permitted to reactivate only part of a suspended sentence that has been imposed on an offender. For instance, a situation may arise

where an offender who has a five year suspended sentence imposed against him or her, later commits a subsequent offence during the period of operation of that suspended sentence, in breach of the conditions of his or her suspension. The court is not obliged to revoke the sentence in full, particularly in circumstances where it is a relatively minor offence. Thus instead of reactivating in full and requiring the offender to serve five years imprisonment, the court may decide to reactivate only two years of that five year sentence. What remained unclear, however, was whether the remaining three year part of that original sentence continues to be suspended or whether the reactivation of the two year part of the sentence prevents any subsequent revocation of the remaining part. Dwyer, in his abovementioned article, noted that that the issue had not yet been determined by the Superior Courts and took the view that the wording of s.99(1) suggested that the remaining part which has not been reactivated does not continue to be suspended.

With doubt surrounding this issue, in my Ninth Report I suggested clarification of the legal position. Such clarification is contained in the Criminal Justice (Suspended Sentences of Imprisonment) Bill 2016. Where a suspended sentence is activated in part, a new order may be made suspending the remaining part of the suspended sentence. The Bill explicitly deals with this type of situation and states that where a court revokes a suspended sentence applying to a person and the person is required to serve only a part of the sentence of imprisonment originally imposed on him or her, the court may make a further order suspending the execution of the part of the sentence of imprisonment that is not required to be served by the person. Such further order shall then be treated as an order made under s.99(1).

It is a positive development that the opportunity has been taken to clarify this issue at the same time as the 2016 Bill seeks to deal with the consequences of the High Court judgment in *Moore & Others v DPP* and the finding of unconstitutionality in relation to subsections (9) and (10) therein. It is unfortunate, however, that the Bill fails to deal with the wider problems associated with the operation of the suspended sentence regime, discussed in my previous Report and examined fully by Dwyer. Given the expanding body of case law concerning s.99, it is recommended that the Criminal Justice (Suspended Sentences of Imprisonment) Bill 2016 be utilised to address all concerns associated with the law surrounding this sentencing option. Rather than quickly plugging the gap created by Moriarty J.'s finding of unconstitutionality, the time should be taken now to introduce all-encompassing consolidating legislation. The Criminal Justice Act 2006 in a short time span has already

been the subject of a number of amendments. It is prudent and practical, therefore, to recommend that the imminent legislative intervention proposed creates one comprehensive statutory regime to govern effectively and definitively the use of suspended sentences, rather than introducing further reactive isolated amendments to an Act already plagued with revisions.

4.6.1 Recommendation

In Moore & Others v DPP the High Court declared sections 99(9) and (10) of the Criminal Justice Act 2006 to be unconstitutional. As a consequence the Criminal Justice (Suspended Sentences of Imprisonment) Bill 2016 was published. This Bill addresses the aforementioned High Court decision. The Bill has not yet been enacted into law and it is recommended that the opportunity be taken to supplement the Bill further to address other aspects of section 99 of the Criminal Justice Act 2006 which remain a cause for concern.

4.7 Cyber Harassment and "Takedowns"

As discussed above, the publication of the Criminal Law (Sexual Offences) Act 2017 has served to demonstrate Ireland's commitment to better protecting its children from online predators. It recognises that with technological advances, the internet can create certain dangers for our children and as a result, it seeks to create a range of new criminal offences dealing with child pornography and grooming, with a particular emphasis on the use of information and communication technology in such offences. A further challenge posed by technological advances not considered above in the context of the Sexual Offences Act but to be considered in a Non-Fatal Offences (Amendment) Bill is the prevalence of cyber harassment. Such harassment can arise in a number of situations and can affect children and young people in differing ways. In particular, there is a need for broader harassment legislation in this jurisdiction and greater clarity on the remedy of "takedown procedures".

Online harassment is a reality in societies such as ours where people communicate regularly by e-mail and where social media platforms such as Facebook, Twitter and Instagram are often used. Such harassment can take a number of different forms. It may, for instance, involve the use of a fake Facebook profile to terrorise a victim through the publication of abusive material, images or videos about him/her which may be foul, fabricated, racist and/or

defamatory. It could take place through the non-consensual publication of images online of an intimate nature, whether consensually generated or gained through covert recording. This type of publication often takes place out of spite or revenge, colloquially termed "revenge porn." In the alternative, the internet can be used to bully a particular person by the repetitive sending of nasty and malicious messages to the intended victim, often anonymously. The effects of these types of online behaviour are immediate, they have the capacity to go viral and they can be extremely invasive. Computers are not required to carry out a campaign of cyber harassment as mobile devices are now equipped with the same internet options. This means that cyber harassment can take place more frequently and with ease when perpetrated with the use of mobile phones. It enables perpetrators to communicate with others and disseminate content online instantly, with little effort.

Teenagers and young adults can be and often are targeted with such behaviour as outlined above. The prevalence of same has been recognised by An Garda Síochána with the publication of its Crime Prevention Information Sheet on Online Harassment (2012), directed towards both children and their parents. It cannot be denied that the capacity for damage from this type of harassment is enormous. Aside from the expected impact of such behaviour on a victim's emotional wellbeing, including embarrassment, hurt and fear, there can be other more drastic consequences of cyber harassment, such as depression and suicide. Harassment or online abuse can equally have an impact on a young person's reputation and could potentially damage his or her future job opportunities.

4.7.1 Harassment – section 10 of the Non-Fatal Offences Against the Person Act 1997

In this jurisdiction, the law in force at present only deals with harassment to a limited extent and has yet to be updated to take into account the potential for online abuse. Section 10 of the Non-Fatal Offences Against the Person Act 1997 creates the offence of harassment in criminal law. It provides:

> (1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.
>
> (2) For the purposes of this section a person harasses another where—

> (a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and
> (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

It is apparent that section 10 is wide enough to include communications through e-mail or social media. It specifies that a person who "by any means" harasses another shall be guilty of an offence. While the telephone is specified as one particular instrument that may be utilised to carry out a campaign of harassment, the provision is broad enough to allow a prosecution to be taken for harassment through the use of online communication. In fact, a number of successful prosecutions have been brought pursuant to section 10 in relation to digital or online harassment. By its nature, however, section 10 requires the conduct in question to be committed persistently. This requires some type of repetition or prevalence in the relevant behaviour. It is very unlikely that the definition of this offence covers a single occasion of behaviour, such as a single upload of a private image. One incident of this type of behaviour, no matter how serious it may be, will fail to come within the criminal definition of harassment and a prosecution under s.10 will not therefore be successful. Successful prosecutions for harassment of a digital nature in Ireland have only involved voluminous incidents. Thus the capacity for s.10 to cover single incidents of online abuse is highly questionable and has not been addressed by the courts to date.

In order to deal with new types of online behaviour and to address existing gaps in Ireland's criminal legislation, regard may be had to the Law Reform Commission's 2016 Report on Harmful Communications and Digital Safety and the recommendations made therein.[227] In particular, it deals with the scope of s.10 of the 1997 Act. While the Law Reform Commission ('LRC') recognises that section 10 does already criminalise online or digital harassment as it refers to harassment "by any means", the LRC is cognisant of the fact that online and digital harassment is under-reported and under-prosecuted in this jurisdiction. This, it believes, suggests that s.10 in its current form is not sufficient to deal with these types of behaviour. In essence, therefore, it recommends the amendment of s.10 to include specific reference to harassment *by digital or online means, including through social media sites.* This would offer clarification surrounding the scope of the offence and it could lead to an

[227] LRC 116-2016 Report on Harmful Communications and Digital Safety.

increase in reporting of such criminal action. The existing reference in section 10 to the use of the telephone alone in the commitment of such offences without any reference to the internet makes the current offence appear archaic and outdated. Furthermore, specific legislative recognition that online and digital communications can be utilised in a campaign of harassment emphasises society's recognition of its seriousness and the need to prevent and punish such behaviour.[228] The reformulation of the definition of harassment proposed by the Law Reform Commission to include cyber communications appears to be an appropriate and simple response to the problems highlighted above. It is recommended, therefore, that s.10 be amended accordingly by the legislature as soon as possible as part of the widespread statutory reform that is undoubtedly required to deal with cyber and digital offending of this nature.

It is also recommended, again in line with the proposals of the LRC, that the amended definition of harassment be further broadened to also criminalise what is known as "indirect harassment". Currently, the offender must persistently follow, watch, pester, beset or communicate with the victim. The offence does not include communications to third parties about the victim, such as posting content on public websites or sending e-mails to persons connected with the victim, but not directly to him or her. While there have been two successful prosecutions for indirect forms of harassment under s.10, both offenders entered guilty pleas to the charges brought. Thus the question of whether s.10 in its current form actually covers indirect behaviour of this nature has never legally been tested. Having regard to the wording of the provision, it is submitted that it is evident that communications to third parties are not covered in its scope. This needs to be ameliorated. Including indirect behaviour such as the above in the definition of harassment would not fundamentally change the meaning of harassment, as long as the link between the offender and victim remains clear. While the behaviour may appear to be directed to a third party, it would still need to be such that it can be proven that it harasses the victim in question.[229] I recommend therefore, that not only should s.10 be amended to encompass online and digital communications, the definition should be further developed to allow prosecutions for indirect harassment to fall within same - in line with the Law Reform Commission's proposals. Having an overall broader offence of harassment on our criminal statute book would be preferable - thereby

[228] *Ibid* at p.55.
[229] *Ibid* at p.61.

encompassing new forms of behaviour that have arisen through the development of digital technology and which merit criminalisation.

4.7.2 New criminal offences

Alongside the proposed amendment of s.10 of the 1997 Act, the Law Reform Commission recommends the creation of two new criminal offences to deal with depraved online behaviour. These offences are specifically designed to cover the gap left by the offence of harassment – the definition of which necessarily requires behaviour of a persistent or prevalent nature. They seek to address the situation where intimate images of a person are published online without consent on a once-off basis. Although this single upload may seriously interfere with a person's privacy, as it is not "persistent" behaviour, it will not amount to an offence under s.10 of the 1997 Act.

The first new offence proposed by the Commission deals with intentional victim-shaming, where intimate image(s) are posted online without a person's consent in a revenge-porn scenario. In this regard, the LRC recommends that an offence be introduced to target the distribution or publication, by any means, of an intimate image without the consent of the person depicted in the image with the intent to cause harm. The offence would take place where the image has actually been published or distributed or where there have been threats to do so. The perpetrator must intentionally or recklessly seriously interfere with the peace and privacy of the person depicted in the image or cause harm, alarm or distress to the person depicted in the image. It is recommended by the Commission that this offence may be prosecuted in a summary manner and on indictment, with the maximum penalty of 7 years upon conviction on indictment. The seriousness of the penalty corresponds with the intentional nature of this offence.

The second entirely new offence proposed by the LRC concerns the posting of intimate image(s) or video(s) online in a voyeurism context, often known as "up-skirting" or "down-blousing". It simply seeks to criminalise taking or distributing an intimate image without consent of the person depicted. The offence will be committed where there is non-consensual taking or distributing of an intimate image by any means of communication, even where no harm, alarm or distress was intended. There is therefore no requirement that the accused has acted intentionally or recklessly. The offence would simply be committed where an intimate

image has been taken, published or distributed without consent. This would be a strict liability offence and as such, summary prosecution only is recommended with a maximum penalty of 6 months imprisonment.

Neither type of harmful publication envisaged in the two new offences, if carried out in the form of one single post, would currently come within the criminal definition of harassment set out in section 10 of the 1997 Act. Nonetheless, even a single upload has the potential to cause significant damage, particularly due to the permanence of online content and the tendency of such material to go viral. The possibility of the contents of the upload remaining in the public consciousness and being publicly available long after the initial dissemination heightens the capacity for substantial long-lasting damage to be caused to the victim. I recommend therefore, that the two new "intimate images" offences proposed by the Commission be introduced in Irish law. This, along with the amended definition of harassment recommended above, would serve to significantly modernise Ireland's approach to online predators.

The question arises, however, as to the definition of "intimate images". The Commission recommends that an intimate image be defined as a visual recording of a person made by any means including a photographic, film or video recording: (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity, and (b) in respect of which at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy, and (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the image is communicated.[230] It is also recommended that photo-shopped images – that is, where part of a person's image is superimposed onto an image of intimate parts of another person's body – be covered by the definition. Furthermore, to include the activities of "up-skirting" or "down-blousing" in the remit of the definition of "intimate image", the Commission recommends that an image of a person's genital or anal region or in the case of a female, her breasts, whether those areas were covered by underwear or were bare be encompassed by the definition.[231] In this regard, I recommend that the definition be broadened slightly further than that proposed by the Commission. While the proposed definition of "intimate image" is appropriately broad in its remit, it is limited in its ability to tackle "up-skirting" or "down-

[230] *Ibid* at p.104.
[231] *Ibid* at p.105.

blousing" by referencing "underwear" only. The unauthorised taking of images of this kind may obviously occur where the victim is nude or wearing underwear, but this may also occur where the victim is not wearing underwear, but is wearing some form of revealing clothing - a low-cut T-shirt for instance - which only partially covers her breasts. Referencing "underwear" solely is too narrow to cover this type of situation. Instead, the definition of "intimate image" should include images of those aforementioned private areas whether bare, covered by underwear or partially covered by clothes.

4.7.3 Child offenders

While such offences as outlined above can be committed against children, teenagers and adults alike, such offences may also be committed by children. Most young people in Ireland possess mobile devices. This significantly increases the ease with which these type of digital and cyber communications and publications may be carried out by juveniles. In recognition of the fact that young people may be the perpetrator of these crimes as well as the victim, the Law Reform Commission recommends in its Report that no prosecutions should be brought for the new "intimate image" offences against those under the age of 17 except by or with the consent of the Director of Public Prosecutions. This is in line with the general aim of avoiding the entry of young people into the criminal justice system. The Commission suggests that the utilisation of other options, such as youth diversion programmes, for those under 17 first be considered before any prosecution is brought.

I believe it is appropriate and necessary for a different approach to be taken toward juveniles who engage in the behaviour envisaged by the proposed new "intimate image" offences in comparison with adult offenders. Allowing prosecutorial discretion in such cases is a proportionate response. It recognises the innate immaturity of children and that it might not be advisable to pursue prosecutions in situations involving them depending on the fact-specific circumstances of each case. It also recognises that children who commit such offences may be vulnerable and in need of support, rather than punishment. Providing for such prosecutorial discretion in cases involving those under 17 and not those under 18 is inadvisable, however, given the nature of these offences and the legal definition of a child. Pursuant to the Child Care Act 1991 and the Children Act 2001, a "child" in our jurisdiction is defined as anyone under the age of 18. This corresponds with the international definition of a child set out in the United Nations Convention on the Rights of the Child. It is

recommended, therefore, that prosecutions for these offences, when enacted, should only be brought against any child under the age of 18 by or with the consent of the DPP. This pays heed to the fact that a 17-year-old may act with as much immaturity as a 16-year-old; with haste and without thought for the consequences of their actions, whether under the influence of peer pressure or for other reasons. Treating all children alike for the purposes of offences concerning the distribution of intimate images will serve to keep children out of the criminal justice system where at all possible and is a prudent recommendation where merited by the circumstances of the case in question.

4.7.4. The Proposed Non-Fatal Offences (Amendment) Bill

In light of the abovementioned loopholes in existing criminal legislation, action has been recently proposed by the Minister for Justice and Equality. At the last Cabinet meeting of December 2016, the Minister received the approval of the Cabinet to draft the Non-Fatal Offences (Amendment) Bill. It is expected that this Bill will legislate to put stalking, including cyberstalking, and revenge pornography on the criminal statute book. It can also be anticipated that the Bill will provide for the creation of new criminal offences, including criminalising the act of intentionally posting intimate images of a person online without his or her consent. Furthermore, the Bill will extend existing offences, such as the offence of harassment to ensure it includes activity online and on social media, and the offence of sending threatening or indecent messages to include digital forms of communication.

The announcement of an intention to legislate in this area is undoubtedly a positive development and it is anticipated that this Bill will endeavor to plug the prominent gaps in existing legislation that were highlighted by the Law Reform Commission in its 2016 Report. In the imminent consultation stage of the drafting process, prior to the publication of the General Scheme and draft Heads of the Bill, regard should be had to both the recommendations of the Commission and the recommendations that I have made in this Report and previous Reports. Both, taken together, have identified the key issues that warrant consideration in this crucial stage of legislative drafting.

4.7.4 Civil remedies

While the criminal law seeks to prohibit certain behaviour and punish those who do not adhere to its provisions, a criminal prosecution is usually not the first priority for victims of cyber or digital harassment. Quite often, the real remedy sought by persons so affected is what is termed a "take down" – the immediate removal of the offending publication or image from the website it has been posted on. This is very important when one considers the speed and ease with which online publications may spread. Indeed this may be a more suitable reaction than criminal proceedings, particularly in less serious cases of harmful digital communications. The prompt removal of any offending content minimises the damage caused by its publication and reduces the potential for a long-lasting negative impact on the person concerned.

Historically it has been a major problem to persuade internet service providers to take down material due to arguments that free speech rights are being curtailed. At present, social media companies have their own self-regulated non-statutory reporting and take down processes. Each social media company has a different policy in relation to harmful content such as hate speech, content that promotes sexual violence or exploitation, threats, fake profiles and other similar content. Pursuant to same, individuals can report any harmful content that violates its policies to that particular social media company and request its removal. The ad-hoc nature of existing take down processes, which are dependent on each company's specific policies, means that individuals are at the mercy of each company, its regime and approach as to whether it will take the impugned material down and how quickly it will do so.

Civil remedies exist and can be relied upon in certain circumstances in response to instances of online harassment or harmful digital publication. An action may be taken under the Defamation Act 2009 for online defamation and injunctions may be obtained in certain circumstances. In the case of *Tansey v Gill*,[232] for example, a solicitor who had been defamed on a "Rate my Solicitor" website, was granted injunctions which ordered the removal of the offending material and restrained the publication of any further material. The effectiveness of injunctions, however, can be questionable. This is illustrated in the decision

[232] [2012] IEHC 42.

of *McKeogh v Doe*.[233] In that case, the plaintiff was defamed in circumstances where an anonymous YouTube user incorrectly identified him as a person who had ran from a taxi without paying the fare. He was the victim of online abuse as a result of same – having been sent offensive messages through Facebook. While he was successful in obtaining interim injunctions to prohibit such messages, these orders were ineffective as he continued to be named in newspaper reports about the YouTube video. This case serves to demonstrate the relative absence of effective take down orders in this jurisdiction.

Other avenues may be pursued in cases such as this, for instance remedies may be available for breach of the constitutional right to privacy. Alternatively, a claim could be made under the Data Protection Acts 1998 and 2003, which focus on protecting privacy and enabling individuals to have control over how information about them is used by others. Pursuant to these Acts, persons may request the rectification and removal of personal data, including videos and images, from data controllers. The 2003 Act implemented Directive 95/46/EC, which in the landmark *Google Spain* case[234], was held to establish a "right to be forgotten". With an expanding body of case law from the Court of Justice of the European Union and the 2016 General Data Protection Regulation[235], which will come into force in May 2018, the data protection regime is gaining strength. Nonetheless, recourse to the data protection regime is not an appropriate solution in all cases and it is clear that there is a real absence of procedures for take downs in Ireland. The time taken to bring legal proceedings, the prohibitive cost of same and the added opportunity for further publicity arising out of the proceedings can mean that the existing civil remedies are often not effective or easily accessible.

4.7.5 LRC recommendation – Digital Safety Commissioner

The Law Reform Commission, in its recent Report, recognises the inadequacy of the existing civil regime in this jurisdiction, noting as follows:

> The potential cost, complexity and length of civil proceedings may deter victims of harmful digital communications and available processes and remedies may not be effective.[236]

[233] [2012] IEHC 95.
[234] Case C-131/12, *Google Spain SL and Google Inc v Agencia Espanola de Protection de Datos* (13 May 2014).
[235] Regulation (EU) 2016/679.
[236] LRC 116-2016 Report on Harmful Communications and Digital Safety at p.134.

It also notes that the current non-statutory self-regulation by social media companies may not be sufficient to tackle harmful cyber communications. Drawing from experiences in Australia and New Zealand, the Commission proposes the establishment of a new statutory oversight system with a dual role of promoting digital safety and ensuring an efficient take down procedure for harmful digital communications. The proposed Office of the Digital Safety Commissioner of Ireland would therefore oversee an "effective and efficient" take down procedure in a timely manner, regulating for a system of take down orders in respect of harmful cyber communications made in respect of both adults and children. Its regulatory role would apply to a wide range of digital or online service providers, including any undertaking that provides a digital or online service, whether by the internet, a telecommunications system or otherwise. These are termed "digital service undertakings" and would include search engines, social media platforms and social media sites. The take down procedure would be made available to all affected individuals and would be free of charge.

Included in the role of the Digital Safety Commissioner would be to publish a Code of Practice on a Take Down Procedure for Harmful Communications. The Code would give practical guidance on the take down procedure and set out the steps required by a digital service undertaking to meet National Digital Safety Standards. These standards would require a digital service undertaking to have in place a provision prohibiting the posting of harmful digital communications and to operate a complaints scheme to allow users to request the removal of such communications without charge. They also would set out a timeline for responding to complaints which must not be less stringent than that set out in the Code. The digital service undertaking would be required to appoint a contact person to engage with the Commissioner. In essence, therefore, the take down procedure would first involve a complaint being made by the user directly to the digital service undertaking. If it did not remove the content or comply with the timeline specified in the Code, then the user could make a complaint to the Commissioner. At this point, the Commissioner would investigate the complaint and consider submissions from both the user and the digital service undertaking. If the Commissioner is satisfied that the undertaking has not complied with the Code or the National Digital Safety Standards, a determination would be made that the complaint is upheld and the undertaking would be directed to remove the harmful communication. The upholding of a complaint would result in the revocation of the undertaking's certificate of compliance. Failure to comply with the Commissioner's

direction to take down the content, would entitle the Commissioner to apply to the Circuit Court for an order requiring compliance.

The proposal made by the Law Reform Commission regarding the establishment of a new statutory oversight system as detailed above appears to be a practical and viable solution to the current lacuna in the law, whereby take downs are difficult to achieve and civil remedies are often too expensive and ineffective. It is recommended therefore that consideration be given by the government to Chapter 3 of the Commission's Report forthwith, to enable progress to be made in this regard and to ensure that steps are taken to establish an Office of the Digital Safety Commissioner. If this statutory system is established, it is submitted that certain time constraints should also be placed upon the Office of the Commissioner. As mentioned above, the digital service undertaking will be required to respond to a user's complaint about a specific alleged harmful communication within certain time limits set by the Code of Practice. Furthermore, the Code would establish clear timelines within which the undertaking is required to take down harmful communications, where the complaint is upheld. Time is clearly of the essence in respect of an individual's complaint to prevent further spread of the harmful content. For that reason, digital service undertakings will be expected to operate their complaints scheme efficiently, within clear time constraints which will be established. There is no discussion in the LRC's proposals, however, as to whether the Digital Safety Commissioner will be required to act with similar haste. The benefit conferred on an individual by this proposed system will be nullified if the Commissioner takes weeks or months to consider his/her position in relation to a complaint. There should be a similar obligation upon the Commissioner to investigate a complaint made to him/her in a timely fashion, without any inordinate delay. Otherwise, the benefit of the entire regime to persons affected by harmful cyber communications would be questionable.

4.7.6 Recommendations

It is recommended that section 10 of the Non-Fatal Offences Against the Person Act 1997 be amended in line with the Law Reform Commission's Report on Harmful Communications and Digital Safety 2016, to include a reformulation of the definition of harassment to adequately account for information and technology communication advances. In addition, "indirect harassment", i.e. communications to third parties, should also be captured by the offence of harassment.

It is also recommended that the suggested offences published by the Law Reform Commission targeted at "revenge porn" and other voyeuristic activities such as "up-skirting" or "down-blousing" be introduced into Irish law in order to combat such harmful acts which do not necessarily fall within the scope of the current criminal statute book.

The definition of "intimate images" as proposed by the Law Reform Commission is to be welcomed. It includes a scenario whereby the subject person is nude or displaying intimate areas covered by underwear only. I suggest that this definition be expanded to include the exposure of intimate areas partially covered by clothing.

The Law Reform Commission recommends that children under the age of 17 years who commit cyber harassment related crimes should not be prosecuted without the consent of the DPP. I recommend that the age be increased to 18 years having regard to the definition of 'child' in our legal system.

Regard should be had to both the recommendations of the Law Reform Commission and the recommendations made in this Report in the drafting of the General Scheme and draft Heads of the Non-Fatal Offences (Amendment) Bill.

The Law Reform Commission has proposed the establishment of a new statutory oversight system with a dual role of promoting digital safety and ensuring an efficient take down procedure for harmful digital communications. The proposed Office of the Digital Safety Commissioner of Ireland would therefore oversee an "effective and efficient" take down procedure in a timely manner, regulating for a system of take down orders in respect of harmful cyber communications made in respect of both adults and children. It is recommended therefore that consideration be given by the government to Chapter 3 of the Commission's Report forthwith, to enable progress to be made in this regard and to ensure that steps are taken to establish an Office of the Digital Safety Commissioner. It is further recommended herein that the Office of the Digital Safety Commissioner be subject to strict timelines within which to act on complaints received and take such further steps as might be necessitated.

4.8 Investigations by the CFA into Allegations of Child Abuse

On 15th February 2016, the High Court delivered its judgment in the case of *P.O'T. v Child and Family Agency*.[237] This is a decision of Humphreys J. concerning an application to prohibit the holding of an investigation by the Child and Family Agency ('CFA') into an allegation of child abuse. It addresses the principles applicable to the determination of such an application and its content is therefore particularly important. It can be expected that the principles enunciated in this case will be employed in all future decisions of a similar nature and for that reason, they warrant detailed consideration. Their scope ought to inform the procedures of the Child and Family Agency in all its investigations into child abuse. This would serve to ensure that the actions taken by the Agency are appropriate and less likely to be judicially reviewed. The ability to stay or prohibit CFA investigations will be reduced, resulting in the more prompt determination of such investigations – benefiting all involved, in particular children. In *P.O'T.*, the application seems to have failed on the basis that the applicant was unwilling to swear an affidavit himself as opposed to relying upon an affidavit sworn by his solicitor.

4.8.1 Factual background

By way of background, in 2011, the complainant alleged that the applicant had committed acts of child sexual abuse against her in the 1970s and 1980s, when she was between 6 and 16 years of age. This complaint was made to the Garda authorities. In 2012, a subsequent complaint was made by the complainant's mother to the HSE, the predecessor to the CFA. The HSE, in September 2013, made a "final determination" in the matter, taking the view that the applicant had committed child abuse, was a current threat to children and that third parties should be informed of same. The applicant was told that if he did not appeal this determination or if he did appeal and said appeal was unsuccessful, third parties would be informed of the situation.

In October 2013, the applicant indicated that he would be appealing the determination and significant correspondence took place between the applicant and the HSE for a two year period. This culminated in a letter from the applicant's solicitors to the CFA in November

[237] [2016] IEHC 101.

2015, in which he stated that he was seeking disclosure of certain material from the Agency, including an unredacted version of the statement of complaint. Failing the disclosure of same, the applicant indicated he would apply for judicial review. The respondent, in reply, stated that the applicant had not indicated the relevance of the disclosure sought. It was also stated by the respondent that if the applicant sought relief by way of judicial review, this would be premature given that the applicant was engaging in the appeal process.

4.8.2 Application for leave to seek judicial review

Ultimately, an application for leave to seek judicial review was brought on behalf of the applicant. The applicant sought two orders. First, he sought an order of mandamus directing the appeal panel to comply with the applicant's request for full disclosure in relation to the allegation at issue. Secondly, he sought what is described as an order of prohibition, preventing the CFA from dealing with the appeal until the disclosure issue had been determined. The court viewed this type of order to be akin to a stay or an injunction rather than an order of prohibition as it was sought on an interlocutory basis only in these circumstances.

Before considering the leave application and the principles applicable thereto, Humphreys J. made a number of general comments in relation to investigations of allegations of child abuse. He stated that "the investigation of allegations of child abuse poses obvious policy and legal questions relating to important but conflicting rights".[238] He noted that on the one hand, credible allegations must be examined. On the other hand, however, the court was cognisant of the fact that the mere making of an allegation against a person is so potentially devastating to his or her life that enormous care needs to be adopted in this process. Specifically with regard to this case, the court noted that the allegation had been made nearly three and a half years earlier, but that the process of investigation remained ongoing. He also commented that while the complaint was initially upheld, no particular steps to mitigate any risks involved had yet been taken by the CFA. The court demonstrated its concern for the time taken in this case to process the allegation. In light of the recent enactment of the Children First Act 2015, the court's concerns were heightened. The Children First Act 2015

[238] [2016] IEHC 101 at p.103.

imposes obligations on tens of thousands of professionals throughout the State to report suspicions and allegations of abuse to the CFA. Humphreys J. stated:

> If the time taken to process the allegation being examined in the present case is anything to go by, one could be forgiven for wondering what level of preparedness and capacity exists within the agency to address the huge increase in reporting that can be expected, and indeed what the impact will be on the High Court which can anticipate a potentially commensurate increase in applications for judicial review.[239]

4.8.3 Four questions applicable to these cases

In determining this case, the High Court took the view that four questions ought to be considered. These questions are capable of applying to future cases of judicial review arising out of the process of investigation by the CFA – thus they can be regarded as the applicable principles in such cases. The four principles that warrant consideration are as follows:

- the amenability of the investigative process to judicial review;
- the level of natural justice required in the process;
- the relevance of discretion and full disclosure to the intervention of the court and any necessary undertakings; and
- the need for the applicant to personally swear the grounding affidavit.

4.8.3.1 Amenability of the investigative process to judicial review

Broadly speaking, the court set out the general principle that any executive or administrative act that has legal or even practical effect on the rights of the applicant is amenable to judicial review. In investigations concerning child abuse or neglect, Humphreys J. held that two critical acts are involved; the formation of an opinion that a complaint against an applicant is sustained, and the decision to notify a third party. He stated that he would be inclined to take the view that, in principle, either or both of these decisions are amenable to certiorari, once there are sufficient grounds. In particular, the court remarked that the decision to notify third parties can have irreversible effects on the lives of those concerned; for instance, it is often impossible for a person to resume employment or a position once they have been "temporarily" suspended. The court therefore advised that where possible, it is desirable and

[239] *Ibid* at p.104.

more proportionate for the person the subject of the complaint to be given an opportunity to voluntarily mitigate the risk rather than third party notification take place. If third party notification is deemed to be required by the CFA, apart from in an emergency situation, the court stated that adequate notice should be given to the person who is the subject of the complaint. This should be a number of days' notice at least, to enable the court to intervene if there are grounds to do so. In such situations, however, the court noted that it will normally be required to start from "a position of deference" to the risk assessment carried out by the Agency. The discretion of the court would also be utilised to balance the appropriateness of any such intervention.

Humphreys J. considered to what extent can or should the court intervene during the process of investigation, prior to the formation of an opinion as to whether a complaint is well-founded – as was the situation in this case. The court noted that in the criminal process, a court can only intervene if there is an inevitability of unfairness in the process, rather than the mere possibility of same. That process, however, is presided over by the judicial branch of government and no such safeguard is present in child abuse investigations. The court stated that the correct approach in relation to investigations of abuse is that set out by Hedigan J. in *M.I. v H.S.E.*[240] concerning review during the actual course of the process by way of prohibition. Hedigan J., citing Butler-Sloss L.J. in *Regina v Harrow L.B.C. ex parte D.*,[241] stated that judicial reviews of the process should be rare and "limited to points of principle that need to be established". Humphreys J. thus concluded that to obtain leave to seek prohibition of a child abuse investigation, "…the applicant must show some new point of principle regarding a shortcoming in the procedures being applied by the agency in such investigations, as opposed to the mere possibility that the agency will not afford him or her due process within the scope of the established procedures which are themselves adequate to ensure natural justice." Once further cases are brought and decided on the scope of natural justice during the process of the investigation, the court stated that the need to grant leave to allow new "points of principle" to be considered should be reduced. Notwithstanding same, the applicant can still challenge the decision ultimately reached.

Applying this principle to the present case, the court took the view that the applicant's submissions came well within the test set out above. It came to this conclusion by reason of

[240] [2010] IEHC 159.
[241] [1989] 3 WLR 1239.

the fact that the required level of disclosure of unredacted documents that ought to be made to the person the subject of the complaint had not been discussed in previous authorities – thus it amounted to a new point of principle regarding the process of the investigation by the CFA. The court viewed the suggestion by the respondent that the redaction was justified for data protection reasons as questionable. He also stated that the suggestion that the applicant should be denied relief because he did not specify why the documents were relevant as unsustainable as the applicant cannot comment of the relevance of parts of documents that he cannot see.

4.8.3.2 Level of natural justice required

The High Court stated that in its investigations, it is evident that the CFA is required to comply with natural justice. It had regard to the procedures applied by the CFA during the course of its investigations. Said procedures are set out in a document entitled *Policy and Procedures: Responding to Allegations of Child Abuse and Neglect*, published by the CFA in 2014. The court noted that certain parts of this document appeared to be unsatisfactory in terms of natural justice, for instance, it advises those involved in child protection to accept what the child says to them, commenting that false disclosures are very rare. With regard to the issues under consideration in this case, the court noted that the CFA's procedures recognised the need to furnish all documentation to the person who is the subject of a complaint. For that reason, Humphreys J. concluded that the present complaint related to matters that come well within the level of natural justice that arguably must be afforded.

4.8.3.3 Discretion and undertakings

The court emphasised the importance of the leave process in judicial review proceedings. Its role as a filter was commended, as it balances the complainant's right to a full hearing against the public interest in not subjecting the machinery of public administration to legal processes that may cause delay and expense or prejudice to third parties or the common good generally – for instance where the applicant does not have sufficient interest, where there is an alternative remedy available, or where the matter is premature, moot or has been delayed. With regard to the judicial review of child abuse and neglect investigations, Humphreys J. noted the particular relevance of the duty of full disclosure and the court's discretion to refuse relief. He stated that the discretion to refuse relief is more appropriately applied at the leave

stage in such cases as it is more suitable to apply the discretion at this point rather than put the respondent through a full trial and then refuse relief as a matter of discretion.

Humphreys J. held that Article 42A of the Constitution was also relevant in this context. He stated that it imposes: "…an autonomous duty on the court to uphold the natural and imprescriptible rights of the child independently of any positions adopted by the parties".[242] Having regard to same and in order to properly balance the interests involved, the court stated that a high level of disclosure and an exacting level of scrutiny of the conduct of the applicant is required in terms of the discretion of the court. While it was argued on behalf of the applicant that Article 42A was irrelevant in this case as the complaint was "historical", the court disagreed, stating that even distantly historical allegations of child abuse may be a significant indicator of possible ongoing or future abuse, even decades later. Practically, therefore, the court stated that any stay granted on the investigation process of child abuse or neglect should be on specific terms which take these issues into account. Even in circumstances where the court does not grant a formal stay, but grants leave to seek judicial review, the order granting leave may be made subject to specific terms to take those issues into account. The court emphasised that where leave is granted, this does not prevent the CFA from proposing any action by way of notification of third parties that it considers appropriate or from carrying out such notification in cases of emergency. In these cases, therefore, it would be appropriate for the applicant to undertake to furnish the CFA on request with details of his contact with children, consent to this being verified, and undertake to take steps to mitigate any risk that may be required by the Agency from time to time pending the determination of proceedings.

The court considered the applicant's co-operation with the CFA's inquiry in this case, noting that he had both failed to consent to the release of his medical records and failed to arrange for his wife to give evidence to the inquiry. In this case, however, the CFA did not require any undertaking such as the above from the applicant – presumably because he had voluntarily ceased coaching young persons some time ago. On this basis, therefore, the court did not insist on such an undertaking in the present case, but Humphreys J. made clear that in principle, such undertakings would be appropriate in future similar cases.

[242] *Ibid* at p.109.

The emphasis placed by the High Court upon Article 42A in this aspect of its decision is most welcome. Article 42A recognises and affirms the natural and imprescriptible rights of all children and demands that the State protects and vindicates those rights. Judicial recognition and promotion of Article 42A in judicial review proceedings demonstrates the scope of this constitutional amendment and its application to many types of legal proceedings. In this decision, the court formed the view that this constitutional provision imposes a duty on the court to uphold the natural and imprescriptible rights of the child, independently of any positions adopted by the parties. This has the practical effect of allowing the court to impose specific terms on orders it makes, whether it is granting a stay or whether it is merely granting leave. Practically, therefore, undertakings may be required of the applicant to ensure that any risks that may arise in the time taken to determine the proceedings are mitigated. In all future proceedings the court will be obliged to consider whether an undertaking of some kind is required and in this way, heightened protection is given to children generally, pending the outcome of the case.

4.8.3.4 Applicant personally swearing the grounding affidavit

The court had regard to the Rules of the Superior Court (Judicial Review) 2011, and the Forms set out therein, noting that they require pleadings in judicial review to be verified by an affidavit of the parties personally. In this case, the applicant did not swear the grounding affidavit himself. Humphreys J. noted that the applicant did not set out on oath his version of events, or clarify the extent of his unsupervised access to children at all material times since the matters complained of, or give details of the precise date when he ceased coaching children, or explain the current level of his unsupervised access to children, if any. Neither did the applicant give his reasons for not co-operating in full with the inquiry. Fundamentally, the court had regard to the fact that the applicant did not personally verify the statement of grounds. The application for leave was instead grounded upon an affidavit of his solicitor.

Apart from being in contravention of the Rules of the Superior Courts, the court took the view that the affidavit sworn by the applicant's solicitor constituted hearsay. He commented that a court at the leave stage is not bound to admit hearsay evidence and a claim of prejudice by the applicant can only be made by the applicant personally and not on his behalf by someone else. A court faced with an application for leave grounded on an affidavit by the

applicant's solicitor, rather than the applicant personally, in circumstances where a personal affidavit is actually necessary, is thus entitled to either refuse relief, adjourn the application pending the swearing of the necessary affidavit or grant leave subject to the filing of that affidavit. In the present case, the court noted that the applicant was not willing to put forward any further affidavits. Humphreys J. stated, however, that this application for leave to seek judicial review was a voluntary act taken by the applicant and if he wanted to engage with same, he must furnish positive evidence personally to support his application. The court also stated that a respondent has the right to apply for the cross-examination of a deponent. This would be significantly curtailed if the relevant witness hid behind a paid professional on his behalf. Finally, the court emphasised its duty under Article 42A to safeguard the rights of children, stating that upholding that duty may require disclosure and undertakings that can only be given by applicants personally.

Due to all of these circumstances, therefore, the court concluded that the applicant should have personally sworn the grounding affidavit in this case. By reason of the applicant's refusal to swear an affidavit personally, Humphreys J. determined that the appropriate course was to refuse the application for leave.

4.8.4 Implications of *P.O'T.*

The decision in *P.O'T. v Child and Family Agency* is informative for a number of reasons. The guiding principles set out therein will be integral in future similar applications. First and foremost, however, the case itself highlights the need for the CFA to act with greater haste in its investigations into child abuse or in cases of child neglect. The length of time from the beginning of the initial investigation in *P.O'T.* until the point in the appeal process at which the leave application was made was approximately three and a half years. While any such delays or failures to investigate promptly can affect the person against whom the complaint has been made, the priority is the protection of children in the intervening period. Such protection is obligated and demanded by Article 42A. While the complainant may not be at further risk, as was the case in these proceedings, other children could potentially come into contact with the person the subject of the complaint. The court, therefore, emphasised its concern for the time taken in this case to process the allegation and was critical of same. Furthermore, in light of the recent enactment of the Children First Act 2015, the court's concerns were heightened. The Children First Act 2015 imposes obligations on tens of

thousands of professionals throughout the State to report suspicions and allegations of abuse to the CFA. This is expected to lead to an increase in reporting to the CFA.

To avoid further judicial criticism and to prevent any more serious consequences that may be attendant upon such investigative delay, it is recommended that the CFA deal efficiently with all reports of complaints and suspicions relating to child abuse or neglect.

The decision of Humphreys J. in *P.O'T.* gives clear guidance to the CFA in relation to its approach to investigations of alleged child abuse. The court noted that the CFA may take a decision to notify third parties regarding the investigation. This decision, however, may have irreversible effects. For instance, if the employer of a person who is the subject of the complaint is made aware of the allegation, it is likely that the employee may be temporarily suspended from his/her employment or position. It may be impossible for that person to resume that role, even where the complaint is not ultimately upheld. Indeed even family relationships may be irreversibly sundered by making a third party aware of a complaint, even if the complaint is not upheld. Due to the often irreversible effects of third party notification, therefore, the court advised that "enormous care" is required in this context. In particular, it was recommended steps should first be taken by the CFA to allow the person subject of the complaint to voluntarily mitigate any risks before making disclosures to third parties – for example, voluntarily stepping down from a coaching role or taking a leave of absence from employment. Voluntary mitigation of a risk may be a more proportionate response in such circumstances and it is recommended, therefore, that this be borne in mind by the CFA in all such investigations.

P.O'T. highlighted certain inadequacies in the Tusla policy document *Policy and Procedures: Responding to Allegations of Child Abuse and Neglect*, published by the Child and Family Agency in September, 2014. This is a comprehensive code for the investigation of allegations of this nature. In it, it is stated that an individual against whom allegations of abuse are made has a right to fair procedures, although it is noted that at times this right may need to be treated as secondary to the protection of children at risk. Humphreys J. commented that certain parts of this document appeared to be unsatisfactory in terms of natural justice. In particular, he is critical of the fact that the respondent to a complaint is termed an "alleged abuser" throughout the document. The court also pointed out that the 2014 document references a further document entitled *Child Protection and Welfare Practice*

Handbook (HSE, 2011). At page 32 of that document, those involved in child protection are advised to *"Accept what the child has to say – false disclosures are very rare"*. It also states that questions asked of children in interviews should be supportive and "for the purpose of clarification only". The court questions whether these elements of the Agency's investigative process would survive an analysis in terms of natural justice. In this regard, therefore, it is recommended that a review of the aforementioned policy document take place – with specific attention to be paid to the requirements of natural justice and the concerns raised above in any such review.

4.8.9 Recommendation

In light of the judgment of Humphreys J. in P.O'T. v Child and Family Agency [2016] IEHC 101 it is recommended that the CFA deal efficiently with all reports of complaints and suspicions relating to child abuse or neglect. Thought should be given to the means through which quicker investigations can be undertaken to avoid the significant risks mentioned in the judgment. This may necessitate a review into the allocation of resources in the CFA. In addition, the Tusla policy document entitled "Policy and Procedures: Responding to Allegations of Child Abuse and Neglect", published by the Child and Family Agency in September, 2014; and the "Child Protection and Welfare Practice Handbook" (HSE, 2011) need to be reviewed in light of the concerns raised by the High Court as to whether the procedures prescribed therein comply with the principles of natural justice.

SECTION 5:
MISCELLANEOUS ISSUES

5.1 Introduction

This section of the report examines two miscellaneous issues that have arisen in 2016 and require further attention in the forthcoming year. Whilst Section 3 of this report examines commencement issues in respect of the Children and Family Relationships Act 2015, a separate issue needs to be addressed in relation to expert reports and the voice of the child. Those provisions of the 2015 Act have already been enacted but issues remain to be addressed in relation to the cost of such expert reports and funding of same. Separately, 2016 is likely to be remembered as the year of 'Brexit'. Whilst the United Kingdom has not yet formally left the European Union, and the terms of its departure have not yet been agreed, it is quite likely that the departure of the United Kingdom from the European Union will have an impact on family law in Ireland in terms of cross border issues that arise. The impact of 'Brexit' on Irish family law is a topic to be considered now and in the coming years.

5.2 Expert Reports and the Children and Family Relationships Act 2015

The 2015 Act has vastly expanded the jurisdiction of the court to order expert reports in family law proceedings. It introduces a number of important amendments into the Guardianship of Infants Act 1964 that significantly broaden the circumstances in which expert reports may be ordered in family law cases. These amendments brought in by the 2015 Act not only widen the basis on which an expert report may be ordered, they also serve to expand to the District Court the power to order such reports, where previously only the Circuit and High Courts could do so. The developments contained in the 2015 Act in this regard are to be welcomed as they signal legislative recognition for the role of experts in providing practical assistance in family law proceedings, the value of which should not be underestimated. Certain operational issues need to be addressed as soon as possible, however, in order to ensure that the new court report regime functions effectively.

5.2.1 Section 47 and Section 20 reports

Prior to the commencement of the Children and Family Relationships Act 2015, there were only two types of reports that could be ordered by the court in family law proceedings. The first is termed a "section 47 report". These can be ordered to be procured pursuant to section 47 of the Family Law Act 1995 for the purpose of reporting on any question affecting the welfare of a party to the proceedings or any other person to whom they relate. This is a very broad provision, allowing the court to seek a report on "any question" concerning the parties or their children. The necessity for s.47 reports has arisen primarily in cases where there is obdurate conflict between parents in relation to issues of custody and/or access; where the court is unable to reconcile conflicting evidence between the parents as to what is in the best interests of the child; and where the court believes it appropriate to ascertain the wishes/voice of the child in relation to the parental dispute.[243] Such reports are usually only ordered where the parties have the financial capacity to discharge the costs of the report, often in the region of €3,000-€4,000. Child psychologists or psychiatrists are the experts required most often to conduct reports under this provision and understandably, the cost of same can be prohibitive in some circumstances.

One substantial drawback of the s.47 regime is that the jurisdiction to order such reports is restricted to the Circuit and High Courts and the District Court does not have jurisdiction to order s.47 reports in cases that come before it. While section 11 of the Children Act 1997 inserted section 26 into the Guardianship of Infants Act 1964 to allow the District Court to order s.47 reports, this provision was never commenced. The only option available to the District Court if it was concerned about the welfare of a child or wanted to ascertain his or her views therefore was to order what is known as a "section 20 report" or "social worker's report". Section 20 of the 1991 Act (as amended by s.17 of the Children Act 1997) allows for a court to direct the Child and Family Agency to carry out an investigation into the child's circumstances whether the proceedings are in the District, Circuit or High Court. This type of report, however, is only to be ordered where the court considers that it may be appropriate for a care order or a supervision order to be made with respect to the child concerned in the proceedings. Its scope therefore is limited and delays in the preparation of such reports are widespread.

[243] See Dr. Geoffrey Shannon, *Children and Family Relationships Law in Ireland*, (Clarus Press, 2016) at p.33.

5.2.2 Section 32 reports 2015 Act

The Children and Family Relationships Act 2015 has ameliorated the unsatisfactory situation whereby the jurisdiction of the District Court to order expert reports was limited. It has simultaneously broadened the context in which expert reports may be ordered, promoting the voice of the child in family law proceedings. The developments are set out in section 32 of the Guardianship of Infants Act 1964. Section 32, as inserted by section 63 of the 2015 Act, allows for the procurement of two new types of expert reports, under section 32(1)(a) and section 32(1)(b) respectively.

5.2.2.1 Expert report on any question affecting the welfare of the child

Section 32(1)(a) of the 1964 Act, as inserted by section 63 of the 2015 Act, provides for the procurement of an expert report by the court in writing on any question affecting the welfare of a child. As it applies to any proceedings concerning the guardianship, custody or upbringing of, or access to a child, the report is specifically concerned with questions affecting the child's welfare, as opposed to the welfare of the parents who are the parties to the proceedings. This provision is therefore similar to s.47 of the 1995 Act, though specifically directed towards the child the subject of the court applications. It may be ordered by any court and pursuant to Order 58, Rule 14 of the District Court (Children and Family Relationships Act 2015) Rules 2016, it is made clear that the District Court has power to order this type of report, whether of its own motion or upon an application being made to it by a party to the proceedings. Ensuring that the District Court has power to order expert reports under s.32(1)(a) is a considerable development that enables this court to use experts extensively where their assistance is required on any question affecting the welfare of the child. It cures the previous anomaly whereby the District Court could not appoint experts in such cases and recognises that this court deals with vast numbers of cases concerning children and may need to utilise the experience and guidance of experts in its dealing with them.

5.2.2.2 Expert report regarding the child's views

Section 32(1)(b) of the Guardianship of Infants Act 1964 provides for the second new type of expert report introduced by section 63 of the 2015 Act. It empowers any court to appoint a

‘child’s views expert’ where it is deemed desirable or necessary to do so. This type of report differs from that covered by section 32(1)(a), which is broader, allowing the court to request a report on a question affecting the welfare of the child. Instead, the sole purpose of the appointment of the expert under section 32(1)(b) is to express the wishes of the child either generally or in respect of specific questions on which the court may seek the child’s views. In this way, it is a more tailored report geared toward putting before the court the views of the child, without the necessity for an in-depth analysis of other matters or general welfare concerns.

The duties and functions of the ‘child’s views expert’ are set out under section 32(6) of the 2015 Act. It is the duty of the expert to ascertain the maturity of the child and, where requested by the court, ascertain the capacity of the child to form his or her own views on the matters that are the subject of proceedings. Where the expert finds that the child is capable of forming his or her own views on the matters that are at issue, the expert must ascertain these views and put them before the court in a report. This provision in particular vindicates the right of the child to be heard in court proceedings. The expert must ensure that the views expressed by the child are put fully before the court. Where the expert finds that the child is incapable of forming his or her views on the matters that are the subject of the proceedings, the expert will also report this to the court. Order 58, Rule 14 of the District Court (Children and Family Relationships Act 2015) Rules 2016 similarly ensures that the jurisdiction to order such reports applies to the District Court. The creation of this new category of report, specifically tailored toward promoting the voice of the child and ensuring that his or her views can be properly garnered and delivered to the judge presiding over his or her case is a welcome development.

5.2.3 Operational difficulties

The developments set out above regarding the new categories of reports and the clear jurisdiction of the District Court to request same have been of undoubted benefit to parties and practitioners alike since the commencement of the 2015 Act in January 2016. Unfortunately, however, some operational issues have caused difficulties in practice in relation to section 32 of the Guardianship of Infants Act 1964, as amended. The most profound difficulty arises in respect of the cost of section 32 reports and specifically, upon whom should the obligation to pay for them fall.

Costs have always been an issue in relation to section 47 reports. Under the legislation, the fees and expenses incurred in the preparation of such a report are to be paid by one party or both parties to the proceedings concerned and in such proportions as the court may determine. The expert's fee for the preparation of such a report may be in the region of €3,000 - €4,000, with supplementary fees in addition to same should an updated s.47 be required subsequently in the proceedings. Costs of expert reports can therefore be prohibitive and sometimes the court will take the view that it is not an option to order a section 47 report in a particular case if the parties cannot discharge the expert's fees. Nothing in the 2015 Act ameliorates this position in relation to section 32 reports. Section 32(9) merely provides that the fees and expenses of an expert appointed under section 32(1)(a) or 32(1)(b) shall be paid by the party or parties to the proceedings and in such proportions as the court may determine. There is no provision dealing with the situation where the parties involved simply cannot afford the amount owing.

In practice, this has caused difficulties, particularly in the District Court. Many persons who attend the District Court are legally aided and are therefore only in part-time employment or are in receipt of social welfare. Their means undoubtedly would not enable them to pay for an expert report. The Legal Aid Board, in certain circumstances, has aided this situation. Where clients are in receipt of a legal aid certificate under the District Court Private Practitioners Scheme, in some cases the Legal Aid Board will extend that certificate to cover expert or professional reports. The terms and conditions of the Scheme state as follows:

> If a solicitor/firm considers that further steps that will incur expenditure are required to process the client's claim, over and above those authorised on the certificate, for example, that a professional report should be obtained or that professional or other witnesses are required, an application must be made in writing seeking an amendment to the certificate to incur such expenditure. Such application should provide sufficient information, particularly in relation to how the additional expenditure is likely to benefit the client's case, to allow a decision to be made and to enable the terms of the Act to be complied with by the Board when considering the application. The application may be made to the Private Practitioner Unit (see paragraph 18 under Scope of the Scheme).

In practice, however, often the Legal Aid Board will only pay a proportion or a contribution towards the costs of an expert report and either an expert will have to be located who will accept a reduced fee or the client will have to pay the remainder. In some cases, the Legal

Aid Board covers the preparation of the expert's report, but does not cover the costs involved in the expert meeting the relevant parties.

This situation is of greater concern for those persons who are unrepresented in the District Court. Many persons in family law proceedings chose to represent themselves. This may be their choice due to the relatively informal nature of such proceedings, particularly in the District Court. On the other hand, they may not be able to afford the required monetary contribution that is required before the Board will grant them their legal aid certificate. Said contribution in respect of the Private Practitioner's Scheme ranges between €130 - €427. Alternatively, they may have already used one legal aid certificate within a twelve month period and they may not be entitled to another one (generally the Board will only grant a person one legal aid certificate in a twelve month period, whether or not they are the applicant or respondent to the proceedings). Whatever the reason, where parties are unrepresented and do not have legal aid, the option of seeking an extension of a legal aid certificate to cover some of the cost of an expert report does not apply. They are therefore left to their own resources. This can have the effect that the appointment of an expert will only be made if the unrepresented parents, or one of them, can cover the fee. Simply put, therefore, children could be denied an opportunity for their voice to be heard as a result of costs.

Due to the practical battle concerning the cost of reports, it is recommended that consideration needs to be given to establishing an effective mechanism for the funding of reports. The current ad hoc system where access to such reports is either entirely dependent on the financial status of the parents or subject to the approval of the Legal Aid Board on a case-by-case basis is unsustainable in light of the increasing tendency of the judiciary to require and order such reports. Given the constitutional promotion of the voice of the child enshrined in Article 42A, the current position is not satisfactory and cannot be said to be adequately vindicating the rights of children in family law proceedings. Arguably, this constitutional provision places a positive obligation upon the State to fund reports so as to vindicate the constitutional rights of those children whose parents cannot afford to fund an assessment or report privately. The establishment of state funding for expert reports in a systematic and accessible way should therefore be introduced as soon as possible.

Pursuant to section 32(1) of the Guardianship of Infants Act 1964, as inserted by the 2015 Act, the Minister for Justice and Equality may introduce regulations specifying both the qualifications and experience required of an expert appointed under s.32 and the fees and allowable expenses that may be charged by such an expert. In light of the abovementioned difficulties regarding the cost of reports, it is clear that regulations under this subsection are required immediately to assist the operation of this expert report regime. It is recommended that these regulations be utilised to create a panel of experts who possess the requisite qualifications and experience to prepare such reports and who are available for this type of work, acting within the specific fees and expenses scale set out in the regulations. When a section 32 report is ordered, therefore, the parties themselves, or if legally represented with the assistance of their solicitors, may agree a particular expert from the panel to carry out the report in their case. By setting out in the regulations the fees and allowable expenses that may be charged by an expert, the cost of an expert will be easily ascertainable – thereby ensuring the parties are aware of same in advance of the commencement of the report. This will also serve to prevent significant divergences in costs between experts. Alongside this panel of experts a separate body should be established to deal with the funding of such reports. Those persons with limited resources should be able to approach this body to obtain state funding for their reports. This should be a separate entity from the legal aid regime, as many lay litigants may require financial assistance for the preparation of a report ordered by the court in their case but they do not have or want legal aid. What proportion of the costs of the report that the person will be expected to contribute, if any, should be determined by this body on a means-tested basis. The remainder should be claimed directly from the state by the expert.

To assist the legislature in establishing the required infrastructure, regard may be had to the Cafcass regime in the UK. Cafcass – the Children and Family Court Advisory and Support Service – represents children in family court cases in that jurisdiction, enabling the voice of the child to be heard; giving advice to the courts regarding the best interests of children involved in proceedings; and ultimately promoting the welfare of children. It is independent of the courts, social services, education and health authorities and all similar agencies. Cafcass is not automatically involved in every private family law case; its involvement is instigated at the request of the court – of its own motion or upon an application being made by one of the parties involved. In some cases, more detailed work with the family in question is required and the Family Court Advisor may be required to write a report about the

children's welfare. The operation of Cafcass in England should be examined by our legislature and thought should be given to operating a similar system in this jurisdiction in light of the need to have appropriate infrastructure in place to give proper effect to the s.32 reports regime. In the alternative, consideration should be given towards seeking the involvement of the Probation and Welfare Service in family law proceedings, as previously was the case. Whatever the method, what is clear is that the existing position is far from ideal and immediate solutions need to be canvassed to ensure that this practical issue does not negate the anticipated benefit of section 32 of the 2015 Act.

5.2.4 Regulations as to qualifications

Under section 32, there are no guidelines as to who may carry out reports. While section 47 Reports are usually carried out by privately employed child psychologists or persons with related specialist expertise, the 2015 Act is silent on the qualifications and expertise that an expert appointed under section 32 must possess. Instead, as indicated above, the Act stipulates that the Minister may introduce regulations to specify the qualifications, experience and a minimum level of professional experience to be held by an expert appointed under this section. This is not a mandatory obligation imposed on the Minister and there is no guarantee that such regulations will be made. None have been introduced since the commencement of these provisions on 18 January 2016.

To aid the operation of the expert report regime, however, it is recommended that regulations be introduced on this issue as soon as possible. Until that occurs, the appropriate qualifications of persons to be appointed, the manner of appointment, the manner in which assessments will be carried out, and the duties and obligations of the assessor and the parties in the process all remain to be clarified.

5.2.5 Recommendations

Notwithstanding the enactment of the Children and Family Relationships Act 2015 the cost of expert reports in family law proceedings remains an issue. The 2015 Act now provides a mechanism through which the voice of the child can be heard in accordance with Article 42A of the Constitution. Arguably, this constitutional provision places a positive obligation upon the State to fund reports so as to vindicate the constitutional rights of those children whose

parents cannot afford to fund an assessment or report privately. The establishment of state funding for expert reports in a systematic and accessible way should therefore be introduced as soon as possible.

The body established to address the funding of such reports ought to be separate to the Legal Aid Board as many lay litigants may require financial assistance for the preparation of a report ordered by the court in their case but they do not have or want legal aid. What proportion of the costs of the report that the person will be expected to contribute, if any, should be determined by this body on a means-tested basis. The remainder should be claimed directly from the state by the expert.

Pursuant to section 32(1) of the Guardianship of Infants Act 1964, as inserted by the 2015 Act, the Minister for Justice and Equality may introduce regulations specifying both the qualifications and experience required of an expert appointed under section 32 and the fees and allowable expenses that may be charged by such an expert. It is recommended that these regulations be utilised to create a panel of experts who possess the requisite qualifications and experience to prepare such reports and who are available for this type of work, acting within the specific fees and expenses scale set out in the regulations. This will improve accessibility to such experts and also transparency on the issue of fees.

5.3 The Impact of Brexit

On 23 June 2016 the United Kingdom, by way of referendum, voted to leave the European Union. The United Kingdom, therefore, is presently on the path toward negotiating its withdrawal from the EU. The impact of "Brexit" is largely uncertain in circumstances where no Member State has left the EU previously. The anticipated effect of same on this jurisdiction remains a matter of great concern. Specifically, how Britain's decision to leave will affect the international operation of child and family law and in particular the UK's dealings with Ireland in this area of law is questionable. What is clear is that family law in the UK is strongly influenced by its membership of the EU and undoubtedly its exit from the Union will have significant consequences. A preliminary review of these issues merit consideration at this point in time, however the real extent of the impact of Brexit will only be ascertainable as the process of the UK's withdrawal from the EU gathers pace.

It is worthwhile to note that prior to the referendum, the General Council of the Bar of England and Wales was concerned regarding the potential effect of Brexit on family law. In advance of same, the Bar Council of England and Wales published a 'neutral' report analysing the legal and constitutional implications of Britain leaving the EU and examining the laws which could be affected by the EU referendum.[244] In the realm of family law, the report emphasised the beneficial impact of EU measures on family law. In particular, Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, known as Brussels II *bis*, and the Maintenance Regulation 4/2009 were cited favourably. The Bar Council commented that these EU Regulations create uniform jurisdiction rules in all Member States for divorce, separation and maintenance proceedings. They also create a system of summary enforcement in the courts of all Member States of maintenance orders and access orders between parents and children made in the courts of any other Member State. While taking the view that neither Regulation is perfect, the Bar Council stated that *"…a major change or even withdrawal from these EU instruments would, in our view, bring disruption and confusion"*. Unfortunately, however, Britain has voted to leave the European Union and a certain amount of confusion and uncertainty is now inevitable.

5.3.1 Brexit process

In the immediate aftermath of the decision to leave, there is no urgent cause for concern. In order to leave the EU, the UK must invoke Article 50 of the Lisbon Treaty. This procedure gives the EU and the UK two years to agree the terms of its withdrawal. It is anticipated that the Prime Minister, Theresa May, will invoke the Article 50 process by the end of March 2017. Pending the negotiation of the terms of Britain's withdrawal from the EU, EU law remains operative in the UK. This will continue to be the position until the UK officially ceases being a Member State of the EU. This means that for persons residing in Ireland and practitioners in this jurisdiction, it is correct for the time being to proceed to act as usual with regard to their approach to the UK. For instance, maintenance orders made in this jurisdiction remain enforceable in Britain by virtue of the Maintenance Regulation. Similarly, in terms of the correct jurisdiction for cases of matrimonial breakdown involving parties who reside between Ireland and the UK (i.e. divorce, judicial separation and nullity

[244] The General Council of the Bar of England and Wales, "EU Referendum: Position of the Bar" (June, 2016).

proceedings), Article 3 of Brussels II *bis* continues to apply. For children, in cases concerning matters of parental responsibility, the courts of the Member State in which the child in question is habitually resident shall continue to have jurisdiction. EU law, therefore, continues in force until the UK formally leaves the Union. In this regard at least, the Article 50 process provides a lengthy timeframe within which important issues can be considered. It is recommended that this time is used by our government to conduct an in-depth analysis into the implications for Ireland of Brexit in the area of family and child law.

5.3.2 Great Repeal Bill

The "Great Repeal Bill" will be enacted once Britain leaves the European Union. It will end the supremacy of EU law in the UK and will annul the 1972 European Communities Act which gives EU law instant effect in the UK. Instead, all EU legislation will be incorporated into UK law. In this way, EU laws will be preserved as part of British law for the time being, but they can be amended, revoked, or repealed by Parliament as it wishes – as if they were pieces of domestic legislation. What changes will be made are not yet foreseeable and they may not be evident for some time as it is anticipated that Brexit may not take place until summer 2019. The approach that is planned in the Great Repeal Bill ensures that even following Britain's withdrawal from the EU, the various EU Regulations in the area of child and family law will continue in force as part of British law until specific amendments are made thereto. Thus the existing position regarding the recognition of divorces, the enforcement of custody, maintenance and access orders and provisions relating to child abduction will continue following Brexit until changes are made thereto. The Bill, however, when enacted will end the jurisdiction of the European Court of Justice ('ECJ') in the UK. At present, the ECJ interprets EU law and its judgments are binding on all Member States of the European Union. This will no longer be the case. Therefore, Britain's own superior courts will interpret and apply these laws. It is anticipated that complications will arise therefrom – with identical laws potentially being interpreted differently by UK and EU courts and with no obligation on the UK courts to follow ECJ decisions.

5.3.3 Other important international instruments

Notwithstanding the extensive laws in place at EU level concerning children and families, for decades the Hague Conference on Private International Law has been to the fore in

generating instruments that recognise the internationalism of family law and unify the rules in respect of same. Obviously, between Member States of the European Union, EU Regulations are in place to govern the jurisdiction, enforcement and applicable law in family law cases. The numerous Hague Conventions, however, serve to govern the interaction between Member States and non-EU countries. As the UK has been a member of the European Union since 1973, in its dealings with Ireland, the relevant EU Regulations have been applicable thus far as they take precedence as between Member States. With its planned departure from the EU to take place over the next few years, it is expected that the various Hague Conventions in the future will have a much more prominent role in governing family law disputes between our two jurisdictions.

The UK is bound by a number of International Conventions in the realm of family law. Of particular importance is the 1980 Convention of the Civil Aspects of International Child Abduction; the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children; the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption; and the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. Ireland is similarly bound. Therefore, it is anticipated that these Conventions will significantly remove the vacuum which will be left when EU laws no longer have effect in the UK. The 1996 Hague Convention, for instance, is very similar to Brussels II *bis* mentioned above. The rules of recognition and enforcement contained therein are akin to those under Brussels II *bis*. Therefore, it is expected that this Hague Convention will be utilised between Ireland and the UK in cases where custody and access orders made in one country are sought to be recognised and enforced in the other. In the alternative to relying on these international instruments, the UK may seek to negotiate bilateral or multilateral treaties with EU Member States. Whether this will be attempted is not yet clear. The issues raised by Brexit in the child and family law area merit consideration and are particularly relevant to the Department of Children and Youth Affairs and the Department of Justice and Equality.

5.3.4 European Convention on Human Rights

The effect of Brexit on the European Convention on Human Rights is one further matter that merits consideration. The European Convention on Human Rights ('ECHR') is a treaty that

was drafted in 1950 between the Member States of the Council of Europe. Each of the articles contained therein protects a basic human right and taken together the ECHR sets the principle of respect for human rights as the basis of the relationship between the member states. The ECHR provides a remedy between the individual and the state through the right of individual petition. Essentially, the ECHR provides for vertical rights in this regard. It was not anticipated that the scope of the ECHR would extend to horizontal rights, in regulating standards of behaviour as between individuals in a state. However, under the ECHR if an individual's rights are breached by another individual, it is possible for the state to be held responsible if it failed to take steps that would have prevented the behaviour occurring in the first place.

The Convention was signed by 47 states, including the UK. The Human Rights Act 1998 incorporated the ECHR into domestic British Law, setting out the fundamental rights and freedoms to which everyone in the UK is entitled. This Act came into force in October 2000 and it enables persons in the UK to institute proceedings in the British courts in circumstances where their human rights have been breached. It requires all public bodies to respect and protect the human rights contained therein and obliges Parliament to ensure any new laws it introduces are compatible with those rights.

Certain provisions of the ECHR are of special significance for families and children. The civil and political rights enshrined in the ECHR emphasise individual and familial freedom and autonomy, and protection from excessive state interference. In particular, Article 8 is very important in this regard. Article 8(1) ECHR guarantees the right to respect for private and family life, home and correspondence. Article 8(2) sets out the limits of permissible interference with the enjoyment of these rights by the state. They can only be interfered with in accordance with law, in the furtherance of a legitimate aim and only if necessary in a democratic society.

The UK's decision to leave the European Union has no obvious effect in relation to the ECHR. As a creation of the Council of Europe, the European Court of Human Rights is not an EU institution. Brexit therefore will not exempt the UK from the decisions of the European Court of Human Rights. In line with the "Leave" campaign, however, there is a strong movement towards repealing the Human Rights Act 1988 at present in the UK. Abolishing this Act will break the formal link between the UK courts and the European Court

of Human Rights. The Conservative government instead is proposing the establishment of a British Bill of Rights. The Conservatives argue their reforms will ensure the European Court of Human Rights will no longer be able to overrule judgments made in British courts and will make "the Supreme Court supreme". Whether Britain will take this further step of repealing the Human Rights Act 1998 will not be determined any time soon. Recent comments by the Attorney General, Jeremy Wright QC, speaking in the House of Commons in December 2016 confirmed that the government would not attempt to take this step until it had finalised Brexit negotiations.[245] Whether or not such a plan would pass through Parliament is questionable but what is clear is that regard will have to be had to developments concerning the ECHR in light of Brexit.

5.3.5 Recommendation

In the wake of 'Brexit', and prior to the United Kingdom formally withdrawing from the European Union, it is recommended that the Irish government conduct an in-depth analysis into the implications for Ireland of Brexit in the area of family and child law.

[245] See https://www.theguardian.com/law/2016/dec/09/uk-bill-of-rights-delayed-further-brexit-supreme-court-case-jeremy-wright (accessed 11 December 2016).