Eleventh Report of the Special Rapporteur on Child Protection

A Report Submitted to the Oireachtas

Professor Geoffrey Shannon

2018

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ACKNOWLEDGEMENTS

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

Aoife Daly

Fiona Quigley

Meg MacMahon

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

The Report reflects the law and practice as at December 31, 2017, but it has been possible to include new developments since that date.

Professor Geoffrey Shannon

EXECUTIVE SUMMARY

SECTION 1: DEVELOPMENTS RELATING TO INTERNATIONAL INSTRUMENTS AND STANDARDS

The UN Committee on the Rights of the Child together with the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families jointly adopted in 2017 two general comments on the rights of children in situations of international migration.[1] The joint general comments emphasise that states should sign and ratify the relevant international standards and ensure that migration-related frameworks, policies, practices and/or other measures should encompass the joint general comments on the rights of children in situations of international migration. The joint general comments also emphasise that priority should be given to children's best interests in measures relating to migration. In a "best interests assessment" for an individual migrant child, the child's best interests should be considered as a primary consideration – they should have high priority and a larger weight must be attached to what serves the child best. Adequate resources and highly-trained personnel are also emphasised, as are strong systems of family reunification and practices which encompass equality and child protection.

In the High Court in England and Wales in the case of *Wolverhampton City Council v JA and Ors*[2] Keehan J. dealt with a child protection case which involved allegations of sexual abuse of two girls. The conclusion of the judge on the facts he had found and regarding the treatment of the children was that X and Y were subjected to sustained and prolonged sexual abuse in their father's and mother's homes. Many questions arose in the judgment concerning the rules of evidence, concerning how children's evidence should be treated and concerning professional privilege, in particular because the children were questioned by their solicitor in a manner which did not conform to acceptable standards. It was emphasised in the case that children's evidence must be gathered in a way which meets *Achieving Best Evidence in Criminal Proceedings* (ABE) standards. The court also stated that in forming a conclusion in

[1] See Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration; and Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.

[2] [2017] EWFC 62.

a child protection case, it is important for courts to take into account tarnished child testimony alongside all other independent material unless the court specifically finds that no evidential weight can be attached to that tarnished evidence.

SECTION 2: BEST PRACTICE FOR CHILDREN AND FAMILY SERVICES IN IRISH COURTS

The Report of the Commission to Inquire into Child Abuse (the 'Ryan Report')[3] was the result of an investigation into child abuse at religious-run schools. It has been considered in detail in my previous Rapporteur reports. The implementation plan for the Ryan Report contains as one of its action points: Action 96 - conduct best practice research into other jurisdictions regarding the management of children and family services in the Court. There has been much recent discussion about the current state of children and family services in the courts in Ireland.[4] There are models of reform and practice such as in England and Wales, Israel and Scotland from which Ireland can learn in order to establish a more appropriate court service for families and children. This issue is also explored in section 3 of this report where fundamental structural reform of the family and child law system is recommended in the context of my review of the Child Care Act 1991.

Ireland does not yet have a specialised family or children's court system, though such systems are commonplace across Europe and in common law jurisdictions. In other states which have specialised systems, such as France and Belgium, the judiciary and lawyers have specialised training to equip them to work in family courts. Family court facilities should be designed with the presence of families and children in mind. Systems should be well resourced as cutting legal aid budgets is a false economy – longer and more entrenched proceedings will ultimately cost more. The adversarial system is not well suited to family law. It should be examined whether a more inquisitorial approach to family law would be preferable.

[3] Commission to Inquire into Child Abuse, *Committee Investigation Report* (Commission to Inquire into Child Abuse, 2009).

[4] See for example Children's Rights Alliance, Making Rights Real for Children: A Children's Rights Audit of Irish Law (Dublin: Children's Rights Alliance, 2015); Conor O' Mahony *et al.*, "Child Care Proceedings in Non-Specialist Courts: Lessons from Ireland" (2016) 30 *International Journal of Law, Policy and the Family* 131; Aisling Parkes *et al.*, "The Right of the Child to be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court" (2015) 27(4) *Child and Family Law Quarterly* 423.

The clear preferred system emerging from other jurisdictions is a separated Family Law Court system which is not overly interwoven with the rest of the Courts System. What also seems clear is the importance of managing the "type" of case which goes before each tier of the Court. Australia originally placed such importance on family cases being heard by Superior Courts, that the result was that procedural or simplistic cases were being unnecessarily heard by Judges of their Superior Courts. This resulted in a change to its system where most cases now proceed before the Federal Circuit Court, with certain "categories" of cases being designated appropriate for the higher Family Court of Australia.

England and Wales operate a very strictly run "gatekeeping system" pursuant to the Family Court (Composition and Distribution of Business) Rules 2014 (the 'Distribution of Business Rules') of ensuring that cases are allocated to the most appropriate tier within the system. This mechanism of managing which case goes to which court is best suited to the Irish context.

The message from other jurisdictions is unequivocal and that is that children and family services in the court are best managed by a dedicated and integrated Family Court structure that is properly resourced to meet the particular needs of people at a vulnerable time in their lives.

Any such Family Court structure must recognise and actively promote an interdisciplinary system to ensure effective communication between all the disciplines involved in family law e.g. medical, law, education, guardians *ad litem* and social services.

Restructuring of the family law court without the involvement and promotion of an interdisciplinary system would not achieve the objective of meeting the particular needs of the users of the family court structure.

In both public and private family law matters, key services should be available to permit family law judges to refer couples or parties to skilled personnel to:

- draw up parenting plans;
- deal with anger management programmes in domestic violence cases;
- monitor custody and access orders when they break down and facilitate their restoration;
- engage in family therapy;

- implement supervised access orders.

The interdisciplinary system involves an acceptance that simply making a court order is not sufficient, that further work needs to be undertaken by specialists with a range of non-legal skills to ensure that the needs of family law clients are met. Without this, any new system remains as flawed as the current one.

The key ancillary services referred to above are an essential part of any new family law court system and the success of this approach when introduced at District Court level in the Dolphin House initiative shows the value of having a variety of agencies such as legal aid, mediation services and the courts and courts offices under the one roof.

The new family courts should be located separately from current venues with sufficient rooms for private consultations and a welfare and assessment service to support public and private family law proceedings. Alternative Dispute Resolution facilities should be located in the new family law courthouses linked into the welfare system.

One area in which change is particularly needed, not least because of the Children and Family Relationships Act 2015, is implementing the right of children to be heard in proceedings affecting them. Whether children can be represented by giving instructions as opposed to a representation of their best interests is one question. Furthermore, there is no clear guidance for judges meeting children in family law proceedings in Ireland. It has also been argued that children do not have sufficient outcomes in proceedings in which their best interests are being determined, and that greater priority should be accorded to their autonomy, considering the extent to which autonomy is valued in other areas of the law such as medical law and the rights of those with disabilities.

The state of Israel has in recent years initiated a holistic system whereby therapeutic endeavours are introduced, and there is a presumption that children will be involved in proceedings. This inclusivity and holistic approach, as well as the success of and satisfaction with the model, means that this model is very interesting for the Irish context. The Scottish children's hearings system is another unique model to consider for Ireland. It uses a lay panel to establish the welfare needs of children in cases concerning child care and criminal behaviour, and which involves children and families together in relatively informal hearings.

There are also a number of interesting initiatives in family law at present from which Ireland can learn. The Children's Rights Judgments project in the UK is a collaboration between over 60 law experts from across the world in re-writing existing judgments, but taking an explicitly children's rights-based approach. It demonstrates how judges can progress children's rights through creative interpretation of the law. The head of the Family Court in England and Wales has been engaging in creative judgment delivery, one in the form of a letter to the boy who was the subject of proceedings. The TALE (Training Activities for Legal Experts) project involved both children and front-line legal practitioners in real cases in order to develop training materials on children's rights so that lawyers can be fully trained in children's rights-based practice.

SECTION 3: REVIEW OF THE CHILD CARE ACT 1991

The Child Care Act 1991 is the primary piece of Irish legislation governing the welfare of children who are in need of care and protection. It places significant statutory obligations on the Child and Family Agency, Tusla to promote the welfare of children who are not receiving adequate care and protection. In performing its functions, the Child and Family Agency is required to take steps to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children. Having regard to the rights and duties of parents, whether under the Constitution or otherwise, Tusla is required to consider the welfare of the child as the first and paramount consideration and give due consideration to the wishes of the child. The Act recognises the principle that it generally is in the best interests of a child to be brought up in his or her own family.

At this point in time, the Child Care Act 1991 is over a quarter of a century old. While a detailed and comprehensive piece of legislation,[5] the 1991 Act requires some updating to ensure that the legal regime in respect of the care of children in this jurisdiction reflects modern society and the changes that Ireland has undergone in recent years. One such crucial change is the recent introduction of the constitutional mandate in relation to the rights of the child. The Children's Referendum, held in November 2012, has led to the insertion of Article 42A into the Constitution. The Thirty-First Amendment of the Constitution (Children) Act 2012 was signed into law on 28 April 2015. It heightens the need to safeguard and vindicate

[5] Governing inter alia the circumstances of voluntary care arrangements; court applications for emergency, interim and full care orders; and situations of foster and residential care.

the rights of our children; emphasises the paramountcy of the best interests of the child and promotes the voice of children in proceedings concerning them. The 1991 Act pre-dates this important constitutional change and its content thus must be updated to reflect the provisions of Article 42A. In a similar vein, regard must be had to the European Convention on Human Rights (ECHR) and the personal rights that flow from same. The European Convention on Human Rights Act 2003 gives further effect to the ECHR in Irish law, requiring the courts to interpret legislation in line with the Convention as far as it is possible to do. Reform within the 1991 Act should therefore seek to align the child care provisions with both the new constitutional dispensation and the contents of the ECHR. Finally, difficulties in the operation of the Child Care Act 1991 also need to be addressed.

This section, therefore, considers certain aspects of the 1991 Act where recommendations for improvements can be made in order to further strengthen child protection in this country. Furthermore, a review of recent case law is undertaken to highlight the key legal matters arising under the 1991 Act that the courts have been required to contemplate and address. This necessarily involves a consideration of certain decisions of the Irish courts throughout 2017 in which issues relating to child protection or children's rights emerged. Recommendations are made for reform emanating from the decisions made in recent case law. Finally, Tusla's new "Signs of Safety" policy is considered, as well as the need for specialist family law courts in this jurisdiction.

SECTION 4: DOMESTIC CASE LAW

This section considers various decisions of the Irish courts throughout 2017 in which issues relating to child protection or children's rights emerged other than cases under the Child Care Act 1991. The issues that arose in the cases that are examined include: powers of a court under section 11 of the Guardianship of Infants Act 1964, as amended; the constitutionality of the ban on asylum seekers working; the deportation of the parent of an Irish citizen; cases which involve a criminal/civil law overlap; developments in Hague Convention/child abduction cases; and the jurisdiction of the High Court in cases involving a foreign element.

The landmark decision of *NHV v Minister for Justice*[6] was delivered in May, 2017 in which the court found that the absolute legislative prohibition on asylum seekers entering, seeking or being in employment was unconstitutional "in principle". In the aftermath of this decision the Irish government announced that it is to opt into the *EU Reception Conditions Directive* (2013/22/EU), which provides for and regulates asylum seekers' right to work. This is to be welcomed. In January 2018, the Minister for Justice and Equality provided some guidance on how the State is to respond to the Supreme Court May 2017 decision prior to Ireland's opting into the *EU Reception Conditions Directive.*

On 9 February 2018, the Supreme Court formally declared that the absolute ban on asylum seekers seeking employment is unconstitutional. It declared that section 16(3)(b) of the International Protection Act 2015 is inconsistent with Bunreacht Na hÉireann and no longer forms part of Irish law.

Since 9 February 2018, asylum seekers can apply for employment permits under the existing Employment Permits Act 2003. A number of conditions will apply. Firstly the employment must have a starting salary of €30,000 per annum and that it cannot otherwise be filled by an EU citizen or a person with full migration status in Ireland. It should also be noted that there are a number of employment sectors which asylum seekers are prohibited from seeking employment in. A central question is whether this interim scheme on the right to work for asylum seekers complies with the Supreme Court's decision on the right to work for asylum seekers.

In *DPP v AB*,[7] the issues that arise in a case of an overlap with the criminal justice system where the child might also be the subject of civil law proceedings (*i.e.* special care) were examined. Helpful guidelines were handed down by O'Connell J. in the District Court as to how to approach such cases.

SECTION 5: CRIMINAL DEVELOPMENTS

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. In November

[6] [2017] IESC 35.
[7] [2017] IEDC 12.

2017, the Criminal Justice (Victims of Crime) Act was passed. The passage of this legislation was essential to ensure Ireland's compliance with its obligations under EU Directive 2012/29/EU. Certain further amendments to the 2017 Act, however, may be required to give heightened protection to children as a category of victims.

The majority of child offenders are remanded on bail, rather than in custody, while they await the outcome of their case. Remanding any child in custody ought to be avoided if at all possible. A Bail Supervision Scheme (BSS) is being piloted in Dublin, seeking to deliver a method of engaging with young offenders who are on bail, providing support for them. The use of Multisystemic Therapy (MST) is being employed in this scheme - a therapy which operates worldwide and which is proven to help to reduce re-offending rates, keep young people in education and decrease adolescent drug and alcohol use. This is an evidence-based approach which seeks to understand the factors that contribute to the young person's behaviour and it uses intensive family and community-based treatment. The introduction of the Bail Supervision Scheme is very much to be welcomed. Efforts should be made in the implementation of this scheme to monitor results closely, thereby ensuring the practical effectiveness of the scheme. In this regard, it is beneficial that the Research Evidence into Policy Programmes and Practice (REPPP)[8] project is currently reviewing and evaluating the progress of the scheme. While the introduction of the Scheme is welcomed, there are a number of limitations to the pilot BSS and recommendations are made for its improvement.

In February 2017, the then Tánaiste and Minister for Justice and Equality Frances Fitzgerald T.D. signed an Order commencing certain provisions of the Criminal Law (Sexual Offences) Act 2017 with effect from Monday 27 March 2017. The commencement order is to be welcomed – finally ensuring that this comprehensive piece of legislation, which has been years in its development – is in place to provide a more effective response to sexual offending perpetrated against children, especially through the use of the internet and social media. It also brings Irish law in line with the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Following the commencement of the Act, it is recommended that prosecutions taken by the Director of Public Prosecutions under the Act's provisions, where the victim is a child under the age of 18, be monitored and analysed. This "operational assessment" would be a detailed piece of research to examine the

[8]Research Evidence into Policy Programmes and Practice (REPPP) project, School of Law, University of Limerick.

effectiveness of the new sexual offences regime, specifically directed towards offences committed against child victims.

SECTION 6: DOMESTIC DEVELOPMENTS

In February 2017, the Domestic Violence Bill 2017 was published. It passed all stages in the Oireachtas during May 2018. Its purpose is to amend and consolidate the law in relation to domestic violence, replacing the existing domestic violence legislation with a comprehensive new regime set out clearly in one piece of legislation. Its new provisions are necessary to enable Ireland to ratify the Council of Europe Convention on preventing and combatting violence against women and domestic violence, known as the Istanbul Convention, which Ireland signed in November 2015. While the Domestic Violence Act 2018 seeks to extend the scope of the orders that may be granted to victims of domestic violence, and indeed expands the categories of persons entitled to these protective orders, some fine-tuning of its provisions is required.

In recent years, people who wish to have families but have been unable to do so naturally have embraced new technologies which have been developed. These new procedures and treatments can greatly assist human reproduction. A number of cases determined by our Superior Courts in the last decade have indicated that Irish law must develop quickly in order to keep abreast of technological advances in the area of reproduction. Eventually, legislation in this area of donor-assisted human reproduction was introduced in Ireland through Parts 2 and 3 of the Children and Family Relationships Act 2015. The 2015 Act, for the first time, provides for regulation of Donor-Assisted Human Reproduction (DAHR) treatment, seeking to give legal clarity on parentage where donated genetic material is used in procreation.

Expanding upon the positive step taken to legislate for donor-assisted reproduction in the 2015 Act, in October 2017, Minister for Health, Simon Harris T.D., published the General Scheme of the Assisted Human Reproduction Bill. It concerns not only gamete and embryo donation for use in Assisted Human Reproduction (AHR) treatment and research, but also deals with surrogacy; posthumous assisted reproduction; pre-implantation genetic diagnosis and sex selection; and embryonic and induced pluripotent stem cell research. Crucially, it provides for the establishment of the Assisted Human Reproduction Regulatory Authority as a dedicated, independent body to oversee this sector and the general aim of the Bill is to

protect and promote the health and safety of children born through AHR, their parents and the other relevant persons involved in the process, including surrogates and donors.

The Bill's approach to surrogacy requires further consideration. It provides that parentage is not determined or designated prior to the birth of the child. The AHR Regulatory Authority makes no declaration as to the legal status of the intending parents pre-birth. Steps must be taken after the birth of the child to obtain the necessary Parental Order through the court process, to reverse the traditional legal concept of the birth-mother being the child's legal mother. Pre-birth approval of parentage, rather than requiring that Parenting Orders be sought after the birth of the child concerned, may be preferable. Certainty is crucial for all parties involved, including the child born as a result of a surrogacy agreement. A revision of the existing approach set out in the General Scheme of the Bill may therefore be appropriate.

RECOMMENDATIONS

1. RECOMMENDATIONS RELATING TO THE JOINT GENERAL COMMENTS

(a) Ireland should sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; as well as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

(b) Ireland's migration-related frameworks, policies, practices and/or other measures should encompass the joint general comments on the rights of children in situations of international migration: the joint general comment on the general principles regarding the human rights of children in the context of international migration; and the joint general comment on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. All relevant personnel should be made aware of the joint general comments, which should be introduced into training for these groups. The joint general comments should be distributed widely.

(c) The International Conventions should be integrated into Ireland's migration-related frameworks, policies, practices and/or other measures.

(d) In particular, it should be ensured that such measures encompass the general principles of the UN Convention on the Rights of the Child – the right to be heard, the right of children to have their best interests considered in all decisions affecting them, the right to life, survival and development, and the right to freedom from discrimination.

(e) Priority should be given to children's best interests in measures introduced in Ireland relating to migration. In a "best interests assessment" for an individual migrant child, the child's best interests should be considered as a primary

consideration – they should have high priority and a larger weight must be attached to what serves the child best.

(f) Ireland should abolish the 'direct provision' system of accommodation for asylum seekers and ensure adequate provision for children's standard of living. In the interim, the Reception and Integration Agency must ensure agreements with commercial contractors in relation to compliance with section 42 of the Irish Human Rights and Equality Commission Act 2014 and ensure high standards of accommodation. Direct provision should be placed on a statutory footing, and a time limited period (6-9 months) introduced after which an individual who has not yet received a first instance decision on his/her status should be able to leave the direct provision system and live independently and access relevant social welfare payments.

(g) Adequate resources and highly-trained personnel should be made available to implement the new single application procedure. The backlog must be dealt with, and fair and high-quality decision-making must be ensured.

(h) In light of the Supreme Court decision in *NHV v Minister for Justice and Equality and Ors*,[9] a time limited period (6-9 months) should be introduced, after which an individual who has not yet received a first instance decision should be able to seek employment. This will facilitate the right of children to an adequate standard of living.

(i) Implementation of the Reception and Integration Agency's guidelines on sexual violence should be monitored as part of inspections of direct provision centres and a statement of compliance should be included in each inspection report. It is also recommended that all staff are trained in gender equality and human rights. The staff should also be trained in children's rights.

(j) Ireland should review the International Protection Act 2015 to bring the legislation into line with the State's human rights obligations, including Article 8 of the European Convention on Human Rights.

[9] [2017] IESC 35.

(k) Ireland should ensure that the International Protection Act 2015 is adequately resourced with highly-trained personnel.

(l) Ireland should take the necessary legislative measures to place assistance and protection for victims of trafficking on a statutory basis.

(m) Women should have equal protection from domestic violence regardless of their immigration status.

(n) Ireland should follow the guidelines of the Irish Refugee and Migrant Coalition which include addressing the root causes of displacement, placing less emphasis on responsibility for protection of migrants as lying outside the EU, and ensuring Ireland meets its commitments on refugees and migrants.

(o) Ireland must plan and provide for the mental health needs of relocated refugees in Ireland, as they are at higher risk of post-traumatic stress. Particular regard should be had for the mental health needs of refugee children.

(p) The recent increase in refusals of permission to land in Ireland should be subject to examination, and a children's rights analysis should be built into this. An effective remedy must be available to persons in Ireland undergoing this process, and those refused leave to land must have adequate access to legal and interpretation services.

Ireland should continue to lead on international co-operation including through implementing the New York Declaration for Refugees and Migrants. Ireland should emphasise the benefits of international migration; ensuring relocation/resettling of migrants whom the State has agreed to accept; and following the Irish Refugee and Migrant Coalition's guidelines for the protection of refugees and migrants and the upholding of human rights.

2. RECOMMENDATIONS RELATING TO WOLVEHERHAMPTTON CITY COUNCIL V JA & ORS

(a) The evidential issues in *Wolverhampton City Council v JA and Ors*[10] should be considered for the Irish context, in particular whether children's evidence is gathered in this jurisdiction in a manner which meets *Achieving Best Evidence in Criminal Proceedings* (ABE) standards.

(b) The 'Lucas direction' should be considered of relevance for the family court, where the 'four conditions' must be satisfied before a defendant's lie can be seen as supporting the prosecution case.

(c) In forming a conclusion in a child protection case, it is important for courts to take into account tarnished child testimony alongside all other independent material unless the court specifically finds that no evidential weight can be attached to that tarnished evidence.

(d) All relevant professionals should be well trained *in Achieving Best Evidence in Criminal Proceedings* (ABE) standards, and in particular how to guard children's best interests and mental health needs, how to avoid repetition of questions and how to avoid suggestive questions.

(e) Only highly experienced solicitors should represent children in highly complex child abuse cases.

(f) It should be examined whether vulnerable witnesses can give evidence and be cross-examined in a manner that is pre-recorded so that they do not have to go through "trial by ordeal" with repeat interviews and court cross-examinations. The state must adequately resource sexual violence services.

[10] [2017] EWFC 62 (18 August 2017).

3. RECOMMENDATIONS RELATING TO BEST PRACTICE FOR CHILDREN AND FAMILY SERVICES IN IRISH COURTS

(a) The necessary detail, resources and implementation are needed in order to make plans for a specialised family or children's court system a reality.

(b) Appropriate waiting and meeting facilities in dedicated court-houses are urgently needed for families. The physical environment of courtrooms should be planned with children's presence in mind.

(c) All judges and lawyers likely to encounter children's cases should be required to have some level of training on children's rights and welfare.

(d) Cuts to legal aid budgets and other elements of family law have been demonstrated to lead to increased expenditure in the long run. Greater resources should therefore be accorded to the family law system, including for legal aid for those minority of families who seek to use the court during family breakdown.

(e) As the adversarial system is not well suited to family law, it should be examined whether a more inquisitorial approach to family law would be preferable in Ireland.

(f) Alternative dispute resolution should be seen as a useful alternative mechanism for resolving family law disputes, not as a cost-saving measure.

(g) Models in other states in which the child has greater influence on the role of his/her representative in court proceedings should be considered in Ireland. Under the 'guardian *ad litem* lawyer' system of the American Bar Association Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, for example, the lawyer takes instructions from a child in a manner similar to any other client, only seeking a 'best interest' representative where the child is both lacking in competence and at risk of substantial harm.

(h) Guidelines should be developed in Ireland for meetings between judges and children, similar to the England and Wales 2010 Family Justice Council Guidelines for Judges Meeting Children.

(i) It should be examined in Ireland how children's autonomy could be given greater priority in proceedings about their best interests, and whether the threshold for overriding children's wishes should be higher than simply the reason that the decision-maker deemed it in the best interest of the child.

(j) The new family law system in Israel where a holistic approach including therapeutic endeavours have been introduced, as well as a presumption that children will be involved, should be considered for the Irish context.

(k) The Scottish children's hearings system, which uses a lay panel to establish the welfare needs of children in cases concerning child care and criminal behaviour, and which involves children and families together in relatively informal hearings, should also be considered for the Irish context.

(l) Positive initiatives in family law should be considered for the Irish context, such as the Children's Rights Judgments project in the UK, the creative and child-friendly judgment delivery of the Family Court in England and Wales and the TALE (Training Activities for Legal Experts) project which trains lawyers in children's rights-based practice.

4. RECOMMENDATIONS RELATING TO FAMILY LAW COURT REFORM

(a) The clear preferred system emerging from other jurisdictions is a separated Family Law Court system which is not overly interwoven with the rest of the Courts System. What also seems clear is the importance of managing the "type" of case which goes before each tier of the Court. Australia originally placed such importance on family cases being heard by Superior Courts, that the result was that procedural or simplistic cases were being unnecessarily heard by Judges of their Superior Courts. This resulted in a change to its system where most cases now proceed before the Federal Circuit Court, with

certain "categories" of cases being designated appropriate for the higher Family Court of Australia.

(b) In England and Wales, they operate a very strictly run "gatekeeping system" pursuant to the Family Court (Composition and Distribution of Business) Rules 2014 (the 'Distribution of Business Rules') of ensuring that cases are allocated to the most appropriate tier within the system. This mechanism of managing which case goes to which court is best suited to the Irish context.

(c) The message from other jurisdictions is unequivocal and that is that children and family services in the court are best managed by a dedicated and integrated Family Court structure that is properly resourced to meet the particular needs of people at a vulnerable time in their lives.

(d) Any such Family Court structure must recognise and actively promote an interdisciplinary system to ensure effective communication between all the disciplines involved in family law e.g. medical, law, education, guardians *ad litem* and social services.

(e) Restructuring of the family law court without the involvement and promotion of an interdisciplinary system would not achieve the objective of meeting the particular needs of the users of the family court structure.

(f) In both public and private family law matters, key services should be available to permit family law judges to refer couples or parties to skilled personnel to:

- draw up parenting plans;
- deal with anger management programmes in domestic violence cases;
- monitor custody and access orders when they break down and facilitate their restoration;
- engage in family therapy;
- implement supervised access orders.

(g) The interdisciplinary system involves an acceptance that simply making a court order is not sufficient, that further work needs to be undertaken by specialists with a range of non-legal skills to ensure that the needs of clients are met. Without this, any new system remains as flawed as the current one.

(h) The key ancillary services referred to above are an essential part of any new family law court system and the success of this approach when introduced at District Court level in the Dolphin House initiative shows the value of having a variety of agencies such as legal aid, mediation services and the courts and courts offices under the one roof.

(i) The new family courts should be located separately from current venues with sufficient rooms for private consultations and a welfare and assessment service to support public and private family law proceedings. Alternative Dispute Resolution (ADR) facilities should be located in the new family law courthouses linked into the welfare system.

(j) The following recommendations from the 2011 Family Justice Service Review in the United Kingdom should be considered:

> **Children's voices:** children and young people should be given age appropriate information to explain what is happening when they are involved in public and private law cases and should be able to make their views known.
>
> **Workforce:** the Courts Service should establish a pilot in which judges would learn the outcomes for children and families on whom they have adjudicated.
>
> **Case management:** judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales.

5. RECOMMENDATIONS RELATING TO RETROSPECTIVE ALLEGATIONS OF ABUSE INVESTIGATIONS

(a) The assessment of whether or not a complaint is substantiated in respect of retrospective allegations of abuse should be carried out by specialist teams of forensic investigators. These investigators should have a separate role and function to Tusla social workers, with a dedicated responsibility for the substantiation outcome. In order to make a final determination as to whether the allegation is founded or unfounded, a fair and independent decision-making forum should assess the evidence. This independent body should be

entirely impartial. The forensic investigators would represent the children requiring protection, and the alleged abuser may represent himself/herself or instruct legal representation. The independent body would then adjudicate on the allegations, determining the final outcome. If the claim is determined to be substantiated, Tusla should then be given express statutory authority to share relevant information with relevant persons and an amendment should be made to section 3 of the Child Care Act 1991 to allow for this. Where claims are not substantiated, the information should not be permitted to be shared. This process would balance carefully the duty to protect unidentified children from any risk with the rights of the alleged abuser – ensuring a comprehensive investigation and fair procedures in any substantiation hearing. When the outcome of the investigation is to hand, any action that may be required in the case for the protection of the child or children concerned should remain in the domain of the relevant social worker.

(b) There needs to be a stronger partnership between An Garda Síochána and Tusla with regard to the interviewing of child and adult victims. It is recommended that a specialist team of forensic investigators carry out an assessment as to whether or not an allegation is substantiated in retrospective abuse cases. To ensure greater cohesion in the operation of the Gardaí and Tusla in their respective roles, it is recommended that these forensic teams be required to work closely with An Garda Síochána to support any criminal investigation that is operating concurrently to or which subsequently follows their substantiation investigation. If these specialist teams have conducted interviews with child victims, adult victims or the alleged perpetrator, these may assist greatly in any criminal investigation. Critically, for the child and adult victims, the risk of repeat and multiple interviews would be decreased – reducing the trauma that can be caused from same.

(c) The significant volume of case law generated by section 3 of the Child Care Act 1991 merits consideration. It demonstrates challenges in the implementation of section 3 which might benefit from legislative clarity for Tusla as to how it should deal with claims of abuse, particularly historical or retrospective claims where unidentified children may be at risk.

6. RECOMMENDATIONS RELATING TO CHILDREN IN VOLUNTARY CARE

It is recommended that section 4 of the Child Care Act 1991 be amended to place a duty on Tusla to maintain a child in its voluntary care so long as his/her welfare appears to require it, but not exceeding a maximum period of 12 months. Upon the expiry of the said 12-month period, where Tusla is not of the opinion that the child should be returned to his or her family, Tusla should be required to take one of the following steps: 1) bring an application for a care order; 2) inform the carer of the child of the avenues open to him or her under the Guardianship of Infants Act 1964, request that an application be brought by said carer under the relevant provision, and actively support the application made. Ultimately, it is submitted that the proposed amendment to section 4 will work in two ways to improve the position of children in voluntary care placements. First, it creates a defined period within which support can be provided to a child's parents, progress can be monitored and issues addressed, preventing those in voluntary care from being invisible due to the consensual nature of their care arrangements. Second, where a reunion is not possible after said period of voluntary care, the options set out above must be considered and action taken in the best interests of the child.

7. RECOMMENDATIONS RELATING TO SECTION 12 OF THE CHILD CARE ACT 1991

The recently-conducted audit of section 12 of the Child Care Act 1991, the first of its kind in this jurisdiction, should be considered in full and regard must be had to all of the detailed recommendations contained therein. It is recommended that these be adopted forthwith in order to bring about the cultural change required in our child protection system. Adopting these recommendations will significantly improve the effective operation of section 12, heighten significantly the level of co-operation between the relevant agencies and ultimately, ensure the better protection of vulnerable children.

8. RECOMMENDATIONS RELATING TO EMERGENCY CARE ORDERS

It is recommended that this provision should be extended to allow the court to make an order preventing a parent of a child in respect of whom an order under the section has been made from attending (or causing anyone else to attend) at or near the school or crèche of the child the subject matter of the proceedings or the foster parent's address pending the determination of the application by the court. Such an order would only be made where required having regard to the specific circumstances of each case and only where it is anticipated that such an order would be necessary and in the best interests of the child. Such a subsection would facilitate the child remaining in care locally and continuing to attend his or her school, Montessori or crèche, thereby ensuring the least disruption to the child for the duration of the emergency care order. Consideration might also be given to empowering the court to prohibit a parent or other party from communicating with a child taken into care under section 13 in any manner and through any medium (Facebook etc.) except with express permission of the other parties or the court. It is suggested that the breach of any of these proposed conditions should be subject to a sanction in order for adherence to be guaranteed. Without prejudice to the law as to contempt of court, it is recommended that where the District Court makes an order under this section prohibiting attendance at a particular location and/or communication with the child, a person who, having been given or shown a copy of said order, fails or refuses to comply with the specific requirements under that order should be guilty of an offence and should be liable on summary conviction to a fine not exceeding €1,000 or, at the discretion of the court, to imprisonment for a term not exceeding 6 months or both such fine and such imprisonment. For the purposes of this section, a person should be deemed to have been given or shown a copy of an order made under this section if that person was present at the sitting of the court at which such an order was made. Any change must also respect the requirements of fair procedures and should be linked to emergency legal aid for the parent.

9. RECOMMENDATIONS RELATING TO THRESHOLD FOR INTERIM CARE ORDERS

(a) It is recommended that consideration be given to lengthening the usual duration of an interim care order from 29 days to 35 days. This longer period would enable Tusla to complete whatever interventions or assessments are required in the particular case and would assist in reducing the current multitude of court appearances commonplace in such cases. This small extension is not so lengthy to prejudice the position of the parents and an extra week between reviews may aid the speedier conclusion of proceedings overall.

(b) Issues can arise where one judge hears the first application for an interim care order, but a second judge hears the next application for an extension of the interim care order. The second judge ought to be aware of the reasons for the initial granting of the order, so that he or she can be satisfied that the grounds for the making of the order continue to exist. In this vein, it is recommended that an Order of the court granting an interim care order pursuant to section 17 of the Child Care Act 1991 ought to reflect;

- the evidence proffered to the court in support of the application;
- the deponent thereof; and
- reasons for the granting or extension of the order.

(c) It is recommended that section 17 of the 1991 Act be amended to enable a court to grant a supervision order in lieu of an interim care order.[11] This would enable the court to make this less intrusive order where it deems some course of action appropriate, but does not view the interim care order sought by Tusla as being necessary or proportionate in the circumstances.

(d) It is recommended that provision be made by law for the continuation of existing orders granted under the 1991 Act during the hearing of an application for a new order or the extension of an existing order. For example, where an interim care order has been granted until a certain date and a hearing is taking place but has not concluded by the time the interim care order

[11] Equivalent to section 18(5) of the 1991 Act.

expires, the question that then arises is whether the interim care order should be extended over the 29 day limit, even if the parties contest it, so as to enable the judge to finish hearing the matter. It is suggested that the 1991 Act be amended to bring clarification to this set of circumstances. An amendment should allow for the court to extend the interim care order until such time as it has concluded the hearing of the matter. It is recommended, however, that a strict timeframe be put in place to ensure that judges in such a situation can only extend these orders for a further short time period solely to enable the prompt conclusion of the hearing. This should not lead to any lengthy continuations of interim orders.

10. RECOMMENDATIONS RELATING TO THRESHOLD FOR FULL CARE ORDERS

Guidelines should be published to provide greater clarity as to the threshold to be satisfied in respect of section 18(1)(c) of the 1991 Act. Its vague nature is open to interpretation and such guidelines would assist social workers in assessing whether there is a reasonable basis for pursuing an application under section 18(1)(c) of the 1991 Act. It is also recommended that the District Court should be empowered to make proportionate orders to underpin transition arrangements when refusing a full care order, where the child is already in the care of Tusla. Such orders, in many situations, will be practically necessary to ensure a smooth transition for the child concerned.

11. RECOMMENDATIONS RELATING TO ARTICLE 40 INQUIRIES IN RELATION TO THE CARE AND CUSTODY OF CHILDREN

Time limits should be set for the delivery of social work and guardian *ad litem* reports to the parents or legal representatives of respondent parents in child care cases in the District Court in order to ensure that parents and their legal representatives are aware of the case they have to answer and can properly respond to any allegations contained within such reports in order to uphold fair procedures.

12. RECOMMENDATIONS RELATING TO SUPERVISION ORDERS

(a) The Child Care Act 1991 should be amended to enable a court, when granting a supervision order, to impose such conditions as it thinks proper to ensure that the rights and welfare of the child are adequately protected.

(b) Section 19 of the 1991 Act requires clarification on the permissible intervention by Tusla once a supervision order is made. At present it is unclear for example whether a social worker can inspect a dwelling, talk to the children separately, or visit the children in school without the parents' consent. It is recommended that the scope of supervision orders be widened accordingly, allowing for the aforementioned types of action where required in the individual case at issue.

(c) Section 19(5) provides that any person who fails to comply with the terms of a supervision order or any directions given by a court under subsection (4) or who prevents a person from visiting a child on behalf of the CFA or who obstructs or impedes any such person visiting a child in pursuance of such an order shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €1,000 or, at the discretion of the court, 6 months' imprisonment, or both. It is recommended that this provision be extended in light of the abovementioned recommendation to empower the court to impose conditions on supervision orders – namely, to provide that a breach of a condition of the order should similarly give rise to a penalty of imprisonment for a term not exceeding 6 months or a fine, or both.

13. RECOMMENDATIONS RELATING TO HEARSAY EVIDENCE IN CHILD CARE CASES

It is recommended that the Child Care Act 1991 be amended to integrate a specific version of section 23 of the Children Act 1997 within its provisions. First, it is recommended that in the context of care proceedings only, section 23 be extended to provide for a presumption that all statements made by children may be admitted in evidence, notwithstanding the rule against hearsay, unless in the interests of justice

this should not occur. The inclusion of such a presumption recognises that such statements shall be admissible, thereby obviating the need for children to be called as witnesses in proceedings concerning them, unless the interests of justice dictates otherwise. Second, in considering whether the aforementioned presumption will be rebutted, a list of relevant factors should be set out therein to assist the court in making its determination, providing the judiciary with better and heightened guidance on this matter. This also improves the transparency with which these decisions will be made if the court makes its way through a checklist of defined factors in reaching a conclusion as to whether the presumption has been rebutted.

14. RECOMMENDATIONS RELATING TO THE PRIVILEGE AGAINST SELF-INCRIMINATION

It is recommended that clarification be provided in the 1991 Act on the procedure governing the operation of the privilege against self-incrimination in child care cases, and the extent and level to which it applies in a child care context.

15. RECOMMENDATIONS RELATING TO SECTION 47 DIRECTIONS

Section 47 empowers the court to give such directions and make such order on any question affecting the welfare of the child as it thinks proper. It is thus very broad in its nature and does not enumerate what directions or orders are envisaged in the operation of this provision. Given the broad nature of section 47, it is recommended that consideration be given to enumerating the various types of orders and directions that may be sought therein. This does not have to be an exhaustive list, but certain guidance could be provided as to what may come within this section – assisting Tusla, foster carers and parents alike in making and resisting any applications made under section 47. The best interests of the child should be clearly acknowledged as the paramount consideration in any application.

16. RECOMMENDATIONS RELATING TO VARYING/DISCHARGING A CARE ORDER

What is not clear from section 22 of the Child Care Act 1991 is whether a court can vary or discharge an interim care order in the same way that it can vary, or discharge a care order/supervision order or any direction or condition attaching thereto. It is recommended that section 22 of the 1991 Act be amended to provide that a court can vary or discharge an interim care order.

17. RECOMMENDATIONS RELATING TO JURISDICTION IN CHILD CARE CASES

Section 16 and section 28 of the Child Care Act 1991 should be amended to provide that a court can be seised of a matter in respect of a child "who resides or is found in its area ... or in respect of a child who was so resident or found at the date of the original application". This will ensure that when a child is received into care under section 18 of the 1991 Act and then moves to reside with a foster carer or residential home in a different District Court area, Tusla can proceed in the court originally seised for the making of the care order (or not) at its choice. It is also recommended that section 79 of the Courts of Justice Act 1924 be similarly amended in the abovementioned fashion.

18. RECOMMENDATIONS RELATING TO APPEALS

Section 21 should be re-examined in light of the 31st amendment to the Constitution and its requirement that the views of the child be ascertained in certain proceedings.

19. RECOMMENDATIONS RELATING TO THE NEED FOR APPROPRIATE AND SPECIFIC SUPPORTS - PARENTS' COGNITIVE FUNCTIONING

(a) It is recommended that guidelines or policies within the CFA should be introduced (if not already in place) to ensure that in cases where there is doubt as to respondent parents' capacity, social workers must be satisfied that a) there is sufficient capacity on the part of the parent to agree to proposals put

forward by the social work department and b) social workers should also be satisfied that such consent is fully informed and that the parents fully understand the consequences of giving such a consent.

(b) In cases involving respondent parents with low cognitive functioning or intellectual disabilities there should be guidelines or policies (if not already in place) outlining how information should be tailored to such people in a manner comprehensible to them so as to enable the parents to take on board and put into practice supports and/or guidance that is provided to them.

(c) It is recommended that where particular needs are identified by Tusla in dealing with a family, the supports or interventions that are put in place to respond to those needs must be specifically tailored to the individual circumstances of the parents, taking into account their level of cognitive impairment. Generic or standardised response programmes are not appropriate in these cases and are unlikely to yield any improvements. A personalised approach is undoubtedly necessitated in light of the sensitive issues at play.

(d) While, in these cases, the focus may be on providing appropriate and specific supports to parents, it must be emphasised that even within the provision of such supports, the best interests of the child are to be the paramount consideration, in line with Article 42A. The best interests of the child concerned need to remain at the forefront of any approach taken by Tusla or guidance given by the court and same must necessarily inform any timeframe that is being afforded to the parents to carry out the necessary changes in their parenting.

20. RECOMMENDATIONS RELATING TO SPECIAL CARE ORDERS

In light of the decision in *CFA v Q and Others*,[12] the commencement of the new Part IVA of the 1991 Act is to be welcomed. This legislation is necessary to inform the development of standards and regulations with regard to the provision of special care for these particularly vulnerable children. In this regard, the Rules of the Superior Courts (Special Care of Children) 2017 will greatly assist with the implementation of the new statutory framework. Consideration should now be given to permitting these cases to be dealt with in the District Court given the fact that it has original jurisdiction in all child care matters.

21. RECOMMENDATIONS RELATING TO JURISDICTION AND TRANSFER OF PROCEEDINGS IN CROSS-BORDER CHILD CARE CASES

In light of the decisions discussed at 3.22 of this report and the freedom of movement throughout the EU, it is recommended that a protocol similar to the one that exists between Northern Ireland and the Republic should be developed between Ireland and the rest of the UK and indeed mainland Europe. Such a protocol would enable the efficient and effective handling of cross-country cases where families travel from one jurisdiction to the other, in circumstances where that family is known to the social services department in the originating country or orders have been made there. The impact of the Supreme Court decision in *CFA v J.D.*[13] should also be considered in this regard – most importantly the comments of MacMenamin J. who recognises that the duration of court proceedings in these sensitive cases, concerning the welfare of a child, can have a significant bearing on the ultimate outcome in a case. In this vein, every effort should be made to facilitate the speedy hearing and resolution of Article 15 applications.

22. RECOMMENDATIONS RELATING TO "SIGNS OF SAFETY" POLICY

Particular consideration should be given to how Signs of Safety operates alongside Article 19 of the United Nations Convention on the Rights of the Child (UNCRC) and

[12] [2016] IEHC 335.
[13] [2017] IESC 56.

the specific obligations that the UNCRC places on the State. The implementation of Signs of Safety must be closely monitored and assessed to ensure its operation does not conflict with and work against the provisions of Article 19 UNCRC. This will enhance effectiveness and resolve any operational difficulties. A legal framework would support the operation of Signs of Safety – introducing mechanisms such as pre-court mediated procedures and information sharing.

23. RECOMMENDATIONS RELATING TO CHILD CARE COURTS

(a) It is recommended that child care law should always take place on a separate day at a separate sitting in light of the highly sensitive matters being litigated and the emotional trauma associated with being a respondent in these proceedings. At a minimum, child care matters should be heard on the same day as family law matters.

(b) It is recommended that judges who are to be assigned to deal with child care matters should be given comprehensive training in regard to issues which are particular to child care law.

(c) It is recommended that experts in the area of attachment, child development and the impact of abuse ranging from neglect to sexual abuse should be provided to judges who are allocated to deal with child care matters in light of the fact that decisions made by these judges have such far-reaching consequences for children and families.

(d) Any designated specialist family courts should be staffed by specially trained judges but specialist judges should remain part of a single judicial body.

(e) Training should be provided in advance of an assignment to child care and should be on-going and regular.

(f) Other practical matters that are necessary to ensure that child and family law matters proceed smoothly include: having translators within easy reach to avoid lengthy delays or adjournments when there are language problems and

providing sufficient space for parties to consult with their legal representatives.

(g) Regard should be had to the family court systems that exist in other jurisdictions such as the United Kingdom and Australia.

24. RECOMMENDATIONS RELATING TO CONSTITUTIONALITY OF BAN ON ASYLUM SEEKERS WORKING

(a) The recommendations of the Working Group Report on the Protection System and Direct Provision (the McMahon Report) should be implemented in order to show "greater respect for the dignity of persons in the system" and improve "their quality of life by enhancing the support and services currently available".

(b) Specifically the following recommendations of the McMahon report should be implemented:

- A 12 month limitation period for the processing of all refugee status and subsidiary protection claims should be put in place;
- In order to ensure the efficient operation of the single procedure, all individuals in the protection, leave to remain or deportation processes, for 5 years or more, should, in general, be granted either protection status or leave to remain;
- There should be a multi-disciplinary assessment of needs of protection applicants within 30 days;
- Improvements to accommodation should be made such as the provision of lockers and the provision of a recreational space for children;
- In relation to child protection, access to cultural diversity training for social workers should be provided;
- Community outreach in the form of partnership agreements with local leisure and sports clubs should be provided;
- Families should have access to cooking facilities and private living spaces in so far as practicable;
- The Reception and Integration Agency (RIA) should without delay "develop a set of criteria" taking into account the multipurpose nature of bedrooms in direct provision accommodation as well as conducting a 'nutritional audit';
- RIA should conduct a "review of security arrangements" as well as the establishment of an inspectorate to assess accommodation;
- The Child and Family Agency (CFA) "should liaise" with RIA to develop a child welfare strategy and to advise on individual cases;

- RIA, in conjunction with the CFA, "should review" its House Rules as regards parents leaving children under 14 unsupervised;
- The CFA, HSE and RIA "should collaborate" to provide early intervention and onsite supports to direct provision residents.

(c) The McMahon report recommends that provision be made for access to the labour market for protection applicants who have been waiting on a first instance determination for over 9 months. Other recommendations contained in the McMahon report include:

- Access to education (including access to homework clubs) for children living in Direct Provision;
- Health care supports;
- Supports for separated children;
- Linkages with local communities;
- Support for Vulnerable Protection Seekers, including LGBT Protection Seekers;
- A review of pregnancy and family planning issues, including crisis pregnancy issues that arise.

25. RECOMMENDATIONS RELATING TO CIVIL AND CRIMINAL LAW OVERLAP

(a) It is recommended that the Children Act 2001 be amended so as to include specific reference, within the provisions dealing with sentencing, to the principle that the best interests of the child shall be the paramount consideration.

(b) Specific reference should also be made within the sentencing provisions of the Children Act 2001 to require consideration of the fact that the child, the subject of the proceedings may already be in (civil) detention such as special care.

26. RECOMMENDATIONS RELATING TO THE CRIMINAL JUSTICE (VICTIMS OF CRIME) ACT 2017

In November 2017, the Criminal Justice (Victims of Crime) Act 2017 was enacted and its provisions commenced. Ireland thus is no longer in default of its obligations under Directive 2012/29/EU and the passing of the 2017 Act is a welcome

development to promote the position of victims within the criminal justice system. Certain further amendments to the 2017 Act are required to give heightened protection to children as a category of victims.

27. RECOMMENDATIONS RELATING TO THE BAIL SUPPORT SCHEME

(a) The pilot Bail Supervision Scheme (BBS) 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.

(b) Consideration should be given to implementing the Scheme in other locations across the country after the completion of its first year in the Dublin region, preventing discrimination based on geographical location.

(c) The scope of the Scheme should be extended for the second year of its operation to increase the numbers participating on the Scheme. The amount of young people permitted to access the BSS should at the very least be doubled within year two.

28. RECOMMENDATIONS RELATING TO THE CRIMINAL LAW (SEXUAL OFFENCES) ACT 2017

(a) Section 27 of the Criminal Law (Sexual Offences) Act 2017 requires the Minister for Justice and Equality to prepare a report within three years on the new provisions making it an offence to pay for sexual activity with a prostitute. This provision should be expanded and a comprehensive "operational assessment" of the new offences introduced by the Criminal Law (Sexual Offences) Act 2017 should take place following the Act's first year of operation.

(b) This assessment should specifically make recommendations to address any prosecutorial difficulties or limitations in police powers that may come to light. Any proactive steps that could be taken to prevent children from

becoming victims of sexual abusive should also be highlighted and rolled out on a national level.

29. RECOMMENDATIONS RELATING TO THE DOMESTIC VIOLENCE ACT 2018

(a) Child-specific services should be made available for children who have been exposed to domestic violence. In particular, such supports should include the provision of counselling for these children.

(b) The Domestic Violence Act 2018 represents a positive step towards protecting victims of domestic violence – which necessarily includes children. Efforts should be made to ensure it is commenced as soon as possible, subject to certain amendments to further strengthen its remit.

(c) A broad definition of "communicating (including by electronic means)" should be included in the 2018 Act, clarifying that it includes phone calls, text messages and emails; communication through social media sites, including Facebook and Instagram; online messaging services; and mobile phone applications such as "whatsapp" and "snapchat".

(d) Children, having regard to their age and maturity, should be given the power and authority to make applications for protection and safety orders in their own right – without having to rely on a parent or the CFA to make an application on their behalf.

Further consideration needs to be given to the exact parameters of out-of-hours orders.

(e) A national system of Child Contact Centres needs to be established to facilitate post-separation contact for victims of domestic abuse, providing qualified staff to supervise access between children and parents within the centre initially, and within the community as progress is made. These centres should also offer play and art therapy to further assist children in their

emotional development; as well as additional supports aimed toward supporting the parent who is taking up the supervised service – through the provision of anger-management classes, parenting courses and counselling, with the aim to reduce the requirement for supervision should all progress well. Child contact centres should be state-funded, preventing any strain on the resources of the family, with the needs and wishes of the child being the core focus of their operation.

(f) State-funding for expert reports in domestic violence cases must be introduced in a systematic and accessible manner.

30. RECOMMENDATIONS RELATING TO SURROGACY

(a) The AHR Bill should emphasise the paramountcy of the best interests of the child, instead of referring to his or her welfare as is currently set out in Heads 6 and 7, to ensure a coherent approach to the protection of children in all modern legislation, moving towards a broader focus on their "best interests" as opposed to welfare.

(b) Counselling specifically directed toward assisting parents to deal with and manage the subject of AHR with any children born as a result of an AHR procedure should be mandatory within any AHR Act. This would ensure that parents have the requisite tools to discuss AHR issues and the child's origins with him or her at an early stage – ensuring that the child's right to know his or her identity is being protected and vindicated. Counselling therefore should be twofold – directed towards intending parents, but also directed towards the rights of any resulting children.

(c) Further consideration must be given on the approach taken to parentage in cases of gestational surrogacy as provided for in the General Scheme in light of the criticisms raised. It is recommended that the existing approach be reassessed and reviewed. Pre-birth approval of parentage, rather than requiring that Parenting Orders be sought after the birth of the child concerned, may be preferable. Certainty is crucial for all parties involved,

including the child born as a result of a surrogacy agreement. A revision of the existing approach set out in the General Scheme of the Bill may therefore be appropriate.

SECTION 1: DEVELOPMENTS RELATING TO INTERNATIONAL INSTRUMENTS AND STANDARDS

1.1 INTRODUCTION

As with past reports, this report begins with an examination of recent developments in matters relating to child protection and welfare in the international context, with a particular focus on comparing and contrasting international best practice to the Irish system. In the past year there have been general comments of the UN Committee on the Rights of the Child, developments in case law in other jurisdictions, and good practice models in family law which must be considered. The relevant issues shall be addressed below.

1.2 JOINT GENERAL COMMENTS OF THE UN COMMITTEE ON THE RIGHTS OF THE CHILD ON CHILDREN AND INTERNATIONAL MIGRATION

The UN Committee on the Rights of the Child together with the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families jointly adopted in 2017 two general comments on the rights of children in situations of international migration:

(1) Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration; and

(2) Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.

The objective of the joint general comments is to provide authoritative guidance on legislative, policy and other measures that should be taken to ensure full compliance with the obligations under the relevant UN Conventions to fully protect children's rights in the context of international migration. The joint General Comments are based on the provisions of both the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Ireland has neither signed nor ratified the latter instrument, but the human rights norms of these general

comments are built on the provisions and principles of the Convention on the Rights of the Child, which has been ratified by Ireland.

The joint general comments promote the development and implementation of rights-based migration policies in countries of origin, transit, destination and return, by improving the realisation of children's rights. The General Comments are a response to different forms of human rights violations faced by children in the context of international migration. The Committees acknowledge that migration can bring positive outcomes to individuals, families and broader communities, but that there are many dangers also for migrants. Children may encounter difficulties such as perilous border crossings and rough seas; risk of sickness, injury and violence; and risks of exploitation, including forced labour and trafficking. These risks are multiplied for unaccompanied children. Migrant children may be held in detention either alone or with their families (although this does not occur in Ireland), or deported without proper due process guarantees, and may face the risk of persecution upon their return. Others have been separated from their parents due to their migration status, with limited or no opportunity for family reunification. Both the Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) address these human rights violations and these general comments aim to provide further clarification on state obligations.

The adoption of these joint general comments was the result of an extensive consultation process involving States, UN agencies and entities, civil society organisations, national human rights institutions and other stakeholders from every region of the world. The joint general comments provide the framework for rights-based migration policies in the 196 States that have ratified the Convention on the Rights of the Child, including countries of origin, transit, destination and return. The joint general comments also have the potential to form frameworks such as Global Compacts on Migration and Refugees and the Sustainable Development Goals (SDGs) regarding the rights of children.

1.3 GENERAL COMMENT IN THE CONTEXT OF INTERNATIONAL MIGRATION: GENERAL PRINCIPLES

In General Comment No. 3 of the CMW and No. 22 of the CRC in the context of International Migration: General principles,[14] the Committees point out that, in the context of international migration, children may be in a situation of double vulnerability as they are children; *and* they will also have vulnerabilities as children affected by migration who:

(a) are migrants themselves, either alone or with their families,
(b) were born to migrant parents in countries of destination, or
(c) remain in their country of origin while one or both parents have migrated to another country.

They may also have additional vulnerabilities relating to national, ethnic or social origin; gender; sexual orientation or gender identity; religion; or disability.

States are obliged, General Comment No. 22 continues, to ensure that children in the context of international migration are treated first and foremost as children. States must fulfil their obligations to respect, protect and fulfil the rights of children in the context of international migration, regardless of the migration status of children, or that of their parents or legal guardians. The Committees encourage children's rights authorities at domestic level to have a leading role on policies, practices and decisions affecting children in the context of international migration, and recommend that international migration should be considered in child protection systems. Authorities responsible for migration should address the needs of children in the context of international migration at every stage of policymaking and implementation. Human rights-based data collection should also happen, and rights-based indicators developed, so that programmes can be based on this data.

The Committees also state that the following elements should be part of the policies and practices to be developed and implemented concerning children in the context of international migration:

(a) comprehensive policies between child protection authorities and other key bodies, including on health, education, justice, and between regional, national and local governments;
(b) adequate resources (budgetary resources included) aimed at ensuring effective implementation of policies and programmes; and

[14] CMW/C/GC/3/CRC/C/GC/22 (16 Nov 2017).

(c) continuous training of child protection and migration officials on human rights (including children's rights).

States are reminded that they have a duty to ensure that the principles and provisions of the CRC are fully reflected and given legal effect in relevant domestic legislation, policies and practices (CRC Article 4). Moreover, the overarching general principles of the CRC must be implemented by states in all actions concerning children.

The principle of non-discrimination (Article 2)

Any differential treatment of migrants must be lawful and proportionate, it must be in pursuit of a legitimate aim and in line with children's best interests and international human rights standards. Similarly, states must realise the human rights of migrant children (and their families), as well as their access to services, in an equal manner with nationals. States must adopt measures to combat discrimination on any grounds throughout the migration process, including in and after returning to the country of origin, whether through measures to combat racist attitudes and practices, collecting accurate data and promoting the social inclusion of families affected by international migration. Policies and programmes should have gender and disability-related analysis.

The principle of the best interests of the child (Article 3)

The Committees emphasise that the child's best interests should be assessed and determined when a migration decision is to be made which affects a child. A "best interests assessment", the general comment continues, involves evaluating and balancing all the elements necessary to make a decision in a particular situation for a specific individual child or group of children. When a migration decision is being made which affects a child, though what is best for a child may be perceived to conflict against other factors such as state or parents' interests: "best interests taken as a primary consideration means that the child's interests have high priority and are not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best."[15]

[15] Para. 28.

States must "[g]ive high priority to the child's best interests in their legislation, policy and practice"[16] and must ensure that all proceedings, policies and programmes relevant to children have the principle integrated through robust procedures. Sufficient resources should be made available to ensure this. Procedures should be developed to assist those making migration-related decisions to determine the best interest of the child. In cases that could lead to the expulsion of migrant families due to their migration status, best interest determinations should be conducted for the children in order to examine the impact of such decisions on the rights and development of those children, including on their mental health.

Unaccompanied children must be identified in border controls and referred to child protection authorities. When best interest determinations are being made, relevant solutions and plans should be developed and discussed together with the child in a child-friendly manner. If it is determined that it is in best interest of the child to return, "an individual plan should be prepared, together with the child where possible, for his or her sustainable reintegration."[17] Comprehensive frameworks should be developed, resourced and implemented to ensure inter-institutional coordination mechanisms. Their effective reintegration through a rights-based approach should be ensured, including through services such as health and education, and "[i]n all such situations, a quality rights-based follow-up by all involved authorities, including independent monitoring and evaluation, should be ensured."[18]

The right to life, survival and development (Article 6)

The Committee states that specific policies and measures, including access to child-friendly, gender-sensitive and safe judicial and non-judicial remedies, should be in place at national level in order to protect and assist children affected by international migration. They should be facilitated to resume their lives with their rights as children respected, protected and fulfilled. States should ensure that children affected by international migration, regardless of their status or that of their parents, have an adequate standard of living to ensure their physical, mental, spiritual and moral development.

[16] Para. 32.
[17] Para. 32.
[18] Para. 32.

The Committees express concern that policies or practices restricting basic rights, including the right to work because of migration status may affect children's right to life, survival and development. Children's rights should be considered in relevant policies. Their interests must be taken fully into account when it comes to policies and decisions aimed at regulating their parents' access to social rights, regardless of their migration status. Children's right to development, and their best interests, should also be taken into consideration when States address the situation of migrants residing irregularly, including through the implementation of regularisation mechanisms.

Asylum-seeking children in Ireland are still kept in 'direct provision' accommodation. This is in direct conflict with their right to an adequate standard of living, as I have emphasised in several previous reports. Direct provision accommodation has been shown to be detrimental to children's well-being and development.[19] The Council of Europe highlighted in 2017 the 'multiple negative effects of the direct provision system on the rights of asylum seeker children'.[20]

It is positive that the Ombudsman and Ombudsman for Children have gained a function in receiving complaints from residents of direct provision. However, the nature of such accommodation is unacceptable for children, not least because of the loss of autonomy, because of institutionalisation, because of accounts of harassment and sexual violence experienced by women living in direct provision,[21] the length of the stay (as of March 2017, there were 564 individuals who had been in direct provision for five years or more)[22] and because centres, which are almost completely privately run, do not set performance measures to ensure quality accommodation.[23]

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[19] Siobhán McGee (CEO Action Aid Ireland), *Reflections - one year on from the New York Declaration for Refugees and Migrants* (19 September 2017). See http://www.dochas.ie/blog/reflections-one-year-new-york-declaration-refugees-and-migrants; Liam Thornton (2015) Spotlight on Direct Provision in Children's Rights Alliance (ed.), Making Rights Real for Children: A Children's Rights Audit of Irish Law. Dublin: CRA p. 124-130.

[20] See para. 165 Nils Muižnieks (2017) Report by the Commissioner for Human Rights.

[21] See pp. 116-117 IHREC, *CEDAW Submission* (IHREC, 2017).

[22] Minister for Justice and Equality, Frances Fitzgerald T.D., 'Written Answers: Direct Provision Data' (question no. 57), Parliamentary Debates: Dáil Éireann, 13 April 2017 (available at http://oireachtasdebates.oireachtas.ie/debates%20authoring/ debateswebpack.nsf/takes/dail2017041300051). 95 IHREC (2014) Policy Statement on the System of Direct Provision in Ireland (available at https://www.ihrec.ie/app/uploads/download/pdf/ihrec_policy_statement_on_direct_provision_10dec14.pdf).

[23] See Seamus McCarthy, 'Procurement and Management of Contracts for Direct Provision' Committee of Public Accounts Debate, 11 May 2017, (available at http:// oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/ACC20170511000 02).

The Irish Human Rights and Equality Commission (IHREC) recommends that direct provision should be placed on a statutory footing, and a time limited period (6-9 months) introduced after which an individual who has not yet received a first instance decision on his/her status should be able to leave the direct provision system and live independently and access relevant social welfare payments.[24] It also advises that the agency responsible for direct provision (the Reception and Integration Agency) ensure agreements with commercial contractors in relation to compliance with section 42 of the Irish Human Rights and Equality Commission Act 2014 which places a positive duty on public sector bodies to have regard to the need to eliminate discrimination, promote equality, and protect human rights, in their daily work.

It is also to be noted that in a recent Supreme Court judgment, discussed in section 4 of this report (*NHV v Minister for Justice and Equality and Ors*),[25] it was held that where there is no statutory time limit for processing asylum applications, it is contrary to the constitutional right to seek employment to have an "absolute prohibition" in the 1996 Refugee Act (and continued in the International Protection Act 2015) on asylum seekers seeking employment. As stated above, the IHREC recommends a time limited period (6-9 months) should be introduced, following which an individual who has not yet received a first instance decision should be able to seek employment.

The right of the child to express his or her views in all matters affecting him or her, and to have those views taken into account (Article 12)

Children should be given all relevant information on their rights, relevant services, complaints mechanisms, the immigration and asylum processes and their outcomes, and other information relevant to their interests and to due process. Information should be provided in the child's own language in a timely manner. Children should be provided with both a lawyer and with a children's guardian, specially trained in immigration and asylum seeking. Groups of children should be involved in the development of relevant laws, policies and procedures concerning international migration.

States must adopt measures, including in law and policy, that these CRC general principles are upheld in practice in contexts affecting children experiencing international migration.

[24] Irish Human Rights and Equality Commission, *Submission to the Committee Against Torture* (IHREC, 2017).
[25] *NHV v Minister for Justice and Equality and Ors* [2017] IESC 35 and page 225 of this report.

1.3.1 Non-refoulement

The Committees also emphasise that states parties must respect non-refoulement obligations deriving from international human rights, humanitarian, refugee and customary international law. The principle "prohibits States from removing individuals, regardless of migration, nationality, asylum or other status, from their jurisdiction when they would be at risk of irreparable harm upon return, including persecution, torture, gross violations of human rights or other irreparable harm."[26] The Committees note with regret that some states have interpreted narrowly this concept of non-refoulement, and require that contracting states "shall not reject a child at a border or return him or her to a country where there are substantial grounds for believing that he or she is at real risk of irreparable harm".[27]

The Minister for Justice and Equality stated in 2017 that "the question of not returning a person to a place where certain fundamental rights would be breached […] is fully considered in every case when deciding whether or not to make a deportation order."[28] This is a positive approach. However, the IHREC points to an increase in refusals of permission to land recorded in the State in recent years. In 2016, 4,127 individuals were refused leave to land (up from 1,935 in 2013), including persons from states such as Afghanistan, Iraq and Syria. Of this 4,127 total, 396 persons were subsequently allowed to enter as asylum seekers.[29] The IHREC has recommended that an effective remedy must be available to persons in Ireland undergoing this process, and that those refused leave to land must have adequate access to legal advice, stating that all necessary steps (including provision of legal and interpretation services) be taken to ensure that Ireland fulfils its obligations under the prohibition on refoulement.

[26] Para. 45.
[27] Para. 46.
[28] Minister for Justice and Equality, Frances Fitzgerald T.D., 'Written Answers: Deportation Orders Data' (question no. 212), Parliamentary Debate: Dáil Éireann, 2 May 2017 (available at http://oireachtasdebates.oireachtas.ie/ debates%20authoring/debateswebpack.nsf/takes/dail2017050200070).
[29] See Irish Human Rights and Equality Commission, *Submission to the Committee Against Torture* (IHREC, 2017) and Minister for Justice and Equality, Frances Fitzgerald T.D., 'Written Answers: Immigration Data' (question no. 76), Parliamentary Debates: Dáil Éireann, 22 February 2017 (available at http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2017022200074).

1.3.2 International Co-operation

The Committees emphasise the need for bilateral, regional and global cooperation in order to ensure children's rights in the context of international migration. In particular it is important to coordinate efforts among countries of origin, transit, destination and return, and to clarify their respective roles and responsibilities in addressing children's rights in the context of international migration, and particularly ensuring the best interests of the child is a primary consideration.

The Committees express concern about an increase in bilateral or multilateral cooperation agreements that aim to restrict migration, emphasising that these have negative impacts on children's rights. The Committees urge cooperation that aims to secure safe, orderly and regular migration and which fully respects human rights.

1.3.3 Dissemination

The Committees urge states to translate the general comment into relevant languages, with child-friendly/appropriate versions and formats accessible to persons with disabilities. The obligations in the general comment should be distributed at conferences, seminars, workshops and other events and good practices on how best to implement it should be shared. It should be included in the training of professionals and technical staff in particular. States parties must include in their periodic reports under Article 44 of the Convention on the Rights of the Child information about the measures adopted in relation to the joint general comments, and relevant outcomes.

1.3.4 Ratification

The Committees also urge states that have not yet done so to ratify relevant international human rights law instruments. Ireland has not yet ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as well as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (as I have noted in previous reports).

1.4 GENERAL COMMENT IN THE CONTEXT OF INTERNATIONAL MIGRATION: STATES PARTIES' OBLIGATIONS IN PARTICULAR WITH RESPECT TO COUNTRIES OF ORIGIN, TRANSIT, DESTINATION AND RETURN

This next section examines Joint General Comment No. 4 of the CMW and No. 23 of the CRC in the context of International Migration and States parties' obligations in particular with respect to countries of origin, transit, destination and return.[30]

1.4.1 Age and Liberty

The Committees emphasise that the definition of the child under the Convention on the Rights of the Child is until the age of 18. The Committees express concern that in the context of international migration, children aged 15 to 18 years are sometimes provided lower levels of protection than under 15s. They are, for example, sometimes considered to be adults or left with an unclear migration status until they reach 18 years of age. States are urged by the Committees to ensure that equal standards of protection are ensured for every child, including those above the age of 15 years no matter what their migration status.

The Committees point-out that in line with the Guidelines for the Alternative Care of Children,[31] States should provide sufficient follow-up and support for children as they approach 18 years of age, in particular if they are leaving state care. This help with transition to adulthood should include access to a long-term regular migration status and access to education and employment. Children should be adequately prepared during this transition period for living independently, and there should be follow-up care and support measures beyond the age of 18 years.

The Committees state that to make an informed estimate of age, authorities should;

> undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands.

[30] CMW/C/GC/4/CRC/C/GC/23 (16 Nov 2017).
[31] General Assembly resolution 64/142.

It is also emphasised that documents that are available should be considered genuine unless there is proof that they are not, and that statements by children and their families must be considered, with the benefit of the doubt being given to the individual being assessed. Medical methods based for example on bone and dental exam analysis, which may be inaccurate, should not be relied upon by states, and it must be possible to review or appeal decisions to a suitable independent body. Child and family immigration detention should be prohibited by law.

1.4.2 Access to Justice

The Committees emphasise that access to justice is a crucial right which is necessary for the protection and promotion of all other human rights. It is therefore of enormous importance that every child in the context of international migration has access to justice in order to enjoy his/her rights.

States have a responsibility to ensure structural and proactive interventions for fair, effective and prompt access to justice. There must exist child-sensitive procedures and administrative and judicial proceedings must be adapted to the needs and development of children. The best interests of the child must be a primary consideration in all such proceedings. States must ensure that all legislation, policies, measures and practices facilitate child-sensitive due process in all migration and asylum administrative decisions and in all judicial proceedings affecting the rights of children and families. All children, including those accompanied by parents or other legal guardians, must be treated as individual rights holders. Their child-specific needs should be considered individually and their views should be appropriately heard and given due weight. They should have access to remedies against decisions affecting their own situation or that of their parents.

Measures should be taken to avoid undue delays in procedures that could negatively affect children's rights in the context of international migration, including family reunification procedures. Speedy proceedings should be encouraged, provided that this does not restrict any due process guarantees and provided that it is not contrary to a child's best interests. Children should have the ability to bring complaints before courts or other bodies and this must be easily accessible to them (e.g., via child protection and youth institutions, schools

and national human rights institutions) and, when their rights have been violated, children should be able to receive advice and representation from professionals with expert knowledge of children and migration issues. States should ensure free, quality legal advice and representation for migrant, asylum-seeking and refugee children.

The Committees state that in the context of best interests assessments, children should be guaranteed the right to:[32]

(a) Access to the territory, regardless of the documentation they have or lack, and to be referred to authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards;
(b) Be notified of the existence of proceedings and of the decision adopted in the context of the immigration and asylum proceedings, its implications and possibilities for appeal;
(c) Have the immigration proceedings conducted by a specialised official or judge, and any interviews carried out in person by professionals trained in communicating with children;
(d) Be heard and take part in all stages of the proceedings and be assisted without charge by a translator and/or interpreter;
(e) Have effective access to communication with consular officials and consular assistance, and to receive child-sensitive rights-based consular protection;
(f) Be assisted by an attorney trained and/or experienced in representing children at all stages of the proceedings and communicate freely with the representative, and have access to free legal aid;
(g) Have the application and procedures involving children treated as a priority, while ensuring ample time to prepare for proceedings and that all due process guarantees are preserved;
(h) Appeal the decision to a higher court or independent authority, with suspensive effect;
(i) For unaccompanied and separated children, have appointed a competent guardian, as expeditiously as possible, who serves as a key procedural safeguard to ensure respect for their best interests;
(j) Be fully informed throughout the entire procedure, together with their guardian and legal adviser, including information on their rights and all relevant information that could affect them.

The Committees also recognise the negative impacts on children's well-being of having an insecure migration status, recommending that States ensure clear status determination procedures for children. The Committees also call on states to ensure the development and implementation of consular protection policies directed to protecting children's rights, including training of consular staff.

[32] Para. 17.

It should be noted, however, that the IHREC has raised concerns about the efficiency related to the International Protection Act 2015 (for the most part commenced on 31 December 2016). It introduces a single application procedure for persons seeking asylum. There is potential for the legislation to streamline the process of protection and to reduce the lengthy delays which characterise asylum applications in Ireland and extended institutionalisation in the 'direct provision' system (see further above). The Commission recommends that adequate resources and highly-trained personnel are available to implement the new single application procedure. The backlog must be dealt with, and fair and high-quality decision-making must be ensured. There is also a high rate of refusals at the first instance[33] – this should be examined to ensure that all human rights obligations, including children's rights, are being met.

1.4.3 Right to a Nationality and Safeguards against Statelessness

The Committees focus in particular on Article 7 of the Convention on the Rights of the Child which emphasises the prevention of statelessness; specifying that states must ensure the implementation of the rights of a child to be registered, to a name, to acquire a nationality and to know and be cared for by his or her parents.

States are not obliged to grant their nationality to every child born in their territory. Nevertheless, they must adopt every appropriate measure to ensure that every child has a nationality when born. Nationality should be conferred on a child born in the territory of the State if the child would otherwise be stateless. States must abolish nationality laws which discriminate on the basis of gender by granting equal rights to men and women to confer nationality on their children and spouses and also regarding the acquisition, change or retention of their nationality.

1.4.4 Family life

The right to protection of family life should be fully respected, protected and fulfilled in relation to every child regardless of their residency or nationality status. States should

[33] See Irish Human Rights and Equality Commission, *Submission to the Committee Against Torture* (IHREC, 2017), p.12.

maintain family unity, including siblings, and prevent separation, which should be a primary focus. States must not only *refrain* from actions which could lead to family separation, but also take *positive measures* to maintain the family unit, for example the reunion of separated family members: protection of the right to a family environment may require this. The term "parents" must be interpreted broadly to include biological, adoptive or foster parents and in some circumstances the members of the extended family or community as provided for by local custom.

The IHREC has raised concerns regarding the restrictive family reunification provisions under the 2015 International Protection Act which the Commission emphasises are likely to cause much hardship to asylum-seeking families. The definition of 'member of family' who may enter and reside in the State is defined narrowly in section 56 of the International Protection Act 2015 and excludes dependents, which does not match the range of family relationships to which Article 8 of the European Convention of Human Rights can apply in the context of family reunification. It has also been stated that there are evidential barriers experienced by family member applicants and a lack of targeted legal services to assist applicants.[34] The Human Rights and Equality Commission recommends that Ireland reviews the International Protection Act 2015 to bring the legislation into line with the State's human rights obligations, including Article 8 of the European Convention on Human Rights.[35]

1.4.5 Non-separation

The Committees state that separating a family by removing a family member from a territory, or refusing to allow a family member to enter or remain in the territory, may amount to arbitrary or unlawful interference with family life.

The Committees are of the opinion that the harm to the family unit where one or both parents are removed based on a breach of immigration laws related to entry or stay is disproportionate. This is, the Committee continues, because any advantage obtained by

[34] See IHREC (2015) *Recommendations on the General Scheme of the International Protection Bill 2015*. See also NASC (2016) *The Loss of Family Reunification Rights in the International Protection Act 2015* (available at http://www.nascireland.org/wp-content/uploads/2016/12/The-Loss-of-Family-Reunification-Rights-in-the-International-Protection-Act.pdf) and ESRI (2017) *Family Reunification of non-EU Nationals in Ireland* (available at https:// www.esri.ie/publications/family-reunification-of-non-eu-nationals-in- ireland/).
[35] Irish Human Rights and Equality Commission, *Submission to the Committee Against Torture* (IHREC, 2017).

forcing the parent to leave the territory is outweighed by the restriction of family life and the impact on the child's development and welfare. The Committees also recommend that States provide ways for the regularisation of the status of migrants where they are in an irregular situation residing with their children, particularly "where a child has been born or has lived in the country of destination for an extended period of time, or when return to the parent's country of origin would be against the child's best interests."[36] States must consider children's best interests and rights where parents are being expelled for criminal offences. The Committees also emphasise that children should not be taken into state care where there are no concerns related to parental abuse and neglect. States should provide appropriate financial and other assistance to parents regardless of the migration status of the parents or the child. Measures should be directed at enabling parents to fulfil their duties with regard to child development. Considering that irregular migration status of children and/or their parents may obstruct such goals, States should make available migration channels so that children and their families may access "long-term regular migration status or residency permits based on grounds such as family unity, labour relations, social integration and others."[37]

1.4.6 Family reunification

The Committees emphasise that states must deal with applications for family reunification in "a positive, humane and expeditious manner, including facilitating the reunification of children with their parents."[38] The best interests of the child must be considered in decisions on family reunification where children's relationships have been interrupted by international migration. For unaccompanied or separated children efforts must be made to find rights-based solutions for them, including the possibility of family reunification. The decision on whether to reunite a child with his or her family should be based on a robust assessment in which the child's best interests are upheld as a primary consideration and family reunification is taken into consideration.

Return to the country of origin, even with family reunification in mind, should *not* be pursued where it means a "reasonable risk" that such a return would lead to the violation of the human rights of the child. Where it is in their children's best interests, measures for parents to

[36] Para. 29.
[37] Para. 31.
[38] Para. 32.

reunify with children and/or regularise their status should be put in place. States should apply best interest determination procedures when finalising family reunification.

If a country of destination refuses family reunification to children or families, detailed information should be provided to the child, in a child-friendly manner, on the reasons for the refusal and on the child's right to appeal. States must develop effective family reunification procedures that allow children to migrate in a regular manner. Otherwise children may end up migrating unsafely, trying to reunite with parents or siblings in destination countries. Any restrictions on reunification should be legitimate, necessary and proportionate.

1.4.7 Protection from all forms of Violence and Abuse

Children in the context of international migration are particularly vulnerable to violence. The Committee lists the different types of violence which children may face: "including neglect, abuse, kidnapping, abduction and extortion, trafficking, sexual exploitation, economic exploitation, child labour, begging or involvement in criminal and illegal activities, in countries of origin, transit, destination and return."[39]

The Committees emphasise that restrictive migration or asylum policies, including criminalisation of irregular migration render migrant children particularly vulnerable to suffering violence during their migration journey. States must take all necessary measures to prevent illicit transfer and non-return of children as well as exploitation. States must recognise that children face gender-specific risks and particularly be aware that girls may be more likely to face sexual exploitation. Additional measures should be taken to address gender and disability issues. States should:[40]

- Establish early identification measures to detect victims of sale, trafficking and abuse, as well as referral mechanisms, and in this regard carry out mandatory training for social workers, border police, lawyers, medical professionals and all other staff who come into contact with children;
- Where different migration statuses are available, the most protective status (i.e., asylum or residence on humanitarian grounds) should be applied and granting such status should be determined on a case-by-case basis in accordance with the best interests of the child;

[39] Para. 39.
[40] Para. 43.

- Ensure that the granting of residence status or assistance to migrant child victims of sale, trafficking or other forms of sexual exploitation is not made conditional on the initiation of criminal proceedings or their cooperation with law enforcement authorities.

The IHREC has highlighted a number of significant gaps in protection for victims of trafficking in Ireland. The identification process, for example, has not been put on a statutory footing.[41] Sole competence for identifying potential victims of trafficking lies with An Garda Síochána, which does not represent good practice. The State's Second National Action Plan to Prevent and Combat Human Trafficking in Ireland commits to undertaking a fundamental review of the formal identification process, but this commitment is not subject to clear or any interim measures. The IHREC expresses concern that Irish legislation focuses on the criminalisation of trafficking in human beings, and does not actually define 'victim of trafficking in human beings', recommending that the State take the necessary legislative measures to place protection for victims of trafficking on a statutory basis.

The general comments also emphasise that states should also take effective measures to ensure that children are protected from exploitation, violence and abuse, regardless of their migration status. States must initiate comprehensive protection, support services and redress mechanisms for migrant children and their families reporting cases of violence or exploitation to police or other authorities. The 2017 UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) report of the IHREC highlighted a number of significant obstacles that victims of gender-based violence experience in securing protection and supports, one of which was a woman's immigration status. The Department of Justice and Equality published a guidance note on the immigration status of victims of domestic violence, outlining the approach which is taken to immigration decisions for victims of domestic violence.[42] The arrangements do not apply to victims who do not have permission to be in the State. Concerns have been expressed by the IHREC regarding the legal arrangements for undocumented women who experience domestic violence.[43]

[41] See IHREC (2016) *IHREC Submission to GRETA in advance of its Second Evaluation Round of Ireland* (available at https://www.ihrec.ie/app/ uploads/2016/12/IHREC-Submission-to-GRETA-2016.pdf).
[42] (available at http://www.inis.gov.ie/en/INIS/Victims%20Of%20Domestic%20Violence%20%20Note%20for%20Web.pdf/Files/Victims%20Of%20Domestic%20Violence%20%20Note%20for%20Web.pdf).
[43] See pp. 60-61 IHREC (2017) CEDAW Submission.

The IHREC conducted consultations in 2017 for its CEDAW report, and heard accounts of harassment and sexual violence experienced by women living in direct provision centres. It was stated that:

> The Commission was struck during its visits by reports of harassment experienced by female residents of both direct provision centres. Women made reference to catcalling, verbal abuse and proposition, and the effect this behaviour had on their well-being.[44]

The IHREC recommended the provision of counselling and support services, particularly to victims of trafficking, and of gender-based violence (including harassment). The IHREC further raised concerns that the guidelines on sexual violence of the Reception and Integration Agency are not satisfactorily implemented.[45]

The IHREC recommended that implementation of the Reception and Integration Agency's guidelines on sexual violence be monitored as part of inspections of direct provision centres and a statement of compliance should be included in each inspection report. It recommended that all staff are trained in gender equality and human rights. Considering the vulnerability of children, I would add that the staff should receive comprehensive training on children's rights.

1.4.8 Right to Protection from Economic Exploitation

Migrant children above working age should enjoy equal treatment to that of national children regarding conditions of work and remuneration irrespective of their status.

States should take all appropriate measures to prevent the employment of migrant children in hazardous work and take necessary measures to guarantee human rights standards for migrant children in this regard. Migrant children and their families should have the right to the same treatment as regards social security as that granted to nationals. States should provide emergency social assistance to migrant children and their families where necessary, regardless of their migration status.

[44] See pp. 18 IHREC (2017) CEDAW Submission.
[45] See pp. 116-117 IHREC (2017) CEDAW Submission.

1.4.9 Right to an Adequate Standard of Living

States should ensure that children experiencing international migration have an adequate standard of living for good child development. States should assist parents and others responsible for the child to provide material assistance where necessary, particularly with regard to nutrition, clothing and housing. States should ensure an adequate standard of living in locations such as reception facilities and ensure that residential facilities do not restrict children's movements unnecessarily. As noted above, asylum-seeking children in Ireland are still kept in 'direct provision' accommodation. This is in direct conflict with their right to an adequate standard of living and needs to be addressed as a matter of priority.

1.4.10 Right to Health and Education

The Committees state that a child's health can be affected by many factors, such as poverty, and violence, emphasising that migrant children may experience severe distress and acute mental health needs. Children should have access to care and psychological support, specific to children's needs. Migrant children should have access to health care equal to that of nationals, no matter what their migration status, including sexual and reproductive health information and services. National plans, policies, and strategies should address the specific health needs and vulnerabilities of migrant children.

The IHREC emphasises the need for Ireland to plan and provide for the mental health needs of relocated refugees in Ireland, as they are at higher risk of post-traumatic stress.[46] The College of Psychiatrists of Ireland has recognised that the current policy of dispersal in Ireland may lead to social isolation and worsen mental health issues.[47]

It is also emphasised in the general comment that all children, irrespective of migration status, must have access to all levels of education, including early childhood education and vocational training, equal to that of nationals of the country where those children are living. States must ensure equal access to quality and inclusive education for all migrant children.

[46] Irish Human Rights and Equality Commission, *Submission to the Committee Against Torture* (IHREC, 2017).
[47] See College of Psychiatrists of Ireland, *The Mental Health Service Requirements for Asylum Seekers and Refugees in Ireland* (College of Psychiatrists of Ireland, 2017).

The Committees urge against migrant children having to move during the school year – they should be supported to complete any education courses until adulthood. States should ensure access to third level education to every child without discrimination. Where necessary, targeted measures should be implemented to support migrant children, including additional language education, staff and other support, without discrimination. Educational segregation is not permitted. Measures should be introduced to foster intercultural dialogue and to address and prevent discrimination against migrant children, including integrating human rights education.

1.5 THE NEW YORK DECLARATION FOR REFUGEES AND MIGRANTS

In September 2016, in response to the growing global phenomenon of large movements of refugees and migrants, the UN General Assembly initiated a process to develop a Global Compact for safe and regular migration, as well as a Global Compact on refugees - the New York Declaration for Refugees and Migrants. The Declaration lays out a vision for a more predictable and comprehensive response to the refugee crisis, known as the Comprehensive Refugee Response Framework, or CRRF. It calls for greater support to refugees and the countries that host them. It is very positive that negotiations were led by Ireland.

In adopting the New York Declaration, Member States:

- expressed profound solidarity with those who are forced to flee;
- reaffirmed their obligations to fully respect the human rights of refugees and migrants;
- agreed that protecting refugees and the countries that shelter them are shared international responsibilities and must be borne more equitably and predictably;
- pledged robust support to those countries affected by large movements of refugees and migrants;
- agreed upon the core elements of a Comprehensive Refugee Response Framework; and
- agreed to work towards the adoption of a global compact on refugees and a global compact for safe, orderly and regular migration.

The Declaration and its accompanying documents make repeated references to safe, orderly and regular migration as a benefit and an opportunity. It reaffirms the purposes and principles of the UN Charter, the Universal Declaration of Human Rights and the core international human rights treaties as they relate to refugees and migrants. The Declaration commits states

to protect the safety, dignity and human rights of all migrants regardless of their migratory status. It commits states to cooperate to facilitate safe, orderly and regular migration.

In the Declaration, States commit to work towards the adoption in 2018 of a global compact on refugees. The High Commissioner for Refugees was asked to propose the text of the compact in his annual report to the General Assembly in 2018. It will be based on the practical application of the CRRF in different refugee situations, bearing in mind a series of thematic discussions, and on the basis of a process of stocktaking that was to take place in 2017. In 2018, the United Nations High Commission for Refugees (UNHCR) will engage in formal consultations with States and other stakeholders on the matter of a draft text of the global compact on refugees.

The initiatives taken by the State in Ireland are deserving of praise, including the Syrian Humanitarian Admission Programme, the humanitarian assistance provision and Ireland's deployment of naval resources to life-saving missions in the Mediterranean.

In Ireland, the Irish Refugee and Migrant Coalition has set out guidelines for the protection of refugees and migrants and the upholding of human rights. These include addressing the root causes of displacement, placing less emphasis on responsibility for protection of migrants as lying outside the EU, and ensuring Ireland meets its commitments on refugees and migrants.[48]

Recommendations Relating to the Joint General Comments and the New York Declaration

Ireland should sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; as well as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

[48] Siobhán McGee (CEO Action Aid Ireland), *Reflections - one year on from the New York Declaration for Refugees and Migrants* (19 September 2017). See http://www.dochas.ie/blog/reflections-one-year-new-york-declaration-refugees-and-migrants.

Ireland's migration-related frameworks, policies, practices and/or other measures should encompass the joint general comments on the rights of children in situations of international migration: Joint general comment on the general principles regarding the human rights of children in the context of international migration; and joint general comment on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. All relevant personnel should be made aware of the joint general comments, which should be introduced into training for these groups. The joint general comments should be distributed widely.

The Conventions should be integrated into Ireland's migration-related frameworks, policies, practices and/or other measures.

In particular, it should be ensured that such measures encompass the general principles of the UN Convention on the Rights of the Child – the right to be heard, the right of children to have their best interests considered in all decisions affecting them, the right to life, survival and development, and the right to freedom from discrimination.

Priority should be given to children's best interests in measures introduced in Ireland relating to migration. In a "best interests assessment" for an individual migrant child, the child's best interests should be considered as a primary consideration – they should have high priority and a larger weight must be attached to what serves the child best.

Ireland should abolish the 'direct provision' system of accommodation for asylum seekers and ensure adequate provision for children's standard of living. In the interim, the Reception and Integration Agency must ensure agreements with commercial contractors in relation to compliance with section 42 of the Irish Human Rights and Equality Commission Act 2014 and ensure high standards of accommodation. Direct provision should be placed on a statutory footing, and a time limited period (6-9 months) introduced after which an individual who has not yet received a first instance decision on his/her status should be able to leave the direct provision system and live independently and access relevant social welfare payments.

Adequate resources and highly-trained personnel should be made available to implement the new single application procedure. The backlog must be dealt with, and fair and high-quality decision-making must be ensured.

In light of the recent Supreme Court decision in NHV v Minister for Justice and Equality and Ors,[49] *a time limited period (6-9 months) should be introduced after which an individual who has not yet received a first instance decision should be able to seek employment. This will facilitate the right of children to an adequate standard of living.*

Implementation of the Reception and Integration Agency's guidelines on sexual violence should be monitored as part of inspections of direct provision centres and a statement of compliance should be included in each inspection report. It is also recommended that all staff are trained in gender equality and human rights. The staff should also be trained in children's rights.

Ireland should review the International Protection Act 2015 to bring the legislation into line with the State's human rights obligations, including Article 8 of the European Convention on Human Rights.

Ireland should ensure that the International Protection Act 2015 is adequately resourced with highly-trained personnel.

Ireland should take the necessary legislative measures to place assistance and protection for victims of trafficking on a statutory basis.

Women should have equal protection from domestic violence regardless of their immigration status.

Ireland should follow the guidelines of the Irish Refugee and Migrant Coalition which include addressing the root causes of displacement, placing less emphasis on responsibility for protection of migrants as lying outside the EU, and ensuring Ireland meets its commitments on refugees and migrants.

Ireland must plan and provide for the mental health needs of relocated refugees in Ireland, as they are at higher risk of post-traumatic stress. Particular regard should be had for the mental health needs of refugee children.

[49] [2017] IESC 35.

The recent increase in refusals of permission to land in Ireland should be subject to examination, and a children's rights analysis should be built into this. An effective remedy must be available to persons in Ireland undergoing this process, and those refused leave to land must have adequate access to legal and interpretation services.

Ireland should continue to lead on international co-operation including through implementing the New York Declaration for Refugees and Migrants. Ireland should emphasise the benefits of international migration; ensuring relocation/resettling of migrants whom the State has agreed to accept; and following the Irish Refugee and Migrant Coalition's guidelines for the protection of refugees and migrants and the upholding of human rights.

1.6 WOLVERHAMPTON CITY COUNCIL V JA & ORS - EVIDENCE IN CHILD PROTECTION

In the High Court in England and Wales, in the case of *Wolverhampton City Council v JA & Ors*,[50] Keehan J. dealt with a child protection case which involved allegations of sexual abuse of two girls aged 13 (X) and 12 (Y) at the time of the judgment. There were a large number of allegations dating back nearly ten years, made against the father and against two male friends of the mother. The conclusion of the judge on the facts he had found and regarding the treatment of the children was as follows:

> X and Y were subjected to sustained and prolonged sexual abuse in their father's and mother's homes over a period of years [which included abuse by the two males: YQ and ZK]. They were further subjected to physical abuse by their father. They were failed to an exceptionally serious degree by those whose duty it was to protect them: their father, their mother and their grandmother.
>
> I will have to determine in due course what I consider to be the appropriate future long-term placements for X and for Y in the welfare best interests of both children.[51]

Many questions arose in the judgment on the rules of evidence, concerning how children's evidence should be treated and concerning professional privilege, in particular because the children were questioned by their solicitor in a manner which did not appear to conform to

[50] [2017] EWFC 62 (18 August 2017). See http://www.bailii.org/ew/cases/EWFC/HCJ/2017/62.html.
[51] *Wolverhampton City Council v JA & Ors*, paras. 288-289.

acceptable standards.[52] This issue is further considered in section 3 of this report in my review of the Child Care Act 1991.

1.6.1 Rules of Evidence

The rules of evidence in England and Wales were considered in the judgment. The court reminded itself that:

- The burden of proof is on the applicant local authority (see e.g. *Re Y (Children) (No. 3)*).[53]
- The standard of proof is 'the simple balance of probabilities' (*Re B (Care Proceedings: Standard of Proof)*).[54]
- In respect of lies, a judge must be aware of *R v Lucas*[55] as explained by McFarlane LJ in *Re H-C (Children*[56]*)* – the approach of the family courts to apparent lies should, as in the criminal jurisdiction, not be taken in itself as direct proof of guilt.
- Findings of fact must be based on evidence or inferences properly drawn from evidence; not on suspicion. [57]
- Just because a respondent fails to establish an alternative case, does not absolve the applicant local authority from its duty to prove its case.[58]

In *Wolverhampton City Council v JA & Ors*, the father and the mother's friends were also involved in criminal proceedings. The court in *Wolverhampton City Council v JA & Ors* made reference to section 11 of the Civil Evidence Act 1968, which states that a conviction in criminal proceedings was admissible in separate proceedings for proving that conviction.[59] The judge decided, however, that he could make his conclusions on the evidence he had already heard.[60]

In *Wolverhampton*, Keehan J. considered the abovementioned case of *R v Lucas (R)*[61] in which the accused had given evidence which was challenged as partly consisting of lies. The jury was directed in a manner that implied that the accused's lies could be considered as corroborative of the evidence of an accomplice; and she was convicted. On appeal, the court stated that on the question of the extent to which lies might not provide corroboration, it must

[52] *Wolverhampton City Council v JA & Ors*, paras. 172-206.
[53] [2016] EWHC 503.
[54] [2008] UKHL 35.
[55] [1981] QB 720.
[56] [2016] EWCA Civ 136.
[57] Para. 15.
[58] Para. 16.
[59] *Wolverhampton City Council v JA & Ors*, para. 232.
[60] *Wolverhampton City Council v JA & Ors*, para. 239.
[61] *R v Lucas (R)* [1981] QB 720.

be considered whether the lie is deliberate, relating to a material issue, have the motive of realisation of guilt, and must be shown as a lie by evidence from an independent witness.[62] The accused's lie had been shown to be such by evidence only from the accomplice and her conviction was quashed.

In *Re H-C (Children),* this '*Lucas* direction' was emphasised as of relevance for the family court, where the 'four conditions' must be satisfied before a defendant's lie could be seen as supporting the prosecution case:[63]

> In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt.[64]

In *Wolverhampton* the judge held that the mother had lead him to "form serious adverse views of her evidence and to make serious adverse finding against her".[65] There might be an 'innocent' reason for this; but the judge rejected any such explanation.

1.6.2 Children's evidence

In *Wolverhampton City Council v JA & Ors* a number of questions arose in relation to how children's evidence should be treated, having regard to *Achieving Best Evidence in Criminal Proceedings* (ABE) standards.

The judge refers in *Wolverhampton City Council v JA & Ors* to the matter of the evidence of children, *Achieving Best Evidence in Criminal Proceedings* (ABE) standards and how the court should approach the reliability of that evidence. ABE standards describe good practice in interviewing victims and witnesses, and in preparing them to give their best evidence in court.[66] It is advisory and does not constitute a legally enforceable code of conduct, but significant departures from the good practice advocated in ABE standards may have to be

[62] *R v Lucas (R),* at 723.
[63] *Wolverhampton City Council v JA & Ors*, para. 97.
[64] *Wolverhampton City Council v JA & Ors*, para. 100.
[65] Para. 126.
[66] See the 2011 statutory guidance *Achieving Best Evidence in Criminal Proceedings* (March 2011) (hereafter the ABE Guidelines), at https://www.cps.gov.uk/sites/default/files/documents/publications/best_evidence_in_criminal_proceedings.pdf.

justified in the courts. The court in *Wolverhampton* frequently refers to the ABE guidance in the judgment which, though referring to 'criminal proceedings', is treated as equally appropriate for child protection proceedings and private law cases where relevant (see e.g. *AS v TH (False Allegations of Abuse)*).[67]

The court stated in *Wolverhampton* that:[68]

- The greatest care needs to be taken in order to minimise the risk of obtaining unreliable evidence from a child;
- The 2011 revised guidance must be considered: *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures*;
- Courts must carefully consider material where there has been deviation from acceptable practice in ABE interviews and must consider whether flaws in the ABE process render the resulting interviews wholly unreliable as per *Re E (A Child) (Family Proceedings Evidence)*;[69]
- The court must consider what the child has said when it comes to hearsay evidence, the circumstances in which it was said and the circumstances in which any alleged abuse might have occurred as per *R v B County Council ex parte P*;[70]
- The court must consider the summary of the principles to be applied and the approach to take in cases of alleged sexual abuse which were laid out in *AS v TH (Fake Allegations of Abuse)*.[71] In that case the court, when criticising the approach of the professionals in investigating allegations of abuse, pointed to standards such as the ABE Guidelines, a clear and comprehensive record of what the child says and proper social work practices.[72]

More specifically, when dealing with evidence of allegations of sexual abuse, the judge in *AS v TH* emphasised that:

- The court must ask: is there evidence of sexual abuse; and, if so, is there evidence of who is the perpetrator;
- The judge sets out steps which should be taken by professionals if they are worried that a child is being abused, and then moves on to consider the *ABE Guidelines*;
- Social workers must be clear whether interviews with children are for possible court proceedings or for therapeutic purposes;
- It is essential to properly record and fully note when listening to a child. The importance of the guidance in the 'Cleveland report' – a report in the wake of a scandal where children were wrongly found to have been sexually abused – is emphasised by the court and there is then reference to the guidance in *Working Together 2015*, a framework for Local Safeguarding Children Boards (LSCBs) to monitor the effectiveness of local services.

[67] [2016] EWHC 532.
[68] Para. 17.
[69] [2016] EWCA Civ 473, para. 35.
[70] [1991] 1 FLR 470, p. 478.
[71] [2016] EWHC 532.
[72] *AS v TH (Fake Allegations of Abuse)* [2016] EWHC 532, paras. 33-52.

1.6.3 Importance of the evidence of the child

After considering the failures in *AS v TH* to interview the children properly, the judge concluded with the following stipulations for courts in cases where there has been a failure to follow interviewing guidelines:

> Where there has, as in this case, been a failure to follow the interviewing guidelines, the court is not compelled to disregard altogether the evidence obtained in interview but may rely on it together with other independent material to form a conclusion (*Re B (Allegations of Sexual Abuse: Child's Evidence)* [2006] 2 FLR 1071). However, where the court finds that no evidential weight can be attached to the interviews the court may only come to a conclusion that relies on the content of those interviews where it has comprehensively reviewed all of the other evidence (*TW v A City Council* [2011] 1 FLR 1597).[73]

It is important, therefore, for the court to take into account tarnished evidence, alongside all 'other independent material to form a conclusion', unless the court specifically finds that no evidential weight can be attached to that tarnished evidence.

The court in *Wolverhampton* considered the girls' evidence. The court did not give any regard to the interview conducted with the older girl by her children's guardian and the solicitor in which they failed to follow acceptable practice. Instead other ABE interviews were relied upon.[74] The judge noted the learning difficulties the girls may have had ("[n]either are able to focus or concentrate on one subject for more than a few minutes"),[75] and their communication difficulties, but also noted the strong personality of one of the girls. He assigns considerable weight to her body language when asked about her father:

> [H]er demeanour and body language was very striking and informative. At the first mention of her father, by way of example, the change in Y's demeanour is dramatic. She had appeared relatively relaxed and comfortable in the interview room. When her father is mentioned she collapses back onto the sofa on which she is sitting, puts her hands over her face and immediately pulls her knees up to her face and wraps her arms around her legs: effectively wrapped into a tight ball …[76]

[73] Para. 52.
[74] Para. 214.
[75] Para. 259.
[76] Para. 222.

The judge concludes that her comments provide "powerful evidence of the abuse she alleges she suffered from [her] father".[77] The judge treated what the children said as informative and relevant to his assessment of their case.

1.6.4 Professional practice

In *Wolverhampton City Council v JA & Ors*, issues also arose concerning confidentiality and legal professional privilege. The children were first represented by a solicitor (SN) and a children's guardian (AB). Ten weeks into the care proceedings they went to see X, the older girl "for the purpose of speaking with her, ostensibly to gain her wishes and feelings about giving evidence at this hearing."[78] They recorded her as having made a number of disclosures of sexual abuse. At a later advocates' meeting the disclosures made by X in that interview were revealed, as did the fact that no referral had been made to the local authority or to the police on the basis of these disclosures. An urgent directions hearing was immediately sought before the courts.

The solicitor took the lead in the interview as the guardian had not been at the previous court hearing. At the interview the child alleged abuse by her father – this was a new disclosure. The court describes an interview at which "egregious errors occurred."[79] The child was subjected to a close to two-hour cross-examination. The judge stated: "I stop short of categorising it as an interrogation. The child was asked leading questions and contradicted repeatedly, with the question about whether her father had abused her put to her again and again".[80] They did not refer the information about sexual abuse from X to the police, because they said the solicitor had said she needed to discuss the matter with the barrister. The court noted that the solicitor was very inexperienced to have been involved in such a highly complex case and was highly critical of the practice of both the guardian and solicitor.

[77] Para. 225.
[78] Para. 172.
[79] Para. 178.
[80] Para. 179.

1.6.5 Lessons for Ireland

As I pointed out in the Ninth Report of the Special Rapporteur for Child Protection, the ABE interview is an example of good practice.[81] It is demonstrated in this case that the guidelines must be followed for a number of reasons, including the need to avoid causing further harm to vulnerable children through inappropriate interviews, and also the need to refrain from tainting evidence for court proceedings.

The Rape Crisis Network Ireland (RCNI) recently made recommendations in a submission to the UN CEDAW Committee - the UN committee on the elimination of discrimination against women. RCNI recommended that victims of/witnesses to sexual offences should give evidence and be cross-examined in a manner that is pre-recorded so that they do not have to go through "trial by ordeal" with repeat interviews and court cross-examinations.[82]

Recommendations Relating to Wolverhampton City Council v JA and Ors

The evidential issues in Wolverhampton City Council v JA and Ors should be considered in the Irish context, in particular whether children's evidence is gathered in this jurisdiction in a manner which meets Achieving Best Evidence in Criminal Proceedings (ABE) standards.

The 'Lucas direction' should be considered of relevance for the family court, where the 'four conditions' must be satisfied before a defendant's lie can be seen as supporting the prosecution case.

In forming a conclusion in a child protection case, it is important for courts to take into account tarnished child testimony alongside all other independent material unless the court specifically finds that no evidential weight can be attached to that tarnished evidence.

All relevant professionals should be well trained in Achieving Best Evidence in Criminal Proceedings (ABE) standards, and in particular how to guard children's best interests and

[81] Ninth Report of the Special Rapporteur for Child Protection (2016), p. 34.
[82] Rape Crisis Network Ireland, Submission to the UN committee on the elimination of discrimination against women (Rape Crisis Network Ireland, 2017).

mental health needs, how to avoid repetition of questions and how to avoid suggestive questions.

Only highly experienced professionals should represent children in highly complex child abuse cases.

It should be examined whether vulnerable witnesses can give evidence and be cross-examined in a manner that is pre-recorded so that they do not have to go through "trial by ordeal" with repeat interviews and court cross-examinations.

SECTION 2: BEST PRACTICE FOR CHILDREN AND FAMILY SERVICES IN IRISH COURTS

2.1 INTRODUCTION

The Report of the Commission to Inquire into Child Abuse (the 'Ryan Report')[83] was the result of an investigation into child abuse at religious-run schools. It has been considered in detail in my previous Rapporteur reports. The implementation plan for the Ryan Report contains as one of its action points: Action 96 - conduct best practice research into other jurisdictions regarding the management of children and family services in the Court. There has been much recent discussion about the current state of children and family services in the courts in Ireland.[84] There are models of reform and practice such as in England and Wales, Israel and Scotland from which Ireland can learn in order to establish a more appropriate court service for families and children. This issue is also explored in section 3 of this report where fundamental structural reform of the family and child law system is recommended in the context of my review of the Child Care Act 1991.

2.2 THE NEED FOR SPECIALISED FAMILY LAW COURTS IN IRELAND

I have pointed in previous reports to the fact that Ireland does not yet have a specialised family or children's court system. Such systems are commonplace across Europe and in common law jurisdictions. In Ireland, most cases concerning children are heard in the general courts system by judges who generally do not specialise in laws concerning children or families. The cases are heard in the same buildings used for proceedings concerning minor crime, for example, and road traffic offences. O' Mahony *et al*. undertook qualitative analysis of professional perspectives on child care proceedings in the Irish District Court. The authors concluded that:

> There is a compelling case that more effective and holistic reform could be achieved through the establishment of specialist family courts that provide staff, facilities, and

[83] Commission to Inquire into Child Abuse, *Committee Investigation Report* (Commission to Inquire into Child Abuse, 2009).

[84] See for example Children's Rights Alliance, Making Rights Real for Children: A Children's Rights Audit of Irish Law (Dublin: Children's Rights Alliance, 2015); Conor O' Mahony *et al.*, "Child Care Proceedings in Non-Specialist Courts: Lessons from Ireland" (2016) 30 *International Journal of Law, Policy and the Family* 131; Aisling Parkes *et al.*, "The Right of the Child to be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court" (2015) 27(4) *Child and Family Law Quarterly* 423.

> support services that are specifically tailored to the unique and pressing demands of child care cases.[85]

There is broad agreement in Ireland that specialist family courts are necessary.[86] The Law Society of Ireland in its submission to the Department of Justice, Equality and Defence *Family Law – The Future* stated:

> The objective of a new Family Court should be to create a dedicated and integrated Family Court structure that is properly resourced to meet the particular needs of people at a vulnerable time in their lives.[87]

The establishment of a specialised system is a recommendation in the Council of Europe guidelines.[88] The intention to establish such a system has been announced,[89] but as O' Mahony *et al*. note the necessary detail, resources and implementation are now needed in order to make those plans a reality.[90]

One important point concerns specialised family law and children's rights training for judges. O' Mahony *et al.* found in their research that *some* judges in Ireland – primarily those based in one particular city and appointed after 2012 – had notable levels of training on children's issues, but beyond this many judges had no specialised training. The geographical issues inherent in Ireland, where rural areas are sparsely populated, will certainly be a challenge to specialisation which may only be possible in areas with high volumes of applications concerning children[91] but as O'Mahony *et al.* state, "this obstacle is hardly insurmountable, and a balance could be struck through combining specialist regional facilities in some areas with travelling specialist judges and refurbished facilities in existing court buildings in other areas."[92] All judges likely to encounter children's cases should and could be required to have some level of training on children's rights and welfare.

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[85] O' Mahony *et al.* at 23.
[86] Law Society of Ireland, *Submission to the Department of Justice, Equality and Defence: Family Law – The Future* (Dublin: Law Society of Ireland, 2014) at 5; Geoffrey Shannon, Seventh Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas (Dublin, 2014) at 98 and Parkes *et al.*
[87] Law Society of Ireland, *Submission to the Department of Justice, Equality and Defence: Family Law – The Future* (Dublin: Law Society of Ireland, 2014), at 29.
[88] Council of Europe, *Guidelines on Child-Friendly Justice* (2010), at 10.
[89] Colm Keena, "Specialist family law courts to be set up through legislation. District Family Court, Circuit Family Court and Family High Court are to be established" *Irish Times*, Tuesday, November 24, 2015.
[90] O' Mahony *et al.* at 23. See also Mr Justice Michael White, "Challenges in Family Law Proceedings", presentation delivered at a conference: *What About Me? Prioritising Children in Family Breakdown Proceedings* (May, 2013), at 8.
[91] O'Mahony *et al.* at 7.
[92] *Ibid.*, at 22.

Some states do well in ensuring a specialised judiciary for cases concerning children. In France, judges in child protection cases have the title of "Judge for Family Affairs" and they are highly specialised and trained in child welfare.[93] This specialist judiciary work closely with social workers to provide support and advice throughout the legal process and to secure the agreement of all parties.[94] In Belgium, there is also a high level of training and specialisation for lawyers in this area. Members of the Flemish Bar Association and its Youth Lawyer Commission must undertake a two year course to train as a "youth lawyer".[95] The course has training on children's rights and trainee lawyers study child psychology as well as methods of communicating with children. Tunisia has also invested heavily in training child protection representatives in children's rights, collaborating with Belgium and UNICEF; initiating various projects to raise awareness of the CRC.[96]

The poor physical facilities in family law courts is another shortcoming in the Irish family law system. Poorly maintained buildings and crowded conditions appear to be the norm.[97] The environment in which proceedings are held is often far from being child-friendly spaces and processes,[98] being described by one professional as a "cattle mart … very, very dysfunctional for a family…"[99] because of the chaotic nature of the existing facilities (for example there may be lots of waiting, nowhere to sit outside the courtroom, no private rooms in which to talk etc.) and also because of the sometimes run-down buildings. In a recent report of the Child Care Law Reporting Project it was argued that a specialist family court should be urgently established[100] including appropriate waiting and meeting facilities in dedicated court-houses.[101]

Article 12 of the UN Convention on the Rights of the Child specifies that children should be heard "freely". This right will not be met if they are in a process, or an environment, which is

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[93] Andy Bilson and Sue White, "Representing Children's Views and Best Interests in Court: An International Comparison" 14 *Child Abuse Review* 220 (2005), at 231-3.
[94] *Ibid*.
[95] In 2010, 400 graduated as youth lawyers. Cited in Ursula Kilkelly, *Listening to Children about Justice*: *Report of the Council of Europe's Consultation with Children on Child-Friendly Justice (*Council of Europe, 2010), at 26.
[96] Representing Children Worldwide, *How Children's Voices are Heard in Protective Proceedings, Tunisia: Summary Analysis*. Available at: http://www.law.yale.edu, Tunisia.
[97] O'Mahony *et al.*, at 7.
[98] Parkes *et al.*, at 430.
[99] O' Mahony *et al.*, at 10.
[100] Coulter, 2014, at 27. See O' Mahony *et al.*, at 13.
[101] Carol Coulter, *Final Report: Child Care Law Reporting Project* (2018) at 76. See O' Mahony *et al.*, at 13.

not designed to accommodate children, which the Irish infrastructure is not.[102] There has been attention given in recent years to 'child-friendly justice' and how proceedings can be better suited to the specific needs of children. I have noted in previous reports the Council of Europe Child-Friendly Justice Guidelines which outline methods for achieving proceedings and settings which are child-sensitive.[103] The Committee on the Rights of the Child[104] provides that the court environment should not be intimidating for children and that the physical environment of courtrooms should be considered with children in mind.[105]

2.3 PROPOSED REFORM OF THE IRISH FAMILY LAW COURTS – A COMPARISON WITH OTHER COMMON LAW JURISDICTIONS

A proposal for a reform to the Irish Family Courts was set out by the Law Reform Commission Family Courts Working Group in 1996,[106] and by the Department of Justice and Equality.[107] It is instructive to review some of the suggested proposals which have been made in respect of the Irish system, and then to consider the approach taken in England and Wales and Australia.

Ireland

The proposal set out by the Law Reform Commission Family Courts Working Group in 1996 recommended the establishments of a two tier court system: the District Court and the Regional Family Court.

Under this proposal, the lower tier would have some of the jurisdiction the District Court currently has, but that court would not make final orders, as is stated at page 128-129 of the LRC's Working Group's Report:

> The jurisdiction of the District Court in family law matters should be limited to the making of emergency orders and interim orders especially in situations of emergency.

[102] Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill/Nijhoff, 2018).
[103] Council of Europe, *Guidelines on Child-Friendly Justice*, at 10.
[104] For consideration of this area, see further UNICEF, *A Practical Guide for Developing Child-Friendly Spaces* (UNICEF, 2009).
[105] Committee on the Rights of the Child, *General Comment No. 12* (2010), at 34.
[106] http://www.lawreform.ie/_fileupload/Reports/rFamilyCourts.htm.
[107] http://www.merrionstreet.ie/en/News-Room/Speeches/address-by-the-minister-for-justice-equality-and-defence-alan-shatter-t-d-a-new-structure-for-family-courts-consultative-seminar-in-law-society-blackhall-place-saturday-6-july-2013.html.

> In all of these matters the jurisdiction of the District Court would be parallel with the jurisdiction of the Regional Family Court. What is envisaged is a system whereby all substantive decisions having long-term effect would be reserved to the Regional Family Court. Any extension of an interim order would be determined in the Regional Family Court.[108]

The proposal was that rather than having the current volume of sittings of the Family District Court where there are "family law days" in each District, sometimes as infrequently as once per month, that there would be more specialised sittings of the Family District Court, which would sit in fewer locations than the current District Court does, but with more frequency. This would have the advantage of being local and even if somewhat more distant than at present these courts would have a dedicated court, staff, and would have other services available and a specialised judge to hear the case.

The second tier proposed was the establishments of Regional Family Courts with information centres attached. These were to be the same tier of jurisdiction as the current Circuit Court and would use specially trained members of the judiciary. It was also recommended that there would be other services which would assist with family breakdown, either on site or close by which would be connected with the family law courts in a real and meaningful manner.

A second tier, to be known as the "Regional Family Court" would have jurisdiction on all other issues: separation, divorce, dissolution of civil partnership, cohabitation, children cases, Hague and Luxembourg cases, adoption, surrogacy, succession cases, and perhaps cases for children requiring secure care. It was proposed that there would be approximately 15 centres nationwide, and that their location would be proportionate to populations across the country. The judges assigned would be specialised Family Law Judges, provided with training.

The right of appeal from the "Regional Family Court" could be to the High Court, though in some instances it could be to the Court of Appeal.

[108] Page 128 and 129 http://www.lawreform.ie/_fileupload/Reports/rFamilyCourts.htm.

United Kingdom

In the United Kingdom, family law applications are made to "the Family Court", a specially designated family court system[109]. A change was brought about to the court system in England and Wales in April 2014 where an applicant no longer applies to the family jurisdiction of either the Magistrates Courts or County Courts, but now applies directly to this specialised "Family Court".

The "Family Court" is a national court which can sit in any location across England and Wales, but generally uses the current Magistrates and County Court buildings. There are only certain judges who are eligible to hear family cases, and they have specialist experience and expertise.

Whether the judge sitting in the "Family Court" will be of Magistrate or County Court level depends on the type of application before the court. This means a lawyer does not have to evaluate whether to make an application to the county court or magistrates' court. The application is merely made to the Family Court.

The Courts of England and Wales operate a system of distributing cases to judges of different levels within the "Family Court" depending on the type of application being heard. Within the Family Court (Composition and Distribution of Business) Rules 2014 (the 'Distribution of Business Rules'), there is a schedule of what level of judges can hear what type of case. If the case has been allocated without a hearing, a party can request the court to reconsider allocation. A case may be allocated to a High Court judge sitting in the Family Court where appropriate but transfer to the High Court will only be permitted by order of a judge of the High Court. Cases pursuant to the inherent jurisdiction of the High Court and international cases under the Hague Convention or Brussels IIA are all heard in the High Court.

The right of appeal from the Family Court is either to the Circuit Court, the High Court or the Court of Appeal depending on what level of judge heard the case at first instance, and the nature of the appeal.

[109] http://www.familylaw.co.uk/news_and_comment/the-single-family-court-essential-update#.Vokox_mLTIU.

Australia

Since 2000, Australia operates a system of hearing the majority of its family cases in its Federal Circuit Courts of Australia (these were originally called Federal Magistrates Courts). The more complex or specialist family law cases are heard in the "Family Court of Australia"[110]. This was not how the operation of Family Law in Australia was originally envisaged when the Family Court of Australia was first established. As a side note, because of the geographical size of Australia, the magistrate courts in Australia do exercise limited original jurisdiction in family law, but this is subject to a full de novo appeal.

The Family Court of Australia is a Superior Court of record and was first established in 1975. It was a single tier court and it assumed the matrimonial causes jurisdiction exercised by State and Territory Supreme Courts, but only in relation to divorce and ancillary relief. In later years its jurisdiction expanded substantially to include matters pertaining to de jure and de facto couples and then eventually all private family law disputes.

Much criticism arose in relation to a Superior Court dealing with all these types of cases, in particular when it lacked the complexity of cases generally heard in the Superior Courts. In 1987, in its final report to the Constitutional Convention, the Advisory Committee on the Australian Judicial System said:

> The work of the Family Court falls into two broad categories. Into the first category fall the large number of applications which are essentially of a routine kind, many of them being uncontested. Generally speaking, this category does not warrant the attention of a superior court. The second category involves a smaller, but significant, number of major contested cases concerning, in particular, questions relating to the custody of children and to property. This category does warrant the attention of a superior court … Because the Committee is of the view that a substantial part of the work of the Family Court is appropriate for a superior court, it does not favour the view that jurisdiction in such matters should be given to a court at District Court level…

Given these criticisms, what ultimately resulted was a two tier system where a Federal Circuit Court (called the Federal Magistrates Court at the time) was established to take the "less contentious" cases. Initially the court had a restricted jurisdiction and there were only a

[110] http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/annual-reports/2014-15/2014-15-annual-report-part2.

limited number of Judges sitting in the Federal Circuit Court of Australia (9 in the year 2000). However, it was quickly appreciated that the restricted jurisdiction in family law would be self-defeating and, within a year of its establishment, in parenting matters, the Federal Magistrates Court was invested with almost concurrent jurisdiction to that of the Family Court.[111]

Today, the Federal Circuit Court of Australia deals with the majority of family law cases and the Family Court of Australia now only deals with more complex matters. The Family Court's judiciary has reduced from 50 judges to 33 and, in general, the Family Court of Australia only sits in large Australian cities. The "Family Court of Australia" has specialist judges and staff.

The Family Court has concurrent jurisdiction in most areas, with the Federal Circuit Court of Australia. The majority of proceedings under the Family Law Act are now filed in the Federal Circuit Court of Australia. Family law comprises the majority of the work which the Federal Circuit Court carries out, and the court has settled into a "General Federal Division" and "Family Law Division". Whilst judges can sit across both divisions, the majority sit in the field of specialisation which they had practised in as lawyers.[112] For this reason, the majority of Family Law cases are heard by specialist judges.

Cases can be transferred from the Federal Circuit Court to the Family Court of Australia. However, in general practice, only the more complex and intractable family law cases are transferred from the Federal Magistrates' Court to the Family Court. There is also a protocol published by the Chief Justice and the Chief Judge of the Family Court which outlines that the Federal Circuit Court undertake the bulk of the family law work while the following cases must be filed in the Family Court[113]:-

• International child abduction;

• International relocation;

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[111] Page 6 http://www.inis.gov.ie/en/JELR/Ms.%20Justice%20Judith%20Ryan,%20Family%20Court%20of%20Australia.pdf/Files/Ms.%20Justice%20Judith%20Ryan,%20Family%20Court%20of%20Australia.pdf.

[112] http://www.inis.gov.ie/en/JELR/Ms.%20Justice%20Judith%20Ryan,%20Family%20Court%20of%20Australia.pdf/Files/Ms.%20Justice%20Judith%20Ryan,%20Family%20Court%20of%20Australia.pdf.

[113] At page 11 http://www.inis.gov.ie/en/JELR/Ms.%20Justice%20Judith%20Ryan,%20Family%20Court%20of%20Australia.pdf/Files/Ms.%20Justice%20Judith%20Ryan,%20Family%20Court%20of%20Australia.pdf.

• Disputes as to whether a case should be heard in Australia;
• Special medical procedures (such as gender reassignment and sterilisation);
• Contravention and related applications in parenting cases relating to orders which have been made in Family Court proceedings, which have reached a final stage of hearing or a judicial determination and which have been made within 12 months prior to filing;
• Serious allegations of sexual abuse of a child warranting transfer, and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court;
• Complex questions of jurisdiction or law; and
• If the matter proceeds to a final hearing, it is likely it would take in excess of four days of hearing time.

Appeals from the Family Court are heard by a "Full Court" of the Family Court (three to five judges). Appeals from the Full Court lie to the High Court of Australia, though special leave is required, and is not that frequently granted.[114] A single judge of the Family Court may hear appeals in family law matters from the Federal Circuit Court of Australia, but generally appeals from the Federal Circuit Court of Australia are heard by three judges of the Family Court.

A family law court system

An analysis of the Family Law Court system in England and Wales and Australia suggests a model which is not overly interwoven with the rest of the Courts System. Managing the "type" of case which goes before each tier of the Court also emerges as a key issue of importance. Australia originally placed such importance on family cases being heard by Superior Courts, that the result was that procedural or simplistic cases were being unnecessarily heard by judges of their Superior Courts. This resulted in a change to its system where most cases now proceed before the Federal Circuit Court, with certain "categories" of cases being designated appropriate for the higher Family Court of Australia.

[114] At page 18: http://www.inis.gov.ie/en/JELR/Ms.%20Justice%20Judith%20Ryan,%20Family%20Court%20of%20Australia.pdf/Files/Ms.%20Justice%20Judith%20Ryan,%20Family%20Court%20of%20Australia.pdf.

In England and Wales, they operate a very strictly run "gatekeeping system" pursuant to the Family Court (Composition and Distribution of Business) Rules 2014 (the 'Distribution of Business Rules') of ensuring that cases are allocated to the most appropriate tier within the system. This mechanism of managing which case goes to which court is best suited to the Irish context.

2.4 WELL-RESOURCED SYSTEMS

Systems must be adequately resourced in order to be fit for purpose. A better system will likely require more resources, at least in the short-term.[115] Systems will require more support professionals and specially trained judges. Good systems and necessary modifications "are not cost neutral."[116] Legal aid cuts around the world in the past decade have had a disproportionate impact on women and children,[117] who are in greatest need of legal aid.

The discourse of a 'cost/benefit' analysis; that is, attempting to ensure that expenditure is perceived to have sufficient (economic) benefits; pervades all discussions of children's services.[118] Although there are already moral and international human rights law obligations to ensure access to good systems and legal aid, there are in fact economic benefits to adequate support in legal proceedings. It appears that cuts to legal aid budgets have led to proceedings which are more drawn-out and more difficult to resolve; where adequate support is lacking. The time constraints faced by professionals actually cost more money in the long run. Kirkman and Melrose outline the challenges that social workers may face when making decisions about children including time and workload pressures and receiving information of relatively low quality (which further affects the time and workload issue as much follow-up is needed).[119]

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[115] Prioritising children's autonomy may ultimately lead to disputes being resolved more quickly, see further below.

[116] Marion Brandon *et al.*, *Child and Family Practitioners' Understanding of Child Development: Lessons Learnt from a Small Sample of Serious Case Reviews* (Department for Education [England and Wales], 2011), at 17.

[117] Felicity Kaganas, "Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy" *Journal of Social Welfare and Family Law* (forthcoming, 2018), and Mavis Maclean, John Eekelaar and Benoit Bastard, eds., *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015), at 1.

[118] See the many references to cost/benefit analysis in Family Justice Review, *Final Report* (Published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government, November 2011).

[119] Elspeth Kirkman and Karen Melrose, "Clinical Judgement and Decision-Making in Children's Social Work: An Analysis of the 'Front Door' System" (Department of Education [England and Wales], 2014), at 4-5.

It has also been often emphasised that the common law adversarial system is highly unsuited for family law cases, as parents are focused on 'winning' and their disputes can be psychologically damaging for both them and their children.[120] The binary nature of family processes is also problematic for complex family situations. Children state that it is very important to them to have flexibility built-in to arrangements so that children themselves can seek to change them if they wish.[121] However, children are frequently unable to secure changes to private law arrangements,[122] or to timelines imposed by the courts.

It is unclear whether inquisitorial systems are better for family law and for proceedings concerning children in particular. Those in favour of a more inquisitorial system (in 2014 the Lord Chief Justice of England and Wales appeared to advocate such a change) point to the decreased bitterness and the potential for economic savings.[123] Those against it say that it will not in fact save money as more judges will be necessary and that judgments will be delivered less considerately.[124] Research is needed into whether inquisitorial systems are better for family law, and if so whether it may be a model which could be adopted in Ireland.

Alternative dispute resolution such as mediation is one arena in which there is potential for greater flexibility in family law, particularly since the enactment of the Mediation Act 2017. It has been recommended as an area for greater attention in Ireland having regard to international practice and what would be possible in Ireland.[125] Mediation and other alternative dispute resolution approaches appear to result in more amicable and enduring arrangements, with the attention of parents more likely to be on children's needs.[126] It may facilitate families to better explore options and solutions themselves. There are significant

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[120] Joan Kelly, "*Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes*: *Current Research and Practice"* 10 *Virginia Journal of Social Policy and the Law* 129 (2002), at 131.
[121] John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" in Philip Alston, ed., *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994), at 42.
[122] Judith Timms, Sue Bailey and June Thoburn, "Children's Views of Decisions Made by the Court: Policy and Practice Issues Arising from the Your Shout Too! Survey" (2008) 14 *Child Care in Practice* 257, at 268.
[123] Owen Bowcott, "Inquisitorial System may be Better for Family and Civil Cases, Says Top Judge" *The Guardian Online* (4 March 2014). Available at https://www.theguardian.com/law/2014/mar/04/inquisitorial-system-family-civil-cases-judge-lord-thomas (last accessed 24 April 2018).
[124] Lorna Borthwick, "Why an Inquisitorial System for Family Courts Won't Work" *Halsburys Law Exchange* (12 March 2014). Available at http://www.halsburyslawexchange.co.uk/why-an-inquisitorial-system-for-family-courts-wont-work/ (last accessed 24 April 2018). See also Adrienne Barnett, "Family Law without Lawyers: A Systems Theory Perspective" 39 *Journal of Social Welfare and Family Law* 223 (2017).
[125] Law Society of Ireland, *Submission to the Department of Justice, Equality and Defence: Family Law – The Future* (Dublin: Law Society of Ireland, 2014).
[126] Joan Kelly, "Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research" 46 *Family Processes* 35 (2007), at 40.

questions over encouraging more mediation if this is conceptualised as an alternative to legal aid.[127] In England and Wales, separating couples frequently do not want to engage in mediation, opting instead to self-represent in court.[128] There are issues relating to power dynamics in relationships and children are often excluded from alternative dispute resolution. Therefore, it should be seen as a useful alternative mechanism for resolving family law disputes, not as a cost-saving measure.

2.5 HEARING CHILDREN

One crucial element of an adequate courts system for children and families is the participation of children in proceedings. Apart from the physical environment of the courts, a family law system must be equipped to not only have children present, but also to facilitate them to have meaningful involvement in proceedings. Courts in Ireland have a duty to hear children and to give due weight to their wishes under the CRC and also under domestic law. Section 24 of the Child Care Act 1991 requires a Court to give due consideration to the wishes of the child having regard to the age and understanding of the child. The enactment of the Children and Family Relationships Act 2015 incorporated the right of children to be heard in private law proceedings, though it is not yet clear how this is being fully implemented. Article 42A of the Constitution provides a more heavily entrenched right for children to be listened to in public and private family law cases.

There is a distinct lack of provision in Ireland for hearing children.[129] Guardians *ad litem* are often the most effective mechanism in which children can present their views to the courts, yet they may or may not be appointed in a given case. Findings of the Child Care Law Reporting Project indicate that guardians were appointed in 53% of cases observed, and that regional variations ranged from 13% to 80%.[130] There are also significant issues with the

[127] Rachel Treloar, "The Neoliberal Context of Family Law Reform in British Columbia, Canada: Implications for Access to (Family) Justice" in Mavis Maclean, John Eekelaar and Benoit Bastard, eds., *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015).
[128] Rosemary Hunter, "Inducing Demand for Family Mediation: Before and After LASPO" 39 *Journal of Social Welfare and Family Law* 189 (2017).
[129] See for example Daly, 2018; Aoife Daly, "The Judicial Interview in Cases on Children's Best Interests: Lessons for Ireland" 20 *Irish Journal of Family Law* 3 (2017); Parkes *et al.*, 2015; Carol Coulter, *Second Interim Report: Child Care Law Reporting Project* (October 2014), at 7, 10, and 61; Aoife *Daly, "Limited Guidance: The Provision of Guardian ad litem Services in Irish Family Law"* (2010) 13(1) *Irish Journal of Family Law* 8.
[130] Carol Coulter, *Second Interim Report: Child Care Law Reporting Project* (October 2014), at 7, 10, and 61.

paternalism of the guardian *ad litem* system, in which guardians represent children's best interests rather than advocating for their wishes necessarily. There are models in other states in which the child has greater influence on the role of the representative. It should be noted that the Child Care (Amendment) Bill 2018 will provide much needed clarity to the role of the guardian *ad litem*. This issue is further explored in section 3 of this report.

Children in other jurisdictions have advocates who take instructions. In England and Wales children in child protection proceedings have both a guardian *ad litem* ('children's guardian') and a lawyer who has discretion as to whether to take instructions.[131] In the US[132] some states have a 'guardian *ad litem* lawyer' role for children in child protection proceedings.[133] The American Bar Association (ABA) passed a comprehensive policy in 2011 – a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings – which provides lawyers with clear guidance on representing children.[134] The Model Act outlines a role whereby the lawyer provides a guiding role, advising and interviewing people in the life of the child. The Act also advocates taking instructions from children in a manner similar to any other client. Where the child's lawyer believes that the child has "diminished capacity" – in accordance with ABA guidance[135] – the lawyer still has discretion to take instructions from the child.[136] The child must *both* be deemed to have diminished capacity, *and* "at risk of substantial physical, financial or other harm…" for the lawyer to take "protective action" including seeking to appoint a best interests advocate.[137]

Another issue in Ireland is that of the judicial interview. CRC Article 12 stipulates that children may be heard by the decision-maker directly, and the UN Committee on the Rights of the Child emphasises that children should have a choice in this matter.[138] Though judges may meet occasionally with children in Ireland, data is not collected on the extent to which it

[131] The judge may overrule the lawyer's decision however, as happened in *W. (A Child)* [2016] EWCA Civ 1051. The legal representative was willing to take instructions from the 16-year-old girl. An appeal court overturned the order.
[132] See Child Abuse Prevention and Treatment Act (CAPTA) 1974.
[133] See First Star, *A Child's Right to Counsel – First Star's National Report Card on Legal Representation for Children* (First Star, 2007), at 10.
[134] Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings 2011. See Andrea Khoury, "Policy Update: ABA Adopts Model Act on Child Representation in Abuse and Neglect Cases" 30 *ABA Child Law Practice* 106 (2011), at 106.
[135] The ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings ABA Model Rules of Professional Conduct (2004).
[136] Section 7(d).
[137] Section 7(e).
[138] General Comment No. 12, (2010).

happens.[139] Furthermore there are no guidelines for meetings between judges and children apart from some points set out in 2008 in *O'D v O'D*.[140] The guidelines of Abbott J. included: judges should not seek to act as a child expert, the terms of reference should be agreed with the parties beforehand; the judge should explain the nature and purpose of the interview to the children, including the fact that children will not have a determinative say; the judge should assess "whether the age and maturity of the child are such as to necessitate considering his or her views"; and only speak to children in confidence if the parents agree.[141] Though these points are useful, they are not comprehensive. They also fail to acknowledge that under CRC Article 12 the process should begin with an assumption in favour of hearing children,[142] and they focus on adult-centric concerns about securing the agreement of parents rather than on ensuring children's comfort and consent.[143]

In England and Wales, the 2010 Family Justice Council Guidelines for Judges Meeting Children in family proceedings lays-out guidance for judges when meeting children. The guidance encourages judges to assure children that their wishes have been understood, to explain the nature of the judge's task and to receive advice from the children's guardian (guardian *ad litem*) or lawyer about when a meeting is appropriate. Judges are advised that the age of the child is relevant but that it should not alone determine whether a meeting is offered. The judge should provide a brief written explanation for the child where the meeting is refused. The guidelines emphasise that the meeting is for the benefit of the child, rather than for another purpose such as gathering evidence. These progressive guidelines assist in ensuring that the meeting is for the benefit of the child involved.

Another issue in family justice systems is the extent to which children have any influence in proceedings affecting them. In children's proceedings it is well recognised that children do not always enjoy their right to be heard and to have their views given due weight as per CRC Article 12. [144] There have been calls this year to rethink the CRC Article 12 right to be

[139] O' Mahony *et al.*
[140] *O'D v O'D* [2008] IEHC 468.
[141] See further Aoife Daly, "The Judicial Interview in Cases on Children's Best Interests: Lessons for Ireland" 20 *Irish Journal of Family Law* 3 (2017).
[142] Parkes, "Implementation of Article 12 in Family Law Proceedings in Ireland and New Zealand: Lessons Learned and Messages for Going Forward".
[143] Daly, "The Judicial Interview in Cases on Children's Best Interests: Lessons for Ireland".
[144] See recommendations of the Law Society of Ireland on hearing children in, *Submission to the Department of Justice, Equality and Defence: Family Law – The Future* (Dublin: Law Society of Ireland, 2014), at 34.

heard.[145] In particular, it has been argued that the notion of according "due weight" to children's views may be too vague, and its vagueness may be preventing children from having a real influence on decisions being made about them.[146] This is something which should be considered in the courts system in Ireland when the best interests of a particular child are being determined.

The research study of Daly draws upon law and practice from around the globe to argue that the right to be heard is often ill-suited to legal proceedings in which decisions are made in the best interest of the child (for example 'contact' arrangements). Best interest decisions are very paternalistic and children's wishes about contact and residence are routinely overridden. Children do not enjoy the same basic due process rights as adults, for example they are most frequently not present at their own proceedings. Daly argues that the focus in legal systems should be on the concept of *autonomy* for children in the sense of the liberal ideal that we should all have personal freedom in our lives to the extent possible. Autonomy is crucial to our psychological wellbeing, it is argued, and a fundamental principle in liberal democracies. It is misunderstood as being an individualistic or selfish principle, but it is in fact about respecting others, and acknowledging that we should be humble about claiming to know what is best for children.[147] Comparisons are made in the research with medical and disability law and with parents' rights, where (in contrast to cases concerning children's interests) autonomy is treated with respect.

A 'children's autonomy principle' is proposed which aims to both ensure greater due process rights for children, and to tackle the difficult question of how to attribute weight to children's views:

***Children's Autonomy Principle*:** In legal decisions in which the best interest of the child is the primary consideration, children should get to choose – if they wish – how they are involved (*process autonomy*) and the outcome (*outcome autonomy*) unless it is likely that

[145] Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (The Hague: Brill Nijhoff, 2018).
[146] See for example Priscilla Alderson, "Giving Children's Views 'Due Weight' in Medical Law" 26 *International Journal of Children's Rights* (2018); Aoife Daly, "No Weight for 'Due Weight'? A Children's Autonomy Principle in Best Interest Proceedings" 26 *International Journal of Children's Rights* (2018); Kay Tisdall, "Challenging Competency and Capacity? Due Regard to Children's Views in Family Law Proceedings" 26 *International Journal of Children's Rights* (2018).
[147] Aoife Daly, "No Weight for 'Due Weight'? A Children's Autonomy Principle in Best Interest Proceedings" 26 *International Journal of Children's Rights* (2018).

significant harm will arise from their wishes.

It is argued that children's wishes about how they participate, and about the outcome, should be upheld in best interest proceedings unless significant harm would likely arise from following those wishes. Children should have 'autonomy support' to consider options and assist them through proceedings. In particular, it is necessary to move away from the poorly understood question over how 'competent' a child might be, to instead accepting that autonomy denial is harmful and therefore asking whether paternalism is truly warranted.

The research considers what 'significant harm' – the threshold proposed for overriding children's wishes – might involve.[148] In child protection cases where the threshold for significant harm has already been reached, for example (perhaps children wish to remain living in dangerous family situations), children's wishes would be unlikely to overcome this level of harm and outcomes would likely remain the same. It is proposed that there would be other legitimate obstacles to children's wishes. There will be occasional cases where children are genuinely being harmed from manipulation (this can occasionally reach the threshold of significant harm[149]). Practical obstacles, for example where a child may wish to live with a parent who is unable to care for her, may also prevent an outcome in accordance with the wishes of the child.

It is suggested that the methodology for applying the children's autonomy principle should be applied in best interest proceedings as follows.

2.6 PROCESS OF THE CHILDREN'S AUTONOMY PRINCIPLE

1. Is the outcome being determined by what is in the child's best interests?
2. Does the child have a wish as to the outcome?
3. Does the child want this wish to prevail?
4. Is the best interest question free of legitimate obstacles to children's wishes?

[148] Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard*, 387-390.
[149] See, for example, *H. (Children)* [2014] EWCA Civ 733 and the Australian case of *Jevons and Jevons* [2014] Fam. CA 220.

5. Is *significant harm* unlikely to result from following the wishes of the child?

If the answer to all questions is 'yes', then the outcome should be in favour of the wishes of the child.

It is proposed that asking these questions would encourage a movement away from the current approach in which in most jurisdictions children are frequently left unheard; and where they *are* heard, their wishes are easily overridden in their adult-determined 'best interests'. It is also suggested in the research that, even where such an approach may not be explicitly facilitated through legislation, judges have much scope for judicial interpretation, and because the UNCRC was drafted over thirty years ago, it could be argued that our interpretation of Article 12 should be broadened to give greater priority to children's autonomy, given the fact that it is a factor so valued in liberal democracies, and consequently in all other areas of the law and having regard to Action 96 of the Ryan Report.

2.7 ISRAEL: A CHILD–INCLUSIVE FAMILY LAW SERVICE

The state of Israel has in recent years initiated a holistic system whereby therapeutic endeavours are introduced, and a presumption that children will be involved.[150] The success when piloting the new initiative has led to the expansion of the initiative nationwide.[151] This inclusivity and holistic approach means that this model is very interesting in the Irish context when considering the management of children and family services in the Court.

2.7.1 Background to the Model

Israel has a specialised family court system, where at the level of magistrate's courts one judge presides over all family law matters. Social services units are also in place to assist the family courts. Social workers and psychologists from these units assist the court in reaching decisions on family law matters and also provide services such as mediation.[152] Courts may

[150] Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project" 26 *International Journal of Law, Policy and the Family* 1 (2012), at 5.
[151] *Ibid*.; Tamar Morag, "Child Participation in Family Courts" paper presented at *Conference on Child-Friendly Justice* (Stockholm, 16 - 18 May 2014).
[152] Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project", at 8.

order the appointment of guardians *ad litem* for children in cases where their interests conflict with those of their parents.[153] However it was recently decided that all children should have the opportunity to be heard.

The Israeli Minister for Justice appointed a CRC Legislative Committee in 1998 with the purpose of examining Israeli law in view of the principles of the CRC.[154] One of the main aims of the Legislative Committee was to change thinking about children and the law in Israel and to implement the CRC guiding principles elaborated by the Committee on the Rights of the Child.[155] A model for hearing children was developed by the Subcommittee on Children and their Families of the Legislative Committee and a pilot of the model of hearing children was run in two regions of Israel from 2006 to 2009 and extended to full-time practice in those regions. It was then announced in 2014 that the model would be implemented throughout the country.[156] An initial evaluation was conducted during this piloting phase,[157] and a follow-up evaluation was conducted in 2015.[158]

2.7.2 Building the Model

The Subcommittee drafted *Recommendations on Child Participation in Family Courts*, which operated on two basic principles: children have the right to participate and different means of participation should be available to them.[159] On the recommendation of the Subcommittee, special sections on child participation were established within the Social Services units of the family courts. These child participation sections are staffed by specialised participation social workers (PSWs), who are assisted as necessary by psychologists.[160]

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[153] Tamar Morag, "Children's Rights in Israeli Case Law: A Spiral Progression" 28 *Israel Studies Review* 282 (2013), at 286.
[154] Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project", at 6.
[155] *Ibid*., at 6-7.
[156] Tamar Morag, "Child Participation in Family Courts" paper presented at *Conference on Child-Friendly Justice* (Stockholm, 16 - 18 May 2014).
[157] See Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project", at 21.
[158] See Tamar Morag and Yoa Sorek, "Children's Participation in Israeli Family Courts – An Account of an Ongoing Learning Process" in Benadetta Faedi-Duramy and Tali Gal, eds., *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (Oxford University Press, 2015), at 33.
[159] Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project", at 7.
[160] *Ibid*.

Where parents and children are involved in family law proceedings, they are provided with information about the child being heard. The judge refers the case to the PSW and invites the child to a meeting with a social worker at the Unit. The judge must make this referral of the child to the PSW unless there are exceptional reasons not to. At a preliminary meeting, the child is then given age-appropriate information about the process, and invited to be heard; either directly by the judge or through a written report of the PSW. The information provided by the child will remain confidential unless the child has agreed otherwise. If the court has been asked to ratify an agreement between parents, parents are sent information on the importance of the views of the child in such processes and if a judge decides that the views of the child have not been sought and should have been, the judge may require that parents are referred to the Social Services Unit for further information on hearing children. When issuing a judgment (or soon afterwards), the judge will inform the child directly or through the PSW the reasoning for the decision made, unless the judge decides this is not necessary.[161]

2.7.3 Evaluation of the Model

Satisfaction

Research was conducted to evaluate the running of the pilot. It was found that 48% of invited children attended the initial PSW meeting. There were high levels of satisfaction with the model amongst children, parents and professionals. Overall, evaluation established that "most of the children felt comfortable during the participation process, expressed satisfaction with it, and felt it had made a significant contribution to them", alleviating any initial concerns that children may be harmed by the process.[162] In the initial evaluation, 93% of children thought it was a good idea to be invited to participate[163] and 92% said that they would recommend participation to a friend.[164] A much lower number of 62% (but still a clear majority) of children responded that participation had helped. Of those who felt it had helped:

[161] *Ibid*., at 9-10.
[162] Tamar Morag and Yoa Sorek, "Children's Participation in Israeli Family Courts – An Account of an Ongoing Learning Process" in Benadetta Faedi-Duramy and Tali Gal, eds., *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (Oxford University Press, 2015), at 33.
[163] Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project", at 15.
[164] *Ibid*.

> The most frequent answers were that they felt that they were being shown respect and consideration for their opinions and feelings, that the conversation helped them decide what they really wanted, and that the involvement with the PSWs contributed to an improved relationship with one of the parents.[165]

Of the children who reported that it had not helped, when asked why, they most frequently responded that nothing had changed after they had participated or that their input had not influenced judicial decision-making in the way they had wished it to.[166] Of the parents interviewed in the research, 77% expressed satisfaction with the participation process.[167]

The professionals involved in the pilot attributed high levels of significance to the participation of children in proceedings affecting them. The PSWs estimated that the participation of children contributed to "a great extent" in 71% of cases,[168] and reported that an independent discussion with children about their situation frequently proved beneficial. It was found by the PSWs that parents were often not aware of the wishes and feelings of their children.[169] PSWs disclosed children's views to parents in the 63% of cases where children permitted them to do so, and reported that a parent's conduct became better suited to the child's needs after the participation meeting in 25% of cases.

Judges reported in the initial evaluation of the project that the meeting with the child contributed "a great degree" to their decision in around half of cases,[170] and in the follow-up evaluation judges reported that children's views were influencing judgments to an even greater extent.[171] Several judges reported that they felt it was preferable for a direct meeting with them, and some even reported that they felt more comfortable having met the child about whom they were making a decision,[172] although all agreed that not every child needed to be seen in every case (particularly since many children did not want to meet with the judge

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[165] *Ibid*.
[166] *Ibid*.
[167] *Ibid*., at 14.
[168] Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project", at 21.
[169] *Ibid*., at 17.
[170] *Ibid*., at 15.
[171] Tamar Morag and Yoa Sorek, "Children's Participation in Israeli Family Courts – An Account of an Ongoing Learning Process" in Benadetta Faedi-Duramy and Tali Gal, eds., *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (Oxford University Press, 2015), at 33.
[172] Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project", at 20.

directly).[173] The views of the judges on hearing children were found to be complex, however. One contentious issue was that of referral of children to the participation unit. Judges were supposed to refer all children unless there were exceptional circumstances, however in practice only 40% of children were referred. When interviewed, judges stated reasons such as being reluctant to burden a child with involvement, assumptions that participation would not assist the court, and technical reasons such as the parents reaching agreement (in such circumstances the judge will not hear the case).[174] Follow-up research indicated that judges began to increase referrals of children to be heard in more difficult cases, but decrease referrals in less difficult cases, indicating resistance to the notion of hearing children as a right of children.[175] When asked about reasons for this decrease, judges primarily referred to the increased judicial workload created by hearing children, as well as the emotional strain on judges of hearing children without having the means to assist them therapeutically.[176]

Recent research into the working of the model has indicated that lawyers have also become convinced of the value of the participation of children.[177] It is reported that they have moved from initial opposition to now recommending it to the court, and in turn influencing parents of its value, making it far more "natural" to engage in hearing children, according to one professional interviewed.[178]

Rates of Participation

The rates of children meeting directly with judges increased from 15% in year one to 32% in the second year. PSWs were encouraged by the Implementation Committee to try to increase the rate of meetings. The PSWs engaged in various methods of reducing children's anxiety about such meetings, for example by showing children photos of the court. The increase in participation of children generally was also due to increased efforts by the PSWs who

[173] *Ibid*., at 21.
[174] Tamar Morag and Yoa Sorek, "Children's Participation in Israeli Family Courts – An Account of an Ongoing Learning Process" in Benadetta Faedi-Duramy and Tali Gal, eds., *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (Oxford University Press, 2015), at 12.
[175] *Ibid*., at 22.
[176] *Ibid*., at 23.
[177] Tamar Morag and Yoa Sorek, "Children's Participation in Israeli Family Courts – An Account of an Ongoing Learning Process" in Benadetta Faedi-Duramy and Tali Gal, eds., *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (Oxford University Press, 2015), at 22.
[178] *Ibid*.

reported that they became more convinced of the importance of hearing children as the pilot progressed, and therefore became better able to convince parents to permit children to participate.[179]

The issue of the age at which children should be heard was a difficult one for the operation of the model. For the purposes of the pilot, it was decided that only children aged 6 years and over would be involved, although in cases in which a child of 6 years old or over had a younger sibling, the courts were permitted to invite the younger sibling to be heard as well.[180]

2.7.4 Conclusions on Israel's Child-Inclusive Family Law Service

There is much which has been learnt from the implementation of the pilot study in Israel. Evaluation of the model indicates the practical issues associated with hearing children. One prominent issue is the involvement of parents – the initially low rates of uptake of the participation sessions were primarily due to the reluctance of parents to permit their children to be involved.[181] However, it was possible to significantly increase the rate of uptake with the assistance of the PSWs and this indicates that such obstacles are not insurmountable.

The evaluation also highlights that vindicating the right of children to be heard has various benefits beyond enabling children to have a say in proceedings. Hearing children in this model enabled many children to express their feelings on often difficult family situations in a way in which they had not been able to do until that point. Many parents were described by children and professionals as unaware of the wishes and feelings of their children and emotionally unavailable to them.[182] PSWs reported that in the vast majority of cases, children had benefitted from expressing their feelings, and in many cases parents adapted their behaviour to better suit the needs of their children.[183] This indicates that there can be

[179] Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project" 26 *International Journal of Law, Policy and the Family* 1 (2012), at 18.
[180] *Ibid*., at 10.
[181] Tamar Morag and Yoa Sorek, "Children's Participation in Israeli Family Courts – An Account of an Ongoing Learning Process" in Benadetta Faedi-Duramy and Tali Gal, eds., *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (Oxford University Press, 2015), at 12.
[182] Tamar Morag and Yoa Sorek, "Children's Participation in Israeli Family Courts – An Account of an Ongoing Learning Process" in Benadetta Faedi-Duramy and Tali Gal, eds., *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (Oxford University Press, 2015), at 19.
[183] *Ibid*., at 18.

significant overlap between engaging the right to be heard and working with issues of family well-being.

It seems, therefore, very positive that this model involves both the possibility of being heard but also of engaging in therapeutic family counselling sessions (if only short-term). PSWs have the capacity to invite the family to four intervention sessions if necessary.[184] The evaluation of the pilot emphasised the importance of taking an interdisciplinary approach to hearing children by involving different professionals, a practice which is also in conformity with CRC Article 12.[185] One finding of follow-up research, however, was the fact that judges were sometimes reluctant to engage in hearing children because they perceived this as a therapeutic endeavour rather than a right of children.[186] This may point to the need to highlight for judges that whilst it is useful to bear the therapeutic element in mind, hearing children is in fact a right of the child under the CRC (and Irish domestic law).

Considering that judges struggled in the pilot with the emotional aspect of hearing children, it seems that it is necessary to take an interdisciplinary approach to hearing children so that, preferably within the same model, adequate children and family services are provided. For example, there should be some psycho-social support available to which legal professionals can refer families where they feel that such assistance is needed. It also emphasises the need for training professionals to deal with the emotional side of hearing sometimes vulnerable children, and understanding that being heard is reported by the majority of children to be helpful in itself.

2.8 DEFORMALISED CHILD LAW – THE SCOTTISH CHILDREN'S HEARINGS SYSTEM

2.8.1 Introduction

The Scottish children's hearings system is a unique model which uses a lay panel to establish the welfare needs of children in cases concerning child care and criminal behaviour, and

[184] Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts – Lessons from the Israeli Governmental Pilot Project" 26 *International Journal of Law, Policy and the Family* 1 (2012), at 17.
[185] Tamar Morag and Yoa Sorek, "Children's Participation in Israeli Family Courts – An Account of an Ongoing Learning Process" in Benadetta Faedi-Duramy and Tali Gal, eds., *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (Oxford University Press, 2015), at 33.
[186] *Ibid*., at 24.

which involves children and families together in relatively informal hearings. In 1964, a review of youth justice in Scotland by the Kilbrandon Committee lead to the recommendation that all children before the courts, either for offending behaviour or for matters regarding care, be considered at risk and dealt with outside of the court system.[187] The approach to be taken was that a welfare-based system was required which did not distinguish between these two groups of children.[188] In 1971, the first children's hearings took place, almost completely replacing the role of the courts in cases concerning children aged 16 years and under, and in some cases concerning 17 and 18-year-olds.[189] These hearings were to be held by an informal tribunal of three highly trained lay volunteers from the local community and a Children's Reporter (usually a lawyer) who acts as a gatekeeper to the hearings,[190] and provides official and legal advice.[191] The Committee advised that action in a child's best interests could be better established by such a tribunal, as it could permit engagement in a greater level of dialogue with all involved, free from the constraints of the adversarial approach of the courts.[192]

The children's hearings system was to be a model of justice focused on welfare, inclining away from a more formal approach based on rights, towards a participatory and more informal means of administering justice.[193] The system has been widely praised as a distinctive and innovative approach to vulnerable children[194] and Norrie states that "Scotland has long been proud of its unique procedure."[195] One notable feature of hearings is that the participation of children in matters concerning them is key to the inception of the system. It was proposed by the Kilbrandon Committee that children would be much more likely to feel

[187] Susan McVie, "Alternative Models of Youth Justice: Lessons from Scotland and Northern Ireland" 6 *Journal of Children's Services* 106 (2011).
[188] Anne Griffiths and Randy Kandel, "The Governance of Children: From Welfare Justice to Proactive Regulation in the Scottish Children's Hearings System" in Franz von Benda-Beckmann *et al.*, ed., *Rules of Law and Laws of Ruling: On the Governance of Law* (Ashgate, 2013), at 172.
[189] Children's Hearings Scotland, *Children's Hearings: A Brief Background* (Children's Hearings Scotland, 2012), at 2. Children may still be considered for prosecution when suspected of committing serious crimes.
[190] See Anne Griffiths and Randy Kandel, "Hearing Children in Children's Hearings" 3 *Child and Family Law Quarterly* 283 (2000), at 285.
[191] McVie.
[192] See Griffiths and Kandel, at 284.
[193] Griffiths and Kandel, at 172.
[194] See further Hannah Walker *et al.*, "The Impact of a New Service for Maltreated Children on Children's Hearings in Scotland: A Qualitative Study" 37 *Adoption and Fostering* 14 (2013), at 15, Griffiths and Kandel, at 172 and Griffiths and Kandel, at 284.
[195] Kenneth Norrie, "Human Rights and the Children's Hearing System" 45 *Journal of the Law Society of Scotland* 19 (2000).

comfortable participating in an informal lay tribunal rather than formal judicial proceedings.[196] Griffiths and Kandel describe the system as follows:

> [T]hey are designed to provide a relatively open and safe space in which children who appear can talk about their lives. The panels are also a soft forum, where, ideally, conversation replaces testimony and evidentiary standards are relatively loose. The panel members understand the hearings to belong to the child — both as a place for them to speak and to get a change for the better in their lives.[197]

This unique system, although established before the drafting of the CRC, is one in which the principle of hearing children in matters affecting them appears to feature prominently.

2.8.2 Procedural Aspects of Children's Hearings

A child can be brought before a hearing for a number of reasons, for example if the child is likely to suffer serious harm through lack of care, if the child is beyond the control of parents or carers, if the child has been the victim of an offence, or if the child has committed an offence.[198] The establishment of facts, where they are disputed, is left to the courts and only cases where the statement set out by the Children's Reporter is accepted or partially accepted can proceed to a hearing.[199] The referral to a hearing can be made by various professionals, or even any member of the public or the child themselves, but is usually made by police or social workers.[200] The referral is made to the Children's Reporter, who conducts an initial investigation and then decides on what action, if any, is in the best interest of the child.[201] The Children's Reporter may decide that no action is required, and write to the child and parent (or other relevant person) to inform them of this decision. It may also be decided that the child must be referred to the local authority for assistance to be given on an informal basis. Finally, if a 'Compulsory Supervision Order' may be required, it will be considered necessary to hold a children's hearing.[202] Such an order can involve control of the residence

[196] Griffiths and Kandel, at 173.
[197] Anne Griffiths and Randy Kandel, "Children's Confidentiality at the Crossroad: Challenges for the Scottish Children's Hearing System" 28 *Journal of Social Welfare and Family Law* 137 (2006), at 149-150.
[198] Section 67(2) of the Children's Hearings (Scotland) Act 2011.
[199] Section 93 of the Children's Hearings (Scotland) Act 2011.
[200] See Part 6 of the Children's Hearings (Scotland) Act 2011.
[201] *Ibid*.
[202] Section 28 of the Children's Hearings (Scotland) Act 2011. The hearing may also issue an Interim Order, which can be extended by children's hearing panels up to 66 days, where it is necessary as a matter of urgency for the child's protection, guidance or control.

or care of the child by the local authority, amongst other measures.[203] It is then decided at the hearing whether it is necessary to make such an order, and what measures will be involved.

The panel may receive psychological or other reports when deciding what measures if any are to be taken concerning the child. Children aged 12 and over as well as relevant persons will receive these reports at the same time as the panel members.[204] The circumstances of the child are discussed fully at the hearing with the child, the family or carers ("relevant persons"), and anyone else present, for example social workers. The hearing is concerned with the long-term well-being of the child, and the measures will be chosen on the basis of the welfare of the child.[205] Despite the relatively informal nature of hearings, ultimately panels have broad powers,[206] which include removing children from home or restricting a child's movement. Hearing decisions are not punitive in nature however and the restrictions will be supported by measures to change behaviour.[207] Children (as well as adults) may request a review or appeal the decision of the panel.[208]

2.8.3 Rights Considerations

Balancing Rights of those Affected by Children's Hearings

Broad praise has been received by the hearing system. There have been concerns about deformalising child law, however, on the basis that this has been to the detriment of the fulfilment of the rights of parents and children.[209] Norrie raises the point that children's hearings are quasi-judicial tribunals with many of the powers vested in courts and that consequently they must "conform to the standards of procedural fairness required not only by natural justice but by international obligations" in order to protect those who appear before them.[210] The introduction of human rights legislation in the UK has modified somewhat the approach of the hearings system to one which appears more mindful of the due process rights

[203] Section 83 of the Children's Hearings (Scotland) Act 2011.
[204] Children's Hearings Scotland, at 11.
[205] Section 25 of the Children's Hearings (Scotland) Act 2011.
[206] Kenneth McK Norrie, *Children's Hearings in Scotland* (2nd edn., Thomson/W. Green, 2005), at 3, cited in Griffith and Kandel, at 178.
[207] Children's Hearings Scotland, at 12.
[208] See Part 15 of the Children's Hearings (Scotland) Act 2011.
[209] Griffiths and Kandel, at 174.
[210] Kenneth McK Norrie, *Children's Hearings in Scotland* (2nd edn., Thomson/W. Green, 2005), at 3, cited in Griffith and Kandel, at 178.

of participants.[211] Norrie argues that this has required a change in approach in hearings from one which simply upheld the best interests of the child to one which instead balances different interests more evenly.[212] The amendments made to law and practice in order to conform to fair trial requirements have resulted in a more formalised process.[213] For example, adults and older children now have the right to receive reports in advance of hearings,[214] children have a right to legal representation in certain circumstances,[215] and reference must be made at the beginning and end of the hearing to the right to appeal. There appear to be arguments for and against these more formal approaches from the perspective of CRC Article 12. A rights approach brings with it the promise of greater regard for due process, and can ensure greater use of legal representation. Such representation can assist children to exercise the right to be heard. However, the formalism which can accompany a rights approach leads to the use of more technical language which may discourage children from participating.[216] Such an approach can also increase regard for the position of parents and perhaps prioritise parents' rights over those of children.[217] Attempts have been made in Scotland to balance an informal approach to law concerning vulnerable children with the requirements of contemporary international human rights law standards. The result appears to be a system in which hearing children is valued on the one hand, yet challenging on the other. What the position will be post-Brexit is as yet unclear.

The Right to be Heard and the Hearings System

Significant regard is given to the participation of children themselves in children's hearings. The more recent legislation governing hearings, the Children's Hearings (Scotland) Act 2011, is said to have as one of its aims the improvement of participation by children in a number of ways,[218] for example by placing duties on the chair of the panel to ensure relevant reports accurately reflect children's views.[219] The participation of children and the family in the

[211] Griffiths and Kandel, at 174.
[212] Kenneth McK Norrie, *Children's Hearings in Scotland* (2nd edn., Thomson/W. Green, 2005), at 5, cited in Griffith and Kandel, at 172.
[213] Griffiths and Kandel, at 177.
[214] It was established in *McMichael v United Kingdom* (1995) 20 EHRR 205 that adults should have this right.
[215] See below.
[216] See Griffiths and Kandel, at 177 and below.
[217] One example of this, as outlined below, is the prioritising in hearings of the right of parents to information over the right or interest children may have in being able to speak confidentially.
[218] See Together (Scottish Alliance for Children's Rights), *Justice for Children: Submission to the Office of the United Nations High Commissioner for Human Rights* (Together, 2013).
[219] Section 121 of the Children's Hearings (Scotland) Act 2011.

hearing is seen as vital in order to ensure discussion of the best way forward, to permit the issues affecting the child to emerge, and to include the input and support of children and families for the course of any action ultimately decided upon.[220]

The opportunity for children to contribute to the dialogue regarding the welfare decision-making process in hearings has been described as "central to the operation of the system."[221] Generally children must attend the hearing, unless the hearing decides that the child does not have to attend due to a welfare risk.[222] A children's hearing may even issue a warrant where a child has failed to attend a hearing in order to ensure that the child attends the next hearing.

Article 12 is clearly embedded in the children's hearings system, as the relevant legislation contains references to the obligation to have regard for children's views, and to consider the age and maturity of the child in this regard.[223] The conceptualisation of the principle is not ideal however, as the text is arguably not as strong as that of Article 12. The qualifier "so far as practicable" is added to the right.

Panel Members: Information-Gathering

Research indicates that panels utilise the hearings as a way to form an independent assessment of the case.[224] The information gleaned from observing family dynamics in the hearing is used for consideration together with the recommendations which will have been made by professionals in the reports circulated to them and relevant persons in advance of the hearing.[225] Panel members report that they observe the body language of and non-verbal communication between those at the hearing; they will observe, for example, the behaviour of a child toward a parent, and the nature of the relationship between families and children on the one hand and professionals on the other.[226] Their observations may conflict with

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[220] Rachel Ormston and Louise Marryat, *Review of the Children's Legal Representation Grant Scheme: Research Report* (Scottish Government, 2009), at 5.
[221] Griffiths and Kandel, at 138.
[222] Section 73 of the Children's Hearings (Scotland) Act 2011.
[223] Section 27(3) of the Children's Hearings Act 2011 states that the children's hearings must:

> [S]o far as practicable and taking account of the age and maturity of the child:
> (a) give the child an opportunity to indicate whether the child wishes to express the child's views,
> (b) if the child wishes to do so, give the child an opportunity to express them, and
> (c) have regard to any views expressed by the child.

[224] *Ibid*., at 288.
[225] *Ibid*.
[226] *Ibid*., at 289.

information in the reports, and the hearings provide the opportunity to measure their own assessments against those of the professionals involved in drawing conclusions as to the best measures for the child.[227]

Panel members must obtain the views of the child who is the subject of the hearing, and this may have to be done confidentially. While relevant legislation was introduced in 1995[228] to prevent having to exclude children from all or part of a hearing,[229] panel members now have powers to require anyone at the hearing to leave the room in order for the panel to have a private conversation with the child. They are required, however, to subsequently inform those who have been excluded of the substance of what happened in their absence. Griffith and Kandel opine that:

> [P]arents no longer have an absolute right to be present throughout the hearing. This does not, however, confer a right of confidentiality on children, given that disclosure is required. This creates dilemmas for panel members as they seek to maintain a balance between the autonomy and welfare rights of children and the rights of parents.[230]

2.8.4 Advocates and Legal Representation

Both children and relevant persons may take an advocate with them to the hearing,[231] and in certain cases it may be possible to apply for legal aid in order to pay for the representation of a solicitor. Research into the use of advocates in the children's hearings system used the following definition:

> At its broadest, advocacy is the provision of information, explanations, support, simple encouragement to participate, or direct advocacy by way of representation. Children and young people involved in the Children's Hearings System experience a need for a mixture of these things at different stages in their involvement with the System and to differing degrees depending on their particular needs.[232]

It was felt by the researchers that this definition reflects the complexity and diversity of ways that children can be assisted to understand and participate effectively in children's hearings in

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[227] *Ibid*.
[228] Section 46 of Part II of the Children (Scotland) Act 1995.
[229] Griffiths and Kandel, at 138.
[230] *Ibid*.
[231] Children's Hearings Scotland, at 9.
[232] Chris Creegan *et. al.*, *Big Words and Big Tables: Research into Children and Young People's Views on Advocacy in the Children's Hearings System* (Scottish Executive Social Research, 2006), at 1.

ways that suit their particular needs and capacities.[233] Children and professionals have characterised three possible types of 'representative' which children may require to assist them with hearings: A 'supporter' to offer moral support, perhaps by accompanying children to hearings; a 'facilitator' may play a more active role, perhaps suggesting what the child might want to say at the hearing and maybe even speaking for them;[234] and a legal representative who would actually advocate for children's wishes. It was also identified that continuity of support throughout the process was important to children, although it may be useful to have different representation provided by different people (relatives, professionals etc.) at different stages throughout the hearing process.[235]

When asked what type of 'advocacy' different children felt they needed during the hearing process, children identified the following characteristics as particularly important: someone loyal and trustworthy who is known to them; someone who listens and explains things; someone who is flexible, sensitive, who is good at communicating with children, and is capable of challenging panel members at their hearings.[236] Children and professionals have identified that different people could act as representatives for children in hearings, for example parents, social workers, dedicated representatives and other professionals.[237]

In research concerning children's views of advocate support at children's hearings, children most frequently identified social workers and parents as providing support for them during their hearing.[238] This was despite the fact that neither social workers nor parents could be generally said to provide 'advocacy' for the child in accordance with the definition above. The authors emphasise, however, that children's perceptions in this regard are perhaps unsurprising as the children interviewed did not generally differentiate between advocacy and other types of support.[239] Children in residential care also reported that the professionals working with them at the units in which they resided often became a source of support at hearings.[240]

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[233] *Ibid*.
[234] Rachel Ormston, "Welfare, Rights and Legal Representation in Children's Hearings" *Scottish Youth Issues Journal* 5 (2002), cited in Ormston and Marryat, at 7.
[235] Rachel Ormston, *ibid.*, cited in Ormston and Marryat, at 8.
[236] Creegan *et al.*, cited in Ormston and Marryat, at 8.
[237] Rachel Ormston, "Welfare, Rights and Legal Representation in Children's Hearings" *Scottish Youth Issues Journal* 5 (2002), cited in Ormston and Marryat, at 8.
[238] Creegan *et al.*, at 16.
[239] *Ibid.*, at 16.
[240] *Ibid.*, at 23.

Two dedicated advocates for children who can be at children's hearings are safeguarders and legal representatives. The main difference between the two roles is that the purpose of the safeguarder is to represent the best interests of the child, whereas the legal representative must represent children's views and rights. The number of children who are represented at hearings either legally or by a safeguarder are in the minority, however.

There is an argument that legal representation in all cases at children's hearings would undermine the unique nature of the system. However, many of the decisions concern matters which profoundly affect children's rights, such as depriving them of liberty. Therefore from a children's rights perspective it seems crucial that children have legal representation for the hearings which have the most serious repercussions. The safeguarder role appears to be a limited one in many respects. It is little used and also questionable from the perspective of the right to be heard. Children express frustration where their advocate only represents their best interests.[241] Where children do have an advocate it is arguable that, where they express a desire for this, it is their wishes which should be represented, not their best interests. There are already a number of adults in the room at the hearing who are purporting to be acting in the best interests of the child, and it seems that children may often be in need of having assistance in expressing their own voice. Perhaps the role of safeguarder should be modified so that, in some cases at least, it is solely children's wishes which are represented.

Children in the research of Creegan *et al*. most frequently identified social workers and parents as advocates, when, as stated above, in fact these attendees do not provide what could be defined as advocacy.[242] This appears to point to the need for children to receive more clear information on the right that they have to bring an advocate to hearings. Creegan *et al.* argue that whilst there exists within the hearings system a commitment to advocacy for children, there is inconsistent use of advocates in practice.[243] This inconsistency concerns both frequency of use and the satisfaction of children with the advocacy provided.[244] The researchers found that of the 29 children consulted, very few had had an independent advocate, and such representation was therefore not the typical experience of children at hearings.[245] They suggest that this situation could be addressed through the introduction of a

[241] Griffiths and Kandel, at 292.
[242] Creegan *et al.*, at 16.
[243] *Ibid*., at 4.
[244] *Ibid*.
[245] Creegan *et al.*, at 1.

"personal advocacy plan" to be drafted together with each child and reviewed throughout the hearings process.[246]

Such a plan would certainly have the effect of making clear to children, panel members and everyone else involved in hearings the need for children to be facilitated to be heard, and the nature of the various advocacy possibilities. Griffiths and Kandel emphasise, however, that the more adults purport to speak for children in hearings, the more difficult it may be for children to speak in their own voices.[247] Professionals need, then, to be acutely aware of the need to facilitate children to speak for themselves rather than necessarily speaking for them.

2.8.5 Children's Hearings: Hearing Children in Practice

A significant body of research exists on the experiences of children involved in the hearings system. Numerous research studies conducted in Scotland have highlighted that children want to be heard at their hearings, and that they want the information necessary to adequately participate.[248] However, the research also indicates that there appear to be many challenges and obstacles preventing them from being heard effectively. It is a useful case study from which to learn considering children's participation is so crucial to the Scottish Hearing's system.

Preparation for Hearing

The initial contact that children have with the hearings system is usually a letter from the Scottish Children's Reporter Administration, the organisation tasked with managing and facilitating the work of Children's Reporters. In research conducted by the Children's Hearings Reform Team, all children interviewed felt that too much paperwork relating to hearings was sent to them and most children felt very frustrated about this.[249] Approximately one quarter of children also expressed that they did not understand the information sent to

[246] Creegan *et al.* at 6.
[247] Griffiths and Kandel, at 292.
[248] Scottish Children's Reporter Administration, *The Children's Hearings System: Understood and Making a Difference* (Scottish Children's Reporter Administration, 2011), at 6 cites Children's Hearings Reform Team, *The Views of Children* (Children's Parliament/ Children's Hearings Reform Team, 2010); Scottish Children's Reporter Administration, *The Views and Experiences of Children and Families Involved in the Children's Hearings System in Scotland* (Scottish Children's Reporter Administration, 2009); and Creegan *et al.*
[249] Children's Hearings Reform Team, *The Views of Children* (Children's Parliament/Children's Hearings Reform Team, 2010), at 4, cited in Children's Hearings Scotland, *Children and Young People's Views and Experiences of Children's Hearings – A Summary* (Children's Hearings Scotland, 2014), at 7.

them in advance of the hearing, which clearly could have an impact on their understanding of the hearing process and consequently their ability to participate in it.[250] Levels of understanding of the process generally tended to be higher amongst children who successfully read and understand information sent to them in advance of the hearing.[251] Children reported that they need to have the hearing process explained to them before their hearing so they know what to expect.[252]

Unfortunately a number of research reports highlight a lack of preparation for children for their hearing.[253] Research by the Scottish Children's Reporter Administration found that 94% of young people but only 56% of children interviewed reported understanding why they were at a children's hearing.[254] It also established that only 30% of children, young people and adults reported having spoken before the day of the hearing to their social worker about the hearing.[255] This lack of information and explanation can lead to deep misunderstandings and even fearfulness for children regarding what the hearing is about.[256] Other children report being more at ease when having had the nature of hearings explained to them beforehand.[257]

Over half of children in further research carried out by the Scottish Children's Reporter Administration had been found not to have been involved in contributing views before hearings.[258] Two thirds of the children interviewed had not felt involved by their social worker in the preparation of reports for hearings.[259] Some children had, however, experience of working with a particular child care institution in which staff and children first discussed what would be in the report and then wrote it together.[260] The lack of involvement of children in the initial preparation of reports seems problematic considering that panel members will presumably have formed initial views on the case based on these reports, and yet they will not have heard the child until the hearing.

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[250] Scottish Children's Reporter Administration, at 77, cited in Children's Hearings Scotland, *ibid*., at 7.
[251] Children's Hearings Scotland, at 8-9.
[252] *Ibid*.
[253] See e.g. Scottish Children's Reporter Administration, at 21 and Children's Hearings Scotland, at 8.
[254] Scottish Children's Reporter Administration, *National Survey of Children and Families in the Children's Hearings System 2012/13* (Scottish Children's Reporter Administration, 2013), at 14.
[255] *Ibid*., at 21.
[256] Children's Hearings Scotland, at 8.
[257] Scottish Children's Reporter Administration, at 33, cited in Children's Hearings Scotland, at 8.
[258] Scottish Children's Reporter Administration, *The Children's Hearings System: Understood and Making a Difference* (Scottish Children's Reporter Administration, 2011), at 10.
[259] *Ibid*.
[260] *Ibid*., Aberlour Child Care Trust.

Children's Feelings about the System

Numerous research studies indicate that children have varying experiences of panels at hearings. Many children report positive feelings towards the hearing process, as they understand that it is concerned with their well-being. One 15-year-old boy explains "[t]hey are there to help; they try to make you and others safe, they are trying to help you."[261] In research conducted by Griffiths and Kandel, children who had positive experiences explained: "it's not too bad"; "you think everyone will shout at you but they don't. They act normal"; "they were listening like [you could tell they were listening] because of the way they were answering back."[262]

It seems, however, that most children find attending a hearing to be a difficult experience, during which they feel upset and frustrated. Research in 2011 found that the average score young people would give to their hearing experience was four out of 10.[263] In one study, a child reported: "You feel like a mouse in a mouse trap. They're bigger than you, they're adults basically and you're just a child and they're deciding your future."[264] Children regularly report that they feel nervous about hearings, sometimes feeling that panel members did not listen to them: "they shuffled papers and like while I was speaking"; "they didn't look at you."[265] Some children report that they perceive panel members as having a negative attitude towards them. Children often reach this conclusion on the basis of what panel members say, from their body language and tone,[266] and sometimes due to children's own expectations and feelings.[267]

2.8.6 Outcomes

Most children (two thirds) reported that their lives had improved since they had become involved in the hearings system.[268] The reasons given primarily related to improvements in the relationships with their families, in the behaviour of their parents, or in their education or

[261] Children's Hearings Reform Team, at 14, cited in Children's Hearings Scotland, at 13.
[262] Griffiths and Kandel, at 289.
[263] Who Cares? Scotland, cited in Children's Hearings Scotland, at 16.
[264] Children's Parliament, cited in Children's Hearings Scotland, at 13.
[265] Griffiths and Kandel, at 289.
[266] Children's Hearings Team, *All About Me Events: Summary and Feedback Report* (Scottish Government, 2012), at 6, cited in Children's Hearings Scotland, at 16.
[267] Children's Hearings Scotland, at 16.
[268] Scottish Children's Reporter Administration, at 5.

other challenges they were facing. Some children interviewed stated that hearings had motivated a change in their parents, particularly regarding substance misuse.[269] One 12-year-old, when asked if things were better after engaging in the hearings system, said: "Better…Getting the extra support an' that, it's helped me a lot."[270] Children who were involved in hearings because they had engaged in criminal behaviour were appreciative that this behaviour had been dealt with by hearings rather than the criminal justice system.[271] Children do of course sometimes experience decisions which they are unhappy about.[272] Nevertheless, researchers conclude that in general, most of the children interviewed felt that the hearings system is fair and that they had been helped by the decisions made.[273]

Understanding the outcomes of hearings, however, does not seem to be a straightforward matter. It has been found that children commonly leave hearings not fully understanding the nature of the decision made.[274] Although information about decisions is given to children in hearings, they often require further explanation afterwards to be able to understand what had occurred, particularly in order to understand terminology such as "supervision requirements".[275] The Scottish Children's Reporter Administration has argued that the decisions made in hearings need to be better explained to children. If there are decisions made that involve the supervision of social workers in a child's life, for example, the details of this should be clearly explained to children both in person and in written form. Details should be made clear such as the duration of the intervention, the supports children are to receive, and those responsible for implementing the decision.[276]

2.8.7 Child-Friendly Initiatives

Training for Panel Members

Efforts have clearly been made in recent years to make panel members aware of the findings of research concerning children's experiences of hearings. Members have training documents including *Children's Hearings System in Scotland: Children's Hearings Handbook* – a

[269] *Ibid*.
[270] *Ibid*., at 23.
[271] *Ibid*., at 21.
[272] Scottish Children's Reporter Administration, cited in Children's Hearings Scotland, at 14.
[273] *Ibid*.
[274] Creegan *et al.*, at 32.
[275] *Ibid*.
[276] Scottish Children's Reporter Administration, at 26.

training resource which was produced by the Scottish Government in 2013.[277] This comprehensive handbook provides information to panel members on the historical context of hearings, principles of the system, and relevant legislation. It documents for panel members the many obstacles which make it difficult for children to participate in hearings such as fears, power dynamics, and language barriers. The vital nature of communication, including through body language, for the participation of children is emphasised in the handbook:

> Communication encompasses the spoken word and its interpretation by the listener; the gestures, facial expressions, glances – all the other ways we have of expressing our views with our bodies rather than with the spoken word; and the written word via letters, reports and legal documents. All these aspects of communication feature in a children's hearing and will play a part in how each person present comes to understand or fails to understand what is happening.[278]

In a 2013 practice and procedure manual, panel members are also made aware of key communication issues at hearings.[279] They are instructed to manage the start of a hearing in order to set a tone that enables participation of all involved,[280] and they are given guidance to meet legal requirements regarding information about appeals in a more accessible manner.[281] Panel members are also clearly instructed to explain the decision and reasons for it to children and others at the hearing. The attention of members is drawn to communication methods regarding their decision, including those that are non-verbal, at a time in the hearing which can be particularly sensitive for children and families.[282]

Recent documents have certainly focused on Article 12 of the CRC as setting an important principle for hearings of which panel members must be aware. The practice and procedure manual emphasises the relevant legislative provision for hearing children and states that the participation of children is a central feature of children's hearings.[283] The *Training Resource Manual* also instructs that, although the decisions of panel members may not always accord with the wishes of the child about whom the decision is being made, "the child's views must always be an important factor contributing to the decision."[284] The manual provides an

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[277] Scottish Government, *The Children's Hearings System in Scotland: Children's Hearings Handbook: Training Resource Manual Volume 2* (Scottish Government, 2013).
[278] *Ibid*., at 196.
[279] Children's Hearings Scotland, *Practice and Procedure Manual* (Children's Hearings Scotland, 2013).
[280] *Ibid*., at 42.
[281] *Ibid*., at 44.
[282] *Ibid*., at 101.
[283] *Ibid*., at 17.
[284] Scottish Government, at 202.

overview of Hart's Ladder of Participation[285] and specifies how the theory could apply to the context of children's hearings. It is stated that, in order for a hearing to be considered fully participatory, children should understand the intention of the hearing; they should know who made decisions about their involvement and the reasons for this; their involvement should be meaningful rather than decorative or tokenistic; and they should "buy into" the aims of the hearing.[286] The manual states that tokenism in this context would include "when a child is told at the beginning of a hearing that it is 'their' hearing and they are the most important person there, but then the discussion ranges between the relevant persons and the professionals and the child is not fully involved."[287] It is stated that the highest levels of participation – in which decision-making is shared by both adults and children – "are the most difficult to achieve partly because of the responsibilities of adults and partly because of the tendency of adults to take directive roles."[288]

Child-Friendly Tools

There are continuous efforts to introduce child-friendly tools for children involved in children's hearings. After a survey in 2008, a number of initiatives were introduced by the Scottish Children's Reporters Administration to improve the service. One of the changes put in place included the establishment of an internal 'Participation Group' tasked with making hearings more accessible to children.[289] Forms were made more colourful and age-appropriate and new information tools were developed for children, such as information leaflets and DVDs.[290] In 2011, the Scottish Children's Reporter Administration reported on the piloting of 'flash cards' in children's hearings. These laminated cards contain pictures that children can hold up to assist them in indicating to panel members about how they feel during hearings, or if they wish to say something. It was found that once children have been shown how to use these cards they find them fun, engaging and empowering. They were found to be particularly engaging for children aged approximately seven and eight-years-old.[291]

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[285] Roger Hart, *Children's Participation: From Tokenism to Citizen* (UNICEF, 1992). Scottish Government, at 213.
[286] Scottish Government, at 213.
[287] *Ibid*.
[288] *Ibid*.
[289] Scottish Children's Reporter Administration, at 6.
[290] *Ibid*.
[291] Children's Hearings Scotland, *Children and Young People's Views and Experiences of Children's Hearings – A Summary* (Children's Hearings Scotland, 2014), at 11.

Children themselves have been involved in some of the initiatives to improve participation in hearings. The Young People's Organising and Campaigning Group – a group of children and young people who have been in care – has produced a 'Guide to Meetings' aimed primarily at the adults that attend hearings.[292] It draws on the experiences of children in hearings and outlines in straightforward language what would assist children to better participate, and in particular what adults can do differently to help. They have also produced a DVD to accompany the Guide in which the same suggestions are proposed and in which a role play of a "bad meeting" is included.[293] There do not appear, however, to be many instances in which children are involved in initiatives aimed at increasing participation in hearings. Such activity involving children should be further explored as their experiences are crucial to creating an improved context for being heard.

2.8.8 Conclusions on the Scottish Children's Hearings System

The informality of children's hearings, their reliance on lay persons as panel members, and their participatory approaches are certainly innovative and a model to consider for Ireland. The contribution of children and their families to decision-making is held to be a key element of the value and unique nature of children's hearings. The system certainly upholds elements of the CRC, particularly Article 12, in many ways. It is assumed that children will participate at hearings, though this assumption is rebuttable if, for example, it would be contrary to the best interests of the child. Children receive much information on hearings and are invited to give their views at various stages of the process. Children may have an advocate present with them to assist them in participating if they wish, and they may have legal representation in certain circumstances. They can also appeal the decision of the hearing.

There are a number of challenges – due process issues and issues of representation for example. However the hearings continue even under the necessity to meet with ECHR fair trial requirements. There are also a number of features of the system which are problematic from the perspective of Article 12. Children are sometimes not prepared well enough for proceedings and are left feeling nervous, pointing to the need for greater support in some instances, from for example social workers or other more explicit advocates of children's

[292] Young People's Organising and Campaigning Group, *Guide to Meetings* (Aberdeenshire Council, 2011).
[293] See Aberdeenshire Council, *Young Peoples' Organising and Campaigning Group*, Available at: http://www.aberdeenshire.gov.uk/children/rights/MakingMeetingsBetter.asp#Download (last accessed 9 April 2018).

rights and interests. It is positive, however, that most children appear to feel that their lives have improved since their involvement with the system, and some directly attribute this to the system despite originally disagreeing with decisions made at hearings.[294]

2.8.9 Children's Rights Judgments Project – Rights-Based Judging

The Children's Rights Judgments project in the UK is a collaboration between over 60 law experts from across the world in re-writing existing judgments, but taking an explicitly children's rights-based approach; one which is based on the UN Convention on the Rights of the Child. It was funded by the UK Arts and Humanities Research Council. A children's rights approach promotes children as active agents and prioritises their needs, best interests, and participation when decisions are being made which affect them.

Participants rewrote cases from a range of areas of the law including health, education, immigration, and family law. A number of different jurisdictions (including the supra-national courts) were covered. Judgment writers took a variety of differing approaches dependent on their particular children's rights analysis. Some judgments came to a different conclusion than in the original, whilst others came to the same conclusion using different rationale.

The rewritten judgments demonstrate the conceptual and practical challenges of securing children's rights within judicial decision-making and explore how developments in judicial practice can inform and progress the legal protection of children's rights. The importance of the role of the judiciary in upholding and advancing children's rights is emphasised, as is the way in which the judiciary can adopt a more explicit children's rights-based approach to their decision-making.

Each judgment is accompanied by a commentary explaining the historical and legal context of the original case and the rationale which underpins each revised judgment. Authors consider particular children's rights perspective adopted; how children's rights deficiencies in the original judgment are being addressed; and the potential impact the alternative version might have had on law, policy or practice. The writers have stayed within the bounds of the relevant laws – even considering, for example, that although the CRC is not part of domestic

[294] Scottish Children's Reporter Administration, at 5 and 23.

law in the UK and Ireland, there are national principles and creative legal interpretations which can be used in a way that progresses children's rights. The authors have taken a real-world approach to the cases in an attempt to demonstrate what judges can potentially do in the area of children's rights.

It is relevant that in a recent case in England and Wales, the Family Court aimed to produce a judgment most accessible for the adolescent in the proceedings. In *Re A (Letter to a Young Person)*[295] Jackson J.'s judgment in a private law case was published, in the form of a letter (apart from the first four introductory paragraphs), with the approval of the boy who was the subject of proceedings. The 14-year-old boy, referred to in the judgment by the fictitious name of Sam, was the subject of the proceedings to determine, inter alia, whether he should be permitted to move to Scandinavia with his father and, if not, what the contact arrangements should be from the judgment onwards. The boy wished to go. His mother objected to the proposed move of the boy to Scandinavia with his father. The judge ultimately refused permission for the boy to move. At the end of the hearing, the judge gave his decision in the form of a letter to Sam, which Sam's solicitor was to discuss with him when he returned from a school trip. The judgment is written in personable and straightforward language and is much shorter than the average judgment. In the 2016 case of *Lancashire County Council v M. and Others*,[296] Jackson J. similarly attempted to render his judgment in a child-friendly format. He wrote a judgment explaining to the children exclusively in child-friendly language why contact with their extremist father would be limited. Particularly of interest was his use of emojis in the judgment![297] These efforts to make proceedings more accessible to children are to be commended.

2.9 TALE PROJECT – ONLINE TRAINING MATERIALS FOR CHILDREN'S RIGHTS

Although children require a face-to-face contact person when they are involved in proceedings – a professional to provide them with the guidance and support and to understand processes[298] – a certain amount of generic information would be useful. One such

[295] [2017] EWFC 48.
[296] [2016] EWFC 9.
[297] See also *Re A. (A Child)* [2014] EWHC 920 in which the judge indicated that he would be visiting the girl in hospital to explain his decision (para. 45), and in *Re. B. (A Child by her Guardian)* [2017] EWHC 488 there was a "suggestion that the court should write a letter to B explaining what the court had decided and why." Para. 48.
[298] Daly, 2018.

innovative initiative is the TALE (Training Activities for Legal Experts) project,[299] funded by the European Union.

In this initiative, work was conducted with both children and front-line legal practitioners in order to develop training materials on children's rights. Real case examples across many different areas of the law – child protection, family law, immigration – were used as a base for the project. Children's rights principles were embedded in cases from beginning to end, with reflections from children and professionals about legal processes and procedures in which they were involved. These reflections and experiences were recorded in different media and form part of an online training course which legal professionals can now undertake in order to ensure they are fully trained in children's rights-based practice.

The modules in the online training course focus on aspects of the legal process that provide opportunities for lawyers to apply a children's rights-based approach to case work when they work with clients who are children. It is emphasised that a children's rights-based approach to the legal process strengthens the capacities of lawyers to work effectively and respectfully with children. It is also highlighted that this will likely enhance the experiences and outcomes for their child clients and also for others involved in the process.

2.10 FAMILY LAW COURT REFORM

Structure

The clear preferred system emerging from other jurisdictions is a Family Law Court system which is not overly interwoven with the rest of the Courts System. What also seems clear is the importance of managing the "type" of case which goes before each tier of the Court.

Children and family services

The message from other jurisdictions is unequivocal and that is that children and family services in the court are best managed by a dedicated and integrated Family Court structure

[299] See the TALE project website at http://www.project-tale.org/ (last accessed 23 Mach 2018).

that is properly resourced to meet the particular needs of people at a vulnerable time in their lives.

Any such Family Court structure must recognise and actively promote an interdisciplinary system to ensure effective communication between all the disciplines involved in family law e.g. medical, law, education, guardians *ad litem* and social services.

Restructuring of the family law court without the involvement and promotion of an interdisciplinary system would not achieve the objective of meeting the particular needs of the users of the family court structure.

In both public and private family law matters, key services should be available to permit family law judges to refer couples or parties to skilled personnel to:

- draw up parenting plans;
- deal with anger management programmes in domestic violence cases;
- monitor custody and access orders when they break down and facilitate their restoration;
- engage in family therapy;
- implement supervised access orders.

The interdisciplinary system involves an acceptance that simply making a court order is not sufficient, that further work needs to be undertaken by specialists with a range of non-legal skills to ensure that the needs of clients are met. Without this, any new system remains as flawed as the current one.

The key ancillary services referred to above are an essential part of any new family law court system and the success of this approach when introduced at District Court level in the Dolphin House initiative shows the value of having a variety of agencies such as legal aid, mediation services and the courts and courts offices under the one roof.

The new family courts should be located separately from current venues with sufficient rooms for private consultations and a welfare and assessment service to support public and private family law proceedings. Alternative Dispute Resolution (ADR) facilities should be located in the new family law courthouses linked into the welfare system.

The following recommendations from the 2011 Family Justice Service Review in the United Kingdom should be considered:

> **Children's voices:** children and young people should be given age appropriate information to explain what is happening when they are involved in public and private law cases and should be able to make their views known.
>
> **Workforce:** the Courts Service should establish a pilot in which judges would learn the outcomes for children and families on whom they have adjudicated.
>
> **Case management:** judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales.

2.11 CONCLUSIONS ON BEST PRACTICE FOR CHILDREN AND FAMILY SERVICES IN IRISH COURTS

It is necessary to ensure specialisation in the area of family law and investment in infrastructure. The failure to make the necessary reforms has been described as "increasingly difficult to justify."[300] Ireland must invest the resources to ensure that its courts system is fit for purpose. It should be not only meeting the requirements of the CRC, the Council for Europe Guidelines and other international standards, but it should be leading the global inclination in favour of specialised family law systems, and of involving children in proceedings affecting them. The detail of broader infrastructural change is discussed in section 3.24 of this report.

[300] Parkes, "Implementation of Article 12 in Family Law Proceedings in Ireland and New Zealand: Lessons Learned and Messages for Going Forward", at 23.

Recommendations Relating to Best Practice for Children and Family Services in Irish Courts

The necessary detail, resources and implementation are needed in order to make plans for a specialised family or children's court system a reality.

Appropriate waiting and meeting facilities in dedicated court-houses are urgently needed for families. The physical environment of courtrooms should be planned with children's presence in mind.

All judges and lawyers likely to encounter children's cases should be required to have some level of training on children's rights and welfare.

Cuts to legal aid budgets and other elements of family law have been demonstrated to lead to increased expenditure in the long run. Greater resources should therefore be accorded to the family law system, including for legal aid for those minority of families who seek to use the court during family breakdown.

As the adversarial system is not well suited to family law, it should be examined whether a more inquisitorial approach to family law would be preferable in Ireland.

Alternative dispute resolution should be seen as a useful alternative mechanism for resolving family law disputes, not as a cost-saving measure.

Models in other states in which the child has greater influence on the role of their representative in court proceedings should be considered in Ireland. Under the 'guardian ad litem lawyer' system of the American Bar Association Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings for example the lawyer takes instructions from children as they do from any other client, only seeking a 'best interest' representative where the child is both lacking in competence and at risk of substantial harm.

Guidelines must be developed in Ireland for meetings between judges and children, similar to the England and Wales 2010 Family Justice Council Guidelines for Judges Meeting Children.

It should be examined in Ireland how children's autonomy could be given greater priority in proceedings about their best interests, and whether the threshold for overriding children's wishes should be higher than simply the reason that the decision-maker deemed it in the best interest of the child.

The new family law system in Israel where a holistic approach including therapeutic endeavours have been introduced, as well as a presumption that children will be involved, should be considered for the Irish context.

The Scottish children's hearings system, which uses a lay panel to establish the welfare needs of children in cases concerning child care and criminal behaviour, and which involves children and families together in relatively informal hearings, should also be considered for the Irish context.

Positive initiatives in family law should be considered for the Irish context, such as the Children's Rights Judgments project in the UK, the creative and child-friendly judgment delivery of the Family Court in England and Wales and the TALE (Training Activities for Legal Experts) project which trains lawyers in children's rights-based practice.

The clear preferred system emerging from other jurisdictions is a Family Law Court system which is not overly interwoven with the rest of the Courts System. What also seems clear is the importance of managing the "type" of case which goes before each tier of the Court. Australia originally placed such importance on family cases being heard by Superior Courts, that the result was that procedural or simplistic cases were being unnecessarily heard by Judges of their Superior Courts. This resulted in a change to their system where most cases now go before the Federal Circuit Court, with certain "categories" of cases being designated appropriate for the higher Family Court of Australia.

In England and Wales, they operate a very strictly run "gatekeeping system" pursuant to the Family Court (Composition and Distribution of Business) Rules 2014 (the 'Distribution of

Business Rules') of ensuring that cases are allocated to the most appropriate tier within the system. This mechanism of managing which case goes to which court is best suited to the Irish context.

The message from other jurisdictions is unequivocal and that is that children and family services in the court are best managed by a dedicated and integrated Family Court structure that is properly resourced to meet the particular needs of people at a vulnerable time in their lives.

Any such Family Court structure must recognise and actively promote an interdisciplinary system to ensure effective communication between all the disciplines involved in family law e.g. medical, law, education, guardians ad litem and social services.

Restructuring of the family law court without the involvement and promotion of an interdisciplinary system would not achieve the objective of meeting the particular needs of the users of the family court structure.

In both public and private family law matters, key services should be available to permit family law judges to refer couples or parties to skilled personnel to:

- *draw up parenting plans;*
- *deal with anger management programmes in domestic violence cases;*
- *monitor custody and access orders when they break down and facilitate their restoration;*
- *engage in family therapy;*
- *implement supervised access orders.*

The interdisciplinary system involves an acceptance that simply making a court order is not sufficient, that further work needs to be undertaken by specialists with a range of non-legal skills to ensure that the needs of clients are met. Without this, any new system remains as flawed as the current one.

The key ancillary services referred to above are an essential part of any new family law court system and the success of this approach when introduced at District Court level in the Dolphin House initiative shows the value of having a variety of agencies such as legal aid, mediation services and the courts and courts offices under the one roof.

The new family courts should be located separately from current venues with sufficient rooms for private consultations and a welfare and assessment service to support public and private family law proceedings. ADR facilities should be located in the new family law courthouses linked into the welfare system.

The following recommendations from the 2011 Family Justice Service Review in the United Kingdom should be considered:

> ***Children's voices:*** *children and young people should be given age appropriate information to explain what is happening when they are involved in public and private law cases and should be able to make their views known.*
>
> ***Workforce:*** *the Courts Service should establish a pilot in which judges would learn the outcomes for children and families on whom they have adjudicated.*
>
> ***Case management:*** *judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales.*

SECTION 3: REVIEW OF THE CHILD CARE ACT 1991

3.1 INTRODUCTION

The Child Care Act 1991 (the 1991 Act) is the primary piece of Irish legislation governing the welfare of children who are in need of care and protection. It places significant statutory obligations on the Child and Family Agency, Tusla, to promote the welfare of children who are not receiving adequate care and protection. In performing its functions, the Child and Family Agency is required to take steps to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children. Having regard to the rights and duties of parents, whether under the Constitution or otherwise, Tusla is required to consider the welfare of the child as the first and paramount consideration and give due consideration to the wishes of the child. The Act recognises the principle that it generally is in the best interests of a child to be brought up in his or her own family.

At this point in time, the Child Care Act 1991 is over a quarter of a century old. While a detailed and comprehensive piece of legislation,[301] the 1991 Act requires updating to ensure that the legal regime in respect of the care of children in this jurisdiction reflects modern society and the changes that Ireland has undergone in recent years. One such crucial change is the recent introduction of the constitutional mandate in relation to the rights of the child. The Children's Referendum, held in November 2012, has led to the insertion of Article 42A into the Constitution. The Thirty-First Amendment of the Constitution (Children) Act 2012 was signed into law on 28 April 2015. It heightens the need to safeguard and vindicate the rights of our children; emphasises the paramountcy of the best interests of the child and promotes the voice of children in proceedings concerning them. The 1991 Act pre-dates this important constitutional change and its content thus must be updated to reflect the provisions of Article 42A. In a similar vein, regard must be had to the European Convention on Human Rights and the personal rights that flow from same. The European Convention on Human Rights Act 2003 gives further effect to the ECHR in Irish law, requiring the courts to interpret legislation in line with the Convention as far as it is possible to do. Reform within the 1991 Act should therefore seek to align the child care provisions with both the new constitutional dispensation and the contents of the ECHR. Finally, difficulties in the

[301] Governing inter alia the circumstances of voluntary care arrangements; court applications for emergency, interim and full care orders; and situations of foster and residential care.

operation of the Child Care Act 1991 also need to be addressed by introducing more effective measures to secure the welfare of vulnerable children.

This section, therefore, considers certain aspects of the 1991 Act where recommendations for improvements can be made in order to further strengthen child protection in this country. Furthermore, a review of recent case law will be undertaken to highlight the key legal matters arising under the 1991 Act that the courts have been required to contemplate and address. This will necessarily involve a consideration of certain decisions of the Irish courts in which issues relating to child protection or children's rights emerged. Recommendations will be made for reform emanating from the decisions made in recent case law. Finally, Tusla's new "Signs of Safety" policy will be considered, as well as the need for specialist family law courts in this jurisdiction.

3.2 SECTION 3, CHILDREN FIRST GUIDELINES AND CHILDREN FIRST ACT 2015

Section 3 of the Child Care Act 1991 sets out the core functions of the Child and Family Agency. It provides:

> (1) It shall be a function of the Child and Family Agency to promote the welfare of children who are not receiving adequate care and protection.
>
> (2) In the performance of this function, the Child and Family Agency shall—
>
> (a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children;
>
> (b) having regard to the rights and duties of parents, whether under the Constitution or otherwise—
>
> (i) regard the welfare of the child as the first and paramount consideration, and
>
> (ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and
>
> (c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family.
>
> (3) The Child and Family Agency shall, in addition to any other function assigned to it under this Act or any other enactment, provide child care and family support services, and may provide and maintain premises and make such other provision as it considers necessary or desirable for such purposes, subject to any general directions given by the Minister under section 69.

From the above, it is clear that Tusla has a legislative function to protect and promote the welfare of both identified children – those who are known to be in a situation where they are not receiving adequate care and protection - and unidentified children – those who may not be in receipt of same. This is a proactive duty. While section 3 lacks specificity, this duty necessarily involves the assessment of current and retrospective allegations of child abuse where the child is under the age of 18 years. There is nothing in the 1991 Act that sets out the powers or authority of Tusla to fulfil its function in this regard and aside from the power given to members of An Garda Síochána to remove a child from his or her home under section 12 of the 1991 Act, the Child Care Act does not place responsibility on any other person in relation to allegations of abuse, past or present. Moreover, there is no bridge to link the section with either section 31 of the Guardianship of Infants Act 1964 or the Children First Act 2015.

While the 1991 Act is relatively silent on the issue of claims of sexual abuse, regard can be had to policy developments on this subject over the last number of decades. In 1977, a series of guidelines were issued by the Department of Health with the aim of assisting persons in identifying and responding to concerns about child abuse and in 1987, the Department issued *Guidelines on Protection Procedures for the Identification, Investigation and Management of Child Abuse*. While the issue of child sex abuse was being highlighted, it was seen as a problem within families, and not perpetrated by non-family members or strangers. These 1987 guidelines were incorporated into Children First Guidelines in September 1999 and were updated to provide guidance to people in identifying and reporting child abuse; to improve professional practice; and to clarify the responsibilities of the various professionals involved.[302]

While the 1999 Children First Guidelines imposed a responsibility on any person who suspected that a child was being abused or at risk of abuse to report his/her concerns to the Health Board, the main focus was on preventing, detecting and responding to abuse by parents or carers. For complaints against other persons, An Garda Síochána was promoted as being the appropriate Agency to handle those allegations. Nevertheless, the 1999 Guidelines outlined the obligation to assess the circumstances of a child in respect of whom a child protection concern had been raised, requiring the outcome of any assessment into an

[302] Children First National Guidelines for the Protection and Welfare of Children, September 1999, Dublin: Stationary Office.

allegation of abuse to be recorded as either: *confirmed abuse; assessment on-going; inconclusive outcome; or confirmed non-abuse/unfounded.* This represented the introduction of a formal process for substantiating abuse allegations, depending on the level of evidence found to exist in each particular case.

The Children First guidelines were updated in 2011 with *Children First: National Guidance for the Protection and Welfare of Children (2011).*[303] The overall aim of *Children First: National Guidance* was to assist people and agencies, including community and voluntary organisations, in identifying and reporting child abuse and neglect, assisting them to deal effectively with these concerns. It provided individuals and organisations with crucial direction on the various issues that may arise where child abuse or neglect exists or is suspected. Under section 3.6, reference is made to retrospective abuse. It states:

> An increasing number of adults are disclosing abuse that took place during their childhoods. Such disclosures often come to light when adults attend counselling. It is essential to establish whether there is any current risk to any child who may be in contact with the alleged abuser revealed in such disclosures.

If any risk is deemed to exist to a child who may be in contact with an alleged abuser, the counsellor/health professional is advised to report the allegation to the HSE Children and Family Services without delay. While this section deals with retrospective allegations of abuse, its remit is narrow in that it envisages such disclosures often come to light in counselling sessions. This small section fails to grasp the complexity of retrospective abuse claims and throughout the 2011 Guidelines, the primary focus is on identified children at risk of abuse, rather than those who may be at risk from a person in respect of whom an allegation has been made years later after its alleged occurrence. Similarly, Children First (2011) echoes the 1999 Guidelines in its emphasis on abuse in the context of family life and protecting children at risk at the hands of their parents or carers.

The effectiveness of the 2011 Guidelines, being non-statutory and therefore not legally binding, has been called into question. In response, the Children First Act 2015 was introduced, demonstrating a move by the legislature to protect children from abuse through the implementation of binding statutory obligations, as opposed to mere guidelines, protecting their safety and well-being. The Children First Act 2015 introduces a number of

[303] https://www.dcya.gov.ie/documents/Publications/ChildrenFirst.pdf.

important child protection measures. Section 14 thereof requires certain defined categories of persons, known as "mandated persons", to report child protection concerns to Tusla by way of a mandated report form. This applies where the person knows, believes or has reasonable grounds to suspect that a child is being harmed, has been harmed or is at risk of being harmed, or where the child makes such a disclosure.

Schedule 2 to the 2015 Act lists those "mandated persons" to whom this obligation applies. Among others, it applies to medical practitioners; therapists; psychologists; social workers; probation officers; teachers; members of An Garda Síochána; counsellors; youth workers; foster carers and pre-school workers. This section was commenced on 11 December 2017. While similar reporting obligations were included in the Children First guidelines, they were not legally binding as they remained guidelines only. With the 2015 Act, reporting is a mandatory statutory duty. Furthermore, it is believed that the quality of reports made to the Agency will also improve with the use of these mandated reporting forms.

The relevant form for reporting child protection and welfare concerns is known as the Child Protection and Welfare Report Form (CPWRF). The Child Protection and Welfare Report Form is to be completed and submitted to Tusla for concerns about children under the age of 18. A web portal has been developed for mandated persons to securely submit CPWRFs and the form can be downloaded from the Tusla website. It is the mandated person's legal responsibility to make a decision as to whether the concern meets the threshold for a mandated report under the Children First Act 2015 or not. Where he or she is satisfied that this threshold has been reached, he or she must indicate clearly on the report that it is a mandated report made under the Children First Act. Where the mandated person is unsure whether his or her concern reaches the legal definition of harm for making a mandated report, he or she can discuss the concern with a Tusla social worker, but the responsibility for making the decision rests with the mandated person under the Act. Reports cannot be made anonymously by mandated persons.

The Children First Guidelines were revised in 2017. On 2 October 2017, the Minister for Children and Youth Affairs launched the updated *Children First: National Guidance for the Protection and Welfare of Children (2017).* The subject of retrospective allegations of abuse is dealt with similarly to the above-quoted section contained within the 2011 version. It provides:

> Some adults may disclose abuse that took place during their childhood. Such disclosures may come to light when an adult attends counselling, or is being treated for a psychiatric or health problem. If you are, for example, a counsellor or health professional, and you receive a disclosure from a client that they were abused as a child, you should report this information to Tusla, as the alleged abuser may pose a current risk to children.
>
> If, as a mandated person, you provide counselling, it is recommended that you let your clients know, before the counselling starts, that if any child protection issues arise and the alleged perpetrator is identifiable, you must pass the information on to Tusla. If your client does not feel able to participate in any investigation, Tusla may be seriously constrained in their ability to respond to the retrospective allegation.

Given the provisions of the 2015 Act, this section also refers to the interaction of these guidelines with the mandatory reporting requirements of the Act. It states:

> The reporting requirements under the Children First Act 2015 apply only to information that you, as a mandated person, received or became aware of since the Act came into force, whether the harm occurred before or after that point. However, if you have a reasonable concern about past abuse, where information came to your attention before the Act and there is a possible continuing risk to children, you should report it to Tusla under this Guidance.

Despite the detailed content of the Children First Guidelines, the 2017 revision, and the recent introduction of the Children First Act 2015, there has consistently been more of a focus on the protection of children at risk within the family and the safeguarding of those children who are known to have been abused. While over time, the abovementioned government policies have shown an increased awareness to protect children from abuse perpetrated outside their family, the role and authority of Tusla to protect unidentified children from the potential risk associated with on-going contact with a person who is alleged to have abused a child in the past, is still unclear. The 1991 Child Care Act places a positive duty on Tusla to protect these unidentified children. That said, the Agency has submitted that there is a lack of clarity as to the express powers under the 1991 Act to carry out this task and there is no obligation on third parties to assist. It is recommended, therefore, that the 1991 Act be updated to address specifically situations where retrospective allegations have been made, setting out the powers of the Agency to act to protect yet to be identified children who may come into contact with the alleged abuser. There needs to be greater clarity on the defined role of Tusla, supported by specific statutory powers to assess retrospective abuse – in particular, allowing Tusla to have the authority to share relevant information with relevant

persons for the protection of children potentially at risk due to their contact with an alleged abuser.

3.2.1 Tusla investigations

There are three broad categories of cases to which Tusla responds in the context of abuse allegations. First, Tusla will investigate cases where abuse is alleged in respect of an identified child, where the alleged abuser is the parent or carer of the child, older sibling or other male (in the main) relative. Second, it responds to situations where abuse is alleged in respect of a child by someone outside of their immediate family situation, i.e. extra-familial. Finally, Tusla will investigate where a disclosure is made by an adult of abuse that occurred in the past, known as historical or retrospective abuse, where the alleged perpetrator is now in contact with non-identified children who may consequently be at risk. In order to outline the standard procedures for assessing a reported case of abuse and to govern the determination of the veracity of an allegation, Tusla developed a *Policy and Procedure for Responding to Allegations of Abuse and Neglect (2014).* Significant challenges, however, have arisen with its operation. In particular, the complexity for social workers of being both the assessor and the adjudicator in these cases is highlighted as a matter of concern. Similarly, the degree of expertise required from social workers in assessing retrospective adult disclosures is a significant issue – particularly where it is expected that the evidence obtained in these cases be of a forensic standard to withstand the test of criminal proceedings. Arising out of these issues, it is expected that this policy is going to be separated into two distinct policies – one dealing with guidance for determining a substantiation finding in retrospective abuse cases to protect children potentially at risk of harm, and another providing guidance for substantiation findings in current child abuse referrals.

In respect of investigations into historical abuse, situations may arise where a retrospective allegation has been made against a person and that person currently interacts with children, whether through their employment or some other recreational or voluntary activity. If this occurs, Tusla must ensure that any child believed to be at immediate risk is protected. In this vein, Tusla may need to share relevant information about the allegation with relevant persons to ensure that protective measures can be taken to safeguard these children. In circumstances where there are no children at immediate risk, Tusla is required to make a determination on the veracity of the allegations before it is permitted to share information with third parties.

This substantiation is therefore essential as it provides the robust evidential basis for subsequently sharing information with third parties. In making its determination, Tusla must apply fair procedures. The assessment of retrospective allegations and the determination of their veracity is a complex process, particularly due to the passage of time from when the alleged abuse occurred. This is further complicated by the fact that Tusla may be unable to obtain third party information relevant to the assessment and because it has limited powers of compellability in relation to either documents or witnesses.[304]

Substantiation, whether an allegation is founded or unfounded, is thus clearly a key concept in child protection and welfare work. A comprehensive body of research has been completed, predominantly in the U.S., which particularly explores whether substantiation of child abuse is an effective indicator for identifying future harm or risk to a child and whether substantiation is a crucial factor in determining the provision of future services.[305] This research interestingly demonstrates that the focus on substantiation in child protection and welfare systems can provide evidence of past harm, but this is not necessarily a good predictor of future harm or risk. It is emphasised that providing appropriate services and ensuring the implementation of effective safety plans to minimise the risk of future danger is actually more important for protecting children than agreeing whether a report is or is not substantiated – as future child harm is similar for both substantiated and unsubstantiated cases.

Recommendation

In view of the above research and the challenges with the current Tusla procedures, it is recommended that the assessment of whether or not a complaint is substantiated in respect of retrospective allegations of abuse should be carried out by specialist teams of forensic investigators. These investigators would have a separate role and function to Tusla social workers, with a dedicated responsibility for the substantiation outcome. In order to make a final determination as to whether the allegation is founded or unfounded, it is recommended that a fair and independent decision-making forum assess the evidence. This independent

[304] See section 16 of Children First Act 2015.

[305] See, for example, Michael Malcolm (2017) "What Can We Make of Unsubstantiated Child Abuse Reports? A New Approach Review of Law and Economics" Volume 13, Issue 2; Department of Health and Human Services and Kohl, P.L., M Jonson-Reid, and B. Drake (2009) "Time to Leave Substantiation Behind: Findings from a National Probability Study", 14 Child Maltreatment 17-26.

body should be entirely impartial. The forensic investigators would represent the children requiring protection, and the alleged abuser may represent himself/herself or instruct legal representation. The independent body would then adjudicate on the allegations, determining the final outcome. If the claim is determined to be substantiated, Tusla should then be given express statutory authority to share relevant information with relevant persons and amendment should be made to section 3 of the Child Care Act 1991 to allow for this. Where claims are not substantiated, the information should not be permitted to be shared. This process would balance carefully the duty to protect unidentified children from any risk with the rights of the alleged abuser – ensuring a comprehensive investigation and fair procedures in any substantiation hearing. When the outcome of the investigation is to hand, any action that may be required in the case for the protection of the child or children concerned should remain in the domain of the relevant social worker.

3.2.2 The interviewing of victims

In the investigation of both current and retrospective cases of child abuse, co-operation between Tusla and An Garda Síochána is essential. The Children First Guidelines (2017) is cognisant of this, providing that; *"Joint working between Tusla and An Garda Síochána forms an integral part of the child protection and welfare service".*[306] In this vein, if Tusla suspects that a crime has been committed and a child has been wilfully neglected or physically or sexually abused, it is required to formally notify the Gardaí without delay. The Gardaí will then carry out its role in relation to the complaint – focusing on preserving life; vindicating the human rights of each individual; and preventing, investigating and detecting criminal offences. Following its investigation, An Garda Síochána may prepare a file for the Director of Public Prosecutions, who will decide whether to initiate a prosecution. Similarly, if a member of An Garda Síochána, in the course of his or her duties, becomes aware of a child welfare and protection concern, he or she has a duty to formally make a report to Tusla, as Gardaí are mandated persons under the Children First Act 2015. A two-way stream of communication is therefore essential and a protocol, *Tusla and An Garda Síochána Children First – Joint Working Protocol for Liaison between both Agencies,* is in place between the two agencies that details how they cooperate and interact in dealing with child welfare and protection concerns.

[306] *Children First: National Guidance for the Protection and Welfare of Children (2017)* at p.42.

The interviewing of children and adult victims, however, is a key area of concern. Pursuant to the Children First Guidelines (2017), joint specialist interviews are conducted in cases where it is deemed necessary by both the Gardaí and Tusla. Chapter 5 provides:

> Joint working between social work and policing services involved in the investigation of child abuse is recognised internationally as providing children with a less traumatic investigation experience and better outcomes where criminal and social care enquiries run in parallel.

The case of *CFA v R.*,[307] however, has demonstrated that such joint co-operation may not take place in practice. It particularly highlighted the concern over the repeat interviewing of child victims. This case dealt with an application by Tusla to lift the *in camera* rule so that reports in respect of the children in the case could be furnished to the Gardaí for the purposes of an investigation into suspected sexual abuse. Reviewing the case, the Court noted that the child in question was interviewed on three occasions by a specialist child sexual abuse unit, who were providing a report to Tusla for the purpose of pending child care proceedings. In addition, six electronically recorded video interviews with the child had been conducted by An Garda Síochána's child specialist investigators. President Horgan noted in her judgment that "neither interview processes appear to have been a joint one in this case; however recordings of the Garda Specialist interviews were made available to the hospital's assessment team." The court went on to cite the protocol for liaison between the Gardaí and Tusla. President Horgan stated:

> A Report entitled "*National Review of Sexual Abuse Services for Children and Young People*" completed in June 2011 (which as I understand it was commissioned by the HSE/now Tusla) also stipulates the key characteristics of 'best practice' in undertaking such investigations. This Report emphasises the need for liaison, the need to avoid multiple interviews of the child, and the necessity to formally record interagency engagements (paragraph 7.11). Accordingly there is no obstacle to joint interviewing and it could certainly have occurred in this case though it did not.

CFA v R. demonstrates that the Protocol does not operate effectively at all times and co-operation between An Garda Síochána and Tusla in respect of the interviewing of child victims of sexual abuse may not be functioning sufficiently. It appears that Tusla sometimes insists on a credibility test in respect of allegations of child abuse by a child and it seems that children are being unnecessarily interviewed. This may have the effect of re-victimising the child victim and may also potentially undermine the evidential value of the evidence of a

[307] [2014] IEDC 03.

child abuse victim. A situation as described above should be avoided. Inter-agency co-operation to ensure joint interviewing, thereby decreasing the distress and potential harm that may be caused to children, should be promoted.

It is recommended therefore that there needs to be a stronger partnership between An Garda Síochána and Tusla with regard to the interviewing of child and adult victims. As detailed above, it is recommended that a specialist team of forensic investigators carry out an assessment as to whether or not an allegation is substantiated in retrospective abuse cases. To ensure greater cohesion in the operation of the Gardaí and Tusla in their respective roles, it is recommended that these forensic teams are required to work closely with An Garda Síochána to support any criminal investigation that is operating concurrently to or which subsequently follows their substantiation investigation. If these specialist teams have conducted interviews with child victims, adult victims or the alleged perpetrator, these may assist greatly in any criminal investigation. Critically, for the child and adult victims, the risk of repeat and multiple interviews would be decreased – reducing the trauma that can be caused from same.

3.2.3 Fair procedures in child protection investigations

A number of recent cases have raised the issue of fair procedures in the context of child protection investigations. Many of these decisions concern investigations by the CFA under section 3 of the 1991 Act into allegations of sexual abuse perpetrated by a particular person. One important decision in this regard is that of the High Court in the case of *P.O'T. v Child and Family Agency*.[308] This is a decision of Humphreys J. concerning an application to prohibit the holding of an investigation by the 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 in any review of the 1991 Act. 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

[308] [2016] IEHC 101.

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.

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 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.

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".[309] 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 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.[310]

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.

[309] [2016] IEHC 101 at p.103.
[310] *Ibid.*, at p.104.

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 he or she has been "temporarily" suspended. The court therefore advised that where possible, it is desirable and 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 *MI v HSE*[311] concerning a 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.*,[312] stated that judicial reviews of the process should be rare and "limited to points of principle

[311] [2010] IEHC 159.
[312] [1989] 3 WLR 1239.

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 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 on the relevance of parts of documents that he cannot see.

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*, discussed at 3.2.1 above. 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.

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".[313] 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

[313] *Ibid.*, at p.109.

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.

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.

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.

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.

The High Court decision of *SB v CFA*[314] also concerned judicial review proceedings and the issue of fair procedures in the investigation into allegations made against a teacher. In this case, the applicant sought to strike out the respondent's statement of opposition in judicial review proceedings. By means of the judicial review proceedings themselves, the applicant had sought an order of prohibition or an injunction restraining the respondent from proceeding with an investigation into certain complaints concerning four children for various reasons, including the assertions that; it had been determined that the complaints were within the remit of a particular school's board of management; it had been intimated that written materials pertaining to an earlier flawed investigation would be used; the applicants' constitutional rights would not be vindicated as part of the investigation; and the respondent had determined that there were no on-going child protection concerns.

The above case centred on the argument that the respondent had not particularised what allegations of fact were being made against the applicant, and how it was contended that such allegations constituted allegations of child abuse. For that reason, the applicant sought to strike out the respondent's statement of opposition or sought an order of the court to direct the filing of a statement of opposition in compliance with Order 84 Rule 22(5) of the Rules of the Superior Courts.

The facts of the case concerned a complaint to a school about a male teacher alleging emotional abuse, physical abuse, sexual abuse, grooming and intimidation of children. An investigation was undertaken by the Board of Management of the School. The CFA had become involved in the case and the applicant's solicitor wrote to the CFA arguing that the CFA had not afforded the applicant with an opportunity to know what was being alleged against him and to respond. The applicant's solicitor also objected to the involvement of a particular person in the investigation given that she had already reached conclusions on the matter. A CFA investigation was concluded with determinations that certain allegations of emotional and physical abuse were founded which findings were sent by letter to the applicant with the following statement contained within: "if you do not respond to the provisional conclusion, the Child and Family Agency will proceed to reach its final determination in relation to the allegations in the absence of any further input from you."

[314] [2017] IEHC 50.

After judicial review proceedings were instituted by the applicant, the CFA filed its statement of opposition which contained the assertion that the applicant was not entitled to the reliefs sought as it was proposed that the respondent was going to conduct a *de novo* assessment of certain allegations. The CFA also denied that it had failed to particularise the allegations against the applicant.

In addressing the argument of lack of specificity in relation to the respondent's statement of opposition, the court noted that "the onus is not on the plaintiff or the Court to look to the myriad of letters in an attempt to ascertain what the respondent's position is". It is the respondent's duty to set out the information he or she seeks to rely on in the 'fresh' assessment with clarity and precision. As referred to in counsel for the plaintiff's written submissions to the Court, in *Ashmore v Corporation of Lloyd's*,[315] precision in pleadings may be seen as part of the duty of the respondent to co-operate with the Court:

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues … It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad points the judge will be capable of fashioning a winner.

The High Court struck out the respondent's statement of opposition criticising the fact that it had led to unnecessary prolonging of the proceedings.

In *TR v CFA*,[316] the applicant sought to prohibit the CFA from continuing an investigation into his behaviour and to prevent it from carrying out any determination of the veracity or credibility of accusations of sexual abuse made against him or from indicating to any third party that the applicant posed a risk to children and/or has sexually abused or may sexually abuse a child. The applicant claimed that he was entitled to prior notice of the allegations made against him, the materials upon which the investigation was based, an oral hearing, the right to call and cross-examine witnesses and the right to have the 'credibility' of the allegations and complainant determined by an independent decision-maker.

In considering the application, the court examined the various stages of the investigation into the applicant which included an interview with the alleged abuser, provisional conclusions

[315] [1992] 1 W.L.R. 446.
[316] [2017] IEHC 595.

and final conclusions which must be provided to the alleged abuser in writing as well as the right of the alleged abuser to appeal the final conclusion. The court conducted an examination of the statutory function of the CFA and referred to section 3 of the Child Care Act 1991 and in particular section 3(1) which states that "[i]t shall be a function of the Child and Family Agency to promote the welfare of children in its area who are not receiving adequate care and protection" and section 3(2) which states that "in the performance of this function, the Child and Family Agency shall—(a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children ...". The court cited the case of *MQ v Gleeson*[317] (which was affirmed in *MI v Health Service Executive*)[318] and the words of Barr J., that as part of such investigations "two fundamental principles of natural or constitutional justice must be observed namely, a person charged with wrongdoing should be informed of what is being alleged against him and he should be given a reasonable opportunity to make his defence."

Ultimately, in this case, the court noted that the investigation was still in its first phase (although it was the second investigation that was conducted in respect of the applicant) and it refused to intervene in the investigative process as the investigation itself was incomplete. With regard to the contentions made by the applicant, the court was satisfied that there may be cases where it would be not only appropriate but necessary to vindicate an applicant's rights to fair procedures by allowing the complainant or another witness be questioned on the applicant's behalf. However, the court was also satisfied that it is not invariably required. The court considered the CFA's policy document, "*Policy and Procedures for Responding to Allegations of Child Abuse and Neglect* (September 2014)" in assessing the fair procedures afforded to the applicant in the case. The court found that "the level of flexibility which the assessors may properly apply in deciding whether the questioning of the complainant ought to be permitted is consistent with the rights of children under Article 42A and 40.3 of the Constitution and the respondent's child protection duties. It is also consistent with the level of protection of children and parents within the family and the protection of the rights of the family under Article 41. It is important to ensure that the best interests of any children who may be affected by such a cross-examination are given primary consideration in any such decision." The court held that it should not anticipate the decision of the assessor as to whether an application by the applicant to cross-examine his accuser would be granted.

[317] [1998] 4 I.R. 85.
[318] [2010] IEHC 159.

In its concluding remarks, the court said that the "the decision to allow cross-examination must be fair, reasonable and proportionate" and should "take account of the consequences of an adverse finding of 'founded' for the alleged abuser" and in the instant case the issue of the cross-examination of the complainant in the course of the second stage of the assessment must be determined having regard to particular circumstances of the case by the assessors under paragraph 24.1(b) of the 2014 procedures alluded to above. The court noted that in the instant case, the applicant had not yet been interviewed and therefore the conflict of facts between the accuser and the accused was not yet apparent. In those circumstances, the court declined to intervene in the process and refused the judicial review.

In *PDP v The Board of Management of a Secondary School and the HSE*,[319] the applicant was a secondary school teacher. A written complaint was made against him that he had sexually abused a former pupil and the school had taken the decision to place him on administrative leave. In these judicial review proceedings, the question as to whether fair procedures had been afforded to the applicant was at issue – namely, whether there had been an independent inquiry into the allegations, properly carried out and whether certain key documentation had been provided to him. In particular, the application challenged the decision to place him on leave. By the time of the hearing, the respondents had agreed to quash certain decisions and the only remaining question to be determined by the court was whether the second named respondent had the power to continue to investigate the allegations made. The applicant challenged the *vires* of the second named respondent to further investigate the applicant in circumstances where the alleged victim was now an adult and where the applicant was not protecting children. He sought an order prohibiting such continued investigation, arguing that an express statutory power was needed for such an investigation and that the continuation of the investigation would be oppressive and unfair.

O'Neill J. held that the insistence on the applicant's attending proposed meetings without knowledge of the allegations placed him in grave jeopardy and concluded that the second named respondent wholly disregarded the right of the applicant to fair procedures. He also noted that a gross delay of nearly two years total inactivity followed. Nonetheless, the court concluded that any breach of fair procedures in not providing the applicant with an opportunity to be heard was cured thereafter. It also noted that the complainant was now

[319] [2010] IEHC 189.

sufficiently old that he could be made available for cross-examination. The court held that the second named respondent had the power now to conduct an investigation into the allegations made against him. A balance had to be struck between the rights of the applicant and the public interest in having the second named respondent discharge its statutory function pursuant to the 1991 Act. The order of prohibition was therefore refused.

In *EE v CFA*,[320] the applicant initiated judicial review proceedings against the respondent for its refusal to permit the applicant to cross-examine the complainant. The applicant, being the biological father of the complainant, contended that the degree of allegation, namely, non-contact sexual abuse made by the complainant against him had a profound impact on his relationship with his other child and related child access issues, and thus, it became imperative for him to cross-examine the complainant. The respondent made various objections to any such cross-examination, including the inability to provide immunities to the witness, availability of an alternative by submitting questions to the complainant, and lack of statutory power. Humphreys J. held that the applicant was entitled to cross-examine the complainant. The Court directed the respondent to set aside the First Instance Examination Report and permit the applicant to file an appeal before the Appeal Panel in case the applicant was not permitted to cross-examine the complainant within two months of the present judgment and order. The Court varied the terms of the stay previously granted, thereby stopping the respondent from further investigating the present case until the right to cross-examine had been afforded to the applicant. The Court held that it was essential to bring clarity in relation to the nature of allegations made by the complainant as there was a marked difference between the non-contact sexual abuse and sexual abuse as the former was liable to various possible interpretations. The Court noted that the right to cross-examine was a constitutional right, and where the reputation and life of the applicant was at stake, it became mandatory to afford him that right, notwithstanding the intent of the respondent to bring justice to the complainant.

WM v CFA[321] also concerned judicial review proceedings in relation to the investigative process of the CFA. In this case, the High Court found the CFA's investigation into child sexual abuse by the applicant to be fundamentally flawed, quashing the determination made following the assessment. The investigation centred around whether the applicant posed a

[320] [2016] IEHC 777.
[321] [2017] IEHC 587.

risk of harm to children and vulnerable adults as a result of allegations made by his sister against him of sexual abuse. As part of the investigation into the applicant a comprehensive forensic psychological assessment was conducted in respect of him. The report of the assessment contained, *inter alia*, the following findings:

> I can only conclude that Mr M. has many of the characteristics of an adult man who could repeat his sexually exploitative behaviour towards children. As such he should be considered to represent a risk of sexual harm to his own and other children ... I cannot rule out the possibility that Mr M. may represent a risk of sexual harm to patients with mental health problems.

The later observation posed particular relevance for the applicant who was a psychiatric nurse.

The applicant challenged the investigation on a number of grounds, namely: the failure to have due regard to his right to prior notice of the allegations made against him; failure to disclose all relevant material, lack of an oral hearing, absence of the right to call and cross-examine witnesses, lack of appointment of an independent decision-maker and the provision of a clear written procedure pursuant to which the allegations of sexual abuse made would be investigated and assessed. In particular, the applicant focused upon the fact that the complainant, his sister, was now an adult and might properly be the subject of cross-examination.

The court noted that the assessment in the case took place before the implementation of the 'Policy and Procedures for Responding to Allegations of Child Abuse and Neglect (September 2014)'. The court cited the principles enunciated in *MI v Health Service Executive*[322]which were summarised as follows:

> (1) The respondent … has a duty to investigate the circumstances … There may be a risk and that risk must be assessed.
> (2) The respondent must afford the applicant fair procedures.
> (3) If the respondent comes to the conclusion that there is a risk, it is under a duty to communicate that to an appropriate party.
> (4) The respondent's role in conducting this investigation is not an administration of justice. It does not make any determination of guilt or innocence. Its role is quite distinct from that of the Director of Public Prosecutions. Its role is the protection of vulnerable children. The Director of Public Prosecution's role is the detection and conviction of criminals, including child abusers.

[322] [2010] IEHC 159.

McDermott J. held that "one of the fundamental requirements of fair procedures is that a person accused of very serious misconduct in the course of an investigation, assessment or inquiry the result of which may result in an adverse finding and consequences for him/her must be given notice of the allegations and full details and disclosure of materials upon which they are based … The purpose of giving full notice of the allegations and the materials upon which they are based is to ensure that the applicant has an adequate opportunity to defend himself and/or make representations in the course of the inquiry or assessment." The court was satisfied that the respondent failed to meet the requirements of fair procedures in failing to ensure that the applicant was fully informed of the allegations made against him and furnished with all relevant materials upon which they were based. The court also held that the applicant was not afforded a realistic opportunity to challenge the extension of the investigation of risk to include vulnerable adults as well as children.

In *P.O'T. v CFA*,[323] the applicant sought an extension of time within which to bring judicial review proceedings, and an order of *certiorari* of the decision of an appeal body of the HSE confirming a determination that an allegation of child sexual abuse against the him was 'well founded'. The judicial review itself sought to quash the determination of the appeal body on the basis that its decision was reached at a time when the applicant had an appeal pending before the Court of Appeal in respect of the appeal body's procedures (specifically regarding the issue of disclosure). The case made by the applicant with regard to the time limit was that he was not aware that the appeal body had made any decision or determination adverse to him.

An investigation into the applicant was carried out after allegations of child sexual abuse alleged to have occurred decades previously were made. The investigation concluded that the allegations were 'well founded' and this finding was communicated to the applicant by way of letter. This letter indicated that it was a 'provisional determination' and invited the applicant's response. No response was forthcoming within the time period set out. Accordingly, this 'provisional determination' became a 'final determination', which was communicated to the applicant by a letter. The applicant sought to appeal the determination and it was the disclosure of information pertaining to the investigation and its appeal that was challenged by the applicant.

[323] [2017] IEHC 582. See also page 129 of this report for discussion of an earlier High Court decision.

The applicant initiated judicial review proceedings but was refused leave by Humphreys J. in the High Court after he refused to swear an affidavit. He appealed that decision to the Court of Appeal. Meanwhile the appeal body gave notice that it would conduct its meeting/hearing on a particular date. The applicant did not respond to the letter inviting him to the meeting/hearing. As a result of his silence in response to its invitation to the meeting/hearing, the appeal body decided to confirm the determination that had been made by the original investigator, namely the determination that the allegation of child sexual abuse was 'well founded'.

The High Court refused the application for an extension of time (as it determined that it would not be permissible under the Rules of the Superior Courts). Although refusing the relief sought the court noted that a finding that a person has committed child sexual abuse is a grave matter and carries significant consequences and criticised the way the investigation into the applicant was handled on a number of grounds: in particular the fact that no explicit warning had been given to the applicant that a determination would be made if he did not attend the meeting/hearing referred to above; the language used in the letter notifying the applicant of the findings of the investigation was somewhat ambiguous in the use of the word 'proposes' in relation to its findings, concluding that "a matter as serious as this should not be determined in a sense, by default, simply because the applicant did not make himself available for a particular hearing/meeting."

In two recent judgments of the High Court, fair procedures were similarly at issue in the context of the court's consideration as to whether Child Protection Conferences are amenable to judicial review. A Child Protection Conference is an inter-agency, inter-professional meeting convened by a designated person within Tusla. The purpose of the Conference is to facilitate the sharing and evaluation of information between professionals and parents, to consider the evidence as to whether a child has suffered or is likely to suffer significant harm, to decide whether a child should have a formal child protection plan and, if so, to formulate such a plan.

The first case dealing with this matter was the decision of O'Malley J. in *J.G. & Others v CFA*.[324] In this case, the first and second named applicants were the parents of the two

[324] [2015] IEHC 172.

children concerned. They brought judicial review proceedings, claiming that their rights were breached by Tusla in relation to the convening of a Child Protection Conference on 13 June 2014, which resulted in an application to the District Court for a supervision order pursuant to the provisions of the Child Care Act 1991. They made a similar complaint in relation to a Case Conference held on 25 November 2014. They sought declaratory relief, orders of *certiorari* and orders preventing the holding of a further conference or the making of an application to the District Court unless full disclosure of specified material was made to them in advance of holding such a Conference.

The applicants contended that concealment of information from them about the welfare of their children was contrary to the concept of fair procedures. The applicants said that the Child Protection Conference is one of the methods by which Tusla carries out its obligation under section 3 of the 1991 Act to investigate concerns arising in respect of particular children. In performing this function, the applicants submitted that Tusla should act in a wholly impartial and transparent manner, and should disclose all material gathered in the investigation, before deciding to take any steps. The investigation should therefore be complete before a decision is made to apply to court, and it is improper to use the court process for the purpose of assessment. It was contended that the decisions made at the Conference have such potentially serious consequences for the family that they must attract the rules of natural justice and fair procedures. A child protection plan can only be drawn up where a decision is made that the child is at risk of significant harm, and that cannot be decided without speaking to parents in a "meaningful" manner. They argued that the conference itself can be seen as a pre-emptive procedure, whereby unnecessary court applications can be avoided. Since parents are invited to attend, it is to be presumed that they have something to contribute to the discussion. In this vein, they should be in a position to present their case properly, whether by oral or written submissions, and that requires disclosure. It was submitted that parents should not have to wait until the matter is before the District Court to seek discovery.

Tusla contended that a decision made in a Child Protection Conference is not amenable to judicial review because, it is said, a decision made at this stage of the process is not adverse to the person. It has no legal consequences and there is therefore no infringement of the applicant's constitutional rights.

O'Malley J. noted that a case conference may make decisions that do not involve court applications. In particular, the decision may be made to draw up a child protection plan with the result that a child is listed on the Child Protection Notification System (CPNS). While the Court stated that a meeting, the purpose of which is to exchange information, could rarely, if ever, be a proper subject for judicial review proceedings, it placed importance on the fact that at the Conference, Tusla can take it on itself to list a child on the CPNS without any court order. O'Malley J. thus stated:

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

O'Malley J. thus took the view that it must follow that parents be afforded proper fair procedures in relation to the holding of such conferences. While she did not believe that a parent is automatically entitled to full disclosure of the entire file of material in Tusla's hands, she noted that Tusla's own policy document provides for sufficient disclosure for the parents to make their case. The Court observed that both the first named and the second named applicants were entitled to full and clear information from the social worker so that they became aware of intended courses of action that might be taken at the conference and it held that the policy document of Tusla was an adequate disclosure that was made to the applicants. Notwithstanding the Court's view, therefore, in this case the Court noted that neither the June nor the November conference made the decision to place the boys on the CPNS and O'Malley J. refused to grant both orders of *certiorari* and prohibition to the applicants.

In the later case of *Ms A & Others v CFA,*[325] Barrett J. considered the same subject matter. In this case, Ms A had been in a long-term relationship with Mr B and they had two children, X and Y, who were aged 13 and 11 respectively at the time of these proceedings. Certain serious allegations were made about Mr B as regards his behaviour towards Ms A and their

[325] [2015] IEHC 679.

two children. A number of the allegations arising were discussed between Ms A and the staff of Tusla on 30 March 2015. Those staff members were sufficiently concerned by the substance of this discussion that, on 31 March, Tusla staff attended at Ms A's family address with members of An Garda Síochána. Tusla staff recommended to Ms A that she depart from the family home with her children to safe accommodation. Ms A was advised that if she did not bring the children to a place of safety, an application may be made to place the children in care. Ms A left with the children, staying initially in a refuge and then in a safe house. Child Protection Conferences were held in respect of the children on 27 April and 27 May 2015. At the Conference held on 27 April, it was decided to place the children on the Child Protection Notification System.

The applicant sought an order of *certiorari* for judicial review of the Child Protection Conferences of 27 April and 27 May 2015 and the decision made therein in relation to the welfare of the children and the continuing separation of the family unit, as well as the decision to place the children on the Child Protection Notification System. The applicant contended that Tusla had acted in violation of both her and the children's constitutional rights in not allowing Ms A to bring legal representation to the Child Protection Conferences. The applicant further sought an interlocutory injunction restraining Tusla from taking any further action.

In his judgment, Barrett J. commented that judicial review in this type of case should be very rare, while stopping short of saying that such proceedings should never be brought. He also stated that his strong sense is that Tusla's area of expertise is one where the courts must yield significant space to the informed discretion of Tusla professionals. On this issue of the potential for a Child Protection Conference to be judicially reviewable, the Court considered the decision of O'Malley J. in *J.G. v Child and Family Agency and Others*,[326] in which she stated the previously quoted following view:

> A meeting, the purpose of which is to exchange information could rarely, if ever be a proper subject for judicial review proceedings. However, the respondent can take it on itself to list a child on the CPNS without any court order. In my view, a finding by the statutory body charged with the protection of children in the State that a child is at risk to the extent justifying this measure cannot be described simply as part of an investigation process. It may be that access to the system is restricted to a small number of professional persons – however, it is, in my view, an interference with the

[326] [2015] IEHC 172.

> autonomy of the family and something that very few parents would welcome. It cannot be said to be without legal effect, since it gives access to private information about the family to persons who would not otherwise be entitled to that information.

Barrett J. failed to agree with the above finding of O'Malley J. in *J.G.* He took the view that the CPNS is something that is highly desirable, enabling Tusla, and the limited categories of person who are able to access the CPNS, to bring an informed and refined response to any interactions with a particular child, instead of coming afresh to that child each time s/he comes under the radar of, for example Tusla and/or the Gardaí. Contrary to the view expressed by O'Malley J., the Court considered that most parents would consider it to be both necessary and desirable that to prevent 'damage' occurring to vulnerable children, the State, acting through the medium of Tusla, should maintain a confidential list of vulnerable children whom it encounters, provided that access to such list is suitably restricted. Barrett J. did not agree that inclusion of a child's name "gives access to private information about the family to persons who would not otherwise be entitled to that information." At the moment in time that the child is included on the register, Tusla is undoubtedly entitled to that information. Provided Tusla shares that information, and legally it is entitled to share that information, in a manner consistent with the obligations incumbent upon it under the Data Protection Acts, it is not sharing that information with people who are unentitled to that information.

When the Court asked during the hearings what was the difference between the Gardaí holding a database of complaints and the operation by Tusla of the CPNS, counsel for Ms A suggested that (a) only the Gardaí can access the Garda database and (b) a child's name remains on the CPNS until s/he is 18. The Court was not convinced by either ground of concern. As to (a), if one takes Tusla staff, one is dealing with people who have access to the most intimate details about the lives of certain families. The Court did not accept that it is somehow objectionable that both they and, for example, the Gardaí, who likewise come across all manner of information about the private lives of many of those with whom they deal, ought not between them to have access to the CPNS, provided access to the CPNS is suitably regulated. As to (b), the Court noted that the Gardaí too retain information on the PULSE system for some time. But be that as it may, the Court considered that in any event most people would acknowledge that it is appropriate and desirable that to prevent 'damage' being occasioned to vulnerable children, the State should maintain a list of vulnerable children whom it encounters so that it can deal with them on an informed basis in the event that it re-encounters them before they become adults.

The Court thus declined to follow the decision in *J.G.* and concluded that (a) the operation of Tusla Child Protection Conferences, as currently structured, are not typically a proper subject for judicial review proceedings, and (b) the decision to list a child's name on the CPNS is not in and of itself an action that has legal effect and thus, absent some special circumstances presenting, is not judicially reviewable.

While the Court came to the conclusion that the Conference was not amenable to judicial review, the Court expressed considerable unease at Tusla's request to Ms A (consistent with Tusla general practice) not to bring a legal representative to the first Child Protection Conference. Barrett J. noted that Tusla appears to adopt this approach because of a concern that lawyers – primed professionally to act single-mindedly in the pursuit of their clients' objectives – may bring an unhelpful, adversarial, even antagonistic approach to meetings that are primarily intended to facilitate information-sharing and solution-finding. However, for people like Ms A, vulnerable and facing a traumatic situation, they may feel to be, and may be, at a considerable disadvantage when in the presence of a number of qualified professionals and it is in precisely such circumstances that a person like Ms A would naturally turn to a solicitor and want that solicitor to attend a Child Protection Conference with her. While Tusla emphasised that it merely "requested" that Ms A not bring a legal representative to the Child Protection Conference, the Court stated that the practical reality of same is that any parent would likely accede to such a 'request' for fear, rightly or wrongly, that s/he would otherwise antagonise Tusla.

The Court thus concluded as follows:

> The court considers that the Child Protection Conferences of 27 April and 27 May, 2015 are not subject to judicial review. Moreover, sensu stricto but still 'on the right side of the line', it is not the case that Tusla did not allow Ms A to bring legal representation to the Child Protection Conferences, which is the form of declaration sought. That said, without making a declaration in this regard, the court would note its considered view that fairness of procedures (i) requires that if a party wishes to bring her own solicitor, for whose services she is paying, to a CFA Child Protection Conference, she should be neither stopped nor dissuaded from so doing; (ii) a 'request' by Tusla that she not do so, constitutes an act of dissuasion; and (iii) although the first Child Protection Conference is not in any event reviewable (because it, and any decisions made thereat, were for all intents and purposes supplanted by the second), the dissuasive 'request' made prior to the first Conference had a continuing effect in respect of the second.

It is recommended that the CFA have regard to the two abovementioned decisions concerning Child Protection Conferences, despite their conflicting nature, bearing in mind the comments of the judiciary. In particular, the CFA should be careful to ensure that it follows fair procedures in the holding of such conferences and ensure that its officers do not engage in dissuading parents from bringing legal advisors to said conferences where they so wish.

Recommendation

The significant volume of case law generated by section 3 of the Child Care Act 1991 merits consideration. It demonstrates challenges in the implementation of section 3 which might benefit from legislative clarity for Tusla as to how it should deal with claims of abuse, particularly historical or retrospective claims where unidentified children may be at risk.

3.3 CHILDREN IN VOLUNTARY CARE

Section 4 of the Child Care Act 1991, as amended, provides for a situation of voluntary care. Pursuant to section 4(1):

> Where it appears to the Child and Family Agency that a child requires care or protection that he is unlikely to receive unless he is taken into its care, it shall be the duty of Tusla to take him into its care…

Subsection (2) makes it clear that this provision only applies where the parent of the child is consenting to the child being taken into care and remaining there.[327] It provides:

> …[N]othing in this section shall authorise Tusla to take a child into its care against the wishes of a parent having custody of him or of any person acting *in loco parentis* or to maintain him in its care under this section if that parent or any such person wishes to resume care of him.

Voluntary care therefore describes a situation where a parent gives permission for a child to be taken into care by Tusla. This usually involves either the placement of a child with foster parents, with relatives or in residential care and it often occurs where a parent, sometimes due to illness, homelessness or other issues, has difficulties in caring for his/her child.

[327] Note this section has been interpreted to require the consent of each parent having custody of the child and of other persons acting *in loco parentis* in respect for the child. This, therefore, includes a non-marital father who, although does not have custody of the child in the strict sense, is a guardian of and has access to the child. See *D.O'H. v HSE* [2007] IEHC 175.

The parent therefore consents to the child in question being taken into care. This differs significantly from the statutory care regime which is provided for elsewhere in the Child Care Act 1991. This regime gives the State the power, through Tusla, to apply to court for an order giving it permission to place a child in care. A court process is therefore necessary where a parent does not consent to placing his/her child in care or where initially he/she agrees to a situation of voluntary care but later withdraws his/her consent and Tusla believes that it is in the child's best interests for the care arrangement to continue. For situations of voluntary care, therefore, there is no need for any court applications or orders – an agreement is made directly between Tusla and the parents without recourse to the courts.

Where the assistance of the statutory regime is required, the court may grant three types of care orders – an emergency care order; an interim care order; and a full care order. Emergency care orders provide short-term emergency protection and can only last for 8 days. Interim care orders may remain in place for 29 days and they are usually made after an emergency care order has been granted where Tusla is of the belief that the child should not be sent back to the parents; where a voluntary care situation is in place but Tusla is concerned that the child will be removed from voluntary care; or simply where Tusla is of the opinion that the child should be removed from his or her parents out of concern for the child's welfare. These interim orders are often extended each month, usually for a lengthy period of time until if necessary, a full care order hearing ultimately takes place or arrangements are made for the child's return to his or her parents. When a full care order is made, it can be made until the child obtains the age of 18, or for a shorter period specified in the order.

In terms of duration for voluntary care situations, section 4(3) states that it is Tusla's duty to maintain the child in its voluntary care *so long as his or her welfare appears to require it* and while he or she remains a child. This is therefore a less definite and more uncertain situation than the abovementioned statutory care regime, where orders are granted for precise periods of time and interim care orders, in particular, are reviewed every 29 days by the District Court. Overall, however, Tusla is under a general obligation to endeavour to reunite the child with his or her parent(s) if this is in the child's best interests. It also is explicitly required to have regard to the wishes of the parents or persons acting *in loco parentis* in relation to its provision of care for a child, but the best interests of the child will ultimately prevail where there is a dispute on any issues raised or decisions to be made concerning the care of the child.

It is clear from the above, therefore, that a voluntary care arrangement can be in place for an indefinite length of time, which may prevail until the child reaches the age of majority. There are no court appearances in which Tusla is required to satisfy the court that the best interests of the child are served by him or her remaining in its care. Instead, Tusla must hold meetings called "child in care reviews" to assess the continued situation in respect of the child. Without any court oversight with regard to the voluntary care placement, the duty is solely on Tusla to continually assess what is in the child's best interests and determine whether continuation of the placement is necessitated. In view of the stretched resources of Tusla and the fact that urgent cases will demand the immediate attention of social workers with significant caseloads, the concern is that those children in voluntary care arrangements may not always be visible. The voluntary nature of their placement and the consent of their parents may mean that their needs fail to be prioritised. It is recommended, therefore, that section 4 of the Child Care Act 1991 be amended to include a defined period in which a child may remain in voluntary care beyond which a situation of voluntary care cannot continue. Upon the expiration of this period – for instance a 12-month period – if Tusla is not satisfied that the child should return to the care of his or her parents, then an obligation should be placed on Tusla to bring an application for a full care order.

From a child-centred perspective, it is submitted that the abovementioned recommendation is in line with the best interests of children as the existing vague nature of voluntary care arrangements should not continue. Aside from concern with regard to the resources of Tusla and the management of children in voluntary care, it is not ideal for any child to be in care for an indefinite period of time, without any certainty or stability. Designating a set period within which a child may remain in voluntary care is preferable. It will also serve to ensure that the child has an allocated social worker, a placement which is approved under the 1991 Act, a Fostering Link Worker, and a care plan – supports that the child may not always receive in a voluntary care situation. Defining the maximum period of time within which a child may remain in voluntary care as a year, means that Tusla will have that 12-month period to prioritise assistance for the family and work with the parent with a view to returning the child to his or her care. If reunion with the parents has not occurred upon the expiration of that period, putting an obligation on Tusla to apply for a full care order will help to bring about a more long-lasting care placement for the child.

It is also recommended that certain notice periods be prescribed where a parent whose child is in voluntary care is seeking to bring that voluntary arrangement to an end and wishes to withdraw his/her consent to voluntary care. The notice period should increase in relation to the length of time the child has been in voluntary care. For instance, if the child is in voluntary care for longer than one week, parents should be required to give two clear days' notice of termination. Where the situation of voluntary care lasts longer than three months, parents should be required to give one week's notice to terminate. These notice periods would prevent last minute changes of heart by parents, necessitating an emergency application to court. Similarly, abrupt changes to the life of a child would be avoided – making sure all processes are more graduated.

The need for the designation of a defined period beyond which a child may not remain in voluntary care is heightened in light of the recent amendments to the Guardianship of Infants Act 1964, as inserted by the Children and Family Relationships Act 2015. Following the commencement of the 2015 Act, there has been a vast expansion of the categories of persons who may apply for guardianship and custody of children pursuant to the Guardianship of Infants Act 1964. Under these new provisions, a person with whom a child has resided for a continuous period of twelve months may apply for both guardianship and custody of a child, where no other parent or guardian of the child is willing or able to exercise the rights and responsibilities of guardianship.[328] This essentially enables foster parents of a child to make applications for guardianship and custody. Applications under section 6C must be on notice to Tusla. Section 11E of the 1964 Act, as amended, also allows a relative of a child to make a custody application, dealing with situations where children are residing with and being cared for by their relatives.

These provisions thus give new categories of persons the power to apply to court within the private family law regime to seek orders in respect of a child. They may be used to regularise the status quo in respect of a child. This may occur, for instance, in a situation where a child has been living with his or her grandparent for a number of years. The grandparent may make a custody application to have his/her situation formally and legally recognised and to obtain the necessary court order. Given the breadth of these new provisions, it is submitted that they should be utilised to bring an end to a continuous situation of voluntary care. Where

[328] See section 6C of the Guardianship of Infants Act 1964, as amended, in relation to non-parent guardianship and section 11E thereof in respect of custody.

the aforementioned recommended 12-month period of voluntary care has expired, and Tusla do not believe it to be appropriate to make an application for a full care order, recourse to private family law should be mandated to give certainty to a child's situation. It is recommended, therefore, that at the end of the designated period, Tusla should be obliged to request that the person with whom the child is residing, be it a foster parent or relative, make an application under the relevant section of the 1964 Act and that it should be the duty of Tusla to provide the necessary support for that application. This system would bring stability to a child's care – making use of alternative court proceedings and obviating the need for statutory care orders.

The possibility of adoption is a further consideration that should be borne in mind in advocating for the cessation of the vague, indefinite nature of voluntary care arrangements. Adoption may, in certain cases, be an avenue to consider for children who are in long-term foster care. Pursuant to the Adoption Act 2010, however, adoption on a voluntary basis was only allowed where the child's parents were not married to one another. Article 42A of the Constitution has altered this situation. It requires that provision be made by law for the voluntary placement for adoption and the adoption of *any* child.[329] Thus no differentiation is to be made between the children of marital and non-marital parents. The Adoption (Amendment) Act 2017 makes such provision by law, as is constitutionally mandated. Adoption, therefore, on a voluntary basis is an alternative that can and should be considered for all children where there is no prospect of them returning to live with their parents.

Recommendation

It is therefore recommended that section 4 of the Child Care Act 1991 be amended to place a duty on Tusla to maintain a child in its voluntary care so long as his/her welfare appears to require it, but not exceeding a maximum period of 12 months. Upon the expiry of the said 12-month period, where Tusla is not of the opinion that the child should be returned to his or her family, Tusla should be required to take one of the following steps: 1) bring an application for a care order; 2) inform the carer of the child of the avenues open to him or her under the Guardianship of Infants Act 1964, request that an application be brought by said carer under the relevant provision, and actively support the application made.

[329] Article 42A.3.

Ultimately, it is submitted that the proposed amendment to section 4 will work in two ways to improve the position of children in voluntary care placements. First, it creates a defined period within which support can be provided to a child's parents, progress can be monitored and issues addressed, preventing those in voluntary care from being forgotten due to the consensual nature of their care arrangements. Second, where a reunion is not possible after said period of voluntary care, the options set out above must be considered and action taken in the best interests of the child.

3.4 SECTION 12 OF CHILD CARE ACT 1991

Part III of the Child Care Act 1991 seeks to secure the protection of children in emergency situations and provides An Garda Síochána and Tusla with certain powers where children are urgently at risk and immediate action is required. Under section 12 of the 1991 Act, a member of An Garda Síochána is given the power to remove a child to safety where there are reasonable grounds for believing that there is (a) an immediate and serious risk to the health or welfare of the child and (b) the delay necessitated in seeking an emergency care order under section 13 of the Act or applying for a warrant under section 35 of the Act would not sufficiently protect the child.

When exercising his or her powers under section 12, a member of An Garda Síochána does not require a warrant and may, where necessary, be accompanied by such others persons as may be required (e.g. a social worker). Where a child is removed under section 12, he or she must be placed in the custody of Tusla as soon as is possible[330] and where the child is not returned to his or her parents, custodians or guardians, Tusla is obliged to make an application for an emergency care order at the next sitting of the local District Court and the court must be satisfied that the criteria in section 13 of the 1991 Act are fulfilled.[331] Section 12 therefore gives members of An Garda Síochána exceptional powers to enter any place without warrant and remove a child to safety. Its exercise depends upon the judgement of the individual Garda faced with what he or she believes to be a serious and urgent child protection risk. The use of the section 12 power is not subject to any external oversight prior to its execution as it is not dependent on any prior authorization of a court. While such

[330] Child Care Act 1991, section 12(3).
[331] Child Care Act 1991, section 12(4).

extraordinary measures may be necessary at times to protect the health and welfare of vulnerable children, it should be stressed that these measures must be used as a last resort.[332]

The power contained in section 12 and the circumstances of its use has recently been comprehensively reviewed in an Audit, "*Audit of the exercise by An Garda Síochána of the provisions of Section 12 of the Child Care Act 1991*", published in May 2017. The audit's remit was confined to an examination of the treatment of children when removed from the care of their parents, or persons acting *in loco parentis*, and was largely positive in its findings on the attitude of Garda members to the treatment of children following their removal under section 12. While some critical aspects of the audit are discussed below, it is advised that the Oireachtas give full consideration to the entirety of the audit and the recommendations made therein. Every endeavour should be made to adopt these recommendations forthwith and they should inform any review of the provisions of section 12.

3.4.1 Exercise of section 12

One of the principal objectives of the audit was to examine the appropriateness, proportionality and legality of section 12 removals of children by members of An Garda Síochána – assessing the grounds upon which a Garda member removes a child. In evaluating these grounds, the audit found that the most frequent circumstances encountered by Garda respondents requiring exercise of their section 12 powers was some form of failure by the parent or person acting *in loco parentis*, or a temporary lack of capacity or competence to care for the child – including addiction-related failures and a parent's inability to control a violent and disruptive child. The audit found that in the overwhelming majority of cases, members of An Garda Síochána exercised their powers following a period of careful consideration of the circumstances and available evidence and there was no evidence found of section 12 being used in an over-zealous manner.

In promoting transparency and openness with the public, and to address any concern that section 12 is not being used appropriately and proportionately, the audit recommended that

[332] D. O'Riordan, "The Protection of 'Parents' In Emergencies," (2001) 4(4) *Irish Journal of Family Law* 3, where O'Riordan points out that "[u]nder the Child Care Act 1991, the [Health Service Executive], Garda Síochána and the District Courts are given great latitude and a very wide berth in carrying out their duties to protect and promote the welfare of children who are not receiving adequate care and protection."

An Garda Síochána publish statistics on an annual basis on the invocation of section 12 in the preceding year. It also recommended that clear guidelines for the use of Garda powers under section 12 should be provided and made available to the public. Directed towards An Garda Síochána specifically, the development of a protocol is recommended requiring the exercise of section 12 powers to be confirmed by a member not below the rank of Sergeant.[333] It recommended that a risk assessment be conducted by the Gardaí prior to the invocation of section 12 powers independent of the risk assessment undertaken by Tusla and furthermore, the audit advised that members should be required to complete mandatory information fields on PULSE relating to their use of section 12.

3.4.2 Inter-agency communication and training

The audit sought to evaluate the nature of inter-agency communication between Tusla and An Garda Síochána. It examined the processes and cultures in which Tusla social workers provide feedback on cases to Garda members, following their removal of children under section 12. Interview respondent Gardaí described a general situation where Tusla did not routinely provide feedback or updates to Garda members following the handover of children into Tusla's care. There was no evidence of formal routine follow-up from Tusla regarding the progress of a particular case after a member of An Garda Síochána has handed over responsibility. This serves to reinforce a "mystification" experienced by Garda members in relation to their understanding of Tusla's practices and procedures. Furthermore, the absence of consistent feedback undermines the valuable learning potential for both Gardaí and social workers from these cases, reinforcing the institutional silos between agencies tasked with pursuing the same child protection objectives.

The audit also showed no evidence of effective and robust systems for inter-agency information-sharing and co-operation between An Garda Síochána and Tusla during and after the invocation of section 12. Not only was there little evidence of discrete training on child protection for Gardaí - the overwhelming majority of current serving members having received no such training - the audit found that there were very low levels of provision for joint training programmes between Garda members and Tusla social workers. The audit found consistently low levels of meaningful communication between agencies. Good inter-agency co-operation and coordination instead was largely dependent on the organic

[333] See *P.L. v Clinical Director of St. Patrick's University Hospital* [2018] IECA 29.

development of positive, informal, personal relationships between those in different agencies, as opposed to formal structures developed by An Garda Síochána and Tusla to foster such good co-operation. The few existing mechanisms for co-operation, such as the HSE/Tusla notification forms, appear to only serve a minimum superficial level of inter-agency co-operation. I welcome the significant ongoing work to address the deficits in inter-agency co-operation identified in the audit. In particular, the section 12 implementation plan produced by the Department of Children and Youth Affairs and An Garda Síochána is a positive step as is the Section 12 Implementation Group led by the Minister for Children and Youth Affairs.

Throughout the audit, therefore, the absence of systems for effective inter-agency information-sharing and co-operation was notable. To address this, the audit recommends that the implementation of the Children First Act 2015 should be reviewed alongside the drafting of clear guidelines on how co-operation should work in practice between An Garda Síochána and other State agencies. Furthermore, the free flow of information between such agencies needs to be ensured to guarantee a proper functioning child protection system. In this regard, the audit advises that the Data Protection Acts should be reviewed to ensure that no legislative roadblocks exist to impede child protection services sharing information relating to vulnerable children and their families. On the subject of training, the audit recommends that comprehensive training on child protection should be provided as part of the Garda training programme reflecting the current law and international best practice; that specialist child protection units within An Garda Síochána be established on a national basis; and that consideration be given to having social workers assigned to these specialist units.

3.4.3 Out-of-hours service and private providers

In November 2015, Tusla commenced an Emergency Out-of-Hours Social Work Service (EHOS) which is to co-operate with and support An Garda Síochána in relation to the removal of a child from his or her family. Through the service, the Gardaí can contact a social worker by phone or arrange access to a local on-call social worker. Within the audit, the out-of-hours social worker services operated by Tusla were the subject of considerable criticism from Garda respondents. Garda respondents were critical about the lack of these services and where there was an out-of-hours Tusla social worker service available, Garda respondents to the audit suggested it is systemically inadequate as it is often under-resourced, and cannot facilitate full access to case files on particular children. It was also noted in the

audit that the out-of-hours service in place is not directly accessible to children or families at risk outside of office hours. The audit recommended, therefore, the development of a social work service that is directly accessible to children or families at risk outside of office hours as a matter of priority to ensure a comprehensive and unified child protection regime.

The use of private fostering service providers as the *de facto* "official" out-of-hours child protection service by An Garda Síochána was a matter of note that emerged in the audit. In a significant number of cases, where section 12 was utilised outside of Tusla's standard hours, a number of respondent Gardaí placed the child concerned with emergency foster placements arranged through private providers. Such private services, however, were not always in a position to organise placements for children with challenging behaviour – and ultimately, they are under no statutory obligation to take children they deem to be too problematic or challenging. This demonstrates the difficulty with the State putting heavy reliance on private, non-statutory frontline service providers in circumstances where Tusla provides a limited service. Given the social nature of the Child Care Act 1991 and the vital role Tusla performs under this statute, it is imperative that absolute clarity exists when it delegates its powers. The audit therefore recommends that the legal framework applying to emergency placements with private providers should be clarified to remove any ambiguity as to the standard to be applied in respect of such placements, particularly in cases where children have emotional and behavioural problems. Furthermore, in any contract between Tusla and such private providers, express reference to the 1995 Foster Care Regulations should be made.

Recommendation

The recently-conducted audit of section 12 of the Child Care Act 1991, the first of its kind in this jurisdiction, should be considered in full and regard must be had to all of the detailed recommendations contained therein. It is recommended that these be adopted forthwith in order to bring about the cultural change required in our child protection system. Adopting these recommendations will significantly improve the effective operation of section 12, heighten significantly the level of co-operation between the relevant agencies and ultimately, ensure the better protection of vulnerable children.

3.5 EMERGENCY CARE ORDERS

Section 13 of the Child Care Act 1991 provides that a judge of the District Court can make an emergency care order. This provides for short-term emergency protection on the application of Tusla where the Court is of the opinion that:

(a) there is an immediate and serious risk to the health or welfare of the child which necessitates his being placed in the care of the Child and Family Agency; or
(b) there is likely to be such a risk if the child is removed from the place where he is for the time being.

The threshold for granting an emergency care order is lower than that required for other orders under the 1991 Act as the Court need only form an "opinion" that there is reasonable cause to believe that either of the grounds set out in (a) or (b) are in play. An emergency care order is temporary in nature - it can remain valid for up to 8 days, although a court may reduce this period. It aims to strike a balance between giving Tusla time to prepare an application for a care order while ensuring that parents are not denied custody for an extensive period of time. Applications for emergency care orders must be made on notice to the relevant parties, however subsection 4(c) provides that an application for any such order may, if the justice is satisfied that the urgency of the matter so requires, be made *ex parte.* While *ex parte* applications are not favoured by the courts, they are typical in urgent, emergency circumstances.

In a 2016 District Court decision, an emergency care order was granted in respect of a baby who had suffered a non-accidental injury consistent with shaking.[334] The baby had been admitted to hospital with seizures and a CT scan showed two bleeds on her brain. The father made admissions to hospital staff that he had thrown the baby on the bed and later fled the country. The mother failed to inform the social worker that the father had been living with her and allegations had been made by another child of the mother that the baby's father had assaulted him. The judge, having heard all the evidence, was satisfied there was an immediate and serious risk to the baby were she to be returned home. She granted an emergency care order for a period of six days.

[334] See Child Care Law Reporting Project, Case Histories 2016, Volume 2, Phase 2; *"Emergency care order for baby with non-accidental injury."*

An emergency care order was similarly granted last year in respect of two children, aged four and five, who arrived at Dublin airport, having been travelling with a man who could not produce evidence of his relationship with them.[335] Initially, the passenger said he was their father. He later said that he was the boyfriend of the younger child's mother. He had said the children were sisters, but subsequently said that they were cousins. The passenger had no documentation to show that he was permitted to travel with the children and no contact could be made with either child's parents. The Gardaí first exercised their powers under section 12 and later an emergency care order was sought by Tusla. The emergency care order was granted by the Court. A week later the order expired and Tusla withdraw its application as the man was at that point able to prove he had authority to travel with the children.

Even in circumstances where there is an immediate and serious risk to the child, it may not be necessary to grant an emergency care order. An example of this is where the risk to a child can be alleviated by removing the abusive or hostile party, either by the other party applying for a barring or safety order under sections 2 or 3 of the Domestic Violence Act 1996 or by Tusla applying on behalf of that other party under section 6 of the 1996 Act. The Supreme Court in *The State (DD) v Groarke*[336] was clear that a Court must positively inquire into whether the welfare of the child requires the removal of the child from the innocent parent. Thus, a Court would only be justified making an emergency care order under section 13 where the innocent parent is unable to protect the child from the abusing parent.

Recommendation

With regard to the operation of emergency care orders, I believe that certain practical amendments would be of some assistance. Section 13(7)(a) of the Child Care Act 1991 provides as follows:

> *Where a justice makes an emergency care order, he may, of his own motion or on the application of any person, give such directions (if any) as he thinks proper with respect to—*
>
> *(i) whether the address or location of the place at which the child is being kept is to be withheld from the parents of the child, or either of them, a person acting in loco parentis or any other person;*

[335] See Child Care Law Reporting Project, Case Histories 2016, Volume 2, Phase 2; *"Emergency Care Order for children travelling without verified guardian."*
[336] [1990] 1 IR 305.

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

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

While the address or location of the child may be withheld, the parent still will usually know the address of the crèche and/or school which the child attends. There is nothing in section 13(7) which allows the court to direct that the parent(s) are prohibited from attending at or near the said school or crèche. It is recommended, therefore, that this provision should be extended to allow the court to make an order preventing a parent of a child in respect of whom an order under the section has been made from attending (or causing anyone else to attend) at or near the school or crèche of the child the subject matter of the proceedings or the foster parent's address pending the determination of the application by the court. Such an order would only be made where required having regard to the specific circumstances of each case and only where it is anticipated that such an order would be necessary and in the best interests of the child. Such a subsection would facilitate the child remaining in care locally and continuing to attend his or her school, Montessori or crèche, thereby ensuring the least disruption to the child for the duration of the emergency care order. Consideration might also be given to empowering the court to prohibit a parent or other party from communicating with a child taken into care under section 13 in any manner and through any medium (Facebook etc.) except with express permission of the other parties or the court. It is suggested that the breach of any of these proposed conditions should be subject to a sanction in order for adherence to be guaranteed. Without prejudice to the law as to contempt of court, it is recommended that where the District Court makes an order under this section prohibiting attendance at a particular location and/or communication with the child, a person who, having been given or shown a copy of said order, fails or refuses to comply with the specific requirements under that order should be guilty of an offence and should be liable on summary conviction to a fine not exceeding €1,000 or, at the discretion of the court, to imprisonment for a term not exceeding 6 months or both such fine and such imprisonment. For the purposes of this section, a person should be deemed to have been given or shown a copy of an order made under this section if that person was present at the sitting of the court at which such an order was made. This is a similar sanction to the offence of failure or refusal to deliver up a child, provided for in section 34 of the 1991 Act. Any change must

also respect the requirements of fair procedures and should be linked to emergency legal aid for the parent.

3.6 THRESHOLD FOR INTERIM CARE ORDERS

Section 17 of the 1991 Act provides that:

> (1) Where a justice of the District Court is satisfied on the application of the Child and Family Agency that –
>
> (a) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care order is in force), and
>
> (b) there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of section 18(1) exists or has existed with respect to the child and that it is necessary for the protection of the child's health or welfare that he be placed or maintained in the care of the Agency pending the determination of the application for the care order,
>
> the justice may make an order to be known and in this Act referred to as an interim care order.

The circumstances referred to in section 18(1)(a) – (c), are:

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

Recommendations

An interim care order requires that a child named in the order be placed or maintained in the care of Tusla for a period not exceeding 29 days or if there is consent of the parents, to a period longer than 29 days. It is recommended that consideration be given to lengthening the usual duration of an interim care order from 29 days to 35 days. This longer period would enable Tusla to complete whatever interventions or assessments are required in the particular case and would assist in reducing the current multitude of court appearances commonplace in such cases. This small extension is not so lengthy to prejudice the position of the parents and an extra week between reviews may aid the speedier conclusion of proceedings overall.

Section 17 states:

> *an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed twenty nine days, of the persons specified in paragraph (b)) on the application of any of the parties if the justice is satisfied that grounds for the making of an interim care order continue to exist with respect to the child.*[337]

Therefore, the interim care order can be extended where the judge is satisfied that "the grounds for the making of the interim care order continue to exist." As per the decision of O'Malley J. in the High Court in K.A. v HSE[338] *on an application to extend an interim care order, the Judge must be presented with evidence to the effect that the circumstances as they then exist continue to justify the extension of the order. Issues can arise where one judge hears the first application for an interim care order, but a second judge hears the next application for an extension of the interim care order. The second judge ought to be aware of the reasons for the initial granting of the order, so that he or she can be satisfied that the grounds for the making of the order continue to exist. In this vein, it is recommended that an Order of the court granting an interim care order pursuant to section 17 of the Child Care Act 1991 ought to reflect;*

- *the evidence proffered to the court in support of the application;*
- *the deponent thereof; and*
- *reasons for the granting or extension of the order.*

Such a practice would ensure that the legal requirements as set out by O'Malley J. in K.A. v HSE are met, and that a judge, or other person, considering the matter on a subsequent occasion can be apprised as to the basis for the granting or extension of the order.

It is recommended that section 17 of the 1991 Act be amended to enable a court to grant a supervision order in lieu of an interim care order.[339] *This would enable the court to make this less intrusive order where it deems some course of action appropriate, but does not view the interim care order sought by Tusla as being necessary or proportionate in the circumstances.*

It is recommended that provision be made by law for the continuation of existing orders granted under the 1991 Act during the hearing of an application for a new order or the

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[337] This section was amended by the Child Care (Amendment) Act 2013 and substituted the period of 28 days referred to in the section for 29 days.
[338] [2012] 1 I.R. 794.
[339] Equivalent to section 18(5) of the 1991 Act.

extension of an existing order. For example, where an interim care order has been granted until a certain date and a hearing is taking place but has not concluded by the time the interim care order expires, the question that then arises is whether the interim care order should be extended over the 29 day limit, even if the parties contest it, so as to enable the judge to finish hearing the matter. It is suggested that the 1991 Act be amended to bring clarification to this set of circumstances. An amendment should allow for the court to extend the interim care order until such time as it has concluded the hearing of the matter. It is recommended, however, that a strict timeframe be put in place to ensure that judges in such a situation can only extend these orders for a further short time period solely to enable the prompt conclusion of the hearing. This should not lead to any lengthy continuations of interim orders.

3.7 THRESHOLD FOR FULL CARE ORDERS

Pursuant to section 18(1) of the 1991 Act, a full care order will be granted where, "on the application of the Child and Family Agency with respect to a child the court is satisfied that- a) the child has been or is being assaulted, ill-treated, neglected or sexually abused or b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or c) the child's health, development or welfare is likely to be avoidably impaired or neglected, and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section."

While section 18(1)(a) and (b) refer to situations of abuse, ill-treatment and neglect, subsection (1)(c) is less clear in its remit. To grant a care order under this provision, the court needs to be satisfied that the child's health, development or welfare is likely to be avoidably impaired or neglected. In this way, contrary to the other first two provisions which deal with what has occurred or is occurring, section 18(1)(c) deals with a situation where a risk exists *i.e.* that the child's health, development or welfare *is likely to be* avoidably impaired or neglected. Given the vague nature of this provision, I believe guidelines should be published to provide greater clarity as to the threshold to be satisfied in respect of section 18(1)(c) of the 1991 Act. Such guidelines would assist social workers in assessing whether there is a reasonable basis for pursuing an application under section 18(1)(c) of the 1991 Act.

Section 24 of the 1991 Act states that "in any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the constitution or otherwise shall-

(a) regard the welfare of the child as the first and paramount consideration and

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

In practice, the District Court, when making a care order, identifies which subsection of section 18 of the 1991 Act is activated and then refers to the proportionality of interfering with the rights of the parents. Section 24, however, is clear that the welfare of the child must be regarded as the first and paramount consideration. In a similar way in which it is recommended that upon an application for an interim care order, the Court should have power to grant a supervision order in the alternative, it is recommended that the District Court should be empowered to make proportionate orders to underpin transition arrangements when refusing a care order, where the child is already in the care of Tusla.[340] Such orders, in many situations, will be practically necessary to ensure a smooth transition for the child concerned.

In the case of *HSE v CJ*,[341] the court noted that in determining an application for a care order under section 18 of the 1991 Act, a court must also have regard to section 24 of that Act. Section 24 mandates the court to have regard to the rights of parents under the Constitution and to have regard to the welfare of the child as the first and paramount consideration and as far as practicable to give due consideration, with regard to age and understanding, to the wishes of the child. In the case of *HSE v YC & HA*,[342] the court went further and explicitly weighed the parents' right to reunification with the best interests of the children. The court stated that "the objective of restricting the right to reunification is so pressing and substantial that it is sufficiently important to justify interfering with a fundamental right." The court further stated that "the restriction is not disproportionate. The restriction, while no doubt difficult for the parents, does not impose burdens or cause harm which is excessive when compared to the importance of the objective to be achieved in the child's best interests."

[340] Section 18(5) of the 1991 Act should be expanded.
[341] [2012] IEDC 27.
[342] [2012] IEDC 19.

The case of *CFA v ND & Anor* considered the proportionality in the length of a full care order being made pursuant to section 18 of the Child Care Act 1991.[343] In this case, the Child and Family Agency (Tusla) successfully brought an application for full care orders pursuant to section 18 of the Child Care Act. The respondent mother was 19 and the father was 22. The respondent was 15 at the time when the child, A, the subject of the proceedings, was born. At the time of the hearing, the child was four years old and was residing with her maternal grandmother. The mother had been in voluntary care herself for about a one-year period. At the time of the hearing, the parents were in a committed relationship. The respondent mother conceded that the criteria for making an order under section 18(1)(c) of the Child Care Act 1991 had been met, however she disputed whether it was proportionate to make an order until her child was 18 and therefore contended that a shorter period would provide a suitable opportunity for her to access supports. The guardian *ad litem* and Tusla contended that the parents had shown no capacity to change and all the supports which had been in place were terminated due to non-engagement.

A psychologist carried out an assessment of the child and the respondent mother. The psychologist found that the child's attachment to her grandmother was secure and she also had a secure attachment to her mother. The psychologist found that the mother had speech and language, communication and learning needs and significant emotional needs. The Court accepted that as of the date of assessment in 2013, that the first named respondent did not have the skills required to provide good enough parenting for the child, but that with sufficient support, supervision and direction, she might develop those skills. A Parenting Capacity Assessment for the father was carried out by the allocated social worker. It identified that the second named respondent had significant parenting capacity but also recognised some concerns and weaknesses. In July 2013, consent was given to a 12-month interim care order in order to allow recommendations made in the assessments to be carried out.

For a few months, the mother engaged well with the parenting tasks which were set. The maternal grandmother was the foster carer to the child, however, and there was increasing tension between the mother and grandmother. Furthermore, the mother found basic care tasks for the child quite overwhelming. At the hearing, the Court found that the mother was pre-

[343] [2015] IEDC 2.

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

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

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

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

> Notwithstanding the lack of certainty in child A's long term care to date, she has not been adversely affected by the interim nature of the orders to date and she is as yet unaware of and unaffected by her status as a child in care. Her situation is stable. At this time she does not require certainty as to her legal status and I am not satisfied that there would be any adverse impact on child A's welfare at this time in making an

> order for a shorter duration than to her 18th birthday. However, child A is now in school and will soon become aware that her circumstances are different to other children. As expressed by the Guardian, her welfare cannot be paused to allow the parents an indefinite period in which to decide to engage.

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

The case of *CFA v RC*[344] was one where the proportionality of care orders under section 18 of the Child Care Act 1991 was examined.

A care order had been made in respect of a child for 18 months in order to give the parents time to address the issues that led the child to come into care. To address the proportionality of the duration of the Order while balancing the rights of the parents and the child, the Court provided for a full review several months from the date of that Order. It was provided that in the event that the mother did not take significant steps on the path outlined in the decision of the presiding District Court Judge at the review stage the applicants should apply for an extension of the period of the Care Order at that time. The rationale was that this would provide the mother with a real goal in terms of turning her life around.

The CFA, forming the view that the parents had not adequately addressed their issues, then applied for a care order until the child was 18 which application was supported by the guardian *ad litem*. The court finding that the threshold under section 18 was met was obliged to also consider the proportionality of any order it would grant. The thrust of the court's decision on proportionality centred on the fact that a shorter care order of eighteen months had already been granted to enable the parents to get their lives back on track and to regain the care of their child and that the parents had not engaged in a meaningful manner. The availability to the parents of the legal mechanism to apply to court to discharge the care order, was also referred to by the court in its proportionality assessment.

CFA v LH[345] was another case that involved a proportionality assessment in the making of a care order under section 18 of the Child Care Act 1991. The parents in the case conceded that

[344] [2017] IEDC 02.
[345] [2017] IEDC 17.

they were not in a position to look after the child at the time the care order application was heard. They, however, disputed the length of the order sought by the CFA and argued that a care order to 18 in respect of the child was a disproportionate interference with their rights. The court, on an assessment of the facts of the case, disagreed with the parents and granted a care order until 18 with the judge noting that "both the Constitution, the Child Care Act 1991 and the jurisprudence of the European Court of Human Rights are clear that where a child's rights conflict with a parents' right the child's interests will take priority." Specific reference was made by the judge to procedural safeguards in the parents favour available under the 1991 Act such as the requirement on the CFA to facilitate reasonable access under section 37 as well as the possibility of applying to vary or discharge the care order under section 22 of the 1991 Act.

Recommendation

Ultimately, with regard to the operation of section 18 therefore, it is recommended that guidelines be published to provide greater clarity as to the threshold to be satisfied in respect of section 18(1)(c) of the 1991 Act. Its vague nature is open to interpretation and such guidelines would assist social workers in assessing whether there is a reasonable basis for pursuing an application under section 18(1)(c) of the 1991 Act. It is also recommended that the District Court should be empowered to make proportionate orders to underpin transition arrangements when refusing a full care order, where the child is already in the care of Tusla. Such orders, in many situations, will be practically necessary to ensure a smooth transition for the child concerned.

3.8 ARTICLE 40 APPLICATIONS AND CARE ORDERS

In *CFA v S.McG. and J.C.*,[346] the Supreme Court considered whether an Article 40 enquiry is appropriate in child care proceedings. In this case, Tusla made an application for an interim care order in the District Court in respect of the two children of unmarried parents. At the hearing, the Tusla solicitor told the District Judge that he was consenting to a one-week adjournment to enable the mother's solicitor take instructions and to allow the father, who was functionally illiterate, to obtain legal aid. The District Judge refused to adjourn the case and ultimately, following a hearing, granted interim care orders in respect of the children.

[346] [2017] IESC 9. See also *Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

The parents subsequently made a High Court application under Article 40.4.2° of the Constitution, challenging the legality of the detention of the children pursuant to the interim care order based on the fact that the District Court hearing had breached their constitutional right to fair procedures.

In the High Court, Tusla argued that the Article 40 procedure was inappropriate in child care matters. It argued that the parents were not entitled to assert breaches of their own constitutional rights to ground an application under Article 40, as they were not the persons detained in this case and in any event, an order placing the children in care did not amount to "detention" pursuant to Article 40. It was argued that if the matter was to proceed, the Court would be faced with a conflict of interests between the interests of the parents, and those of the children. Tusla furthermore contended that a judicial review application would have been more appropriate in the circumstances as this would have been a more flexible remedy. Baker J. did not agree with these arguments. It was held that there had been a failure by the District Court to afford the mother and father an opportunity to "fully engage with the evidence." The Court held that the adjournment application should not have been refused by the District Judge and that the parent's constitutional right to fair procedures had not been respected in the District Court hearing. Baker J. noted the presumption that the children's welfare was best found in the family, taking the view that the balance of rights engaged in care proceedings could only be fully respected if the substantive procedural rights of children and their parents were respected. As to the appropriateness of the Article 40 procedure, Baker J. had regard to the long history of permitting Article 40 enquiries in child care cases, citing the decision in *N v HSE*,[347] where the Supreme Court had ordered the phased return of the child concerned. The High Court thus granted the Article 40 application and a phased return of the children to their parents was agreed – during which time Tusla made a new application to the District Court.

Tulsa appealed the ruling of the High Court directly to the Supreme Court, who dismissed the appeal. MacMenamin J., delivering the majority judgment, held that the District Court hearing had been a fundamental denial of justice to the parents, coming within the exceptional basis identified in *Ryan v The Governor of the Midlands Prison*[348] and *Roche v*

[347] [2006] 4 IR 374.
[348] [2014] IESC 14.

The Governor of Clover Hill Prison[349]. The Court held that the effective representation of parents does not merely vindicate their own rights, but also protects those of their children. In this case, the parents were denied their constitutional right to fair procedures which entitled them to be legally represented, to be given time to give instructions, and to comply with other procedural steps if necessary. The breach of fair procedures here was not a mere legal error but was so great that the Interim Care Order was rendered a nullity.

While the Supreme Court noted that generally Article 40 may be inappropriate when it concerns proceedings relating to the welfare of a child, the Court noted the dicta in *N v HSE* regarding the use of Article 40 in child care cases. Further, the Court, looking at the concrete factual circumstances of the children who were under the complete supervision and control of the HSE and were not free to leave their placements, did not agree that a child care order cannot amount to "detention" for the purposes of an Article 40 application. Given that the District Court hearing took place in breach of the parent's right to fair procedure, MacMenamin J. determined that the children were being held without legal mandate.

The Court referenced section 23 of the Child Care Act 1991. This section provides that in any proceedings, where a Court finds or declares that a care order, for whatever reason, is invalid, the Court may of its own motion, refuse to order the delivery or return of the child where it would not be in the child's best interests to do so. MacMenamin J. rejected Tusla's argument that section 23 could not apply to Article 40 proceedings because it would put an impermissible constraint on the operation of Article 40. Due to the special status of proceedings concerning the welfare of a child, and because of the paramountcy of the child's best interests as protected by Article 42A of the Constitution, section 23 does not abrogate the implementation of Article 40. The Court thus held that section 23 could apply to Article 40 applications, as well as judicial review proceedings, and its use is consistent with a decision to return a child on a phased basis as was the case in *N v HSE.* In such cases, once a court has found that the detention of a child is unlawful pursuant to Article 40, it can then proceed to invoke and rely on the provisions of section 23 if the court is of the view that in the interests of the welfare of the children, they should not be returned to the care of their parents.

[349] [2014] IESC 53.

Distinctions were drawn in the judgment between the law on *habeas corpus* generally and that procedure as it applies to children. With cases involving children the issue is not as much the liberty of the children but who should have custody of them. The applicant in such cases involving children will generally be the parent of a child (who may have their own reasons for bringing the application - not necessarily aligned with the interests of the child), rather than the subject of the proceedings, namely the child, as would be common in a regular *habeas corpus* application.

O'Donnell J., in his judgment, pointed out that the Article 40 procedure does not quash the order of detention but directs the release of the person from detention, whereas a judicial review (of which he says section 23 of the Child Care Act 1991 is a statutory example) would have had the effect of quashing the interim care order itself. On this point, however, MacMenamin J. stated that "a range of authorities make it abundantly clear that an order under Article 40 of the Constitution can have the effect of rendering an order of a District Court "invalid", where, as here, there has been a denial of natural justice or fair procedures."

In relation to the interaction (and in particular the sequencing of applications/orders) between Article 40.4.2° of the Constitution and section 23 of the Child Care Act 1991 MacMenamin J. held that "in such a case, therefore, where a child is the subject matter of an order under Article 40, a court which has made an order of invalidity, after ordering the release of the child, may lawfully then, and only then, invoke or rely on the provisions of section 23 of the 1991 Act." In other words, in order to maintain the integrity of Article 40, a court may not make an order under section 23, unless and until it has held that the order of the District Court or Circuit Court is invalid. MacMenamin J. held that "Article 40 is appropriate, in these exceptional circumstances, where there has been a denial of constitutional justice" but he would "entirely deprecate the usage of Article 40 proceedings in routine inter-parental care disputes."

Charleton J. in his dissenting judgment questioned whether children who are the subject of a care order can truly be said to be in some form deprived of their liberty. In relation to the phased release of the children, Charleton J. opined that "to permit a 'controlled' or 'phased' release seems at variance with the plain text of Article 40.4" and his view was that, the strength of Article 40.4.2° lies in its simplicity, i.e. if the court is not satisfied that the detention is legal it must release the person. Charleton J., dissenting, expressed his view that

the habeas corpus remedy was inapplicable "within the constitutional structure to mistakes made by a judge of the District Court in the context of proceedings concerning the welfare of children."

Dunne J. made reference to section 13 of the Child Care Act 1991 (and the potential under that section for *ex parte* hearings where the parents might not be present nor represented) stating that "it is clear therefore that in some instances the requirement to take steps to protect children may take precedence over the rights of parents to fully participate in such hearings."

This recent decision makes it clear that in certain circumstances, such as situations where a fundamental denial of justice has occurred, recourse to Article 40 may be available to challenge the detention of children under a care order. The argument put forward by Tusla – namely that all proceedings to challenge the legality of a care order should be brought by judicial review as opposed to Article 40 applications – was not accepted by the Supreme Court. The pronouncement of the Supreme Court, allowing an Article 40 application in limited circumstances where a care order has been made, is to be welcomed. The speedy nature of the Article 40 procedure means that a determination of the legality of the detention will be made forthwith, preventing any delay which is never ideal in considering matters of child welfare. The lengthier nature of judicial review proceedings is also avoided. It is noteworthy, however, that the abovementioned decision has indicated that section 23 of the 1991 Act is applicable to Article 40 proceedings. It is submitted that this is of real benefit for the children at issue in this type of application – ensuring that their welfare is prioritised rather than summarily directing the return of the child without consideration as to whether such a step is in tune with what is in the best interests of that child.

Recommendation

To prevent situations such as the above from arising in future care proceedings, it is recommended that time limits should be set for the delivery of social work and guardian ad litem reports to the parents or legal representatives of respondent parents in child care cases in the District Court. This will ensure that parents and their legal representatives are aware of the case they have to answer and can properly respond to any allegations contained within such reports in order to uphold fair procedures.

3.9 SUPERVISION ORDERS

A court may grant a supervision order by virtue of section 19 of the 1991 Act. Once such an order is granted, Tusla may visit the child in question on such periodic occasions as may appear necessary to the Agency with a view to monitoring the provision of care to the child. A supervision order will be granted where the court is satisfied that there are reasonable grounds for believing that a child has been or is being assaulted, ill-treated, neglected or sexually abused or; the child's health, development or welfare has been or is being avoidably impaired or neglected or; the child's health, development or welfare is likely to be avoidably impaired or neglected and it is desirable that the child be visited periodically by or on behalf of Tusla.

Section 19(2) of the 1991 Act states that a supervision order authorises Tusla to have the child visited on such periodic occasions as the Agency may consider necessary in order to satisfy itself as to the welfare of the child and to give to his or her parents or to a person acting *in loco parentis* any necessary advice as to the care of the child. Under section 19(3) and (4) the court can give such directions as it thinks fit as to the care or visitation of the child including requiring the parents of the child or a person acting *in loco parentis* to attend for medical or psychiatric examination, treatment or assessment at a hospital, clinic or other place specified by the court.

The visitation rights afforded by this section have a dual purpose. The first is primarily to monitor the child and his or her carers and to ensure that the child's welfare is being promoted. The second purpose allows for a more proactive approach, permitting Tusla to give any necessary parenting advice to the child's custodians or carers, with a view ultimately to improving the child's well-being.

By its nature a supervision order has a less intrusive impact on the family and child in question than a care order which directs that the child is taken out of the care of his or her parents and placed in the care of the State. In some cases, indeed, it may obviate the need for further proceedings. The knowledge that the authorities are "keeping an eye" on them may prompt some errant parents to take the necessary steps to mend their ways. A court however, may feel that a supervision order on its own is not a sufficient guarantee to the court that the child's rights and welfare will be protected and the court may feel that it should impose some

conditions on the supervision order. There is however no provision in law to do so. The court is permitted pursuant to sections 19(3) and (4) of the 1991 Act to make such directions as it thinks fit when granting a supervision order but this does not extend to the imposition of conditions when granting a supervision order.

In *HSE v YB & GB*,[350] the District Court made section 47 directions alongside the granting of a supervision order including that the parents engage in parenting coaching and the parents engage with a family resource worker.

In the case of *F.H. & Others v Staunton and Others*,[351] Hogan J. was asked to decide whether there was a proper legal basis to make directions towards the parents when granting a supervision order pursuant to section 19(1) of the 1991 Act. The District Court had made a supervision order pursuant to section 19 of the Child Care Act 1991 in respect of the first and second applicants' children, which contained a direction that both applicants attend parental capacity assessments and that the second applicant attend psychotherapy. These directions were not complied with by the parents. The District Court, taking into account the failure of the applicants to comply with the earlier directions, made an interim care order pursuant to section 17(1) of the Act of 1991 in respect of the children. The first and second applicants brought proceedings by way of judicial review to challenge the interim care order. Hogan J. quashed the interim care order and remitted the matter to the District Court. He noted that "while the HSE is plainly authorised to visit the child and to give advice to the parents of a child who is the subject of a supervision order, the sub-section does not envisage that parents can be the subject of positive obligations of the kind which were actually directed by the District Judge and embodied in the supervision order." The court noted that it is fundamental to our legal order that something akin to medical treatment (such as, for example, psychotherapy) represents a voluntary choice on the part of the prospective client and that very clear and express language would be required before it could be assumed that the Oireachtas had given the District Court a power to impose a condition of this kind in respect of parents otherwise subject to a supervision order. Hogan J. therefore held that section 19 gave no power to the District Court to direct for a parenting capacity assessment or direct that one of the parents take part in a course of psychotherapy, thus the directions contained in the District Court order should be regarded as invalid. The court did not accept that section 47 of

[350] [2012] IEDC 21.
[351] [2013] IEHC 533.

the 1991 Act (which gives a District Court powers to make certain directions) could provide an appropriate legislative basis for the types of directions set out above either. Hogan J. noted that "the section 47 order must relate directly to the welfare of the child. The Oireachtas did not envisage that this jurisdiction could be used to impose obligations on third parties (even such as parents)." The court pointed out that the language of section 47 could not be taken to permit the imposition of positive obligations on parties other than the children themselves.

Recommendations

In light of the aforementioned decision, therefore, it is recommended that the Child Care Act 1991 be amended to enable a court, when granting a supervision order, to impose such conditions as it thinks proper to ensure that the rights and welfare of the child are adequately protected. Such conditions and supports, if they were to be linked with a supervision order, could provide 'scaffolding' in a child care context and may potentially provide vulnerable families with the support they need, possibly obviating the need of further court orders being sought. Consideration needs to be given to the type of conditions that could potentially be attached to a supervision order and it is recommended that consideration be given to enabling the Court to direct the parent of the child to participate in a course of action or treatment. Such steps may ultimately serve to assist the parent greatly, thereby benefiting the child and gradually reducing the level of involvement of the social work department.

Section 19 of the 1991 Act requires clarification on the permissible intervention by Tusla once a supervision order is made. At present it is unclear for example whether a social worker can inspect a dwelling, talk to the children separately, or visit the children in school without the parents' consent. It is recommended that the scope of supervision orders be widened accordingly, allowing for the aforementioned types of action where required in the individual case at issue.

Section 19(5) provides that any person who fails to comply with the terms of a supervision order or any directions given by a court under subsection (4) or who prevents a person from visiting a child on behalf of the CFA or who obstructs or impedes any such person visiting a child in pursuance of such an order shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €1,000 or, at the discretion of the court, 6 months' imprisonment, or both. It is recommended that this provision be extended to

empower the court to impose conditions on supervision orders – namely, to provide that a breach of a condition of the order should similarly give rise to a penalty of imprisonment for a term not exceeding 6 months or a fine, or both.

3.10 HEARSAY EVIDENCE IN CHILD CARE CASES

Section 23 of the Children Act 1997 provides for "the admission of statements made by a child as evidence of any facts therein, of which direct oral evidence would be admissible … notwithstanding the rule of law relating to hearsay, where the court considers that a) the child is unable to give evidence by reason of age or b) the giving of oral evidence by the child … would not be in the interest of the welfare of the child." This provision applies to all civil proceedings concerning the welfare of a child, and therefore it applies to proceedings under the 1991 Act. In practice, applications under section 23 are usually made in care proceedings where Tusla intends to rely on the evidence of a child by way of statements made by the child to a third party, where it does not intend to call the child as a witness.

In *HSE v EL & AL*,[352] the District Court held that it would not be in the interests of the welfare of the child to be called to give evidence. In considering whether the admission of statements would cause an injustice to the mother, the court was satisfied that the interests of the welfare of the child outweighed any potential injustice to the mother. In that case the judge, in considering the weight to be attached to the admissible statements, considered that: the statements were not contemporaneously made; they did not involve multiple examples of hearsay; the motive to misrepresent or conceal appeared to be low; the statements were an edited account in collaboration with the social worker and guardian *ad litem* and the circumstances did not suggest an attempt to prevent a proper evaluation of the weight of the evidence.

Although section 23 of the 1997 Act states that it is the court that ultimately decides whether or not it would be in the interests of the welfare of the child to give evidence, no guidance is provided as to how this decision is reached. In practice this is often a source of debate and difficulty in the courtroom, with judges sometimes vocalising the fact that they are not trained in child psychology and therefore might not be the most qualified professionals to determine the competence of a child witness. Furthermore, section 23(2) merely provides

[352] [2013] IEDC 4. See also *Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016).

that the statement of a child shall not be admitted in evidence if the court is of the opinion that, in the interests of justice, the statement ought not to be so admitted. In considering whether the statement or any part of the statement ought to be admitted, the court must have regard to all the circumstances, including any risk that the admission will result in unfairness to any of the parties to the proceedings. This is relatively vague. It allows the court to refuse admission in the interests of justice, and in making its decision, the court is to have regard to "all the circumstances". Apart from specifying "risk of unfairness" as one such circumstance that the court will consider, there is no list of other pertinent or relevant factors that the court should consider. Such a list would provide critical guidance to judges in making their determination.

Recommendation

To improve the efficacy of this section, the Oireachtas should provide clearer guidance to the judiciary and to best protect child witnesses, it is recommended that section 23 of the 1997 Act be expanded, specifically in its application to care proceedings. In this regard, it is suggested that the Child Care Act 1991 be amended to integrate a specific version of section 23 within its provisions. First, it is recommended that in the context of care proceedings only, section 23 be extended to provide for a presumption that all statements made by children may be admitted in evidence, notwithstanding the rule against hearsay, unless in the interests of justice this should not occur. The inclusion of such a presumption recognises that such statements shall be admissible, thereby obviating the need for children to be called as witnesses in proceedings concerning them, unless the interests of justice dictates otherwise. Second, in considering whether the aforementioned presumption will be rebutted, a list of relevant factors should be set out therein to assist the court in making its determination, providing the judiciary with better and heightened guidance on this matter. This also improves the transparency with which these decisions will be made if the court makes its way through a checklist of defined factors in reaching a conclusion as to whether the presumption has been rebutted.

3.11 PRIVILEGE AGAINST SELF-INCRIMINATION

The privilege against self-incrimination is a general right that a party has to refrain from answering any question if the answer would tend to expose him or her to a criminal charge.

This privilege has long since been recognised as attracting constitutional protection in Ireland and most often arises in the context of both criminal investigations and prosecutions against an individual, considered together with the accused's pre-trial and at-trial right to silence. It is worth noting, however, that the right is not absolute.

In the seminal case of *Heaney and McGuinness v Ireland*,[353] the privilege against self-incrimination was recognised by the European Court of Human Rights (ECtHR) as capable of protection under Article 6 of the European Convention on Human Rights. In this case, the applicants were arrested in connection with an explosion at a British Army/RUC checkpoint in Co. Derry. They were asked to account for their movements during a certain period, pursuant to section 52 of the Offences Against the State Act 1939, but refused to do so. They were therefore convicted of failing to comply with the section 52 requests. As a result, the applicants challenged the constitutionality of section 52, but same was upheld by the Supreme Court. In these proceedings before the ECtHR, they contended that section 52 of the 1939 Act violated their right to silence, their right not to incriminate themselves, the presumption of innocence, their right to respect for private life and their right to freedom of expression.

The ECtHR rejected the Irish Supreme Court's upholding of the legislation as constitutionally valid. It held that there had been a violation of Article 6(1) and (2) of the Convention; finding that although not specifically enumerated in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. With regard to the privilege against self-incrimination in particular, the Court held it serves to ensure that the prosecution in a criminal case proves its case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. It is thus closely linked to the presumption of innocence contained in Article 6(2) and is primarily concerned with respecting the will of an accused person to remain silent. The Court, however, stated that right to silence and the right not to incriminate oneself guaranteed by Article 6(1), are not absolute rights.

[353] [2001] 33 EHRR 12.

Legislation therefore may demand that a person answer questions in relation to a criminal investigation. An example of such a provision was contained in section 10 of the Companies Act 1990, which imposed an obligation on company officers and agents to co-operate with inspectors investigating a company – including answering any questions of the inspector. Section 18 of the Act further provided that any such information obtained under section 10 could then be used as evidence in a criminal prosecution of the same individual. The constitutionality of these provisions was at issue in the case of *Re National Bank*.[354] In this case, the bank was being investigated in relation to certain criminal offences, including tax evasion and fraudulent charges on customer accounts. Employees of the bank refused to answer questions put to them by the inspectors, claiming their right to silence was infringed by the operation of section 10 and that this provision potentially required them to incriminate themselves.

In its judgment, the Supreme Court upheld section 10, rejecting the argument that the bank officials in this instance could invoke the privilege against self-incrimination to refuse to answer questions under section 10. It held that while the employees did have a right to silence, the powers designated to the inspectors in the legislation were proportional and no more than that required in the public interest. The Court reserved judgment as to the admissibility of any such evidence under section 18 to a future trial judge with the reminder that admissions could only be admitted against an accused where they are shown to be voluntary. Barrington J stated:

> It appears to me that the better opinion is that a trial in due course of law requires that any confession admitted against an accused person in a criminal trial should be a voluntary confession and that any trial at which an alleged confession other than a voluntary confession were admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Article 38 of the Constitution and that it is immaterial whether the compulsion or inducement used to extract the confession came from the Executive or from the Legislature.

Thus, while legislation may validly restrict the right to silence, it appears that the privilege against self-incrimination operates to prevent any answers given by an accused in such a situation before the trial from being used as evidence against him at the trial.

[354] [1999] 1 ILRM 321.

The issue of the operation of the privilege against self-incrimination has arisen in the context of child care proceedings. In the case of *HSE v YG*,[355] the guardian *ad litem* for a child in proceedings under the 1991 Act made an application to court pursuant to section 47 of the Act for a direction that the child's mother produce certain inappropriate photographs and recordings she had of the child. On behalf of the mother, as there was an on-going criminal investigation, it was argued that her privilege against self-incrimination militated against her handing over the material in question and that section 47 should not be applied where it interfered with the mother's constitutional rights or her rights under the European Convention on Human Rights. The District Court did not agree. It held that, "section 47 of the Child Care Act places the interests of the child above all other rights". In this case, the District Judge decided it was proportionate in the circumstances to order the mother to produce an inappropriate video/recording of a child.

Recommendation

This case raises the issue of competing rights and questions the role of the privilege against self-incrimination in the context of child care proceedings. It is likely that the issue will arise in future proceedings where there are concurrent criminal investigations concerning suspected abuse or neglect for instance. A dilemma is posed where a witness in such proceedings is asked questions or required to hand over material where the answers to these questions and/or the material produced may expose that witness to criminal investigation or prosecution. It is recommended, therefore, that clarification be provided in the 1991 Act on the procedure governing the operation of the privilege against self-incrimination in such cases, and the extent and level to which it applies in a child care context.

In the United Kingdom, such legislative clarification on this matter is contained within the Children Act 1989. Section 98(1) of the 1989 Act provides that in respect of certain child care proceedings, no person shall be excused from giving evidence on any matter, or answering any question put to him during the course of his evidence, on the ground that to do so might incriminate him or his spouse or civil partner in an offence. Section 98(2), however, provides that such statements or admissions shall not be admissible in evidence against the person making it, or his spouse or civil partner, in proceedings for an offence other than

[355] [2012] IEDC 25.

perjury. These provisions thus ensure that witnesses in child care proceedings must answer the questions put to him or her and may not be excused from giving evidence, but guarantees that any admissions made by the witness cannot be used in future criminal proceedings. This highlights the importance of child care proceedings in which the best interests of the child in ensuring that all relevant evidence is before the court is treated with priority over the right of a witness to remain silent. The Child Care Act 1991 requires some certainty on this matter in line with the UK position.

Re EC (Disclosure of Material)[356] represents the leading UK authority on release of information from within child care proceeding to the police. In that case, Swinton Thomas LJ set out ten matters which a judge is required to consider when deciding whether to order disclosure. None of the factors have priority over the others, as the importance of each of the various factors will inevitably vary very much from case to case. The ten factors which are to be considered by the court in making its determination are as follows –

(1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor;

(2) The welfare and interests of other children generally;

(3) The maintenance of confidentiality in children cases;

(4) The importance of encouraging frankness in children's cases ...;

(5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice;

(6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor;

(7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order;

(8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service,

[356] [1996] 2 FLR 725.

medical practitioners, health visitors, school, etc. This is particularly important in cases concerning children;

(9) In a case to which section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incrimination statement and any danger of oppression would also be relevant considerations ...;

(10) Any other material disclosure which has already taken place.

In the more recent case of *Re X and Y (Disclosure of Judgment to Police)*,[357] Baker J. referred to *Re EC* as still being the authority on this issue, while noting that the relative importance of the factors identified in that case may have shifted with the passage of time, given it was decided under a much earlier version of the rules for children proceedings. Baker J. held that given the current rules and case law, the courts would be more, rather than less, disposed towards release to the police. In this case, the police had applied to see a judgment made within care proceedings where the court had noted that the father of a child admitted he had perpetrated injuries on one of his three children. The care order had ultimately been made and the police wanted both the judgment and the disclosure of any information which had come to light in these proceedings as to the perpetrator of the child's injuries so that a decision could be made whether to prosecute. In making his decision, Baker J. considered the decision of *Re EC* in detail, as well as the provisions in the Children Act and the Family Procedure Rules relating to disclosure to the police of material in care proceedings. The court took into account both the arguments in favour of disclosure and those against, ultimately concluding;

> …the balance in this case clearly falls in favour of disclosure of the judgment to the police and the Crown Prosecution Service, subject to clear directions from the court restricting further disclosure of the judgment or any information contained therein without permission of this court.

3.12 CHILDREN AS NOTICE PARTIES TO JUDICIAL REVIEW PROCEEDINGS

In *L.N. v Judge Daly & Others*,[358] an application was made by the guardian *ad litem* of four children seeking an order joining the children as notice parties to judicial review proceedings. A full care order had been granted in respect of the four children in the District Court which

[357] [2014] EWHC 278 (Fam) and [2015] 1 FLR 1218.
[358] [2016] IEHC 140.

was to remain in place until they each attained the age of 18. In the District Court care proceedings, the applicant, a qualified social worker, was appointed as guardian *ad litem* to the four children pursuant to section 26 of the Child Care Act 1991. She prepared a detailed report and gave evidence in accordance with the report. The guardian *ad litem* recommended that the children should remain in the care of the Child and Family Agency pursuant to care orders until they reached the age of majority with a court review of the children's circumstances after twelve months. Following the granting of the full care orders, the mother of the children brought judicial review proceedings, seeking *inter alia*, an order for *certiorari* quashing the decision of the District Court and a declaration that the granting of full care orders pursuant to section 18 of the Child Care Act 1991 until each child reaches the age of majority failed to properly apply the appropriate test for the making of a proportionate order and thus went further than was strictly necessary to ensure the welfare of the children.

When the High Court granted leave to the mother to pursue her judicial review proceedings, the applicant sought an order to be joined as a party in those proceedings pursuant to order 15, rule 13 of the Rules of the Superior Courts or order 84, rule 22 (9) and 27 (1) of the Rules of the Superior Courts. McDermott J. granted an order to the effect that the four children should be joined as notice parties in the said proceedings and that the applicant should be appointed as their guardian *ad litem* for that purpose. The Court held that a guardian *ad litem* could play a dual role; namely, to carry out its obligations concerning child welfare and to act as a child's representative in the Court proceedings. The Court observed that it had inherent jurisdiction to consider an application by the applicant for being nominated and appointed as guardian *ad litem* to the children under order 84, rule 22 (9) of the Rules of the Superior Courts notwithstanding the limited roles assigned to the guardian *ad litem* under section 26 of the Child Care Act 1991. The Court held that since the quashing of the decision of the District Court would have a direct impact upon the welfare of the children, it was imperative that the voice of the children should be heard in the interests of justice and there could be no better person to discharge this role than the guardian *ad litem* who was deeply involved in every aspect regarding the care of the children.

3.13 ROLE OF THE GUARDIAN AD LITEM IN CARE PROCEEDINGS

In the High Court case of *A.O'D. v O'Leary*,[359] the functions and role of a guardian *ad litem* appointed in child care proceedings were considered by the court. This case concerned the child, E.O'D., in respect of whom care proceedings were brought. These proceedings were fully contested by the child's mother, who wished that her daughter would be placed with her brother J and half-sister A who live with A's father. A guardian *ad litem* was appointed by the court to act in the proceedings on behalf of the child pursuant to section 26 of the Child Care Act 1991. The guardian *ad litem* engaged a solicitor to act for her following her appointment as she regarded the case to be complex. She believed that the best interests of the child required that she engage a solicitor. Some degree of complexity arose from the relationship that the child had with her half-sister and brother, both of whom lived with the father of her half-sister with whom the child had no blood link, but with whom she had a good relationship. The guardian *ad litem* also anticipated significant difficulty in the long-term foster placement for the child as the placement which had lasted for a number of years had now broken down. The guardian *ad litem* gave a number of examples of factual matters in respect of which she said she should be entitled to give evidence, cross-examine and make submissions in the interest of the child and that it would be "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." The District Judge was required to decide upon the entitlement of the guardian to instruct legal representation and ultimately, he ruled that the guardian *ad litem* of the applicant's child was entitled to instruct a solicitor or solicitor and counsel to act as an advocate for her in the same way as an advocate of any party in proceedings under the Child Care Act of 1991.

The applicant mother sought an order of *certiorari* quashing the order of the District Court. On her behalf, it was contended that the only persons who could appear before the Court were a party to a suit, solicitor or counsel for that party, but not the guardian *ad litem* as he/she was not a party to the child care proceedings. It was argued that it was unlawful for the District Court to permit a person who is not a party to proceedings before it to instruct a legal representative to act as advocate for that party in the same way as an advocate might act for a party to the proceedings, there being no statutory provision by which this is authorised. It was submitted that it was not within the power of the guardian appointed under section 26

[359] [2016] IEHC 555.

of the 1991 Act to be involved in the determination of facts where they are disputed between the parties in the proceedings. While section 25 of the 1991 Act allows the District Court to join a child as a party to proceedings and specifically gives the court power to appoint a solicitor to represent such a child, section 26 contains no such statutory power to appoint a solicitor for a guardian.

Baker J. refused to grant the desired relief to the applicant. The Court held that since the guardian *ad litem* represents the best interests of the minor, he/she possessed the right to ask for legal representation in conformity with fair procedures. While there were differences between section 25 and 26, specific powers to appoint a solicitor for a child under section 25 were necessary due to the fact that a child does not have legal capacity to instruct lawyers or enter into a contract for legal services. If section 26 were interpreted as not permitting a guardian to take part in the proceedings, and confined him or her to a role of advocating only for a child, then a young child who could not avail of the section 25 procedure, would be denied procedural fairness where their interests were at stake. The Court thus found that section 13 of the Child Care (Amendment) Act 2011 amending section 26 of the Act of 1991 made provisions for the entitlement of a guardian *ad litem* to instruct a solicitor wherever necessary.

The Court observed that child care proceedings being akin to civil proceedings could not be taken to mean that the guardian *ad litem* was a party to the action. Baker J. stated:

> To describe the guardian *ad litem* appointed by the order in the present case as a "party" is neither accurate nor helpful … 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 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 that the guardian was permitted to act as a party to the extent or in the manner for which the applicant contends.

The Court thus held that the District Judge's order was not made *ultra vires* nor was it impermissible. In this case, given the views of the guardian *ad litem* that there would be a denial of fair procedures if she was not given the right to legal representation, it became imperative to permit her to engage a solicitor for the welfare of the child.

3.14 SECTION 47 DIRECTIONS

Pursuant to section 47 of the Child Care Act 1991, where a child is in the care of the Child and Family Agency, the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order. The power of the District Court under this provision was considered by the High Court in the decision of *V.Q. v Horgan.*[360]

In this case, the foster parents of a child applied to the District Court under section 47 of the 1991 Act seeking the directions of the Court in respect of the provision of orthodontic care for their foster child, aged 14. The foster parents were in receipt of the Foster Carer's allowance - an allowance at a rate determined from time to time by the government. The scheme establishing the allowance expressly does not preclude the making of additional payments to foster parents in respect of medical expenses not covered by other public health schemes. The contract made between the foster parents and Tusla provides inter alia that Tusla shall "provide such additional or other assistance" as it considers necessary to enable the foster parents to take care of the child. The young boy in this case had poor dental alignment which resulted in a conspicuous overbite and crooked teeth of which he was conscious, and it was believed that some degree of bullying had occurred as a result. 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, as he did not meet the threshold clinical requirements of that limited scheme.

The foster parents had privately funded the requisite treatment for the child, at a cost of nearly €5,000. They argued that the allowance they received in respect of the foster placement does not stipulate or envisage that the foster parents meet exceptional payments such as the cost of orthodontic care and they requested that the cost be met by Tusla. Their application was opposed by Tusla, not by reason of any disagreement that the treatment was not desirable for the child, but rather because the standard foster allowance was considered to be sufficient to cover the expense of the treatment, regarded by it as a "usual need and expense" experienced by many families with growing children. It was also argued by Tusla that the District Court did not have jurisdiction under section 47 to make the orders sought by

[360] [2016] IEHC 631.

the foster parents as this would amount to directing the Agency as to how to expend its resources, which on the basis of the decision in *T.D. & Others v The Minister for Education*[361] was impermissible as a breach of the doctrine of the separation of powers.

The President of the District Court declined to grant an order that Tusla fund the private orthodontic treatment in respect of the foster child. She commented that the obligation of the executive is to determine how funding is spent and in so determining, it must balance the obligation to fund all children under the service. The District Judge determined that it was not open to the court to direct Tusla to fund the child's treatment privately as this was outside the remit of the District Court.

The applicant foster mother instituted judicial review proceeding in respect of this decision, seeking an order of *certiorari* quashing the District Court order. She also sought a declaration that the District Judge had made an error while holding that she did not have the jurisdiction to determine the question under section 47 of the Child Care Act 1991. The key issue for the determination of the High Court, therefore, was whether the District Court was correct in declining jurisdiction in the light of her acceptance of Tusla's argument that the granting of the order sought would mean that the judiciary was forcing the executive to allocate funds outside of what was permitted, which was in reality the function of the legislature.

Baker J. in the High Court considered the authorities on section 47 directions which made it clear that section 47 is wide ranging in nature and is intended to give the District Court the overall control of children in care. She stated:

> 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 Tusla, 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 publicly 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.

Baker J. held that the jurisdiction of the District Court is vested in matters of welfare, not such that only matters which adversely affect welfare come to be considered, but where the

[361] [2001] 4 IR 259.

welfare or interest of a child are engaged and require to be clarified, or steps taken to direct the means by which these are to be furthered.

The Court went on to state:

> It is not correct to interpret the powers of the District Court under section 47 as meaning that Tusla must, as a result of a declaration made under section 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 section 47, may make orders relating to matters that "affect" the welfare of the child, and may have regard to various factors, including what is called by counsel for Tusla "the existence and ongoing provision of financial and other support by public bodies" to determine whether the welfare of the child requires that its direction be given. 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.

This case was thus distinguished from the *T.D.* decision as a distinction can be drawn between a decision that directs policy in general, and a decision in an individual case the practical effect of which is that the financial resources of the State are impacted. In this case, the Court pointed out that the District Court was not being asked to predetermine whether the cost of orthodontic treatment be met for all children in care, and the applicant was not seeking a direction to the government that the funds for the orthodontic treatment should be allocated to Tusla. What was being sought was a direction as to the interest of the child which may have led to a determination in this case that the expenditure be met by Tusla.

Ultimately, Baker J. granted an order of *certiorari* quashing the District Court's decision. The Court held that before embarking to decline the jurisdiction under section 47 of the 1991 Act, the District Judge should have made inquiries into the nature of the agreement entered into between the notice party and the foster parents in relation to the child in care. The Court found that it was the constitutional obligation of the District Court to determine whether the treatment sought to be funded was regular, anticipated or discretionary. The Court, however, noted that it was not within the jurisdiction of the District Judge or the High Court to direct the notice party to disperse funds for a particular treatment as that would cause interference in the functions of the executive. The District Court, however, was vested with the jurisdiction

to make orders under section 47 of the Child Care Act 1991 for the welfare of the child taking into account the individual circumstances of a case and this did not occur in the present proceedings.

Recommendation

Section 47 empowers the court to give such directions and make such order on any question affecting the welfare of the child as it thinks proper. It is thus very broad in its nature and does not enumerate what directions or orders are envisaged in the operation of this provision. This is clear from the aforementioned judgment. Given the broad nature of section 47, it is recommended that consideration be given to enumerating the various types of orders and directions that may be sought therein. This does not have to be an exhaustive list, but certain guidance could be provided as to what may come within this section – assisting Tusla, foster carers and parents alike in making and resisting any applications made under section 47. The best interests of the child should be clearly acknowledged as the paramount consideration in any application.

3.15 FOSTER CARERS TAKING CHILDREN ON HOLIDAYS

The case of *CFA v M and J* considered a parent's right to refuse to provide permission for their children in interim care to travel abroad.[362] This was an application under section 47 of the Child Care Act 1991, for directions in respect of A and B. Section 47 provides:

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

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

A and B were the subject of interim care orders pursuant to section 17 of the Child Care Act 1991, and those orders had been extended on several occasions. During the period that the

[362] [2015] IEDC 03.

children had been in care, they had been on holidays, including abroad, and the parents had consented to such holidays. They were not however, consenting to this holiday with the foster carers. The foster carers informed Tusla of the proposed holiday some 3 to 4 weeks before it was due to take place. When the parent's consent was sought, approximately 3 weeks before the proposed holiday, they immediately refused to give consent. The children were informed of the proposed holiday in considerable detail by the foster carers without consultation with Tusla. The children were told of the holiday either at the same time as, or before the parents. The children had been informed that their parents were not consenting to the holiday. Five days before the holiday, one of the children asked the parents to consent to the proposed holiday. The Court noted:

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

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

The evidence of the guardian *ad litem* and the social worker was that, in their opinion, it would be in the interests of the welfare of the children that they would be permitted to travel on the proposed holiday. Their evidence was that children placed with foster carers should have the benefit of being placed with a family including being included in family holidays, and that being excluded from such a holiday would promote a sense of not belonging, to the detriment of the children. Specifically, in circumstances where the children already knew of the proposed holiday, and were looking forward to it with great excitement, it would detrimental to their interest and welfare to exclude them from it.

Both parents gave evidence as to their reasons for not consenting to the proposed holiday. Their expressed reasons must be understood in the context of what was a long running, highly contested application, involving very serious allegations which were vigorously denied, and which was slowly but inexorably proceeding to a hearing of an application to take their

children in to the care of the State until they reached the age of 18 years. They felt that while the process was on-going, whether it led to a full care order or otherwise, that they were losing their relationship with their children (in particular B who was not attending access), and that in effect they were losing their children.

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

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

He continued:

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

The judge went on to note that the children's welfare had not been served in this case as they should never have been told about the holiday in advance of the parent's consent being obtained. The judge found it surprising that the social worker was unaware of any protocol in

relation to planning a holiday abroad for a child in care. The judge noted that if there is no such protocol, then such a protocol is urgently required in order to avoid unnecessary adverse effects on the welfare of children. The judge stated:

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

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

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

The judge noted that perhaps disparity of lifestyle may merit consideration when selecting foster placements, but noted it is unlikely to dictate the actual placement. The judge was not satisfied, that the contention of the parents that if the children did not go on the proposed holiday, that all the children would engage more meaningfully with the parents at access, and that it would assist in breaking the influence the foster carers had over the children. In fact the judge found that it was more likely the children would resent the parents and it would not support the resumption of access. As such, he found there was nothing identified as to why the proposed holiday would not be in the interests of the children and therefore he granted the order dispensing with the parent's consent.[363]

3.16 VARYING/DISCHARGING A CARE ORDER

Section 22 of the 1991 Act permits a court of its own motion or on the application of any person to vary or discharge a care order or supervision order, or vary or discharge any condition or direction attaching to the order or, in the case of a care order, discharge the care order and make a supervision order in respect of the child.

[363] See also *CFA v A and Anor* [2017] IEDC 5.

Recommendation

What is not clear from section 22 is whether a court can vary or discharge an interim care order in the same way that it can vary, or discharge a care order/supervision order or any direction or condition attaching thereto. It is recommended that section 22 of the 1991 Act be amended to provide that a court can vary or discharge an interim care order.

3.17 JURISDICTION

Section 16 of the 1991 Act states that "where it appears to the Child and Family Agency that a child requires care or protection which he is unlikely to receive unless a court makes a care order or a supervision order in respect of him, it shall be the duty of the Agency to make application for a care order or a supervision order, as it thinks fit."

Section 28(2) states that "proceedings under part III, IV, V may be brought, heard and determined before and by a justice of the District Court for the time being assigned to the district court district where the child resides or is for the time being." It is recommended that consideration be given to amending this provision to allow applications for care and supervision orders to be considered by District Courts outside the area of the current residence of the child concerned in certain defined circumstances.

Recommendations

Section 16 and section 28 of the Child Care Act 1991 should be amended to provide that a court can be seised of a matter in respect of a child "who resides or is found in its area ... or in respect of a child who was so resident or found at the date of the original application". This will ensure that when a child is received into care under section 18 of the 1991 Act and then moves to reside with a foster carer or residential home in a different District Court area, Tusla can proceed in the court originally seised for the making of the care order (or not) at its choice.

While the 1991 Act specifically deals with jurisdiction in child care cases, the Courts of Justice Act 1924 deals generally with the jurisdiction of the District Court in Part III thereof. This legislation is of some antiquity and has been amended on numerous occasions. It is

recommended that section 79 of the 1924 Act be similarly amended in the abovementioned fashion. Specifically, it should state that a District Judge assigned to the jurisdiction in which the child resides or is found, or in which the child was so resident or found at the time proceedings under the 1991 Act were initiated shall have jurisdiction to consider such applications under the 1991 Act. This will ensure that the recommended reform is reflected in both pieces of legislation, preventing any future conflict on this issue.

3.18 APPEALS

Section 21 of the 1991 Act states that an appeal (from an order under that part) shall "stay the operation of the order on such terms (if any) as may be imposed by the court making the determination."

Recommendation

Section 21 should be re-examined in light of the 31st amendment to the Constitution and its requirement that the views of the child be ascertained in certain proceedings.

3.19 COSTS ORDERS IN CHILD CARE CASES

The case of *LG v CFA*[364] dealt with the issue of costs in child care cases. The applicant sought judicial review in the High Court of a District Court order refusing her costs. An application for an interim care order had been sought by the CFA in respect of the applicant's child. The applicant's solicitor, who was a member of the Legal Aid Board's private practitioners scheme, applied for legal aid in respect of his client but was informed that the legal aid certificates for that scheme for that month had been exceeded. The applicant contended that extensive preparation was undertaken by her solicitors for various applications that were to be made including the lifting of the *in camera* rule and the application for the interim care order itself. The CFA then withdrew its application for an interim care order in respect of the applicant's child. The applicant consented to a supervision order, which was duly made, and a safety plan was agreed. The principles set out by the Supreme Court

[364] [2017] IEHC 633.

in *Child and Family Agency v O.A.*[365] were considered both at the District Court and the High Court.

Coffey J. in the High Court held that the applicant's challenge to the costs ruling on the legal aid ground had been made out. In *Health Service Executive v O.A.*,[366] O'Malley J. determined that the question of the potential eligibility for legal aid of a parent in proceedings under the Child Care Act 1991 was not a matter that had any bearing on their entitlement to apply for costs. Coffey J. held that:

> the District Judge took into account the fact that the applicant had applied for legal aid and had been refused a certificate. To my mind, this was not something the District Judge was entitled to do in the exercise of her jurisdiction, having regard to what was stated by O'Malley J. in *HSE v O.A.* Thus, the fact that the District Judge factored into her consideration on costs a discussion of how the applicant fared in seeking legal aid invokes a reasonable apprehension that that the District Judge's considerations on the question of costs strayed outside the parameters set by MacMenamin J. in *O.A.*

3.20 THE NEED FOR APPROPRIATE AND SPECIFIC SUPPORTS – PARENTS' COGNITIVE FUNCTIONING

In a large number of cases in which care orders are sought – whether emergency, interim or full care orders - the families and children involved have been known to the Child and Family Agency previously, most often for a considerable period of time prior to the application being made. In some circumstances, supervision orders may previously have been granted or due to referrals, the parents or children became known to Tusla and were given some form of assistance or support from their duty social work team.

In some cases, when the matter comes before the courts, various professionals are used to carry out parenting capacity assessments or psychiatric or cognitive assessments on the parties involved. In a not insignificant number of cases the results of these tests reveal that one or both parents suffer from a cognitive disability or low level intellectual functioning. In such a situation, evidence is generally given to the court by social workers or other health care professionals of supports that were put in place to assist such parents who may have been struggling to cope. This was demonstrated in a recent District Court case in respect of

[365] [2015] 2 I.R. 718.
[366] [2013] 3 I.R. 287.

the five children concerned.[367] The court ultimately granted care orders until the age of 18 for the five children, all of whom were under the age of 12, on the grounds that they had suffered neglect and they were likely to continue to do so if such orders were not granted. In the case, evidence was given by a family support worker who conducted 23 support sessions with the parents to teach the parents how to focus on the reactions of the children, encouraging them to sit at a table, talk about school, etc. Both of the parents in this case had learning difficulties with experts putting them both in the first percentile – meaning 99% of the population would have had greater parenting capacity. The support worker gave evidence that the parents were not able to transfer the skills from these sessions.

In the case of *CFA v CH and SC*,[368] both parents had significant cognitive impairments (described as mild intellectual disability) which was felt by the CFA to impact upon their ability to parent their children. A supervision order had initially been granted as well as a voluntary care arrangement in respect of some of the children. The CFA applied for a care order under section 18 on the basis of non-wilful neglect of the child, the subject of the proceedings. It was clear that the overarching concern of the CFA was that the parents, even with the assistance of their wider family and targeted community and social work supports, simply could not meet the child's needs. There were also historical concerns as to substance misuse but evidence to that effect was not adduced at the hearing as that issue was no longer considered to be a primary concern. The CFA maintained that the parents operated with compromised cognitive and executive functioning, which limited their respective understanding and adaptive coping skills. The conclusion of the CFA was that the parents could not, despite their willingness and best efforts, meet the needs of the children. The CFA position was that the child's unmet needs required a care order to be made until the child would reach the age of eighteen years, as the issue of functioning of each parent was a lifelong enduring condition.

Among the submissions made by the parents in contesting the care order application was the contention that the supports made available to them were inadequate or insufficiently tailored to their level of understanding and were provided by child care workers who had no training in disability issues. A clinical psychologist in the case, however, had recommended a

[367] See Child Care Law Reporting Project, Case Histories 2017, Volume 1; *"Care orders for five children where both parents cognitively impaired"*.
[368] [2017] IEDC 4.

systemic/family therapy approach pitched to the parents' level of understanding to assist the parents in acquiring better listening and communication skills. She gave evidence that in her view, work undertaken appeared to have been tailored to their level of understanding with tasks being broken down and employing the use of role play. Ultimately, the court was satisfied that the threshold under section 18 of the 1991 Act was met and granted a care order until the child was 18 years old.

During the case, the issue of the parents' capacity to consent to the pre-existing voluntary care arrangement also arose. The legal advisors for each parent raised the issue of fairness and submitted that there was an absence of true consent by the parents to the voluntary care agreement and that the parents did not have legal advice or assistance in advance of signing the agreement in circumstances where their mild intellectual disability was well known to the CFA. Horgan P. stated that "social workers must actively consider the issue of capacity and take into account all the circumstances prevailing at the time, including the ability of the parents to weigh up all the relevant information". She held that "parents may require special fair procedural measures in some cases to ensure that they are enabled to fully understand the matters at issue." The Judge went on to express the view that this obligation would not be discharged by giving a parent a generic document unrelated to the factual matters in the particular case.

While addressing issues relating to respondent parents who have cognitive difficulties/intellectual disabilities and their capacity to consent, Horgan P. on the evidence found that the parents in this particular case had not been coerced into signing the voluntary care agreement and that they had functional capacity to instruct their legal teams. As already mentioned, the judge granted a care order until 18 years of age in respect of the child in question.

A further issue that arises in these cases is the suitability of the programmes of support that are offered to such families. A judge in one case commented that the parents in a particular case had been identified as having learning disabilities and low cognitive functioning and were given a personalised parenting class over a number of weeks to help them grasp certain parenting skills. The judge went on to comment that there seemed to be no connection between the finding of the low cognitive functioning on the one hand and the parenting course that was being offered which was relatively complicated and involved the teaching of

new material every week. It seems that there is sometimes a gap in understanding between the identification of problems and needs of parents relevant to the welfare and protection of their children and the supports that are then offered to particular parents in response to those needs.

In the case of *HSE v LW and GW*,[369] it was noted that social work support and interventions were put in place for the family as far back as 1998 but the court noted that "this intervention does not appear to have been sufficient to effect any change in the family dynamic." The court noted that the children were registered under the Child Protection Register in 2004 under the category of neglect. The guardian *ad litem* in that case was highly critical that, despite the children being on the register, further abuse and neglect occurred of the child that remained in the home.

Recommendations

In light of the concerns raised in these cases, it is recommended that guidelines or policies within the CFA should be introduced (if not already in place) to ensure that in cases where there is doubt as to respondent parents' capacity, social workers must be satisfied that a) there is sufficient capacity on the part of the parent to agree to proposals put forward by the social work department and b) social workers should also be satisfied that such consent is fully informed and that the parents fully understand the consequences of giving such a consent.

In cases involving respondent parents with low cognitive functioning or intellectual disabilities there should be guidelines or policies (if not already in place) outlining how information should be tailored to such people in a manner comprehensible to them so as to enable the parents to take on board and put into practice supports and/or guidance that is provided to them.

It is recommended that where particular needs are identified by Tusla in dealing with a family, the supports or interventions that are put in place to respond to those needs must be specifically tailored to the individual circumstances of the parents, taking into account their

[369] [2012] IEDC 4.

level of cognitive impairment. Generic or standardised response programmes are not appropriate in these cases and are unlikely to yield any improvements. A personalised approach is undoubtedly necessitated in light of the sensitive issues at play.

While, in these cases, the focus may be on providing appropriate and specific supports to parents, it must be emphasised that even within the provision of such supports, the best interests of the child are to be the paramount consideration, in line with Article 42A of the Constitution. The best interests of the child concerned need to remain at the forefront of any approach taken by Tusla or guidance given by the court and same must necessarily inform any timeframe that is being afforded to the parents to carry out the necessary changes in their parenting. A situation as detailed above where a child continued to suffer neglect/abuse despite being placed on the Child Protection Register years previously must be avoided.

3.21 SPECIAL CARE ORDERS

Special care orders are sought by Tusla where it appears that a child requires special care or protection which he or she is unlikely to receive otherwise. Special Care is intended to be short-term, stabilising and safe care in a secure therapeutic environment, which aims to enable a child to return to a less secure placement as soon as possible based on need. Until recently, a placement in special care required an order from the High Court under the High Court's inherent jurisdiction to place children in special care units. The Child Care Act 1991 in its original form did not make any legal provision for special care. Such provision was made under the Child Care (Amendment) Act 2011, inserting a new, expanded Part IVA into the 1991 Act setting out a statutory framework for the placement of children in special care units.

Under Part IVA of the 1991 Act the High Court may make a special care order where it is satisfied that the child in question has reached 11 years of age and there is reasonable cause to believe that the behaviour of the child poses a real and substantial risk of harm to that child's life, health, safety, development or welfare. Moreover, the High Court must be satisfied that the provision of continued care other than special care would not be adequate to meet the therapeutic needs of the child.

The key provisions of the new Part IVA were commenced on 31 December 2017.[370] This new statutory framework for the civil detention of children in special care units will substantially alter the manner in which a court must assess the special care needs of a child and places a series of new obligations on Tusla when applying for a special care order. These include a requirement on Tusla to conduct an assessment as to whether a particular child needs special care and the power to convene a family conference to aid in the process of making a determination as to the need to apply for a special care order for a child. A special care order has effect for a maximum of three months and must be reviewed by the High Court every four weeks for the duration of the order. The new provisions allow for the making of an interim care order which Tusla will apply for where it has not made a final determination but there is reasonable cause to believe that that the risk of harm to the child is immediate.

Tusla may provide and maintain special care units or make arrangements with voluntary bodies to provide and operate them. All centres will be registered and inspected by the Health Information and Quality Authority (HIQA). In this regard, the new HIQA standards for special care units are now in force.

The case of *CFA v Q (a minor) and Others*[371] concerned the review of a special care order made in favour of the minor, Q. She was aged 15 and had been in special care for approximately two years. She had initially come to the attention of the social work department in March 2013, due to concerns relating to her "at risk" behaviour including incidents of self-harm. Her father, her sole custodian, sought help from the State to manage her concerning behaviours and she was placed, with the consent of her father, in a number of out-of-hours foster placements in January and February 2014. All of these placements broke down and Q was then placed in a private residential unit with a high level of support. Unfortunately, she continued to place herself in extremely high-risk situations and the level of concern for her became so serious that an application was made for an assessment for special care in March, 2014. From April 2014 onwards, she had been placed in each of the three special care units that operate within this State and her stay in each of the three units presented significant challenges to both her carers and to herself. At the time of the review of the special care order in the within proceedings, Q had been in 23 placements of various

[370] S.I. No. 637 of 2017.
[371] [2016] IEHC 335.

types and the Court noted that Q was a young person in deep distress although there had been some improvement.

O'Hanlon J., in her review of the special care order, considered the systemic issue concerning psychiatric services for children in special care which was highlighted by expert evidence in the case. Essentially, the evidence demonstrated a lack of adequate psychiatric input for minors in special care and a national shortage of child and adolescent psychiatrists. This had impacted Q in particular. The Court recognised that public authorities must exercise their statutory authority and that the Court cannot direct the use of public resources in a particular manner. It commented, however, that the inherent jurisdiction of the High Court to detain a child under a special care order 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 warned that it cannot detain a minor under the inherent jurisdiction if the therapeutic rationale is undermined by a lack of resources.

The Court opined that the purpose of the detention of a minor under special care was not only protective, but that there also must be an educative and therapeutic rationale underlying the detention. In this case, the Court found that there was, for a considerable period of time during which this case came before the High Court for intensive welfare review, an inability on the part of some of the stakeholders to grasp that this young person could only be detained under the inherent jurisdiction of the High Court in order to protect the constitutional rights of the minor concerned. This means that the Court must be satisfied that the minor's welfare needs are such that they outweigh the minor's entitlement to liberty, and that the curtailment of the minor's right to liberty will only pertain for so long as those welfare needs absolutely require such measures.

In this vein, for future *ex parte* applications for special care orders by Tusla under the High Court's inherent jurisdiction, O'Hanlon J. stated that she would expect the provision of certain basic documents to the Court. These documents were together to be known as the "Programme of Special Care" and she detailed the requisite documents which should be shared, as appropriate, with the young person, his/her parents, his/her guardian *ad litem*, the Tusla special care court liaison officer, the Court and others with the permission of the young person's allocated social worker, as follows:

(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 Assessment Consultation Therapy Service (ACTS) team.
(6) The sixth document will be a psychiatric treatment/intervention plan and, under the interim protocol, will 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".

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 must accompany the social work court report at each interim stage thereafter in terms of updating documents.

With regard to Q, the Court held that there had been a lacuna in the care provided to Q in the concerned residential placement cell. The Court criticised Tusla and various other agencies assigned to the care of Q for a lack of cooperation and mutual understanding, finding that their lack of an integrated approach to her care had led to Q being detained in secure care for far too long and contributed to a deterioration in her behaviour. The Court noted that Q had been kept apart from other residents in the secure care unit for prolonged periods of time, unbeknownst to her guardian *ad litem* or the Court. This level of deprivation of liberty experienced by Q, O'Hanlon J. found, exceeded what was contemplated by the Court in its order placing Q in special care. Ultimately, O'Hanlon J. modified the special care orders by exercising the inherent jurisdiction of the High Court. She stated that it was clear that a step-down placement should be developed that was specifically tailored to the needs of this minor and that such step-down preparations would be reviewed by the Court. O'Hanlon J. endorsed certain measures to ensure regular psychiatric counselling for Q. The Court criticised Tusla for not having a qualified psychiatric in the State-run facilities and suggested the appointment of same without delay so that the Q would be put under the constant care and supervision of a psychiatrist.

Recommendation

In light of this decision and the failings identified above, the commencement of the new Part IVA of the 1991 Act is to be welcomed. This legislation is necessary to inform the development of standards and regulations with regard to the provision of special care for these particularly vulnerable children. In this regard, the Rules of the Superior Courts (Special Care of Children) 2017 will greatly assist with the implementation of the new statutory framework. Consideration should now be given to permitting these cases to be dealt with in the District Court given the fact that it has original jurisdiction in all child care matters.

3.22 JURISDICTION AND TRANSFER OF PROCEEDINGS – COUNCIL REGULATION 2201/2003 (BRUSSELS II *BIS*)

3.22.1 Article 15 of Council Regulation EC 2201/2003

The relative ease with which families may re-locate from one Member State to another gives rise to particular concerns where child protection issues exist. A basic example of this is where a family leaves his/her country of origin, in which they are known to social services but where no formal court orders have been made, and arrive in Ireland – unknown to our social work department. Often, such movement takes place to evade proposed action by social services in the family's home country. There is no protection for such children, unless families have moved between Northern Ireland and the Republic. Pursuant to the Inter-Jurisdictional Protocol for the Transfer of Children's Social Care Cases between Northern Ireland and the Republic of Ireland, an established protocol is in place for handling these cross-border cases. Where families move from mainland UK or elsewhere in Europe to Ireland, there is a notable absence of a similar protocol or defined procedures.

Pursuant to Article 15 of Council Regulation 2201/2003, child care or parental responsibility cases can be transferred from one jurisdiction to another in certain defined circumstances. Article 8 of the Regulation provides that the courts of a member state in which a child is habitually resident shall have jurisdiction on matters of parental responsibility. By way of an exception to this rule, Article 15 allows the courts of a member state having jurisdiction to adopt other measures "…if they consider that the courts 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 court may, for instance, stay the case or request a court of another member state to assume jurisdiction.

A number of recent cases have touched upon this issue. In *HSE v C.R. and J.M.*,[372] the mother had moved to Ireland from England at a very late stage in her pregnancy and the child was born in Ireland. The Child and Family Agency applied to the court to transfer the case from Ireland to the courts of England and Wales. The Gardaí had invoked section 12 of the Child Care Act 1991 to ensure that the baby was not removed from hospital. An emergency care order and interim care orders followed and the child was placed with foster carers. The HSE then brought an application pursuant to Article 15 of Council Regulation (EC) No. 2201/2003 seeking a request to be made of the courts of England and Wales to assume jurisdiction of the mother's case. Considering the case, the High Court held that it was in the best interests of the child for the courts of England and Wales to determine the matter. In this regard, the Court noted that the courts of England and Wales had conducted lengthy hearings, both at first instance and on appeal in relation to the child care proceedings involving the mother's three other children. Inevitably, therefore, there would be a considerable overlap between those earlier proceedings and any future care proceedings concerning the mother's youngest child born in this jurisdiction. Thus, the Court noted that the courts of England and Wales would have considerable advantages in the case as a result of the long history of involvement that the family had with social services in the UK. In its decision to transfer, the court further noted some additional factors, namely that the fact that the child's extended family are all located in England and Wales which may assist a consideration at some stage in the future to place the child with a member of his extended family. Furthermore, the child's siblings were resident in England, thus the court took the view that there was greater prospect of contact with those siblings as well as other extended family members if the case was transferred to England.

HSE v M.W. and G.L.[373] was an appeal of a decision of the High Court requesting the courts of England and Wales to determine a child care matter pursuant to Council Regulation EC 2201/2003. The Supreme Court held that Article 15 of Council Regulation 2201/2003 "unequivocally extends to public law matters." The court noted that the Regulation itself sets

[372] [2013] IEHC 472.
[373] [2013] IESC 38.

out the test that is to be applied in Article 15 applications. The child must be considered to have a particular connection to the member state, it must be in the best interests of the child for the member state to accept jurisdiction and the other court must be better placed to hear the case.

In *CFA v JD*,[374] the Supreme Court considered the Article 15 process. It had to decide which Irish court was the appropriate one to bring an application under Article 15 of Council Regulation (EC) No. 2201/2003. The question also arose as to how a court could determine the question of habitual residence where a mother and her unborn child recently moved to Ireland to avoid social services in another Member State and the prospect that her child might be taken into care or placed for adoption. In particular, this case concerned a UK national who came to Ireland shortly before the birth of her child. Her elder child was in care in the UK and when she was expecting her next child, she was subject to a pre-natal assessment organised by the UK child protection authorities, who felt that her second child should also be placed in a foster family. In light of this, the mother left the UK and came to Ireland. Her child was born one month after her arrival. Shortly after the child's birth, Tusla obtained an interim care order in respect of the child. Alongside the care proceedings, Tusla brought an application to the High Court seeking the transfer of the case to the High Court of Justice in England and Wales under Article 15 of Council Regulation 2201/2003. This application was supported by the child's guardian *ad litem*.

The High Court authorised Tusla under Brussels II *bis*, to request that the High Court of Justice in England and Wales assume jurisdiction in the case. The mother appealed this decision to the Supreme Court. In this appeal, the question arose as to the proper interpretation of the concept of the "best interests of the child" as set out in Article 15(1) of the Regulation. It was queried whether it should be understood in light of the objective of quickly and speedily determining which court, in which jurisdiction, should hear a case or whether it required an Irish court to carry out a comprehensive examination of the substance of the child's best interests. To clarify the interpretation of this concept, the Supreme Court referred this question to the Court of Justice of the European Union (CJEU) pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU) in July 2015. The Supreme Court also queried to what extent the court to which the Article 15 application

[374] [2017] IESC 56.

is made should take account of either the effect of the application on the right of freedom of movement or the reasons why the mother of the child has exercised that right. A number of questions were referred by the Irish Supreme Court to the European Court of Justice as follows:

1. Does Article 15 of Regulation 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 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 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 2201/2003, have regard to the specific circumstances of the case, including the desire of a mother to move beyond the reaches of social services of her home state, and thereafter to 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?

The CJEU delivered its judgment in October 2016, having given the case priority, but not treating it as coming within the urgent preliminary ruling procedure. In relation to the freedom of movement issue, the CJEU held that the court having jurisdiction in a member state must not take into account either the effect of a possible transfer of the case on the right of freedom of movement of persons other than the child, or the reason why the mother of that child exercised that right prior to the court being seised, unless those considerations were such that there may be adverse repercussions on the situation of the child. With regard to the interpretation of the "best interests of the child", the CJEU concluded that in order to determine that a court of another member state with which the child has a particular connection is better placed to hear the case, the court having jurisdiction must be satisfied that the transfer of the case to the other court is to provide genuine and specific added value to the examination of that case, taking into account the rules of procedure in place in that other member state. In determining that a transfer is in the best interests of the child, the court must be satisfied that the transfer is not liable to be detrimental to the child's situation.

In reaching this conclusion, the CJEU emphasised that Article 15 is an exception to the general Article 8 rule whereby jurisdiction is determined having regard to the child's habitual residence. Thus, Article 15 must be interpreted strictly and there is a strong presumption in favour of the member state maintaining its own jurisdiction. When applying Article 15(1), the state having jurisdiction has to compare the extent and degree of general proximity that links it to the child concerned under Article 8, with the extent and degree of relationship of "particular" proximity demonstrated by one of the factors in Article 15(3) that exists in a particular case between that child and the other member state. In ensuring that the transfer is not liable to be detrimental to the child's situation, 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.

MacMenamin J., delivering the judgment of the Supreme Court and considering the effect of the CJEU's decision, cited the case of *HSE v M.W. and G.L.*[375] in which he had expressed the view that to achieve an expeditious hearing in the only court which was best suited to address and hear all the evidence, the paramount consideration in an Article 15 application should be the appropriate forum to determine the child's best interests. The CJEU ruling, however, distinguished between the questions of "best interests" and that of "forum", thus MacMenamin J. held that the previous decision in *HSE v M.W. and G.L.* was confined to the facts of that case.

The Supreme Court noted that the effect of the CJEU judgment is that the question of potential detriment to a child should be treated as a discrete matter to determine. A court hearing the matter should not limit its evaluation of the child's best interests to the question of forum. The trial judge addressing this case thus should consider the situation of the child; the situation of the foster parents; whether they were willing to look after the child on a long-term basis; the attachment of the child to the foster parents; whether the mother had a viable plan to remain in Ireland; the attachment of the child to the mother; and the effect of the transfer on those relationships.

The Supreme Court noted a number of practical consequences which flowed from the CJEU ruling as follows:

[375] [2013] 2 ILRM 225.

1. The court which first deals with a child care matter with international dimensions must consider the question of whether it is the court best placed. In this case, this is the District Court and there is no need for a separate application to the High Court;
2. The question of "best interests" is to be dealt with in a manner apart from the consideration of "forum";
3. Motivation for parental movement from one jurisdiction to another is not to be considered in the court's assessment, unless those considerations might have adverse repercussions on the situation of the child;
4. The court must assess the question of proximity. In general, there is a strong presumption that the court of the child's habitual residence is the jurisdiction with which the child will have the greatest proximity, but this can be rebutted if there is evidence of a sufficient degree of proximity between the child and another member state which would render the exercise of jurisdiction by the country of habitual residence contrary to the child's best interests;
5. In order to ascertain whether there is a sufficient degree of proximity between a child and another member state to justify a transfer, the court must: (a) consider whether there is a particular connection with another member state; (b) assess the degree and extent of the proximity to the other member state arising from that connection; (c) determine whether the other court is "better placed" which requires consideration of whether the transfer would provide "added value"; (d) in considering whether there will be such "added value", the court may have regard to the rules of procedure in the other state but not its substantive law; (e) establish that the transfer of the case will not have a detrimental effect on the child.

In the intervening period between the reference of this case to the CJEU, which occurred in July 2015, and the CJEU's decision in October 2016, the position of the parties crystallised. The interim care order relating to the child had been extended a number of times and the mother had applied for and was granted access. When the case came back before the Supreme Court following the referral, the court directed Tusla to confirm whether it intended to make an application under Article 15 if the matter was remitted to the High Court. It confirmed that there was no such intention.

MacMenamin J. therefore allowed the mother's appeal, but noted that the elapse of time in court proceedings can have a significant bearing on the potential outcome of these sensitive cases. The Supreme Court also emphasised that in all stages of such litigation, a child's interests are paramount. At paragraph 35 of MacMenamin J.'s decision it is held that a court (dealing with Article 15) should set out, in its judgment and order, the basis upon which, in accordance with the relevant provisions of Brussels II *bis* it is either accepting or rejecting jurisdiction, and also the basis upon which, in accordance with Article 15, it either has or has not decided to exercise its power under Article 15. The benefit to such a thorough approach

will be to ensure that the court's decision (as to whether to exercise its power under Article 15) will be less exposed to a potential judicial review.

3.22.2 Article 10

In *CFA v AS and MS,*[376] the court had to decide whether it had jurisdiction in respect of an application under the Child Care Act 1991 in circumstances where the mother had unilaterally moved with the child to Ireland. Reference was made by the court to the case of *DE v EB,*[377] in which it was held that a unilateral decision by one parent to move a child to another country without the consent of the other is a factor which militates against a finding that there had been a change of habitual residence. It was noted by the judge as significant that since the father had become aware that the child had been brought to Ireland he had not instituted child abduction proceedings.

The court was satisfied on the facts of the case that the child was settled in Ireland and that at the time that the court was seised in November 2016 the child had acquired a habitual residence in Ireland and resided in this jurisdiction with his mother for over one year after his removal by his mother. The court also took into account the views of the child who said that while he wanted some contact with his father he did not wish to return to his old home. The fact that the father had not instituted child abduction proceedings was considered a relevant factor in the case. Reference was made to the European Court of Justice case of *Mercredi v Chaffe*[378] where it was held that the concept of "habitual residence", for the purposes of Articles 8 and 10 of Council Regulation (EC) No 2201/2003 must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment.

3.22.3 Articles 12 and 13

In *CFA v G and Ors* (No.2)[379] the District Court had to determine where jurisdiction lay in accordance with Article 13 of the Regulation which states that "Where a child's habitual

[376] [2017] IEDC 9.
[377] [2015] IECA 104.
[378] C-497/10 PPU.
[379] [2017] IEDC 11.

residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction".

It was accepted by all parties that before determining that the court had jurisdiction under Article 13 of the Regulation based on the presence of the child in the state, the court must determine whether jurisdiction can be determined on the basis of Article 12 of the Regulation.

The court focussed on Article 12(3)(b) and the requirements of the parties accepting jurisdiction in "an unequivocal manner". The European Court of Justice case of *L v M and Ors*[380] was cited, with specific reference to the elements required under Article 12(3)(b) of the Regulation:

> The clear wording of that provision [Article 12(3)(b) of Brussels II *bis*], read in the light of Article 16, thus requires:
>
> (i) the existence to be shown of an agreement;
> (ii) express or at least unequivocal;
> (iii) on the prorogation of jurisdiction;
> (iv) between all the parties to the proceedings;
> (v) at the latest at the time when the document instituting the proceedings or an equivalent document is lodged with the court chosen.

The District Court judge stated that "prorogation in my view implies selection, in advance of proceedings, of the court which is to have jurisdiction." The court was satisfied that there was no agreement on the prorogation of jurisdiction, express or unequivocal, in existence between mother and the Child and Family Agency at the relevant date holding therefore that Article 13 of the Regulation applied, i.e. "the courts of the Member State where the child is present shall have jurisdiction".

3.22.4 Article 16

The District Court, in the case of *CFA v G and Ors*[381] had to determine when the court was seised of proceedings. In assessing seisin the court did "not find that the continuance of protective measures (i.e. 'voluntary care') in the period from July 2015 to July 2016 can render the seisin of proceedings by the court continuous" in circumstances where different

[380] C-656/13.
[381] [2017] IEDC 10.

orders were applied for before the court but proceedings at various junctures were not continuous with orders expiring or withdrawal of appeals. The date when the court was seised was determined to be a date in 2016 related to the set of proceedings before the court.

The next question the court had to consider was the habitual residence of the child on the date when the court retained seisin of the matter. Case 523/07 of the European Court of Justice was quoted in which it was held that:

> ....the physical presence alone of the child in a Member State, as a jurisdictional rule alternative to that laid down in Article 8 of the Regulation, is not sufficient to establish the habitual residence of the child. 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. In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment. In particular, the duration, regularity, conditions and reasons for the stay on 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.

The mother's travel to Ireland, it was heard, was initially referred to as a holiday and she had brought a week's clothing with her. Following her arrival in Ireland she applied for social welfare payments. The child in question was born in Ireland and had spent his life thus far in Ireland, having been received into care hours after birth. It was determined by the court that the child's primary attachment was with his foster carers. The court assessed the factors as set out in case 523/07 as referred to above. In applying those criteria the court determined that the child's habitual residence was Ireland, concluding that the child's presence in the state was 'not temporary'.

Recommendation

In light of the aforementioned decisions and the freedom of movement throughout the EU, it is recommended that a protocol similar to the one that exists between Northern Ireland and the Republic should be developed between Ireland and the rest of the UK and indeed mainland Europe. Such a protocol would enable the efficient and effective handling of cross-country cases where families travel from one jurisdiction to the other, in circumstances where that family is known to the social services department in the originating country or

orders have been made there. The impact of the above mentioned Supreme Court decision should also be considered in this regard – most importantly the comments of MacMenamin J. who recognises that the duration of court proceedings in these sensitive cases, concerning the welfare of a child, can have a significant bearing on the ultimate outcome in a case. In this vein, every effort should be made to facilitate the speedy hearing and resolution of Article 15 applications.

3.23 "SIGNS OF SAFETY" POLICY

In the 1990s, a radical approach to child protection, known as "Signs of Safety" was pioneered by Dr. Andrew Turnell and Steve Edwards in collaboration with child protection practitioners. In mid-2008, the Department for Child Protection in Western Australia adopted Signs of Safety as its child protection practice framework. This has continued ever since, with revisions being made following further work by Turnell.[382] The Department for Child Protection in Western Australia therefore utilises Signs of Safety as its child protection practice framework across all Departmental child protection services. It is used to answer the crucial questions involved in child protection, namely - what supports are needed for families to enable them to care for their children; whether there is sufficient safety for the child to remain within his or her family; whether the situation is so dangerous that the child must be removed from the care of his or her parents; and regarding children within the care system, whether there is enough safety for the child to return home.[383]

There are three core principles that underpin Signs of Safety as an approach. First, the emphasis is on working relationships. Positive and constructive working relationships are promoted. This does not merely apply between professionals and family members, but also applies to relationships between professionals themselves. Such co-operation leads to effective practice in child protection situations. Thinking critically is crucial. A stance of inquiry should be taken in cases, being conscious of the distinct positions those involved are likely to hold. As a professional, admitting that errors can be made actually serves to help to minimise mistakes. Finally, recognising good everyday practice is a key way of learning, and

[382] Government of Western Australia, Department for Child Protection: "The Signs of Safety Child Protection Practice Framework"; September 2011; 2nd edition.
[383] See *Signs of Safety as the Department for Child Protection's Child Protection Practice Framework*, available at https://www.dcp.wa.gov.au/Resources/Documents/Policies%20and%20Frameworks/SignsOfSafetyPolicy.pdf.

this involves documenting practitioner and clients' descriptions of on-the-ground good practice in complex cases.

In essence, the general approach proposed within the Signs of Safety policy is strength-based and safety-organised, grounded in partnership and co-operation with children, their families and wider networks of support. Since its introduction in Western Australia, Signs of Safety has been adopted in 15 other countries, including Canada and parts of the UK. It has had a positive outcome in these jurisdictions, leading to fewer children in care, safer children and empowered parents. In May 2017, Tusla formally announced that it has implemented Signs of Safety as Ireland's national framework for child protection assessment and practice. Adopted as part of Tusla's broader Child Protection and Welfare Strategy, *Creating Effective Safety; Child Protection and Welfare Strategy 2017-2022,* the aim of Signs of Safety is to provide one uniform, nation-wide approach to assessment and intervention in this jurisdiction. It represents one of six "elements", or "cogs" to the overarching strategy – all of which are interconnected to operate together to transform how Ireland protects its children.[384]

The general approach proposed within Signs of Safety is a change in attitude for professionals working with vulnerable families. It emphasises a need to move away from seeing the dangers that arise in such families, to also noticing and building on their strengths. Working with the family to keep children safe in their home environment is prioritised, as opposed to acting hastily to remove the children from their family's care. Adopting this approach represents a considerable shift in how Tusla approaches child protection and it is expected that it will take three years for the strategy to be embedded throughout Tusla. Training has already commenced and is intended to be delivered to all staff and partner agencies, with every social worker being trained in the new model. It aims to ensure that Tusla as a whole takes a uniform approach to child protection across its separate service areas.

While the adoption of Signs of Safety in Ireland is to be commended and its success in other jurisdictions recognised, certain considerations must be borne in mind with regard to Ireland's implementation of this approach. It must be remembered that in applying Signs of Safety, Tusla is obliged to have regard to its primary responsibility to ensure that children are

[384] CEO Foreword, Fred McBride; *Creating Effective Safety; Child Protection and Welfare Strategy 2017-2022.*

protected. Article 19 of the United Nations Convention on the Rights of the Child (UNCRC) requires that States "…take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."[385] This necessitates the protection of children from harm and abuse and is reflected in Irish law. Notwithstanding the approach promoted by Signs of Safety, it is the State's obligation to ensure the protection of its children. It is recommended, therefore, that particular consideration be given to how Signs of Safety operates alongside Article 19 and the specific obligations that the UNCRC places on the State. The implementation of Signs of Safety must be closely monitored and assessed to ensure its operation does not conflict with and work against the provisions of Article 19 UNCRC.

In the new overarching strategy for 2017-2022, *Creating Effective Safety*, Signs of Safety is stated as reflecting best practice principles, which are fundamentally underpinned by the *Children First* principles. In 2011, the government published *Children First: National Guidance for the Protection and Welfare of Children (2011).* This is a comprehensive and detailed policy document which was revised in 2017. It contains guidelines to assist individuals and agencies in identifying and reporting child abuse and neglect, advising them how to deal effectively with these concerns. Crucially, it spells out 10 key principles, known as the Children First principles, that should inform best practice in child protection and welfare. These principles include the following: that the best interests of the child should be paramount; that the safety and welfare of children is everyone's responsibility; that intervention should be proportionate to support families and keep children safe; that intervention should build on existing strengths and protective factors within the family; that early intervention is key to better outcomes; and that children have a right to be heard. The Children First guidelines and principles are not mandatory in nature and are therefore not legally binding. In November 2015, the Children First Act was enacted to put these guidelines on a statutory footing. Included therein is a statutory obligation on certain persons, known as "mandated persons" to report child protection concerns to Tusla and organisations who provide services to children must carry out risk assessments and prepare child safety statements.

[385] Article 19(1) UNCRC.

Recommendation

Particular consideration should be given to how Signs of Safety operates alongside Article 19 of the United Nations Convention on the Rights of the Child (UNCRC) and the specific obligations that the UNCRC places on the State. The implementation of Signs of Safety must be closely monitored and assessed to ensure its operation does not conflict with and work against the provisions of Article 19 UNCRC. This will enhance effectiveness and resolve any operational difficulties. A legal framework would support the operation of Signs of Safety – introducing mechanisms such as pre-court mediated procedures and information sharing.

3.24 SPECIALIST FAMILY COURTS[386]

Ireland does not have a specialist family or child care court system *per se*. Child care cases are primarily dealt with by the District Court with the possibility of appeal to the Circuit Court with family law cases being dealt with at the District and Circuit Court level for the most part, as always with the possibility of appeal to the higher courts. Cases dealing with judicial separation, divorce and nullity must be brought either in the Circuit Court or the High Court. Applications under the Adoptions Acts and cases of child abduction (under the Hague Convention and Brussels Regulation) must be brought in the High Court. In Dublin there are a number of judges who, at any one time, hear family and child law matters. Outside Dublin such cases are heard on particular days in the general Circuit and District Courts by judges who do not specialise in family law, but instead preside in such cases as the necessity arises.

Difficulties with the courts structure, in its current form, include: excessive caseloads resulting in inadequate hearings and delays; inconsistency in decisions.

There have been calls for some time for the establishment of specialist family courts.[387] The Law Reform Commission in 1996 published a Report on Family Courts. Many of the recommendations of the report of the Law Reform Commission remain relevant–reforming the court structure by unifying jurisdictions and establishing regional courts presided over by

[386] The term 'family courts' for the purposes of this section should be understood to mean any court that hears family matters involving children or child care matters.
[387] See 'Reforming the courts' *The Irish Times*, 19 July 2012 and 'Chief Justice wants way paved for specialist courts' *The Irish Times*, 29 June 2012. The Law Reform Commission published a Report on Family Courts in 1996 and identified a "system in crisis".

judges with appropriate expertise and experience; access to information, advice and mediation[388]; case management and representation of children and their views.

Strictly speaking all family law courts operate within the same rules as other courts and therefore it is properly speaking the case that those rules of practice and procedure should be enforced in all family law hearings. Certain formal changes have been made to make family law proceedings more informal and less intimidating, e.g. in relation to the attire of judges and legal representatives. However, it cannot be disputed that family law proceedings, particularly those involving children, are inherently distinct from many other types of civil proceedings. In the cases involving children, the welfare of the child is the paramount consideration in formulating decisions which may affect those children. There does not appear to be a coherent view, either amongst the judiciary or legal practitioners, as to how family law proceedings should be conducted. Perhaps the starting point of this consideration should be an acknowledgment that family law proceedings are by their nature distinct from other civil proceedings.

3.24.1 Child Care Courts

It is envisaged that the child care courts are to be grouped in the same pillar as family courts in any restructuring of the courts system.

While in the Dublin Metropolitan District, there are certain judges hearing child care matters on a full-time basis, arrangements around the country vary, with on occasion child care matters dealt with on the family law day once per month other than emergency applications, and in other cases child care is at the conclusion of an ordinary District Court list.

The new proposed structure of the family courts could consist of a lower family court of limited jurisdiction and a higher court of unlimited jurisdiction. The current jurisdiction of the family District, Circuit and High Courts has been determined in a piecemeal fashion as various family law statutes have been introduced. What is required is an examination of matters which could be best described as complex matters which would be dealt with in the superior court and less complex matters which could be dealt with in the lower court. The

[388] See Mediation Act 2017 (No. 27 of 2017).

higher court would have all the jurisdiction of the current family Circuit and High Court. Appeals from the lower court would be heard by the higher court or possibly by the Court of Appeal. I am aware that the Department of Justice and Equality is currently undertaking significant work on developing a family court structure.

A specialist family court in Ireland could involve specialist judges dealing with cases more expeditiously. It could also enable issues in family law cases to be addressed in a more holistic manner, and could facilitate access to mediation as well as other forms of support. A number of jurisdictions have such a court structure.

Recommendations

It is recommended that child care law should always take place on a separate day at a separate sitting in light of the highly sensitive matters being litigated and the emotional trauma associated with being a respondent in these proceedings. At a minimum, child care matters should be heard on the same day as family law matters.

It is recommended that judges who are to be assigned to deal with child care matters should be given comprehensive training in regard to issues which are particular to child care law.

It is recommended that experts in the area of attachment, child development and the impact of abuse ranging from neglect to sexual abuse should be provided to judges who are allocated to deal with child care matters in light of the fact that decisions made by these judges have such far-reaching consequences for children and families.

Any designated specialist family courts should be staffed by specially trained judges but specialist judges should remain part of a single judicial body.

Training should be provided in advance of an assignment to child care and should be on-going and regular.

Other practical matters that are necessary to ensure that child and family law matters proceed smoothly include: having translators within easy reach to avoid lengthy delays or

adjournments when there are language problems and providing sufficient space for parties to consult with their legal representatives.

Regard should be had to the family court systems that exist in other jurisdictions such as the United Kingdom and Australia.

3.24.2 Voice of the child

The new constitutional requirement to hear the voice of the child in certain family law proceedings has the potential to be of transformative effect and consequentially any restructuring of the family law courts should focus on trying to integrate children into the process as much as possible where appropriate having regard to their age and degree of maturity.

There are many ways in which the voice of the child can be heard: through the child's parents or those acting *in loco parentis*, by the child giving evidence directly in court, by interview with the judge, through a third party expert report or through the guardian *ad litem* or mediation attended by the parents. In any restructuring of the family and child care court system, serious thought must be put into the manner in which the voice of the child can best be heard in line with our obligations under the Constitution. In any new courts structure, steps must be taken to ensure that the system is conducive to hearing the voice of the child. If, for example, children are to be interviewed by judges, the environment should be child-friendly.

The constitutional amendment could be viewed as an opportunity for a fundamental reappraisal of how disputes concerning children are dealt with by the courts. Rather than see the obligation to hear the voice of the child as a burden or procedural hurdle which must be addressed, the focus of the courts should perhaps be to make the child the genuine centre of focus.

SECTION 4: DOMESTIC CASE LAW

This section considers various decisions of the Irish courts throughout 2017 in which issues relating to child protection or children's rights emerged, other than cases under the Child Care Act 1991. The issues that arose in the cases that are examined include: powers of a court under section 11 of the Guardianship of Infants Act 1964, as amended; the constitutionality of the ban on asylum seekers working; the deportation of the parent of an Irish citizen; cases which involve a criminal/civil law overlap; developments in Hague Convention/child abduction cases; and the jurisdiction of the High Court in cases involving a foreign family law matter.

4.1 POWERS OF A COURT UNDER SECTION 11 OF THE GUARDIANSHIP OF INFANTS ACT 1964

The case of *NK v SK*[389] was an appeal of a High Court decision in judicial separation proceedings wherein the court had granted interim custody of the children (aged 18 and 15) to the wife and had directed that the husband leave the home pending the determination of the judicial separation proceedings. Two important issues were raised in this case:

(i) Does the court have jurisdiction to make an order for custody in respect of a young adult who has attained majority?
(ii) Does the court have jurisdiction under section 11(1) of the 1964 Act (which is unrelated to the Domestic Violence Act 1996) to exclude a spouse from a dwelling which he/she owns?

The 18-year-old boy in question was autistic and was incapable of caring for himself independently of his parents.

The Court of Appeal noted that no evidence was heard in the High Court sufficient to meet the threshold pursuant to section 3(2)(a) of the Domestic Violence Act 1996 that "there are reasonable grounds for believing that the safety or welfare" of the wife or children required the barring of the husband from the house. No finding of domestic violence was made in the High Court but the court adopted the view that because the welfare of the two younger children required it, the husband could be directed to leave the house. In that vein, O' Hanlon

[389] [2017] IECA 1.

J. made an interim exclusion order as well as an interim custody order awarding the wife custody of the two younger children.

In relation to the first question, the definition of 'child' is set out at section 2(1) of the 1964 Act as a "person who has not attained full age". "Full age" is defined at section 2(1)(b) of the Age of Majority Act 1985 as a person who has attained his/her 18th birthday. Section 11(5) and 11(6) of the 1964 Act provide a specific definition of the word 'child' for the purposes of maintenance under section 11(2)(b) by providing that a 'child' shall include references to a person who is over 18 but is in full-time education and is under 23 years old.

Section 11(6) of the Guardianship of Infants Act 1964 states that "subsection (2)(b) shall apply to and in relation to a person who has attained the age of 18 years and has a mental or physical disability to such extent that it is not reasonably possible for the person to maintain himself or herself fully, as it applies to a child." The above provisions relate to maintenance only and the Court of Appeal clarified that there is no jurisdiction under the 1964 Act to make a custody order in respect of a person over the age of 18 and in that respect the custody order made in respect of the child was set aside by the Court of Appeal.

In relation to the second question, it was noted at the outset that there is a jurisdiction to exclude a spouse from the family home under the Domestic Violence Act 1996. Under the Judicial Separation and Family Law Reform Act 1989, the Family Law Act 1995 and the Family Law (Divorce) Act 1996 there are provisions to make property transfer orders which may require the transfer or sale of the family home consequential upon a separation or divorce. It was noted that section 10(1) and 10(2) of the 1995 Act enables the court to make an order consequent upon a decree of judicial separation or at any time thereafter excluding one spouse from the family home.

The question before the court was related to the ability of a court under section 11(1) the 1964 Act to make an order excluding a spouse from the family home for reasons other than a property transfer order or domestic violence. The wife's application to exclude the husband from the house was based first on the welfare of the children pursuant to section 11 of the 1964 Act and secondly pursuant to the terms of an application for a barring order brought under section 3 of the 1996 Act which was not proceeded with in the District Court and did not provide the basis for the order which O'Hanlon J. made in the High Court. There was no

evidence before the High Court of any domestic violence by the husband. O'Hanlon J. seems to have made the High Court order on foot of the evidence given by a clinical psychologist that the father's conduct was likely to cause "child alienation" stating that in order to prioritise one of the child's interests the mother should move into the family home rather than the father.

In assessing the jurisdiction of the High Court to make such an order under section 11 of the 1964 Act, Hogan J. in the Court of Appeal noted that there were "at least some options open to her which fell short of an exclusion order directed against the husband", noting that it was "necessary for the trial judge to explain the reasons why she took the particular option which she did, not least given the unusual - if not entirely unprecedented - step which she did in fact take." Hogan J. noted that "a mandatory exclusion order from a property owned or partly owned by a spouse is a matter of profound significance and clearly engages the constitutional rights of the party affected." The learned judge went on to highlight "the necessity of ensuring that any order made excluding a spouse from a family home outside of the special jurisdiction conferred by the 1996 Act must have a secure and clear legal basis".

Hogan J. held that "if the courts enjoyed a jurisdiction to make an exclusion order under section 11 of the 1964 Act in cases involving children there would be no necessity at all to show that there was such a risk to the safety of the children: it would be sufficient to show that the exclusion order was justified by general considerations of child welfare which were independent of issues of safety, fear or molestation." Hogan J. applied the same reasoning as he had in the case of *JG v Judge Staunton*[390] in asserting that if the Oireachtas had intended section 11 to be used in such a far-reaching manner, words to that effect would have been required within the provision.

The court then assessed whether such a jurisdiction could be derived from Article 42A.4 of the Constitution. Hogan J. pointed out that it would have been helpful if the High Court had expressly identified some of the statutory criteria (under section 31 of the 1964 Act as inserted by section 63 of the Children and Family Relationships Act 2015) which compelled it to make its decision and specifically why the older child's views on the potential exclusion of his father from the family home were not ascertained. Hogan J. in the Court of Appeal

[390] [2013] IEHC 533.

found that "despite the breadth of generality of Art.42A.4 and the corresponding legislation designed to give it effect (i.e. the 1964 Act as amended by the 2015 Act) there is nothing in the 1964 Act which sanctions the *exclusion* of a parent from the family home on the general ground that the child's best interests so require where this is divorced from any finding of any actual or potential misconduct on the part of the parent." There would have to have been express provision permitting such an order had this been the intention of the Oireachtas. Hogan J. rejected the submission that the court possessed an inherent jurisdiction to direct the exclusion of a spouse from a family home where he/she would otherwise enjoy a legal right to reside in that property.

In light of the above, Hogan J. held that the order of O' Hanlon J. in the High Court excluding the father from the family home should be set aside by reason of an absence of jurisdiction to make such an order under section 11 of the 1964 Act. Hogan J. observed that "clear statutory words are necessary before a jurisdiction which inevitably involves the over-riding of the constitutional rights of the spouse in question can properly be exercised."

4.2 ASYLUM/IMMIGRATION AND CHILDREN

4.2.1 Constitutionality of ban on asylum seekers working

The case of *NHV v Minister for Justice*[391] examined the ban under section 16(3)(b) of the International Protection Act 2015 (and section 9(4) of the Refugee Act 1996) on asylum seekers in Ireland seeking or entering employment. The case, heard in 2017, concerned a Burmese asylum seeker who had arrived in Ireland in 2008 and applied immediately for refugee status. In May 2013, he was offered employment in the Direct Provision facility in which he was living. The man then brought a challenge to section 9(4) of the 1996 Act and sought a declaration of incompatibility with the Charter of the European Union, the European Convention on Human Rights and the Constitution. The man in question lost his case in the High Court and also lost his appeal to the Court of Appeal. Hogan J. in the Court of Appeal, although dismissing the claim in relation to EU law and in relation to the European Convention on Human Rights dissented from the rest of the court and held that the man, although a non-citizen, was entitled to rely on an unenumerated right to work protected by Article 40.3 of the Constitution. Although the man was eventually granted refugee status the

[391] [2017] IESC 35.

Supreme Court went on to consider his appeal in light of the view that the issue was of general public importance and was bound to arise again in other cases.

O'Donnell J. in the Supreme Court held that, although the man in question had been offered a job, it would not have been necessary to show that he had such an offer. The Supreme Court again rejected the man's arguments as to his rights under the Charter of the European Union or the European Convention on Human Rights.

The first question that O'Donnell J. addressed was whether a non-citizen can rely on the unenumerated rights provisions of the Constitution, in particular the right to work. Noting the complexity of this issue, O'Donnell J. noted "the position has emerged whereby non-citizens have been permitted to rely on some rights but found to be precluded from relying on others which are plainly closely connected to concepts of citizenship and loyalty to the State such as voting". O'Donnell J. also pointed out that there is no consistency in the Constitution itself with the use of the words 'person' and 'citizen'. He went on to hold somewhat obtusely that "the obligation to hold persons equal before the law 'as human persons' means that non-citizens may rely on constitutional rights where those rights and questions are ones which relate to their status as human persons, but…differentiation may legitimately be made under Article 40.1 having regard to the differences between citizens and non-citizens, if such differentiation is justified by that difference in status." Clarifying the position, O'Donnell J. held that: "In principle I consider that a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right including possibly the right to work which has been held guaranteed by Article 40.3 if it can be established that to do otherwise would fail to hold such a person equal as a human person."

O'Donnell J. pointed out in his judgment that it is rare for a person to be precluded by law from seeking employment and that it would be almost impossible to apply such a ban to a citizen. The Supreme Court then went on to conduct an equality and fundamental rights analysis, examining whether "to deny any protection to the applicant would be to fail to treat him equally as a human person. This involves a consideration of whether the right is in essence social and tied to the civil society in which citizens live, in the way that it might be said that voting is limited by belonging to the relevant society or whether the right protects something that goes to the essence of human personality so that to deny it to persons would be to fail to recognise their essential equality as human persons mandated by Article 40.1."

The question that was then examined was whether legitimate distinctions can be drawn between citizens and non-citizens and in particular those whose only connection to the State is that they have made an application for asylum status which has not yet been determined. O'Donnell J. said that the differences between citizens and non-citizens are clear and would justify a significant distinction in terms of employment. Therefore, the question to be decided by the court was whether such a difference justified the distinction. The argument on behalf of the State was that if asylum seekers enjoyed a right to work that would act as a 'pull factor' for potential applicants.

O'Donnell J. pointed out that section 16(3)(b) of the International Protection Act 2015 (and section 9(4) of the Refugee Act 1996) does not limit the right of asylum seekers to work but completely prohibits them working. The length of time that applicants spend in the Irish asylum status was also raised as significant.

The Supreme Court concluded that "the right to work at least in the sense of a freedom to work or seek employment is a part of the human personality and accordingly the Article 40.1 requirement that individuals as human persons are required to be held equal before the law, means that those aspects of the right which are part of the human personality cannot be withheld absolutely from non-citizens." Although there are differences between citizens and non-citizens, O'Donnell J. asserted that he could not "accept that if a right is in principle available, that it is an appropriate and permissible differentiation between citizens and non-citizens, and in particular between citizens and asylum seekers to remove the right for all time from asylum seekers" holding that the differences between asylum seekers and citizens could not continue to justify the exclusion of an asylum seeker from the possibility of employment.

The length of time that applicants spend within the asylum system was also considered by O'Donnell J. who noted that "if there was a legal or practical limitation upon the amount of time during which an application for asylum status could be processed then a provision in terms of section 9(4), itself unlimited as to its time span, could be permissible." Thus, the main problem with the ban on asylum seekers working was with its absolute and indefinite nature. In circumstances where there was no temporal limit on the ban, O'Donnell J. held that the absolute prohibition on seeking employment contained in section 16(3)(b) of the International Protection Act 2015 was unconstitutional "in principle".

In the aftermath of this decision the Irish government announced that it is to opt into the *EU Reception Conditions Directive* (2013/22/EU), which provides for and regulates asylum seekers' right to work. This is to be welcomed. In January 2018, the Minister for Justice and Equality provided some guidance on how the State is to respond to the Supreme Court May 2017 decision prior to Ireland's opting into the *EU Reception Conditions Directive.*

On 9 February 2018, the Supreme Court formally declared that the absolute ban on asylum seekers seeking employment is unconstitutional. It declared that section 16(3)(b) of the International Protection Act 2015 is inconsistent with Bunreacht Na hÉireann and no longer forms part of Irish law.

Since 9 February 2018, asylum seekers can apply for employment permits under the existing Employment Permits Act 2003. A number of conditions will apply. Firstly the employment must have a starting salary of €30,000 per annum and that it cannot otherwise be filled by an EU citizen or a person with full migration status in Ireland. It should also be noted that there are a number of employment sectors which asylum seekers are prohibited from seeking employment in. A central question is whether this interim scheme on the right to work for asylum seekers complies with the Supreme Court's decision on the right to work for asylum seekers.

Recommendations

The recommendations of the Working Group Report on the Protection System and Direct Provision (McMahon Report) should be implemented in order to show "greater respect for the dignity of persons in the system" and improve "their quality of life by enhancing the support and services currently available".

Specifically the following recommendations of the McMahon report should be implemented:

- *A 12 month limitation period for the processing of all refugee status and subsidiary protection claims should be put in place;*
- *In order to ensure the efficient operation of the single procedure, all individuals in the protection, leave to remain or deportation processes, for 5 years or more, should, in general, be granted either protection status or leave to remain;*
- *There should be a multi-disciplinary assessment of needs of protection applicants within 30 days;*

- *Improvements to accommodation should be made such as the provision of lockers and the provision of a recreational space for children;*
- *In relation to child protection, access to cultural diversity training for social workers should be provided;*
- *Community outreach in the form of partnership agreements with local leisure and sports clubs should be provided;*
- *Families should have access to cooking facilities and private living spaces in so far as practicable;*
- *RIA should without delay "develop a set of criteria" taking into account the multipurpose nature of bedrooms in direct provision accommodation as well as conducting a 'nutritional audit';*
- *RIA should conduct a "review of security arrangements" as well as the establishment of an inspectorate to assess accommodation;*
- *The Child and Family Agency (CFA) "should liaise" with RIA to develop a child welfare strategy and to advise on individual cases;*
- *RIA, in conjunction with the CFA, "should review" its House Rules as regards parents leaving children under 14 unsupervised;*
- *The CFA, HSE and RIA "should collaborate" to provide early intervention and onsite supports to direct provision residents.*

The McMahon report recommends that provision be made for access to the labour market for protection applicants who have been waiting on a first instance determination for over 9 months. Other qualified recommendations contained in the McMahon report include:

- *Access to education (including access to homework clubs) for children living in Direct Provision;*
- *Health care supports;*
- *Supports for separated children;*
- *Linkages with local communities;*
- *Support for Vulnerable Protection Seekers, including LGBT Protection Seekers;*
- *A review of pregnancy and family planning issues, including crisis pregnancy issues that arise.*

4.2.2 Deportation of the parent of an Irish citizen

The case of *Igbosonu (a minor) v Minister for Justice & Ors*[392] concerned the deportation of the parent of an Irish citizen child. The father of the child had been convicted of a criminal offence and given a five year sentence with two years suspended. A deportation order issued in respect of the father. The father unsuccessfully applied to revoke the deportation order based *inter alia* on the rights of the child, unborn at that time. Subsequent to that refusal the father instituted judicial review proceedings challenging the deportation order.

[392] [2017] IEHC 61.

As part of its consideration of the judicial review the court assessed whether i) the best interests of the child were considered; ii) the decision in *A.O.* should have been relied on and iii) whether the judgment of the European Court of Justice in the case *Gerardo Ruiz Zambrano*[393] was complied with. The judge pointed out that, even if the father were to be deported, the citizen child would not be forced to leave the State/European Union due to the fact that his mother as an Irish citizen would remain here. For that reason the court determined that the case of *Gerardo Ruiz Zambrano* did not apply. Humphreys J. determined that the Minister had engaged in a proportionality exercise as was required under *Fajujonu v Minister for Justice*[394] where members of a family are Irish citizens. Reference was made to the case of *A.O. and D.L. v Minister for Justice*[395] and the principle that the constitutional right of an Irish-born child to the company, care and parentage of its parents within the State was not absolute and unqualified. Reference was also made to *Oguekwe v Minister for Justice*[396] that in making a deportation order, the Minister should weigh the factors and principles in a just manner to achieve a reasonable and proportionate decision and be satisfied there was a substantial reason for deporting the non-national parent in a manner that was not disproportionate. Humphreys J. held that the Minister had engaged sufficiently in such a proportionality assessment. Interestingly, Humphreys J. determined that the Minister having stated that he had considered the child's best interests in making the deportation order was not required to set out a more elaborate breakdown of his consideration of the best interests of the child, as was suggested by the father's lawyers.

4.3 CIVIL AND CRIMINAL LAW OVERLAP

In *DPP v AB*,[397] the issues that arise in a case of an overlap with the criminal justice system where the child might also be the subject of civil law proceedings (*i.e.* special care) were examined. Helpful guidelines were handed down by O'Connell J. in the District Court as to how to approach such cases.

The case highlights the issues that arise where a young person can be involved with the criminal justice process as well as civil detention in the form of special care. The young

[393] Case C-34/09.
[394] [1990] 2 IR 151.
[395] [2003] 1 IR 1.
[396] [2008] 3 IR 795.
[397] [2017] IEDC 12.

person in question suffered from a number of disorders including autism and attention deficit hyperactivity disorder. The boy in question had been tried in the children's court in respect of a number of charges including criminal damage and assault. The judgment refers to the boy living in a residence run by a charitable organisation. Reference is then made to the criteria for admission of children to special care. At the conclusion of the criminal proceedings, the defence solicitor applied for a dismissal on the basis that at the time of the charges, the boy was either detained, or about to be detained, in a Special Care Unit as a result of his challenging behaviour and that it was precisely the escalation of his behaviour that facilitated a successful application to the High Court. The defence solicitor submitted that for the Court to convict the boy of the charges would amount to a double penalty. While not invoking the doctrine of double jeopardy, the defence stated that *AB* would be criminalised for conduct which was compounding the effects of his civil detention. The prosecution argued that this was a criminal trial and the charges and summons were entirely separate and distinct from the legal issues placed before the civil proceedings in the High Court. It was argued that both the High Court and the District Court are charged with fulfilling entirely different functions within the justice system and enjoy the presumption that they will uphold the constitutional and international rights of the child.

The distinctions between the special care system and the criminal justice system were examined with the judge noting:

> The legal test applied by the High Court in reaching its decision was based on the civil standard of proof, namely, 'the balance of probabilities'. The application for the High Court Special Care application is moved by an agent of the State whose duty it is to look after the welfare of children at risk. In contrast the Children Court is charged with hearing criminal complaints validly placed before it by way of summons or charge sheet by the appropriate prosecuting authority ... it must adjudicate upon the matter and establish either guilt or innocence of the child. As the prosecutions against the child were validly placed before the Court it was therefore submitted that the Court must determine the prosecutions in due course of law.

It was acknowledged by the judge that:

> the Children Court does not, however, ignore welfare concerns. Specific sections of the 2001 Act, also deal with welfare. For example, section 77 of the 2001 Act, permits the court, if it considers that the child before it is in need of care and protection, to adjourn proceedings and direct a Child and Family Welfare conference. The "best interests" of the child is also a significant part of sentencing in criminal cases concerning children as evidenced by the criteria set out in section 96 of the 2001 Act.

Reference was made to relevant literature including the Director of Public Prosecutions' Guidelines for Prosecutions and the importance of not engaging in unnecessary criminalisation (of children). The judge stated that "a referral to the Children Court should not be regarded as an automatic response to alleged offending behaviour by a child in a Special Care Unit, irrespective of the child's history including, if relevant, criminal history."

A best practice model, as follows, was put forward by O'Connell J. who noted the competing requirements in such cases i) to ensure that that vulnerable children in a Special Care Unit have a fair trial; ii) to ensure that children, their families, victims and the public have confidence in the criminal justice system; and iii) to comply with the provisions of the 2001 Act and international best practice:

- A special care unit should have an individual disciplinary policy incorporated into its Care Plan for each child and this should be tailored to each child, bearing in mind the child's needs.
- There should be clear guidelines and agreement with An Garda Síochána, the CFA and the care unit as to when it is appropriate to involve the Gardaí.
- A copy of the written policy, a statement from the special care unit and how the policy has been applied to a particular incident should always be available for inspection.
- All cases should be reviewed by the Garda Diversion Programme before the case is brought to court.
- The reasons for the charge and unsuitability for the Garda Diversion Programme [if applicable] should be clearly recorded. The factors that determine how the public interest is satisfied in bringing the charges should also be clear and recorded.
- The views of the child's social workers, counsellor or other relevant support person should be obtained as to the effect of the criminal justice intervention on the child, particularly where the child suffers from an illness or disorder.
- The views of the victims and their willingness to attend court, give evidence, attend family conferences or other restorative justice or diversionary programme should be ascertained at an early stage and at a minimum prior to the case being set down for trial.
- The views of the child and how this should be addressed should be ascertained.
- Subject to the consent of the child's defence lawyer any apology or reparation of the child should be available to the court. The matter should be discussed prior to court.
- All aggravating and mitigating factors should be presented to the court and should be recorded.
- The child's medical history should be available but care should be taken that matters are not disclosed to the court which could prejudice a child's rights without consent.

Section 143(1) of the Children Act 2001 was cited which provides that "[t]he court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child and that a place in a children detention school is available for him or her" as well as Article 37 of the United Nations Convention on the Rights of the Child which provides that "(a) the arrest, detention or imprisonment of a child

shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his or her liberty unlawful or arbitrarily."

The judge observed that the Children Court cannot sentence a child on welfare grounds but it can take welfare concerns into account both during the proceedings and during the sentence hearing. Specifically the Children Court can direct the CFA to convene a Family Welfare Conference under Part 2 and section 77 of the 2001 Act which is what the court did and adjourned proceedings.

Recommendations

It is recommended that the Children Act 2001 be amended so as to include specific reference, within the provisions dealing with sentencing, to the principle that the best interests of the child shall be the paramount consideration.

Specific reference should also be made within the sentencing provisions of the Children Act 2001 to require consideration of the fact that the child, the subject of the proceedings may already be in (civil) detention such as special care.

4.4 DEVELOPMENTS IN HAGUE CONVENTION/CHILD ABDUCTION CASES

In *KW v PW*,[398] the Court of Appeal was asked to decide the habitual residence of two young boys who had been had been born and raised in Australia to an Irish father and an Australian mother. Hogan J. pointed out that the court had to determine *only* the question of habitual residence and the answer to that question would determine in the manner mandated by the 1980 Hague Convention which courts (in this instance, whether the Irish or the Australian courts) had jurisdiction to decide the issues of custody which arose in respect of these two boys. In essence the court had to determine (i) the habitual residence of the children, and (ii) whether there was a wrongful removal or a wrongful retention of the children within the meaning of Article 3 of the Convention. After the children had been brought to Ireland the husband sought custody of the children in the Circuit Court and the wife instituted child

[398] [2016] IECA 364.

abduction proceedings in the High Court. O'Hanlon J. in the High Court held that the children were habitually resident in Ireland. The net effect of that judgment was that the Irish courts – rather than their Australian counterparts – had jurisdiction to hear the custody proceedings. The appeal came before Hogan J. in the Court of Appeal.

The parents had come to Ireland with the children but the relationship had deteriorated with the father seizing the children's passports and obtaining an ex parte order from the local Circuit Court restraining the wife/ mother from removing the children from the jurisdiction.

A child psychologist was appointed to ascertain the views of the child who appeared to believe he was going back to Australia with his mother. However, O' Hanlon J. concluded that little weight could be attributed to his views given his age (5 years old). O'Hanlon J. addressed the issue of settled intention of both parents and concluded that it was the intention of the parties to move to Ireland contrary to the wife's view that the husband had wrongfully removed the child/children. The evidence of each party was produced on affidavit rather than orally. In the High Court, O'Hanlon J. found in the circumstances that the children had changed their place of habitual residence to Ireland and there could consequently be no wrongful retention within the meaning of Article 3 of the Hague Convention. On appeal, however, Hogan J. found that the evidence fell short of establishing that there was a settled and mutual decision to effect a change of habitual residence. Hogan J. examined the relevant case law and categorised the habitual residence test as follows: "The authorities establish that young children can lose their habitual residence where the family makes a settled decision to leave one country (in this instance, Australia) in order to take up residence in another country" and that a "unilateral decision by one parent to move a child to another country without the consent of the other is a factor which militates against a finding that there had been a change of habitual residence."

The Supreme Court case of *AS v CS (Child Abduction)*[399] was affirmed with its test of whether the parties "adopted [Ireland] voluntarily and for settled purposes" as the country where the "parties would live as part of the regular order of their lives for the time being, whether of long or short duration." The case of *Re R (Abduction: Habitual Residence)*[400] was also cited in which it was held that: "The test for habitual residence is whether the residence

[399] [2009] IESC 77 and [2010] 1 IR 370.
[400] [2004] 1 FLR 21.

was for a settled purpose, which might be either a purpose of short duration or conditional upon future events. The test is not 'that one does not lose one's habitual residence in a particular country absent a settled intention not to return there.' This comes perilously close to confusing the question of habitual residence with the question of domicile and is contrary to the authorities."

The Court of Appeal concluded that there was no wrongful removal or wrongful retention of the children in this State, contrary to Article 3 of the Hague Convention as both parties had initially agreed to travel to Ireland. The husband and wife had joint custody of the children. Hogan J. went on to hold that as the wife was entitled to refuse to give any further consent for the children to remain in Ireland, the failure to permit the children to return to Australia (by the husband) amounted to wrongful retention in the manner envisaged by Finlay Geoghegan J. in *DE v EB*[401] amounting to a breach of the rights of custody which the mother was entitled to exercise in respect of the children. Hogan J. therefore concluded that the husband's actions amounted to wrongful retention of the children. The Court of Appeal held: "(i) that habitual residence of the children for the purpose of Article 3 of the Hague Convention remained that of Australia, and (ii) that the actions of the husband in unilaterally taking possession of the children's passports on 2nd July 2016 amounted to a wrongful retention of the children for the purposes of Article 3 of the Hague Convention."

The case of *AB v CD*[402] was an appeal from an order of the High Court that a child be returned to Brunei which is not a party to the 1980 Hague Convention on Child Abduction. The mother had, without the knowledge or consent of the father, taken the child from Brunei to Ireland. The mother sent a text message on 8th March stating that she intended to stay permanently in Ireland with the child.

Binchy J. in the High Court had granted an order for the return of the child subject to certain undertakings proffered on behalf of the applicant and the provision of appropriate financial support for the respondent.[403] The High Court held that it was bound under section 31(2) of the Guardianship of Infants Act 1964 to take the welfare of the child into consideration.

[401] [2015] IECA 104.
[402] [2017] IECA 174.
[403] [2017] IEHC 274.

It was noted by Finlay Geoghegan J. in the Court of Appeal that this case was the first application for what has been termed the "summary return" of a child to a country which has not acceded to the 1980 Hague Convention on Child Abduction ("a non-Convention country") since the entry into force of Article 42A of the Constitution in April 2015 and the amendments made to the 1964 Act by the Children and Family Relationships Act 2015.

The father was seeking a direction for "the return forthwith" of the child to Brunei which was claimed to be for the purpose of enforcing the father's rights of custody, guardianship and access with respect to the child.

Specific reference was made to section 31 of the Guardianship of Infants Act 1964, as amended, and the requirement that the court "shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family" with those factors and circumstances specifically listed under section 31.

One of the questions to be answered, as identified by the Court of Appeal, was whether, at the High Court application under section 11 of the 1964 Act as amended for an order for the prompt return of a child to a non-Convention country in which it was habitually resident, the court had jurisdiction to determine on affidavit evidence alone that it is in the best interests of the child to make the order for return. Finlay Geoghegan J. concluded that no constitutional principle or any provision in the 1964 Act as amended precluded the High Court from making such a decision following a hearing on affidavit evidence alone and that there is no obligation on the court to determine the application by oral hearing.

Finlay Geoghegan J. stated:

> The trial judge, in assessing whether or not it is in the best interests of the child to make the order for prompt return, is only required to resolve any matters in dispute between the parties which are relevant to the determination of that issue. The Court is required to determine what is in the best interests of the child in the short-term. The parties currently share joint custody of the child. The application on behalf of the father did not seek to deprive the mother of custody. The Court was not required to determine a custody dispute between the parents.

The Court of Appeal upheld the High Court decision and the fact that in determining the application pursuant to section 11 of the 1964 Act for the order for return of the child to

Brunei, the court should do so in accordance with section 31 of the 1964 Act by determining whether or not such an order was in the best interests of the child. Finlay Geoghegan J. determined that the High Court had correctly concluded that, as this was not a case to which either the Hague Convention or Article 11 of Council Regulation 2201/2003[404] applied, the High Court should not have applied either directly or by analogy the principles according to which applications under those provisions are determined. It was also held by the Court of Appeal that the trial judge correctly, in accordance with section 31(1) of the 1964 Act, had regard to all of the factors or circumstances relevant to the child and her parents including but not limited to those expressly set out in section 31(2). Finlay Geoghegan J. held that "it was not necessary for the High Court to be satisfied that either the factors to be taken into account by the Brunei courts or the approach of those courts to determining what is in the best interests of the child are identical to the statutory provisions in this jurisdiction", holding that "the trial judge was entitled to be satisfied on the evidence before him that the future custody disputes in relation to [the child] would be determined by the courts of Brunei in accordance with his best interests."

In the case of *JW v MR,*[405] the court ordered the return of a child to England from Ireland pursuant to the 1980 Hague Convention on Child Abduction. Among the issues raised in the case was whether the father consented to the removal of the child from England and Wales, and whether he was exercising custody rights at the time of the removal. The court noted that, as the child had lived in England continuously from the date of his birth to the date of his removal to Ireland, it was clear that his habitual residence prior to his removal was England and Wales and it was argued by the mother that the father did not have custody rights at the time of the removal of the child (as required under Article 3 of the Hague Convention on Child Abduction). The issue of custody was examined by the court.

Both Irish and international jurisprudence on the issue were considered. The case of *M.J.T. v C.C.*[406] was referred to in which it was held that "the definition of a wrongful removal has two aspects, sometimes referred to as the juridical and factual aspects, i.e. that the applicant held rights of custody under the law of the State of habitual residence and as a matter of fact was actually exercising those rights of custody at the time of the removal."

[404] EC No. 2201/2003.
[405] [2017] IEHC 67.
[406] [2014] IEHC 196.

Irish case law was examined and the principles in *M.S.H. v L.H.*[407] were applied, namely that a failure to exercise custody rights must be established clearly and unequivocally; and, from the decision of Finlay Geoghegan J in the *M.J.T.* case above, that the courts are to take a liberal approach to the exercise of custody rights in this context.

In *JW v MR*, the court observed that, not only did the father have custody rights as a matter of law, but was also living with his child. The court concluded that the removal of the child was wrongful within the meaning of Article 3 of the 1980 Convention.

Although the court observed that the respondent had not consented to removing the child it still went on to deal with the issue of discretion under Article 13 of the Hague Convention on Child Abduction which gives the court a discretion not to order the return of the child in certain circumstances. The court in *JW v MR* noted that "even where one of the exceptions in Article 13 applies, the Court has a discretion as to whether an order should be made for the return of the child and that this discretion should not be exercised lightly in favour of non-return" as per the Supreme Court decision in *A.U. v T.N.U.*[408] The court, in *JW v MR*, went on to state that "a wide range of factors should be taken into consideration when a court is exercising its discretion pursuant to Article 13 of the Convention. A non-return should not lightly be ordered. Further, the court should have regard to the overall objectives of the Convention as a whole. It should also be kept to the forefront of the court's mind that these proceedings will not determine custody and access issues in the long term, but merely whether the child should be returned to England within the parameters set by the Hague Convention."

In *JJ v PJ*,[409] the applicant sought the return of his child to Poland where the child had lived for a continuous period of over two years before his removal, the court noting that there was no doubt that Poland was his habitual residence before the date of his removal. The court said that there was no doubt that the father had custody rights and was exercising them at the relevant time. The key issues arising in the case are (1) whether the father consented to the removal of the child; (2) whether he acquiesced to the retention of the child in Ireland after his removal to Poland; and (3) whether, in circumstances where the special summons issued

[407] [2000] 3 IR 390.
[408] [2011] 3 I.R. 683.
[409] [2017] IEHC 68.

some 24 months after the child's removal from Poland, the defence that the child is 'well settled' applied, and, if so, how the Court should exercise its discretion.

The Supreme Court case of *S.R. v M.M.R.*[410] was examined and particularly its examination of consent (which itself referred to the UK case of *Re. K. (Abduction: Consent)*)[411] in which it was held that:

(i) the onus of proving the consent rests on the person asserting it;
(ii) the consent must be proved on the balance of probabilities;
(iii) the evidence in support of the consent needs to be clear and cogent;
(iv) the consent must be real; it must be positive and it must be unequivocal;
(v) there is no need that the consent be in writing;
(vi) it is not necessary that there be proof of an express statement such as 'I consent'. In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent.

It is clear, from the case law on the issue, that consent to removal must be clear and unequivocal, and that the burden of proof is upon the party seeking to prove consent. The court in *JJ v PJ* was satisfied that the father had not consented to the child's removal and it was a wrongful removal within the meaning of Article 3 of the 1980 Hague Convention.

The court then went on to deal with the so-called 'well settled' defence and specifically Article 12 of the 1980 Hague Convention.

It was noted by the court that the plenary summons had issued two years after the removal of the child so triggering the second part of Article 12 and the requirement to consider the 'well settled' defence. An analysis of the case law on the 'well settled' defence was conducted. In this regard, the Supreme Court case of *P v B*[412] was examined in which it was held that a "degree of settlement which is more than mere adjustment to surroundings" was required. The Supreme Court held "[the] word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability". Referring to the English case of *Re*

[410] [2006] IESC 7.
[411] [1997] 2 FLR 212.
[412] [1999] 4 IR 185.

N (Minors) (Abduction),[413] it was stated: "If [in those circumstances] it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of Article 18 the court may or may not order such a return." The Supreme Court in *PL v EC*[414] held that settlement must be assessed according to all the circumstances including a physical and emotional component.

The court in *JJ v PJ* held that any concealment or subterfuge must be assessed in the context of a delay in bringing proceedings seeking the return of the child determining that while there was subterfuge in the manner in which the mother took the child from his crèche in Poland, there was no evidence of subterfuge in the manner in which she and the child were currently living in Ireland. The court exercised its discretion in not returning the child to Poland, holding that he was well settled here and taking into account the father's delay in instituting proceedings but not holding that such delay amounted to acquiescence.

The mother had argued that the child would be exposed to a grave risk if returned to Poland. Article 13(b) refers to "a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". The court dismissed this argument saying the threshold under Article 13(b) is a high one.

In the case of *Q v J,*[415] the court refused to make an order for the return of children to Pakistan. It was alleged that the respondent wrongfully removed the children from the jurisdiction of Pakistan and travelled to Ireland in breach of an order of the Guardian Court of Lahore, Pakistan. The father contended that the family were habitually resident in Pakistan and that the issue of the welfare of the children was best decided in their place of habitual residence. The mother submitted that the children retained their habitual residence in Ireland at all times throughout their stay in Pakistan and were habitually resident in Ireland as of the date of the proceedings. The mother gave evidence of emotional, physical and sexual abuse at the hands of the father and stated that she was in fear of returning to Pakistan.

As part of its assessment the court ordered a report to be carried out in respect of the children by a professional assessor initially to ensure the re-introduction of access between the

[413] [1991] 1 FLR 413.
[414] [2009] 1 IR 1.
[415] [2017] IEHC 342.

children and their father and subsequently to ascertain the views of the children in relation to access and their potential return to Pakistan. The assessor found that the eldest boy was very negative about Pakistan and saw himself as settled in Ireland and lacking in a secure attachment to his father. Another child described herself as frightened of her father and expressed her view that she did not want to be returned to Pakistan. The youngest child did not wish to go back to Pakistan either. The assessor found the children to be of average maturity for their ages and that they were able to formulate views based on their experiences but would attach less weight to the views of the youngest child. The children were also interviewed by the judge who noted that the views were identical to those expressed to the assessor.

In deciding the case on its facts, it was noted that while Pakistan recently ratified the Hague Convention on Child Abduction 1980, the EU has not accepted Pakistan's accession.

The court applied the factors enunciated in *Re J (A Child) (Custody Rights: Jurisdiction)*[416] (race, ethnicity, religion, culture, education, language, nationality and where the child has lived most of his/her life). The court also conducted an assessment of the individual factors listed at section 31 of the Guardianship of Infants Act 1964 (as amended) as well as Article 42A of the Constitution.

The court determined that the family had never integrated in Pakistan although they resided in that country for 18 months. However, the court held that the mother acquiesced to the move (to Pakistan) and took into account the length of time spent in Pakistan (18 months) and the fact that the respondent engaged the jurisdiction of the Pakistani Courts finding on balance that the children were habitually resident in Pakistan at the relevant time.

The court stated that as Pakistan is a non-Hague Convention, Non-Regulation State this meant that jurisdiction for the application was found in Article 14 of Brussels II *bis* whereby the domestic laws of Ireland were to be applied. The court also noted that Pakistan was not an accession state for the purpose of the 1996 Hague Convention and therefore the majority of the Convention could not apply. However, the Court held itself to be empowered by Article 11 of the 1996 Convention to take a measure of protection:-"1. In all cases of urgency, the

[416] [2005] UKHL 40.

authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection." The court concluded that "it would not cause these children irreparable harm to refuse to make an order returning them to Pakistan. It may even be the case that it could cause these children irreparable harm to be returned to Pakistan and separated from their mother."

In *PEO v SEO*,[417] the court exercised its discretion against returning two children to England having determined that they had been wrongfully removed from England to Ireland in circumstances where the proceedings were commenced more than one year after the wrongful removal and the court deemed that the children had become 'well settled' within the jurisdiction.

It was conceded by both parties that the children were habitually resident in the United Kingdom prior to their removal from that jurisdiction and that the applicant has and had custody rights, and was exercising them within the meaning of Article 3 of the 1980 Hague Convention. The court noted that it was clear that at the time of the children's removal the respondent mother had indicated that they were travelling to Ireland for a short visit and gave no advance warning of her intention to remain permanently within this jurisdiction. She had enrolled her children in an Irish school and had advised their old school that they would not be returning.

In considering Article 12 of the 1980 Hague Convention on Child Abduction, the court noted that proceedings for the children's return were commenced over a year after their removal. The court then went onto consider the 'well settled' defence pursuant to Article 12. The court examined the case law on the 'well settled' defence in light of the facts of the case. In particular the court had regard to the fact that there was now a family unit in Ireland; the wishes of the children to remain in Ireland; a return to the United Kingdom would involve a breakup of the family union and separation from their family within this jurisdiction; the fact that there was no longer a family home in United Kingdom (the respondent relinquished the tenancy on the property); the children had completed two years schooling in Ireland and the fact that the respondent was a full-time homemaker.

[417] [2017] IEHC 531.

The court observed that there was "clear evidence in this case that the respondent engaged in subterfuge or concealment in respect of the removal of the children to this jurisdiction" but also had regard to the delay on behalf of the applicant in instituting proceedings.

In reaching its determination the court had regard to the views of the children and referred to the three stage approach applied in the case of *CA v CA (otherwise McC)*[418] (itself referring to the English case of *Re M (Abduction: Child's Objections)*[419]) in which it was held that:

> Where a child's objections are raised by way of defence, there are of course three stages in the court's consideration. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that it is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established). Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return.

The court did not consider the argument made that to return the children to England would pose a grave risk again noting that "the threshold for establishing 'grave risk' is very high, as set out in authorities such as *AS v PS*[420] and *P v P*[421] and is simply not met by the evidence in this case."

In *RR v LMR*,[422] the court ordered the return of two children to England. The case involved parents who were Lithuanian nationals where one parent sought the return of the children to England from Ireland. The respondent had advised the children's school that she was removing them to reside permanently in Lithuania without any reference to the applicant and in circumstances where he was left with no contact details for the respondent or the dependent children. The court noted that the applicant had difficulty ascertaining the whereabouts of the children following their removal. He made initial enquiries through the respondent's family members in Lithuania and eventually discovered that the respondent had brought the children to this jurisdiction. The respondent contended that the children objected to returning to England and Wales and on that basis should be permitted to remain within this jurisdiction and also objected to the children's return in circumstances where she contended

[418] [2009] IEHC 360 and [2009] 2 IR 162.
[419] [2007] EWCA Civ 260 and [2007] 2 FLR 72.
[420] [1998] 2 IR 244.
[421] [2012] IEHC 31.
[422] [2017] IEHC.

that it would expose them to physical and psychological harm or otherwise place them in an intolerable situation pursuant to Article 13 of the 1980 Hague Convention.

It was accepted that the children were habitually resident in England prior to their removal and it was also accepted that the applicant had formal rights of custody and was exercising them within the meaning of Article 3 of the Hague Convention. It was also conceded that the respondent had travelled from England to Ireland with the children without notifying the applicant or obtaining his consent.

As part of its assessment the court considered the issue of consent/acquiescence of the applicant. The respondent accepted that the applicant did not consent to the initial removal of the children to this jurisdiction in July 2016 but contended that his failure to prevent the respondent and the children returning to Ireland in May 2017 amounted to acquiescence or consent on his part to the children remaining in Ireland. The High Court rejected the acquiescence argument stating that it was "untenable to suggest that the applicant's non-objection to the children returning to this jurisdiction in May 2017 could amount to consent or acquiescence to the children changing their habitual residence to this jurisdiction ... It is simply inconceivable to suggest that his failure to prevent the return of the children was suggestive or indicative of his consent/acquiescence to them remaining in this jurisdiction when all the necessary steps had been taken by him to assert his right to the summary return of the children."

The court also addressed the 'grave risk' defence under Article 13 of the Hague Convention on Child Abduction. Rejecting the assertion that the children would be subject to a 'grave risk' or otherwise be placed in an intolerable situation, the case of *R v R*[423] (Court of Appeal, unreported, 4th November 2015) was cited (itself referring to the case of *AS v PS (Child Abduction)*[424] and the words of Fennelly J.) with Finlay Geoghegan J. in the Court of Appeal stating:

> Where, as in this instance, one of the risks being referred to is a risk of physical or psychological harm of the boys, it is also clear that the courts in this jurisdiction will normally place trust in the courts of the country of habitual residence to be able to protect the children, and indeed, the mother, from any such harm. This is particularly

[423] [2015] IECA 265.
[424] [1998] 2 IR 244.

so where the state of habitual residence is a member of the European Union and Article 11 of Regulation 2201/2003 applies to the return.

The court took into account the views of the children as ascertained by a psychologist who opined that the older child was capable of forming his own views but the younger child was more susceptible to being easily influenced by adult figures in his life with the court determining that it should attribute less weight to his views. The court noted that the children expressing a wish to stay in this country fell short of an objection to returning to England.

Referring to the requirement under Article 12 for the Court to make an Order for the return of the children "forthwith", the High Court ordered the return to England of the children in advance of the new school year in order to minimise disruption for the children.

4.5 JURISDICTION OF THE HIGH COURT IN CASES INVOLVING A FOREIGN ELEMENT

In *PMcA v VH*,[425] the High Court refused a preliminary application in a case in which the plaintiff sought an order recognising and enforcing an order of a United States court directing that the child be required to move to live with the plaintiff in Rhode Island. The Rhode Island Family Court had granted, *inter alia*, sole custody of the child to the plaintiff. The defendant issued a motion claiming that two preliminary issues should be decided as follows "(i) that the Courts of Ireland have exclusive jurisdiction where a child is habitually resident in Ireland regarding issues of parental responsibility, and, (ii) that the High Court did not have jurisdiction to hear the proceedings".

It was submitted on behalf of the defendant that the Irish High Court had no jurisdiction to recognise and enforce the foreign Order because the child was habitually resident in Ireland at the time the Order was made. The jurisdiction of the High Court had already been challenged by the defendant in the High Court (Baker J.) which stayed the proceedings in the Irish courts pending the decision of the US court. In circumstances where the issue of jurisdiction was decided by the Rhode Island Supreme Court and the defendant engaged fully in that case, Reynolds J. decided that the defendant was estopped from raising the jurisdiction issue again.

[425] [2017] IEHC 529.

In relation to the second question, the defendant submitted that the High Court had no original jurisdiction in proceedings brought under Part II of the Guardianship of Infants Act 1964 and that the Circuit Court and District Court have exclusive jurisdiction in this regard. The court rejected this contention noting that the same defendant, previously in the High Court in related proceedings, had sought to invoke the provisions of the Guardianship of Infants Act 1964 and relief pursuant to same despite the claim being made on her behalf that the High Court did not have jurisdiction relating to the 1964 Act.

In *PK v MM*,[426] the High Court ordered the return of two children to Poland but placed a stay on the order as it considered this to be in the children's best interests. The High Court had already made an order for return of the children but the mother had returned to Ireland with the children precipitating fresh proceedings. The court was satisfied that the father had custody rights at the time of the removal of the children and that he did not consent to their removal, finding that they were wrongfully removed to Ireland from Poland within the meaning of Article 3 of the 1980 Hague Convention. The court rejected the mother's argument that to return the children would expose them to psychological harm or otherwise place them in an intolerable situation holding that "it would be contrary to the policy of the Convention if the court were to accept a grave risk created by the respondent's own refusal to return to the country from which there had been a wrongful removal by the respondent herself, where the refusal is based upon a mere assertion of a lack of income or accommodation in that country, and the country is actually the country of her own nationality and previous residence."

The views of the children were ascertained through a psychologist who met the children, with the court concluding that the older child had a clear objection to returning to Poland and the younger children had a preference for not returning to Poland. The court placed a stay on the order of return to allow the Polish courts have sight of the psychological reports in respect of the children, considering such a stay to allow progress to be made in the Polish courts, as well as to cause the least disruption to the children, to be in the best interests of the children.

[426] [2017] IEHC 689.

4.6 MENTAL CAPACITY

In the case of *HSE v DWW*,[427] O Hanlon J. in the High Court determined that a patient lacked capacity as he suffered from schizophrenia and suicidal ideation. The court accepted a plan of treatment of the said patient as proposed by the parties under the care of a HSE consultant jointly with the treating psychiatrist of the patient.

[427] [2015] IEHC 796.

SECTION 5: CRIMINAL DEVELOPMENTS

5.1 CRIMINAL JUSTICE (VICTIMS OF CRIME) ACT 2017

In July 2015, the General Scheme of the Criminal Justice (Victims of Crime) Bill 2015 was published after a lengthy wait for significant development in the area of victims' rights. Following government approval for the drafting of a Bill along the lines of this General Scheme, the Criminal Justice (Victims of Crime) Bill 2016 was published by Minister Fitzgerald in December 2016, exhibiting continued progress in this realm of law. A detailed analysis of the provisions of the Victims of Crime Bill is contained within my Tenth Report, along with a number of key recommendations which I made, most notably in relation to children as a category of particularly vulnerable victims.[428] Crucially, I emphasised the need for the Criminal Justice (Victims of Crime) Bill 2016 to be expedited and treated with priority as it moved through the Oireachtas to ensure that the uncertain status of victims in Ireland be ameliorated as soon as possible. I also highlighted Ireland's obligation to transpose Directive 2012/29/EU. In accordance with Article 27 of the Directive, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 16 November 2015.

Fortunately, significant progress has been made recently in this regard and on 5 November 2017, the Criminal Justice (Victims of Crime) Act 2017 was enacted. The vast majority of its provisions were commenced on 27 November 2017. Strengthening the rights of victims of crime and their families, the Victims of Crime Act places the rights of victims of crime on a statutory footing and explicitly recognises the place of victims in the criminal justice system – whereas previously victims' rights in Ireland were governed by the Victims Charter, a document which was not legally binding, providing no legal entitlements or rights to victims. The commencement of the 2017 Act is a welcome development demonstrating the State's commitment towards greater acknowledgement of the victim within the criminal process. It also endorses the EU developments in this regard and specifically, the Act transposes 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.

[428] See Dr. Geoffrey Shannon, *Tenth Report of the Special Rapporteur on Child Protection* (2017).

The Act gives victims of crime the following integral rights:

- The right to comprehensive information on the criminal justice system;
- The right to information on victim support services;
- The right to be kept informed on the progress of the investigation and any court proceedings;
- The right to an individual assessment of their protection needs and measures to safeguard them from further victimisation and intimidation;
- The right to be informed of a decision not to institute a prosecution and the right to request a review of that decision; and
- The right to receive information in clear and concise language and to interpretation and translation services where necessary.

While the 2017 Act and its detailed provisions are very beneficial to victims of crime in Ireland – certain discrete recommendations previously made have not been reflected in the 2017 Act as enacted. Regard may be had to my previous reports for a comprehensive critical analysis of the provisions of the General Scheme of the 2016 Bill and the Victims of Crime Bill, as initiated. In particular, however, certain recommendations that I have previously made to provide heightened protection for child victims have not been included in the final version of the Bill. The following is particularly noteworthy:

> The necessity to include a stand-alone provision stating that for child victims, the information being provided to him or her under the Act shall also, where practicable, be furnished to a parent or guardian of the child.

Part 2 of the Act governs a victim's right to information and how such information is provided to him or her. Sections 7 and 8 provide important rights for victims with regard to the provision of information, both through the process of making a complaint, as well as throughout the investigative process and any resulting criminal proceedings. Section 22 of the Act provides where the 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 2017 Act. Unfortunately, with regard to the provision of information, there is no specific arrangement set out in the Act 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 should also, where practicable, be furnished to a parent or guardian of the child. The Act 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 the information to the child if required. It is recommended therefore that a similar provision to Head 17(3) be included in the Act, 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.

In line with Article 22 of the Victims' Directive, section 15 of the Victims of Crime Act 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 Act - protection measures and special measures. "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 17 of the Act or a measure which may, at the discretion of the court or pursuant to an application to it under section 19 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. The mandatory assessment that is

required by section 15 thus 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 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 17, or any other special measures to be employed during the course of criminal proceedings as envisaged by section 19 and Part III of the Criminal Evidence Act 1992. Section 15(7) makes specific reference to children. 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 or 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. I believe that section 15(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 section 15(7) appropriately recognises the vulnerable status of children within the criminal justice system, 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 Act. 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 Act.

Section 19 of the 2017 Act 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 section 15 in considering whether a victim requires special measures during court proceedings. New special measures include the court's power, pursuant to section 20 of the Act, to exclude members of the public from proceedings where there is a need to protect the victim from repeat victimisation, intimidation or retaliation; as well the power, pursuant to section 21 of the Act, 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 30 of the Act 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 - namely Part III of the Criminal Evidence Act 1992, which 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 previously only applied 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 30 extends 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 30 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. There is nothing in the Act, however, that would allow the child 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.

The benefits of the 2017 Act for those who unfortunately find themselves the victim of a crime in this jurisdiction cannot be underestimated and the provisions of the Act are to be widely welcomed as a positive move to protect victims. It is clear from the above, however, that the addition of certain discrete provisions as recommended herein would further

strengthen the application of the Act for children, as a particularly vulnerable category of victims.

Recommendation

In November 2017, the Criminal Justice (Victims of Crime) Act 2017 was enacted and its provisions commenced. Ireland thus is no longer in default of its obligations under Directive 2012/29/EU and the passing of the 2017 Act is a welcome development to promote the position of victims within the criminal justice system. Certain further amendments to the 2017 Act are required to give heightened protection to children as a category of victims.

5.2 BAIL SUPPORT SCHEME

The age-appropriate treatment of children who commit criminal offences is widely prioritised in both international and domestic law. 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 section 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 or where further charges have been incurred while on bail, the accused offender may consequently be remanded in custody. In Dublin, offenders are detained in Oberstown Children Detention Campus until their next court date. 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.[429] 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.[430]

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.[431] Such a scheme has the potential to deliver a method of engaging with young offenders who are on bail, providing support for them, thereby ameliorating the current general 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.

I noted positively in my Ninth Report that the Department of Children and Youth Affairs indicated its intention to implement a Bail Support Scheme in line with recommendations I had previously made. In June 2017, concrete progress was achieved in this regard, with the Minister for Children and Youth Affairs, Dr Katherine Zappone T.D., launching Ireland's first Bail Supervision Scheme (BSS) for young offenders. This pilot scheme is operated by Extern, the social justice charity, and is directed toward offering an alternative to detention for young persons – focusing on supporting young offenders to remain within their home and in education, training or employment, keeping them out of trouble with the law. Extern is providing the necessary interventions through the use of Multisystemic Therapy (MST) – a therapy which operates worldwide and which is proven to help to reduce re-offending rates, keep young people in education and decrease adolescent drug and alcohol use. Ultimately, it

[429] See Barnardos, Submission on the Courts Service Statement of Strategy 2012-2014, August 2011.
[430] See Dr. Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010).
[431] See Dr. Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2010).

is an evidence-based approach which seeks to understand the factors that contribute to the young person's behaviour and it uses intensive family and community-based treatment.

The BSS operates through a referral system from staff in Oberstown Detention Centre. Where an offender is denied bail, due to a breach of bail conditions or otherwise, upon his/her remand to Oberstown, staff may make a referral on the young person's behalf for a suitability assessment. An initial assessment will then be carried out by the BSS team to ascertain whether the young person is suitable for the Scheme, having regard to the criteria for accessing MST treatment. It is anticipated that many of the young persons referred to the Scheme will have a difficult history with problems with truancy, alcohol and drugs being common, as well as previous criminal behaviour. The criteria for entering the Scheme are as follows: the young person must be on remand; he/she must be referred from the Children's Court; he/she must live within a 20 mile radius of Dublin; he/she must have a primary caregiver willing to work with the BSS team; and he/she must be between 12 and 17-years-old and be on the Scheme for at least three months prior to his/her 18th birthday. Crucially, participants and their families must agree to be involved with the Scheme – making participation consensual. If the offender meets the aforementioned criteria for MST treatment, the BSS may duly inform the court and the presiding judge then is to determine whether or not to release the alleged offender on bail with the support of the Scheme, rather than keeping him or her on remand in Oberstown. In making its decision, the court may consider representations from An Garda Síochána, the Probation Service and any other relevant stakeholders. Should bail be granted in circumstances where the court receives assurances that the young person will engage with the Scheme, a MST therapist will immediately be assigned to the young person and intensive treatment will begin. If the offender breaches his or her bail conditions, the usual consequences will apply. That said, the overarching aim of the programme is to provide intense support for the individual while on bail to ensure that there is compliance with these conditions.

Overall, the use of MST seeks to empower parents to address the needs of their child more effectively, assisting them with discipline. It is hoped that the young persons involved will reduce their association with negative peers, instead building positive relationships with pro-social peers and engaging in constructive recreational activities. An improved educational performance is desired, with decreased anti-social behaviour, and help is provided to the family to assist them in building social support networks within the community. Long-term

change is the ultimate goal which it is hoped will prevail after engagement with the BSS is completed.

The introduction of the Bail Supervision Scheme is to be welcomed and it can be recognised as a positive development in support of the principle that custody should be a last resort for children. It also recognises that early intervention is key to preventing young persons from re-offending. Efforts should be made in the implementation of this scheme to monitor results closely, thereby ensuring the practical effectiveness of the scheme. In this regard, it is beneficial that the Research Evidence into Policy Programmes and Practice (REPPP)[432] project is currently reviewing and evaluating the progress of the scheme. Data obtained therein regarding the operation of the BSS must be utilised to inform and assist the rolling-out of a nation-wide version of the scheme on a permanent basis as soon as possible. While the introduction of the Scheme is welcomed, there are a number of limitations to the pilot BSS. It is to run over a two-year period and it will cater for 25 young people each year. While the use of a pilot scheme is a sensible approach – to enable lessons to be learned which will aid the introduction of a permanent scheme – it is unfortunate that the BSS will apply to so few young people annually. Furthermore, it operates only in the Dublin region – preventing those who live elsewhere in the country from accessing the Scheme. It is recommended, therefore, that consideration be given to implementing the Scheme in other locations across the country after the completion of its first year in the Dublin region. This would allow young offenders residing elsewhere in the country to access this crucial support – not merely those based in the Dublin area. It would also prevent discrimination based on geographical location, which contradicts the State's obligation to protect children from discrimination as set out in Article 2 UNCRC. Extending the scope of the Scheme for the second year of its operation would also increase the numbers participating on the Scheme, and in this regard, I believe that the amount of young people permitted to access the BSS should at the very least be doubled within year two.

It is also necessary to consider the eligibility criteria which determine a young person's suitability for the BSS. One specific requirement is that the young offender has a primary caregiver who is willing to work with the BSS team. While in many cases, the young person in question will have a parent or guardian who is anxious to support him/her and engage with

[432]Research Evidence into Policy Programmes and Practice (REPPP) project, School of Law, University of Limerick.

the Scheme to prevent him/her from getting into further trouble, in some situations, the young person may not have an appropriate parent or guardian. This may be because he/she is in the care of foster parents or because he/she lives within a residential programme, or due to addiction issues or mental health difficulties, his/her parent or guardian is not capable or willing to work with the MST therapist. I believe that children in these difficult positions, where their vulnerability is heightened due to their lack of familial support, should not be automatically excluded from accessing the BSS. Consideration needs to be given to the appointment of an alternative appropriate adult who can step in to support the young offender in these circumstances – for instance, through the use of a team of designated social workers who become involved to take the place of a parent/guardian who is not willing to liaise with the BSS. Further thought is thus required on this eligibility issue to ensure that the Scheme is accessible to all young offenders, whatever the family situation or supports.

Recommendations

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.

Consideration should be given to implementing the Scheme in other locations across the country after the completion of its first year in the Dublin region, preventing discrimination based on geographical location.

The scope of the Scheme should be extended for the second year of its operation to increase the numbers participating on the Scheme. The amount of young people permitted to access the BSS should at the very least be doubled within year two.

5.3 CRIMINAL LAW (SEXUAL OFFENCES) ACT 2017

The contents and detailed provisions of the Criminal Law (Sexual Offences) Act 2017 have been considered at length in my previous reports.[433] In my Tenth Report, I called for the immediate commencement of the Act – putting the new wide range of criminal offences in relation to child pornography and the grooming of children, particularly through the use of information and communication technology, on the statute books for immediate use. Fortunately, progress has been made and in February 2017, the then Tánaiste and Minister for Justice and Equality Frances Fitzgerald signed an Order commencing certain provisions of the Criminal Law (Sexual Offences) Act 2017 with effect from Monday 27 March 2017. This initial commencement order covers all new offences targeting the sexual exploitation and grooming of children; new offences to counter the demand for sexual services through prostitution; and introduces the statutory definition of "consent" into Irish law. The commencement order is to be welcomed – finally ensuring that this comprehensive piece of legislation, which has been years in its development – is in place to provide a more effective response to sexual offending perpetrated against children, especially through the use of the internet and social media. It also brings Irish law in line with the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.

Following the commencement of the Act, I believe that prosecutions taken by the Director of Public Prosecutions under the Act's provisions, where the victim is a child under the age of 18, should be monitored and analysed. This "operational assessment" would be a detailed piece of research to examine the effectiveness of the new sexual offences regime, specifically directed towards offences committed against child victims. The 2017 Act already provides for a review of its operation, but in a more limited vein – with regard to Part 4 of the 2017 Act only. Part 4, in section 25, introduces a new section 7A into the Criminal Law (Sexual Offences) Act 1993, criminalising paying for sexual activity with a prostitute. This provides that it shall be an offence where, in the context of prostitution, a person pays money or any other form of remuneration or consideration for the purpose of engaging in a sexual activity with a prostitute. It also is an offence to promise payment for sexual activity with a prostitute. This section expands existing law whereby it is only an offence to solicit or importune

[433] See Dr. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014) and Dr. Geoffrey Shannon, *Eighth Report of the Special Rapporteur on Child Protection* (2015).

another person for the purposes of prostitution in a street or public place.[434] Section 27 of the Act requires the Minister for Justice within three years of the commencement of Part 4 to prepare a report on the operation of section 7A, which criminalises paying for sexual activity with a prostitute. The report must include:

- information as to the number of arrests and convictions in respect of offences under section 7A of the Act of 1993 during the period from the commencement of that section, and
- an assessment of the impact of the operation of that section on the safety and well-being of persons who engage in sexual activity for payment.

While the review provided for in Part 4 will undoubtedly deliver helpful data, the "operational assessment" proposed herein is of a much wider scale – not focusing solely on the application of one specific offence, but on all of the new offences contained in the Act, where the victim of said offence is a child. It is therefore recommended that section 27 of the Act be expanded to also include the operational assessment of the other provisions of the Act impacting on children.

The operational assessment proposed would serve to demonstrate how the offences apply to certain behaviours in practice, show the process of the investigation of said crimes by An Garda Síochána and follow the ultimate prosecution of the alleged perpetrator through the criminal justice system. Such a detailed examination would necessarily point to areas which may need further review. This could demonstrate the need for amending legislation to cure technical issues or prosecutorial problems or the requirement to extend the investigative powers of the Gardaí. Similarly, it may indicate the need for proactive steps to be taken to warn children of the dangers of certain online communications, for instance through widespread advertisement campaigns. It is recommended that this assessment begin in 2018, a year after the commencement of the Act, to investigate the operation of the Act in its first year – thereby immediately addressing any issues that may arise.

I believe that such a body of research would help to identify any prosecutorial difficulties that occur that may need to be addressed in future amending legislation. One potential difficulty may arise in the prosecution of offences under section 8(2) of the 2017 Act. Section 8(2) provides that sending sexually explicit material to a child under 17 by means of ICT is criminalised. Given the real danger of online sexual exploitation, this section demonstrates a

[434] Criminal Law (Sexual Offences) Act 2017, section 7.

practical and stringent approach to criminalising predatory behaviour using the internet and other communication technologies. In this section "sexually explicit material" means any indecent or obscene images or words. It is possible that a defendant charged pursuant to section 8(2) may seek to claim that he/she had no knowledge that he/she was sending an e-mail or other online communication containing such material. It may, from the standpoint of a prosecutor, be difficult to prove that he or she did possess such knowledge. In this regard, therefore, it could be necessary to introduce a presumption that the defendant had such knowledge, unless on the balance of probabilities, the defendant can rebut this presumption. The assessment of the operation of the Act would inform whether the imposition of such a rebuttable presumption is required and it is recommended that consideration be given to introducing a rebuttable presumption if any difficulties arise in this regard.

A similar prosecutorial difficulty may arise with regard to the operation of the new offences criminalising the purchase of sexual services. These new offences set out in the Criminal Law (Sexual Offences) Act 2017 target the persons who are purchasing rather than those who are selling the sexual services. Section 25 of the 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 sexual activity with a prostitute. It also is an offence to promise payment for sexual activity with a prostitute. This section expands existing law whereby it was only an offence to solicit or importune another person for the purposes of prostitution in a street or public place.[435] 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. 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

[435] Criminal Law (Sexual Offences) Act 2017, section 7.

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.

In my Tenth Report, however, I highlighted an anticipated problem that may arise in the course of prosecutions under section 5 of the 2008 Act, as amended by the Sexual Offences Act 2017. 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, it may be preferable to amend this provision 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.[436] This may be a more practical way to achieve the aims sought by the implementation of these provisions and to fulfil the purpose of Article 18 of the Trafficking Co-operation Directive.[437] Thus, it is recommended that particular regard be had to the operation of prosecutions under section 5 of the 2008 Act, as amended, in the proposed operational assessment of the Act. If prosecutorial problems arise under this section, it is recommended that further amendment in the vein suggested above be considered.

A further matter of concern is the ability of An Garda Síochána to properly investigate the vast array of new offences that have been introduced in the Act concerning the solicitation and grooming of children.[438] This is particularly so in light of the use of technology by abusers in the commission of their crimes and the Act's specific aim to combat this activity. For instance, mobile phone 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). The old position whereby child pornography was often stored on an offender's computer in his/her home does not reflect the reality of modern life. In order to

[436] As recommended in my Sixth Report; Dr. Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2012) at pp. 226-227.
[437] 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.
[438] Sections 3 to 8 of the 2017 Act.

aid effective investigations, it may be the case that additional powers need to be afforded to members of An Garda Síochána (AGS) and as a result, I previously have recommended that further powers be designated to the Gardaí. One possible expansion of such powers would be to enable AGS to search a suspect of an offence contrary to sections 3 to 8 of the 2017 Act in a location other than the suspect's home. This may be a power similar to section 23 of the Misuse of Drugs Acts or alternatively, could be facilitated by introducing a new category of warrant to allow a search of a specific person in a public place. A power of this kind may enable Gardaí to seize relevant evidence such as mobile phone devices and other such portable equipment. The need to increase police powers is therefore a further factor that requires careful consideration in any research conducted on the operation of the 2017 Act. Following the operational assessment, the precise powers required would be easier to ascertain.

It is also anticipated that Garda powers may need to be extended in other ways, particularly in requiring co-operation from non-Irish companies that hold offices in this country, such as Facebook, Google, Yahoo, Adobe and Microsoft. Where AGS are investigating child pornography cases involving the use of information and communication technology, data may be required from these companies. While many of the companies store their Irish data in Ireland, some may claim it is stored in the US or elsewhere. In order to ameliorate this issue, it may be necessary for AGS to be afforded the power to obtain production orders against such companies, akin to an order under section 15 of the Criminal Justice Act 2011 which operates in relation to fraud and banking offences. A production order could be served on any such company registered in Ireland, requiring the company to produce the requisite ICT evidence. This may include photos, chat, account information and IP addresses which would be critical to assist AGS in its investigations into child pornography or grooming offences. It is recommended therefore, that consideration be given to expanding the powers of AGS as outlined above.

Recommendations

Section 27 of the Criminal Law (Sexual Offences) Act 2017 requires the Minister for Justice and Equality to prepare a report within three years on the new provisions making it an offence to pay for sexual activity with a prostitute. This provision should be expanded and a

comprehensive "operational assessment" of the new offences introduced by the Criminal Law (Sexual Offences) Act 2017 should take place following the Act's first year of operation.

This assessment should specifically make recommendations to address any prosecutorial difficulties or limitations in police powers that may come to light. Any proactive steps that could be taken to prevent children from becoming victims of sexual abuse should also be highlighted and rolled out on a national level.

SECTION 6: DOMESTIC DEVELOPMENTS

6.1 THE DOMESTIC VIOLENCE ACT 2018

6.1.1 Introduction

In this jurisdiction, the existing legal regime aimed to combat domestic violence is contained within the Domestic Violence Act 1996. The 1996 Act has been amended a number of times, most significantly in 2002 with the Domestic Violence (Amendment) Act 2002. It expanded the operation of the 1996 Act to some extent. The law relating to domestic violence primarily seeks to enable victims to apply to court in order to obtain a protective measure against their abuser, in the hope that this will have the effect of keeping them safe and preventing the re-occurrence of any threatening or abusive behaviour. Orders that the court can grant include safety orders, barring orders, interim barring orders and protection orders. Once an order under the Domestic Violence Act is granted against a particular respondent, he or she can be criminally prosecuted in the event of an alleged breach of such an order – with penalties upon conviction including possible imprisonment for a twelve-month period.

On 3 February 2017, new legislation was published in the form of the Domestic Violence Bill 2017. Its purpose is to amend and consolidate the law in relation to domestic violence, replacing the existing domestic violence legislation with a comprehensive new regime set out clearly in one piece of legislation. Its new provisions are necessary to enable Ireland to ratify the Council of Europe Convention on preventing and combatting violence against women and domestic violence, known as the Istanbul Convention, which Ireland signed in November 2015. Upon publication of the Bill, the then Tánaiste and Minister for Justice and Equality, Frances Fitzgerald T.D. commented that the Bill will "particularly improve the protections available to victims of domestic violence ...". She further stated that the Bill "aims to make the court process easier for victims of domestic violence." The Domestic Violence Act 2018[439] passed all stages in the Oireachtas during May 2018.

[439] Number 6 of 2018.

6.1.2 Impact of domestic violence on children

Prior to considering the key legislative proposals contained within the Domestic Violence Act, it is necessary to reiterate the devastating impact that domestic violence can have on children – an issue which I have highlighted in my previous reports. Witnessing domestic abuse and living in such an environment can scar children emotionally, impact upon their development and result in anxiety and aggression. Without assistance, the damage caused can be irreparable. While there exists no data to give a precise account of how many children are affected by domestic violence in Ireland, statistics from Women's Aid in its *Impact Report* concerning 2015, indicated that nearly 6,000 disclosures of child abuse were made in 2015, as well as in excess of 16,000 disclosures of domestic abuse against women.[440]

Children themselves recognise violence within the home as an important issue that affects them, with 44% of EU children listing this as a first or second place priority issue in European Commission research.[441] In 2015, the Council of Europe commissioned a report to establish the most important rights issues for children in Europe based on available research.[442] A particular theme considered therein was the issue of violence against children. Children stated that they experience high levels of violence in the home and those who witness such violence in the home felt that services are very much tailored for adults, the assumption being that helping parents will automatically help their children. Thus, the report emphasised the need for services specifically geared towards children. Children who experience domestic violence most frequently describe their families as their greatest support. In Ireland, for example, research has shown that: "For most of the children interviewed, their greatest supports — practical and emotional — came from their siblings and then from their mothers."[443] Despite this, the bonds between mothers and children can be greatly harmed through the trauma of domestic violence, and families require assistance such as counselling to repair their relationships. **In line with the submissions made in my Ninth Report, therefore, and concurrently with the passage of the Domestic Violence Act 2018, I feel compelled to reiterate my recommendation that child-specific services be made available for children who experience domestic violence. In particular, I believe that**

[440] Women's Aid (2016) *Impact Report 2015*.
[441] European Commission, *Flash Eurobarometer – The Rights of the Child* (May 2009).
[442] A. Daly *et al.*, *Challenges to Children's Rights Today: What do Children Think?* (Council of Europe/European Children's Rights Unit, 2015).
[443] Office of the Minister for Children Ireland, *Listening to Children: Children's Stories of Domestic Violence* (Office of the Minister for Children Ireland, 2007).

such supports should include the provision of counselling to children, working to repair those relationships damaged by domestic violence.

6.1.3 Orders under the Domestic Violence Act 2018

Part 2 of the 2018 Act concerns court proceedings, providing for the different orders that can be applied for under the legislation and dealing with the procedural aspects of court proceedings issued under the Act. Section 6 thereof concerns safety orders. Safety orders are currently provided for in section 2 of the Domestic Violence Act 1996, as amended. This is an order which prevents the person against whom it is made from using or threatening violence against, molesting or putting in fear the applicant or a dependent person. It also prevents the respondent from watching or besetting the place where the applicant resides. An application for a safety order may be brought by a spouse, former spouse, civil partner or former civil partner of the respondent; by a person who lived with the respondent in an intimate and committed relationship prior to the application; by a person who has a child with the respondent; by a parent of an adult respondent; and by a person who lives with the respondent, the basis of which is not primarily contractual. Such orders are made where the court is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant or a dependent person so requires.

Section 6 of the 2018 Act broadly replicates the contents of section 2 of the 1996 Act. It, however, goes slightly further to protect the beneficiary of the order. In addition to the foregoing, the court may also prohibit the respondent from "following or communicating (including by electronic means) with the applicant or the dependent person." This is intended to improve the protection given by a safety order, and it takes into account the abuse, harassment and intimidation that can take place through communication technology. There is, however, no definition of "communicating (including by electronic means)". Presumably, it can be interpreted to include phone calls, text messages and emails; but the exact scope of this provision is not defined to ensure that communication through social media sites, including Facebook and Instagram, online messaging services, and mobile phone applications such as "whatsapp" and "snapchat" come within this provision. A broad and all-encompassing definition is thus recommended for inclusion in the Act.

Section 6 also proposes an expansion of the categories of persons who may apply for a safety order. Currently under section 2, for persons in intimate relationships, where the parties do not have a child together, an application for a safety order can be made if the applicant has lived with the respondent in an intimate and committed relationship prior to the application. Thus, where a couple has not had a child together, the parties must have resided together before the application is made by the applicant. Only cohabitants and former cohabitants are therefore eligible to seek such protection from the courts and there is no defined length of cohabitation required. In the Domestic Violence Act 2018, as passed by the Oireachtas, this category of applicant has been widened to provide that an applicant may be a person who is "…not the spouse or civil partner of the respondent and is not related to the respondent within a prohibited degree of relationship, but was in an intimate relationship with the respondent prior to the application for the safety order". The cohabitation requirement is removed and all that is needed is for the parties to have been in an intimate relationship before the application is made. This provision was notably absent from the Bill in its initiated form, but its introduction had been anticipated. Former Minister Fitzgerald, speaking at the Bill's introduction to Seanad Éireann - Second Stage, had indicated her intention to introduce an amendment to section 6 at Committee Stage "…to ensure that persons in intimate and committed relationships, but who are not cohabiting, can also avail of safety orders".[444] This therefore is a welcome inclusion in the Act. It recognises that domestic violence takes place in relationships, whether or not the parties are cohabiting, and victims of such abuse within dating relationships also deserve and require protection. Furthermore, the applicant's children may also be at risk. While the parties may not be cohabiting, the nature of such a relationship envisages the parties spending considerable time with one another, in public or within either of their homes, giving ample opportunity for abuse to occur which children may witness or experience. The new provision is welcome progress to address the lacuna in protection for victims of domestic violence.

The power to grant a barring order is currently provided for in section 3 of the Domestic Violence Act 1996, as amended. A barring order is similar to a safety order, however crucially it also directs the respondent to leave a place where the applicant or a dependent resides and prohibits him/her from entering said place. Only certain categories of persons can apply for barring orders and given their interference with the property rights of

[444] Domestic Violence Bill 2017, Second Stage - Seanad Éireann; speech by Ms Frances Fitzgerald, T.D., Tánaiste and Minister for Justice and Equality, 1 March 2017.

respondents, these categories are more limited than those applicants who may apply for a safety order. Essentially, pursuant to section 3(1) of the existing legislation, a spouse, former spouse, civil partner, former civil partner or a parent of an adult respondent may apply for a barring order. Cohabitants may apply where they have lived with the respondent in an intimate and committed relationship for at least a period of six months in aggregate during the period of nine months immediately prior to the application for a barring order, where they have a greater or equal property interest in the relevant property compared with the respondent.

The 2018 Act expands the scope of the barring order regime to allow the court to prohibit communication with the applicant or dependent by electronic means as an additional condition of a barring order. The main change in the Act is the removal of the six-month minimum cohabitation requirement in cases involving persons in cohabiting relationships. Section 7(1) of the Act simply requires the applicant to have "lived with the respondent in an intimate relationship prior to the application for the barring order …". This brings a broader spectrum of cohabiting couples within the barring order regime. Requiring no minimum period of cohabitation has regard to the on/off nature of some relationships, deals with situations where one party may work abroad for certain periods of time and prevents preliminary disputes from arising in relation to the precise length of cohabitation of the parties (which often occur where, for social welfare purposes, the parties have not been legally cohabiting). Once they were cohabiting prior to the application, it is possible for the cohabitant to apply for a barring order.

In the 1996 Domestic Violence Act, as amended, provision is made for the granting of interim barring orders on a temporary basis where there is an immediate risk of significant harm to the applicant or any dependent person and the granting of a protection order (temporary safety order) will not suffice. These orders are often made *ex parte*, and as such, the order only is in place for 8 working days – thereafter an *inter partes* hearing on the full barring order takes place. Only those entitled to apply for a barring order may apply for in interim barring order. The court cannot grant an interim barring order in respect of a cohabitant or a parent of an adult respondent unless the applicant has a greater or equal property interest in the relevant property. The 2018 Act therefore seeks to introduce a new measure, namely an "emergency barring order". It is set out in section 9 thereof, and it does not apply to spouses and civil partners as they have the benefit of interim barring orders. An

applicant who is the parent of the adult respondent or who has been cohabiting with the respondent in an intimate relationship prior to the date of the application, can apply and be granted an emergency barring order even where the applicant has no property interest in respect of the relevant property or where his/her interest is less than that of the respondent. This provision is described by Minister Fitzgerald as geared toward putting "life and limb ahead of property" and allows a person in a dangerous situation to get a temporary barring order even if he/she has no rights to the property. The duration of the emergency barring order gives the applicant time to organise alternative accommodation in safety where the property requirement will prevent him/her from obtaining a full barring order. This is an important new provision which must be enacted to enable Ireland to ratify the Istanbul Convention. On an *ex parte* basis, these orders can also only remain in place for 8 days.

Safety orders may be made for a period of up to 5 years. Barring orders can be granted for a maximum of 3 years. In respect of both, subsequent orders can be made following the expiration of the first order. The order itself specifies its precise duration in each particular case. None of this is altered by the 2018 Act. There is, however, one significant change in the duration of safety and barring orders. Pursuant to section 2(7) of the 1996 Act, as amended, where a safety order or so much of a safety order is made for the benefit of a dependent person, the safety order in respect of the dependent person expires at the end of the term specified in the order, or upon such person ceasing to be dependent, whichever occurs first. A similar provision is contained in section 3(10) in relation to the duration of barring orders. In operation, this means that a 5-year safety order, made for the benefit of a dependent child when that child was 16, will expire upon the child attaining full age – namely 18, as the cessation of the child's dependency occurred prior to the expiration of the order according to its precise terms. This is the existing situation, despite the court determining that the circumstances of that case were such to merit a 5-year order and not a 2-year order. This represents an illogical position which fails to recognise that vulnerabilities of dependents can continue after they obtain full age and ignores the practical economic reality that necessitates a situation where dependents may have to continue residing with the respondent to the order when they turn 18. The 2018 Act ameliorates this unsatisfactory situation by removing the aforementioned subsections that allow for the expiration of safety and barring orders upon the cessation of dependency if this occurs prior to the expiration of the terms specified in the order. In all circumstances, therefore, such orders will simply remain in force according to the time period set out in the order which will dictate its expiration. Where a safety or barring

order is made for the protection of a dependent child, therefore, it will remain in force after the child reaches the age of 18, until the order expires.

It is important to note that neither the Domestic Violence Act 1996, as amended, nor the proposed new regime set out in the 2018 Act, enable children to apply for orders under the domestic violence legislation in their own right. Both allow a person to apply for an order for his/her own protection or for the protection of a "dependent person". A dependent person means any child of the applicant and/or respondent or in respect of whom either is *in loco parentis*, who is not of full age or if of full age, is suffering from a mental or physical disability to such an extent that it is not reasonably possible for him or her to live independently of the applicant. The CFA may also apply for certain orders on behalf of a person or a dependent whose safety or welfare it believes to be at risk of violence and who is being deterred or prevented from making an application because of this risk of violence. While children are somewhat covered by these provisions, there is no stand-alone section to enable a child, under the age of majority, to apply for an order under the Act. There is thus no protection under existing legislation or the Act to enable a sixteen-year-old to apply for an order against an estranged parent with whom he/she does not reside or to enable a person under 18 in a dating relationship to seek an order for his/her protection against his/her partner. It is recommended therefore that children, having regard to their age and maturity, be given the power and authority to make applications for protection and safety orders in their own right – without having to rely on a parent or the CFA to make an application on their behalf. This would recognise that at times, there may not be a person who is a parent or *in loco parentis* to a child who is willing or able to take action to protect him/her and that some especially vulnerable children may have no choice but to take action to protect themselves.

In making orders, the Domestic Violence Act sets out a lengthy list of factors to which the court must have regard. Section 5(2) provides as follows:

> In determining an application for a specified order, the court shall have regard to all the factors or circumstances that it considers may have a bearing on the application including where relevant:
>
> (a) any history of violence inflicted by the respondent on the applicant or a dependent person;
>
> (b) any conviction of the respondent for an offence under the Criminal Justice (Theft and Fraud Offences) Act 2001 that involves loss to, or is to the prejudice of, the applicant or a dependent person;

(c) any conviction of the respondent for an offence that involves violence or the threat of violence to any person;
(d) whether any violence inflicted by the respondent on the applicant or a dependent person is increasing, or has increased, in severity or frequency over time;
(e) any exposure of any dependent person to violence inflicted by the respondent on the applicant or any other dependent person;
(f) any previous order under this Act or the Act of 1996 made against the respondent with regard to any person;
(g) any history of animal cruelty by the respondent;
(h) any destruction or damage caused by the respondent to— (i) the personal property of the applicant, the respondent or a dependent person, or (ii) any place where the applicant or a dependent person resides;
(i) any action of the respondent, not being a criminal offence, which puts the applicant or a dependent person in fear for his or her own safety or welfare;
(j) any recent separation between the applicant and the respondent;
(k) substance abuse, including abuse of alcohol, by the respondent, the applicant or a dependent person;
(l) access to weapons by the respondent, the applicant or a dependent person;
(m) the applicant's perception of the risk to his or her own safety or welfare due to the behaviour of the respondent;
(n) the age and state of health (including pregnancy) of the applicant or any dependent person;
(o) any evidence of deterioration in the physical, psychological or emotional welfare of the applicant or a dependent person which is caused directly by fear of the behaviour of the respondent;
(p) whether the applicant is economically dependent on the respondent;
(q) any matter required to be considered by the court under, and in accordance with, subsections (2) and (3) of section 29;
(r) any other matter which appears to the court to be relevant to the safety or welfare of the applicant and any dependent person.

This is a novel provision, designed to ensure the court has regard to the particular enumerated factors set out above where they are relevant in the matter at hand.

6.1.4 Proposed new court procedures

With regard to the procedure in place for the use of domestic violence legislation, the 2018 Act introduces a number of measures designed to make the legal process more accessible for applicants. It is expected that these measures will operate in tandem with the safeguards provided for in the Criminal Justice (Victims of Crime) Act which focus on the protective procedures in place for victims in criminal proceedings. Section 26 of the Act allows for an applicant to be accompanied to court by a person of his or her choice, in addition to his or her legal representative, such as a support worker. Section 25 of the Act provides for the giving

of evidence via live television link. It states that in an application for a safety order, a barring order, an interim barring order, an emergency barring order or a protection order, a person (other than the respondent) may give evidence through a live television link –

- where that person has not attained the age of 18 years, unless the court sees good reason to the contrary;
- in any other case, with the leave of the court.

This is a beneficial measure and it is a welcome addition to court procedure for the hearing of domestic violence applications. From a child protection perspective, the presumption is that a minor will give evidence through live TV link. Given their youth, children are often intimidated by court proceedings. This is heightened in family law applications given the delicate nature of applications involving their family members and is compounded by the fact that in applications for the abovementioned orders, the child may be in fear of the respondent or worried about the repercussions of giving evidence. Having the option to give their evidence through live TV link is a helpful means of protecting children from the additional trauma of court proceedings where they have also been a victim of or witness to violence within their home or family life. While the emphasis on protecting children from the intimidating courtroom environment is a trend that has been seen in criminal legislation for some time, this provision is a welcome addition in other legal proceedings.

Ensuring that the child's right to be heard is vindicated throughout proceedings concerning them is a further trend that can be discerned throughout recent Irish legislative developments.[445] The focus on the voice of the child has stemmed from the insertion of Article 42A into our Constitution and it reflects the importance of child participation, as protected by Article 12 UNCRC. Section 27 of the Domestic Violence Act exhibits this trend. In applications for full orders under the domestic violence legislation,[446] the court may, having regard to the age and maturity of the child, ascertain the views of the child prior to deciding whether or not to make the order in so far as that order relates to the child.[447] In this regard, the court may appoint an expert to determine and convey to the court the child's views. This only applies where an applicant is seeking an order for the protection of his/her child, whether wholly or partly. It will thus not impact proceedings where the applicant is simply seeking an order for his/her own protection only. This section is not mandatory in

[445] See the Children and Family Relationships Act 2015; the Adoption (Amendment) Act 2017.
[446] This section therefore does not apply to interim applications – namely applications for an interim or emergency barring order or protection order.
[447] Section 27(1) of the Domestic Violence Act 2018.

nature. The court is not obliged to ascertain the child's views, but it *may* do so. While ultimately, it should be mandatory to hear from children in proceedings that concern them where their age and maturity allows for it, given the particularly tense, conflict-based nature of domestic violence proceedings, the use of the word "may" as opposed to "shall" is preferable. This allows the court to decide to hear from children in domestic violence proceedings where it is appropriate in a particular case, but prevents it from being an absolute necessity where for instance, it is believed that hearing from the child in such a case will cause further harm and/or upset to the child.

These expert reports which are proposed in the Domestic Violence Act 2018 are specifically directed towards establishing whether or not an order under domestic violence legislation should be made and do not concern issues such as access between a child and the abusive parent. Where issues arise concerning access by a parent to a child where that parent has had an order under domestic violence legislation made against him/her, alternative reports, such as section 20, section 32 or section 47 reports, can be utilised to ascertain the child's view on this matter and to set out any child welfare or protection concerns that arise. This reflects the recent Council of Europe report on children's views which indicates that it is a significant issue for children that they do not want courts to order them to have contact with domestically violent parents against their will.[448] In some circumstances, however, sustaining a relationship between the child and his/her violent parent will be in the child's best interests and will be desired by the child in question. Often supervised access is the most suitable form of access in order to protect the child from the risk of continued abuse. There is, however, a noticeable lack of facilities available for supervised access in this jurisdiction. The abused parent or one of his/her family members are regularly designated by the court as the supervisor of access – there being no other option available to the family. This creates the opportunity for further abuse, or at the very least leads to further conflict between the parties involved, negatively impacting the child who is seeking to enjoy access with his/her parent.

Barnardos and One Family have both identified the "definitive need for formal, supported contact facilities for post-separation contact in domestic abuse cases". **I therefore recommend the establishment of a national system of Child Contact Centres to facilitate**

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

post-separation contact for victims of domestic abuse.[449] The provision of such support will serve to benefit the child – ensuring he or she is in a safe, stress-free environment for access, while at the same time enabling his or her relationship to be maintained with the parent in question. Play and art therapy should also be offered therein to further assist children in their emotional development. Qualified and trained staff should initially supervise access within the centre, but should support access in a less-formalised setting within the community as time goes on, such as trips to the park, cinema and leisure centers. These contact centers should be additionally aimed toward supporting the parent who is availing of the supervised service – through the provision of anger-management classes, parenting courses and counselling, with the aim to reduce the requirement for supervision should all progress well. Ultimately, child contact centers should be state-funded, preventing any strain on the resources of the family, with the needs and wishes of the child being the core focus of their operation.

As mentioned above, section 27(2) of the Act gives the court the power to appoint an expert to ascertain and convey the views of the child where the court considers that appointment to be necessary in order to enable the child's views to be heard. In considering whether to appoint an expert, the court is required to have particular regard to the age and maturity of the child; any previous report made under this section in respect of the child; whether such a report will assist the expression by the child of his or her views in the proceedings; and the best interests of the child. Enabling a child's views in domestic violence proceedings to be heard through the report of an expert – usually a child psychologist or family therapist – is a positive step, as expert reports are usually regarded as a preferable way to ascertain the wishes of the child, without the child being exposed to the pressure of having to come to court and either give evidence or speak directly with the presiding judge. A similar power of appointment is contained in section 32 of the Guardianship of Infants Act 1964, as inserted by the Children and Family Relationships Act 2015. This applies to proceedings concerning guardianship, access and custody matters in relation to a child. In my Tenth Report, while commending the benefits of section 32 in terms of its use to properly put before the court the thoughts and views of children, I highlighted the operational difficulties that had occurred since its introduction in January 2016, particularly in the District Court.[450]

[449] Barnardos (2016) *What's the Harm? A child-centred response to domestic violence*.
[450] See Dr. Geoffrey Shannon, *Tenth Report of the Special Rapporteur on Child Protection* (2017).

Specific concerns were raised in respect of the cost of such reports. In these private family law proceedings, experts charge in the region of €3,000 to €4,000 to compile a report. 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 provided support in this situation by making a contribution towards the cost of these reports, but ultimately 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. It can be anticipated that the cost of a report ordered under the provisions of the Domestic Violence Act would be in a similar range to section 32 reports and I would expect that the aforementioned practical difficulties with regard to their expense will also arise in respect of a report ordered under section 27(2). Section 27(7) simply provides that the fees and expenses of an expert shall be paid by such party or parties to the proceedings and in such proportion as the court may specify. No indication thus far has been given regarding any potential plans for the funding of such reports where the parties to the proceedings do not have the requisite financial resources. It is recommended therefore that concurrently with the commencement of the Act, the establishment of state-funding for expert reports in a systematic and accessible way should be introduced.

On a procedural level, consideration needs to be had for the way in which urgent orders – namely interim barring orders and the proposed new emergency barring orders – may be obtained. The 1996 Act allows for interim barring orders and protection orders to be granted by the court on an *ex parte* basis where there is an immediate risk of significant harm. Such an application needs to be grounded on an affidavit or information sworn by the applicant and requires his or her attendance at court. Adhering to these procedural requirements may be problematic for some applicants in certain circumstances, rendering it difficult for them to access this remedy, or indeed, delay their access to these orders. Typically, this could occur if the intended applicant was hospitalised as a result of an incident of domestic violence.

In its recommendations on the Domestic Violence Bill, the Law Society noted this concern: "Amongst the difficulties posed by the current process, may be the time of day or night at which the risk occurs, the distance of the applicant from a courthouse, or the process of

completing a sworn affidavit."[451] To address same, it proposed that if an applicant cannot access the court in a safe and timely manner "… a faster, more flexible remedy would be to permit a member of the Gardaí to make the initial application on behalf of the person in danger until such time as the applicant had the opportunity to access the court personally." Barnardos similarly recommends the use of "an on-call judge system that Gardaí can utilise to grant emergency barring orders" in acknowledgment that crises do not just happen during office hours.[452] In its submission on the 2017 Bill, Women's Aid also called for a provision in the Domestic Violence Bill 2017 to allow for Gardaí to apply for "Out of Hours Barring Orders" to an on-call judge. This proposal was made to enable a Garda of appropriate rank, on request from a Garda attending a domestic violence incident, to authorise the calling of an on-call judge to apply for an Out-of-Hours Barring Order. The return date suggested was the next sitting day in the nearest available Court.

Evidently, therefore, the abovementioned organisations view reform of a procedural nature as necessary within the Domestic Violence Act 2018 to cater for situations where domestic violence orders are required urgently. In its initial form, the 2017 Bill was silent on this issue. The Domestic Violence Act 2018, having passed through the Oireachtas does, however, provide for such out-of-hours orders. Section 24 of the Act provides special out-of-hours sittings of the District Court may be requested where necessary to deal with urgent applications for domestic violence orders. This is a welcome addition, but it is vague as to how the communication with an on-call judge is to take place and the procedure that must be followed. It is recommended that the legislature give further consideration to the precise mechanism which should be adopted to deal with such emergencies and further detail ought to be included in the 2018 Act. Particular attention should be paid to the precise method of communication between an applicant and judge where the applicant is not in a position to attend court. In this regard, it is submitted that a situation where a victim of domestic violence has been hospitalised must be borne in mind. In these circumstances, for medical reasons, the victim's attendance in court may not be possible and consideration may need to be given to allowing for video-link *ex parte* evidence where this situation prevails.

[451] Law Society Submission, *Recommendations for Amendments to the Domestic Violence Bill 2017*, May 2017.
[452] See Barnardos, Press Release, 1 March 2017, viewable at https://www.barnardos.ie/media-centre/news/latest-news/with-small-changes-domestic-violence-bill-could-improve-protections-for-children-experiencing-domestic-abuse.html - accessed 21 August 2017.

Section 16 of the 2018 Act contains a novel provision to protect children from the trauma of cross-examination in certain circumstances. It provides that where a person under the age of 18 is giving evidence in an application for an order under the Domestic Violence Act, and either the applicant or the respondent proposes to cross-examine the child personally, the court must direct that the applicant or the respondent, as the case may be, may not personally cross-examine the witness unless the court is of the opinion that the interests of justice require the applicant or respondent to conduct the cross-examination personally. This will serve to prevent the applicant or respondent in many cases from personally questioning the child, thereby reducing some of the trauma for the child of giving evidence in such proceedings. Given the relatively informal nature of family law and the high number of lay litigants, section 16 will serve to limit the circumstances in which an applicant/respondent may personally examine a vulnerable witness under 18.

6.1.5 Legal age to marry

At present, the legal age at which a person may marry in Ireland is 18 years of age. Section 31(1)(a) of the Family Law Act 1995 provides that it will be an impediment to a marriage if one or both of the parties to the intended marriage is under the age of 18 years on the date of solemnisation of the intended marriage. Pursuant to section 2 of the Civil Registration Act 2004, there currently exists an exemption to the application of section 31(1)(a), where both of the parties to the intended marriage make an application to court under section 33 of the 1995. On such an application, the court may exempt the couple from having to comply with the age requirement where such an exemption is justified by serious reasons and is in the interests of the parties to the intended marriage. The Domestic Violence Act 2018 seeks to remove this underage marriage exemption. In section 49 thereof, it amends the 2004 Civil Registration Act, only allowing those court-obtained marriage exemptions granted prior to the coming into operation of this Act to remain valid. The aim of this provision is to protect minors against forced marriage. Mandating both intended parties to a marriage to be at least 18 years of age should assist in ensuring that they have the maturity to withstand parental or other pressure that may be exerted upon them to marry and this is a welcome reform.

Overall, the provisions of the Domestic Violence Act 2018 represent an improvement to the level of protection currently given to victims of domestic violence in this jurisdiction. It is certainly a step in the right direction and the 2018 Act was passed by the Oireachtas in May

2018. As discussed above, a number of further discrete amendments, however, are required. These would ensure that every opportunity is taken in this consolidating piece of legislation to combat violence within the home as strongly as possible. Resources, however, are also required from a practical perspective to give effect to some of these measures and to compliment the new regime as a whole – particularly with regard to both counselling for children who have experienced domestic violence and the funding of expert reports.

Recommendations

Child-specific services should be made available for children who have been exposed to domestic violence. In particular, such supports should include the provision of counselling for these children.

The Domestic Violence Act 2018 represents a positive step towards protecting victims of domestic violence – which necessarily includes children. Efforts should be made to ensure its commencement as soon as possible, subject to certain amendments to further strengthen its remit.

A broad definition of "communicating (including by electronic means)" should be included in the 2018 Act, clarifying that it includes phone calls, text messages and emails; communication through social media sites, including Facebook and Instagram; online messaging services; and mobile phone applications such as "whatsapp" and "snapchat".

Children, having regard to their age and maturity, should be given the power and authority to make applications for protection and safety orders in their own right – without having to rely on a parent or the CFA to make an application on their behalf.

Further consideration needs to be given to the exact parameters of out-of-hours orders.

A national system of Child Contact Centres needs to be established to facilitate post-separation contact for victims of domestic abuse, providing qualified staff to supervise access between children and parents within the centre initially, and within the community as progress is made. These centres should also offer play and art therapy to further assist children in their emotional development; as well as additional supports aimed toward

supporting the parent who is taking up the supervised service – through the provision of anger-management classes, parenting courses and counselling, with the aim to reduce the requirement for supervision should all progress well. Child contact centres should be state-funded, preventing any strain on the resources of the family, with the needs and wishes of the child being the core focus of their operation.

State-funding for expert reports in domestic violence cases must be introduced in a systematic and accessible manner.

6.2 ASSISTED HUMAN REPRODUCTION BILL

6.2.1 Introduction

In recent years, people who wish to have families but have been unable to do so naturally have embraced new technologies which have been developed. These new procedures and treatments can greatly assist human reproduction. Many persons who seek such assistance provide the necessary reproductive material themselves, for instance by availing of In Vitro Fertilisation, using their own sperm and/or eggs. In some cases, however, couples require a donor to provide gametes (whether egg, sperm or embryo), to aid reproduction. Where this occurs, the assignment of legal parentage becomes complicated. This is similarly the case where the intending parents seek to use a surrogate to bear their child. Thus, while these innovative technologies concerning human reproduction clearly provide people with a renewed sense of hope in their ability to have children, undeniably complex legal issues arise with regard to their use and operation. In light of the increased number of people in Ireland accessing human reproduction treatments and services, ensuring the complete regulation of the Assisted Human Reproduction (AHR) process is therefore a matter of pressing concern.

6.2.2 Case law on assisted human reproduction

A number of cases determined by our Superior Courts in the last decade have indicated that Irish law must develop quickly in order to keep abreast of technological advances in the area of reproduction. In *M.R. v T.R.*,[453] the plaintiff was seeking to use three frozen embryos which had been created using her eggs and her husband's sperm. Initially six embryos had

[453] [2006] IEHC 2001.

been created. Three had been implanted resulting in the plaintiff and defendant having a daughter. The remaining embryos were frozen. Subsequently, the marriage between the parties broke down. The plaintiff sought to implant the remaining three frozen embryos and the defendant objected to such implantation, claiming that it would be unreasonable and a breach of his rights, as he did not want to be the father of another child with the plaintiff due to their separation. There were a number of difficult and disparate issues to be considered, thus McGovern J. heard the case in two separate sittings. In this first case, he considered the contractual argument - namely whether there was either an express or implied agreement between the parties that the plaintiff could use the remaining frozen embryos and whether such agreement, if it existed, could bind the parties after their separation.

The learned judge examined a number of consent forms signed by the plaintiff and defendant before engaging in the IVF treatment. He considered that such documents showed that the purpose of freezing the remaining three embryos was to use them if the first implantation failed. He noted that no document stated what was to happen if either the first implantation was successful or if the couple's circumstances changed such as the death of one of the parties or a separation. As such, the learned judge was unable to find that the defendant gave express consent to the plaintiff to use the remaining embryos. He found similarly in relation to the existence of implied consent. McGovern J. noted that there was no presumed intention between the parties as to the fate of the three frozen embryos. Similarly, it was not necessary to imply such consent to give effect to the original agreement and again the judge noted that the purpose of freezing the three embryos was to use them if the original implantation failed. It is interesting to note, however, that McGovern J. seemed to accept that had such issues been dealt with by agreement of the parties that it could have been upheld.

A subsequent hearing by McGovern J. considered whether the frozen embryos could be considered "unborn", and thus entitled to protection under Article 40.3.3º of the Constitution.[454] Evidence was placed before the Court as to when exactly human life begins. That said, there was no consensus on this point. The learned judge observed that all the case law discussing the right to life of the unborn revolved around the issue of abortion and, indeed, the insertion of Article 40.3.3º was to ensure the prohibition on abortion. Thus, it was concluded that Article 40.3.3º could not refer to embryos which are outside the womb and the

[454]*M.R. v T.R.* [2006] IEHC 359.

Court did not therefore have the power to extend the meaning of Article 40.3.3º to include such embryos. McGovern J. stated the position as follows:

> There has been no evidence adduced to establish that it was ever in the mind of the people voting on the Eighth Amendment to the Constitution that "unborn" meant anything other than a foetus or child within the womb. To infer that it was in the mind of the people that "unborn" included embryos outside the womb or embryos *in vitro* would be to completely ignore the circumstances in which the amendment giving rise to Article 40.3.3º arose. While I accept that Article 40.3.3º is not to be taken in isolation from its historical background and should be considered as but one provision of the whole Constitution, this does not mean that the word "unborn" can be given a meaning which was not contemplated by the people at the time of the passing of the Eighth Amendment and which takes it outside the scope and purpose of the amendment.

The learned judge considered, however, what protections the frozen embryos would be entitled to and ultimately decided that as the parties could not seem to agree on what to do, the embryos would, most likely, remain frozen indefinitely. Significantly, McGovern J. held that the Court did not have authority to intervene in the matter and it was for the Oireachtas to establish the legal status of embryos *in vitro*.

The case was appealed to the Supreme Court. The five-judge Court unanimously dismissed the appeal. It held that a frozen embryo is not an "unborn" person as protected by Article 40.3.3º of the Constitution and the word "unborn" refers to an embryo within the womb, not pre-implantation embryos. Denham J. stated that Article 40.3.3º referred to a situation where two lives are connected and envisaged a balancing between the life of the mother and her unborn child. The learned judge stated the position as follows:

> [Article 40.3.3º] applies to a relationship where one life may be balanced against another. This relationship only exists, this balance only applies, where there is a physical connection between the mother and the unborn.

Hardiman J. held that the "unborn", "na mbeo gan breith", is the foetus "*en ventre sa mere*", the embryo implanted in the mother's womb.

In deciding that an embryo created by *in vitro* fertilisation treatment is not an unborn, the Supreme Court stressed the need to respect the dignity of the human embryo. Fennelly J. stated as follows:

> I agree with the judgments of Hardiman J. and Geoghegan J. that the frozen embryo is

> entitled to respect. This is the least that can be said. Arguably there may be a constitutional obligation on the State to give concrete form to that respect. In default of any action by the executive and legislative organs of the State, it may be open to the courts in a future case to consider whether an embryo enjoys constitutional protection under other provisions of the Constitution.

The Supreme Court also stated that there was no enforceable contract between the woman and her estranged husband. Denham J. noted that the forms provided by the clinic to the couple were to obtain their consent to medical procedures and did not establish any contractual relationship between them. That said, Denham J. left open the possibility of ordering the implantation of embryos in circumstances such as where a woman has no children "and had no other opportunity of having a child". In such circumstances, a woman may be entitled to implantation irrespective of the consent of the man concerned.

The Supreme Court expressed concern at the total absence of statutory regulation of *in vitro* fertilisation in Ireland. Hardiman J. referred to the marked reluctance on the part of the legislature to legislate in this area, citing the case of *Attorney General v X*.[455] He stated as follows:

> The fact that difficulties are raised does not absolve the legislature from the obligation to consider the degree of respect due to fertilised embryos and to act upon such consideration 'by its laws'. […]
>
> If the legislature does not address such issues, Ireland may become by default an unregulated environment for practices which may prove controversial …

Murray C.J. considered the moral status of embryos but concluded that this was not the issue under review, but rather whether a frozen embryo was human life within the meaning of Article 40.3.3º of the Constitution. The former Chief Justice held that given the uncertainty and lack of consensus as to when human life begins, the point in law as to when protection for life before birth should be deemed to begin was a policy choice for the legislature and not a justiciable issue for the courts. The learned judge stated:

> Absent a broad consensus on that truth, it is for legislatures in the exercise of their dispositive powers to resolve such issues on the basis of policy choices.

Clearly, this case demonstrated calls from the judiciary for legislative intervention in this

[455] [1992] 1 IR 1.

delicate area of family life and reproduction.

In the High Court case of *J.McD. v P.L. and B.M.*,[456] an assisted human reproduction procedure was also at issue. In this case, Hedigan J. considered a guardianship and access application brought by a homosexual man who donated his sperm to a lesbian couple. The couple had been in a relationship since 1996 and entered into a civil union in the United Kingdom in 2006. The applicant sought to have a significant "fatherly" role in the life of the child. The respondents, however, maintained that the agreement had been that the applicant would play the role of a "favourite uncle". To this end, a contract had been drawn up between the respondents and the applicant detailing the applicant's role and specifying that the child's parents were the respondents. The High Court, however, held that "sperm donor agreements, such as herein, may constitute a valid contract but are enforceable only to the extent that the rights of any child born as a result thereof are not prejudiced".[457]

In refusing the application for guardianship or access, Hedigan J. placed considerable emphasis on the report produced for the Court under section 47 of the Family Law Act 1995. The author, Dr Byrne, stated that while it is generally accepted that a child should have knowledge of both parents, in this instance it could lead to psychological damage of the child. Dr Byrne noted that the child had not yet created an attachment to the applicant and as such, removal of the applicant from the child's life would not damage him. Hedigan J. noted that the rights of the applicant sperm donor were no greater than those of an unmarried father. The donor had a right to apply to be appointed a guardian but such an appointment would be considered in light of the welfare of the child. Hedigan J. stated as follows:

> [W]here the court finds the presence of factors negative to the child's welfare, the blood link is of little weight and would not be a determining factor. Where there are positive factors which are or would be beneficial to the child, there may be rights and interests inherent in the sperm donor. All factors must be taken into account but at all times it is the welfare of the child that is paramount.[458]

The rights of the *de facto* family were also considered and the Court drew on European Convention on Human Rights (ECHR) jurisprudence for assistance in dealing with the

[456] [2008] IEHC 96; unreported, High Court, Hedigan J., April 16, 2008.
[457] *Ibid*., at p. 35 of the judgment.
[458] *Ibid*., at pp. 38 and 39 of the judgment.

matter. The judge, relying on *X., Y. and Z. v U.K.*,[459] held that a lesbian couple in a stable and committed relationship can be considered a *de facto* family entitled to protection under Article 8 of the ECHR. The learned judge held that such protection would extend to any child that was a part of that *de facto* family unit.

This matter was appealed to the Supreme Court. The Supreme Court unanimously overturned the High Court decision. In dismissing the appeal on the guardianship issue, Denham J. held that a birth father who is a sperm donor has the status of a father under section 6A of the Guardianship of Infants Act 1964, as inserted by section 12 of the Status of Children Act 1987.[460] Each of the judges focused on the paramount importance of the welfare of the child, the subject of the proceedings. Denham J. stated the position in the following terms:

> In cases where the issues of guardianship, custody and access arise the kernel issue is the welfare of a child. In assessing the welfare of a child all the circumstances require to be analysed. These include the biological parents, the age of the child, the relationships which the child has formed, the situation in which he or she lives. If a couple have lived together in a settled relationship for years and have a child in that relationship then these are critical factors. A child will know and have a relationship with the people with whom he lives – it will be an important aspect of his life, and therefore weigh heavily in determining his welfare. On the other hand, if a couple have a child and do not live together, there may be little or no relationship between the child and the father and thus the relationship with the father will not weigh so heavily. These will be factors in the balance to be considered by the court in determining the welfare of the child. It is a question of considering the welfare of the child in all the circumstances of the case.

Fennelly J. noted that the issue of access by a sperm donor should be determined in accordance with section 11(4) of the Guardianship of Infants Act 1964, as amended by section 13 of the Status of Children Act 1987, which provides as follows:

> In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him.

[459] [1997] 24 EHRR 143. See also *M. v The Netherlands* [1993] 16 EHRR 38. In this case the applicant was a sperm donor. Relying on Article 8 of the ECHR, he sought access to the child, who was born to a lesbian couple. The European Court of Human Rights (ECtHR) declined his application stating that his biological link to his genetic child was not sufficient to establish a "claim to family life" under the ECHR, even though he had some initial contact with the child. Similarly in *Leeds Teaching Hospital NHS Trust v A.* where Dame Butler-Sloss P. stated the need for there to exist *de facto* "family life" between a child and its genetic parent.

[460] Section 6A of the Guardianship of Infants Act 1964 provides as follows: "Where the father and mother of an infant have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant."

All four written judgments were unanimous in finding that the father was entitled to apply for guardianship and access. The Court held that the father was entitled to access but not guardianship and ordered that the case be remitted to the High Court to determine access by the father to the child.[461] Denham J. held that Hedigan J. gave insufficient weight to the biological link in this case although she did state that it was not always a determinative factor. She noted that there was benefit to a child, in general, to have the society of his father. The learned judge also alluded to the fact that this was not an anonymous sperm donor case in that the father "had entered a situation where it was anticipated he would have contact with the child". This Supreme Court decision is important for its focus on the blood link and supports the approach adopted by the High Court in *W.S. v Adoption Board.*[462] However, the potential application of Article 8, ECHR to the relationship between the father and the child receives little attention in any of the judgments in this case. This is to be regretted. Denham J. merely states that Article 8 is not engaged, relying on the 1992 ECtHR case of *J.R.M. v The Netherlands*.[463] No reference is made to the recent jurisprudence of the ECtHR, which requires a relatively minimal level of involvement following the birth of his child on the part of the biological father for family life to be engaged.[464]

The Supreme Court held that a sperm donation agreement was generally unenforceable. Despite this, the Court held that insofar as such an agreement protects the child's welfare, it may be of assistance in furnishing factual information and context. Fennelly J. stated the position as follows:

> The learned trial judge did not rule on the contractual status of the agreement. In reality, it was not necessary for him to do so. If such an agreement is to be regarded as enforceable at all, he held, rightly, in my view, that the agreement is enforceable, only to the extent that the child's welfare is protected. The only material parts of the agreement relate either directly or indirectly to the question of the father's contact with the child, in which case the welfare principle takes over and renders the agreement redundant.[465]

Murray C.J. questioned whether a sperm donation agreement could ever be enforceable stating as follows:

> The fact is that a person in the position of *McD.* when faced after birth with the reality of

[461] See unreported, High Court, Hedigan J., April 27, 2010.
[462] Unreported, High Court, O'Neill J., October 6, 2009.
[463] Application No. 16944/90.
[464] See, for example, *Pini v Romania* (2005) 40 EHRR 13, discussed at para. 2–62.
[465] See also *Re: Patrick* [2002] Fam. CA 193.

> a child, a person, who is his son or daughter, even if biologically in the sense of the facts of this case, may, quite foreseeably, experience strong natural feelings of parental empathy and identity which may overcome previous perceptions of the relationship between father and child arrived at in the more abstract situation before the child was even conceived. That such a change of heart would occur must also be foreseeable as at least a real possibility by parties in a position similar to that of *P.L. and B.M.*

The Supreme Court rejected the analysis of Hedigan J. that the lesbian couple and the child were a *de facto* family entitled to invoke family rights under Article 8 of the ECHR or the Constitution. Denham J. stated that "there is no institution of a *de facto* family in Ireland". Moreover, she stated that the ECtHR has not recognised same-sex couples as constituting "family life" under Article 8 of the ECHR.[466] Murray C.J. noted that "the learned trial judge embarked on what appears to have been an autonomous direct application of Article 8 of the Convention" which he held "in the circumstances of this case was not correct". On the status of "social" parents, such as the second respondent in *J.McD. v P.L. and B.M.* and grandparents and foster parents, Murray C.J. made the following interesting comments:

> That is not to say that the *de facto* position of *B.M.* could or should be totally ignored in considering the issues in this case since so much turns on the ultimate interests of the child. *B.M.*'s relationship with *P.L.* and their relationship with the child are among the factors to be taken into account in that context. That the situation of a party other than a natural parent, and in particular such a person's relationship with the child, should be a material factor in determining the custody and associated rights of the child is not unique to the situation which has arisen in this case. It may also arise in a variety of other situations such as a household consisting of a mother and child and one, or both, parents or where a child has been raised for a number of years by grandparents or foster parents.

Geoghegan J. stated that there was "nothing wrong with the rather useful expression '*de facto family*' provided it is not regarded as a legal term or given a legal connotation". Fennelly J. added that the European Convention on Human Rights Act 2003 does not afford an "open-ended mechanism for our Courts to outpace Strasbourg".

In contrast to the two aforementioned cases which concern the use of frozen embryos and the donation of genetic material, the issue of parentage in cases of surrogacy was raised in the Supreme Court decision of *M.R. and D.R. v An tArd Chláraitheoir*,[467] delivered on 7 November 2014. This case similarly highlighted the lack of legislative provision for new

[466] See *Mata Estevez v Spain*, Application No. 56501/00.
[467] [2014] IESC 60.

technologies designed to assist reproduction – in particular, by emphasising the legal vacuum for surrogacy agreements. In this case, twins were born to a surrogate, through the use of genetic material from their genetic mother and father. The Registrar of Births refused to register the genetic mother of the twins as their legal mother, resulting in a challenge in the High Court by the genetic parents. In a landmark decision, the High Court ruled that the birth certificates of the twin boys born to a surrogate should record the name of their genetic mother.[468] Considering the maxim *mater semper certa est* (a woman who gives birth to a child is the mother of the child), Abbott J. stated;

> The maxim *mater semper certa est* is part of a series of maxims relating to maternity and paternity arising from the ancient Roman law. It can be said that the maxim achieved such prominence, acceptance and fixity by reason of the fact that before IVF the mother of the baby was determined at parturition or birth and the maxim (being an incontrovertible truth) expressed the facts of the situation. In the parlance of the common law the maxim became a presumption at law and in fact. Because it was based on incontrovertible facts, it became an irrebuttable presumption in any court proceedings. That meant that motherhood would be presumed in respect of a baby as between a woman and that baby once parturition of that baby was proven in relation to the woman. No other evidence or argument was required. The matter was self-evident. No evidence could be adduced to controvert this presumption. If perchance evidence could be permitted by the law to be introduced to controvert this conclusion, then the presumption would change from being irrebuttable to rebuttable. The presumption could be rebutted by whatever evidence was appropriate. Prior to surrogacy arrangements, this possibility of the rebuttal of *mater semper certa est* did not arise. The fundamental issue in this case is whether, in the circumstances of this case of surrogacy, such a possibility arises within the current legal and constitutional framework of this jurisdiction.[469]

Abbott J. considered the argument made on behalf of the Attorney General, that the maxim *mater semper certa est* has received a constitutional approval in the pro-life amendment of the Constitution (Article 40.3.3^{o}) and that the word mother appears in that Article in connection with pregnancy as unquestionably the mother who carries the baby, i.e. the 'unborn'. The State submitted that the harmonious interpretation of the Constitution requires that the word 'mother' should carry the same meaning throughout the Constitution and the statutory provisions of the Status of Children Act and all other relevant legislation. The High Court, however, took the view that "mother" in that Article has "… a meaning specific to the Article itself, which is related to the existence of the unborn which was held by the Supreme

[468] [2013] IEHC 91.
[469] *M.R. & Anor v An tArd Chláraitheoir & Ors* [2013] IEHC 91at para. 100.

Court in the frozen embryo case of *Roche v Roche* to have an existence only when the foetus was in the womb and not otherwise."

Abbott J. stated that it is clear from the judgments of Fennelly J. in *N. v Health Service Executive* and *J.McD. v P.L.* that the concept of blood relationships or links is paramount in deciding parenthood. In relation to paternity, determining what is meant by blood relationships or links is simply established through a DNA test or blood test. The State submitted that to argue that maternity should likewise be determined on the same blood test procedure, was to compare "apples with oranges", and failed to recognise the fundamental difference between motherhood and fatherhood. Abbott J. nonetheless held the following:

> In view of my findings in relation to the determinative nature of chromosomal DNA, I find that while the input of a gestational mother to an embryo and foetus not containing genetic material from her is to be respected and treated with the care and prudence which the best medical practice dictates, the predominant determinism of the genetic material in the cells of the foetus permits a fair comparison with the law and standards for the determination of paternity. It would be invidious, irrational and unfair to do otherwise. In reaching this conclusion, I am supported by current legislative practice in the most recent Adoption Act of 2010 where the legislature recognised the importance of blood relationships by ensuring control at High Court level of the process by which a mother proposing to consent to adoption would at least be counselled in relation to the importance of knowing the genetic background of a child which is proposed to be adopted.[470]

In light of the abovementioned conclusions, Abbott J. considered whether the application of the maxim *mater semper certa est* as an irrebuttable presumption was consistent with fair procedures under the Constitution. He held that the judgment of O'Hanlon J. in *S. v S.* was ample authority to enable the court to conclude that the presumption of *mater semper certa* did not survive the enactment of the Constitution insofar as it applies to the situation post IVF:

> To achieve fairness and constitutional and natural justice, for both the paternal and maternal genetic parents, the feasible inquiry in relation to maternity ought to be made on a genetic basis and, on being proven, the genetic mother should be registered as the mother under the Act of 2004.

While it was indicated to the court that there was a European consensus among a number of governments (including the Irish Government) that the irrebuttable presumption was still accepted internationally as the appropriate point of departure in relation to dealing with

[470] *M.R. & Anor v An tArd Chláraitheoir & Ors* [2013] IEHC 91 at para. 103.

surrogacy questions, the High Court took the view that this so-called international and historic consensus should not restrain the Court in circumstances where the Attorney General did not advance any detailed comparative law analysis to show why this consensus had arisen (apart from historical convention). The court stated:

> As distinct from such an atmosphere of positive legislative enactment banning the surrogacy contract or positively co-defining the irrebuttable nature of *mater semper est*, the situation in this jurisdiction is one where positive legislation on this area is totally absent, meaning that the surrogacy contract in this case is not illegal ... There is nothing in the Irish legislative context that positively affirms the maxim of *mater semper certa est*, or for that matter makes illegal any surrogacy contract. Therefore, the Court should not be swayed from its conclusions or doubt same by reason of the assertion of this so called European consensus.[471]

Abbott J. therefore granted a declaration allowing the genetic mother to have the particulars of her maternity entered on the twins' birth certificate. The State appealed the High Court ruling, arguing in particular that this decision would have significant implications for mothers who bore children through donated eggs.

In a six-to-one majority, the High Court decision was overturned by the Supreme Court.[472] In her judgment, Denham C.J. stated that the core issue in this appeal is the registration of a "mother" under the Civil Registration Act 2004; and the declaration sought that the genetic mother is entitled to have the particulars of her maternity entered on the Certificate of Birth, and that the twins are entitled to have their relationship to her recorded on their Certificates of Birth.

Denham C.J. considered the Constitution and references to "mother" contained therein; concluding that there is no definitive definition of "mother" in the Constitution. Denham C.J. then went on to consider in detail the status of the maxim *mater semper certa est* and the argument on behalf of the State that it is an irrebuttable presumption of the common law. She held:

> It appears to me that in fact the maxim mater semper certa est was not part of the common law of Ireland. It was a statement which recognised the medical and scientific fact that a birth mother was the mother of a child. The common law of Ireland has not addressed the issue of motherhood in a surrogacy situation.

[471] *M.R. and D.R. v An tArd Chláraitheoir & Ors* [2013] IEHC 91at para. 105.
[472] *M.R. and D.R. v An tArd Chláraitheoir* [2014] IESC 60.

Nonetheless, whether such a maxim or principle was part of the common law or not was not regarded as determinative by the court:

> The words were a simple recognition of a fact which existed prior to the modern development of assisted human reproduction.

The then Chief Justice noted that while there had been statutory developments in other jurisdictions addressing assisted human reproduction, no legislation in Ireland had addressed the issue of surrogacy. She stated that legislation in this area would, by its nature, be in the realm of the Oireachtas. Citing the separation of powers, she 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 legislature addressing this lacuna, and providing for retrospective situations of surrogacy.[473]

The court thus held that under the current legislative framework, it was not possible to address issues arising on surrogacy, including the issue of who is the mother for the purpose of the registration of the birth. Neither the common law nor statutory law to date addressed this issue, thus the court allowed the State's appeal.

Emphasising that the law in this area is primarily a matter for the Oireachtas, in his judgment Hardiman J. joined the other members of the Supreme Court in calling for the urgent legislation regarding surrogacy. He stated that the present case is not one for judicial reform precisely because it requires significant policy choices and detailed provisions beyond the legitimate scope of the court. The dilemma at issue is one which necessitates for its solution an important policy decision:

> This is an invitation to overrule the established understanding of "mother" and then to legislate in the area left vacant, and to do so without any evidence-based assessment of the merits of the new dispensation. If the court were to accede to the Respondent's invitation, it would dangerously approach illegitimacy.[474]

Hardiman J. specifically departed from the High Court's finding that the examination of

[473] *M.R. and D.R. v An tArd Chláraitheoir* [2014] IESC 60 per Denham C.J. at para. 113-116.
[474] *M.R. and D.R. v An tArd Chláraitheoir* [2014] IESC 60 per Hardiman J. at para. 12.

genetic material is the sole and determinative evidence of parenthood, as for the court to express a specific view on this subject in advance of legislation might tie the hands of the legislature. This view would exclude from the definition of "mother" a woman who has given birth to a child through the use of donated genetic material. Ultimately, the majority of the Supreme Court thus allowed the appeal and quashed the orders made by the High Court, calling for legislative intervention.

6.2.3 The Children and Family Relationships Act 2015

As the abovementioned authorities indicate, there was for some time a marked absence of regulation in this jurisdiction concerning Assisted Human Reproduction (AHR). The effect of this was that clinics providing AHR did so in a varied manner and individuals who were availing of the services of fertility clinics were doing so in a legal vacuum. In light of the complex, risky and often costly nature of AHR procedures and treatments, the unregulated nature of these services was a matter of serious concern for all parties involved. Legislation in the area of donor-assisted human reproduction however was finally introduced in Ireland through Parts 2 and 3 of the Children and Family Relationships Act 2015. The 2015 Act, for the first time, provides for regulation of this area of treatment, seeking to give legal clarity on parentage where donated genetic material is used in procreation. While initial drafts of the Bill included provisions relating to parentage where children are born through surrogacy, these were removed in light of the decision in *M.R. and D.R. v An tArd Chláraitheoir*. The government took the view that the complex issues raised in that case meant that further policy work and consultation was required on the subject of surrogacy. The Children and Family Relationship Act 2015 thus only governs situations where genetic material, provided by a donor or donors, is used by the intending parents in creating their child. It deals with AHR, excluding surrogacy, and introduces coherent legislation in an area that was previously entirely unregulated. At the time of writing hereof, however, neither of these Parts of the 2015 Act have as of yet been commenced – but it is envisaged that both Parts will be in force by the end of 2018.

Pursuant to section 4 of the Children and Family Relationships Act, a "donor-assisted human reproduction" (DAHR) procedure is essentially a procedure performed in a DAHR facility for the purposes of human reproduction where one or both gametes from which the embryo is formed or the embryo itself has been provided by a donor. A "DAHR facility" is a place at

which a DAHR procedure is performed. Under the 2015 Act, the donor of a gamete will not be regarded as the parent of any child ultimately born as a result of a procedure. Section 5 of the Act specifically sets out the situation in relation to donors, saying that a donor of a gamete (egg or sperm) or the donors of an embryo that is used in a DAHR procedure will not be the parent or parents of a child born as a result of that procedure, and shall have no parental rights or parental duties in respect of the child. There is, therefore, no connection, legal or otherwise, between the donor and the child and the Act serves to clarify this issue definitively.

The Act contains detailed provisions concerning the consent of the donor to the use of his or her gametes in a DAHR procedure, meaning the donor is abundantly aware that he/she is making his/her donation without incurring any legal rights or parentage in respect of any child that ultimately is borne by the recipient. Strict requirements are set out in this regard and in particular, the donor must make a declaration in writing, signed, dated and witnessed by the operator of the DAHR facility where the gamete is provided. This declaration must be made before the donation is made and it must confirm that the person: consents to the use of his/her gamete(s) in a DAHR procedure; is aware that he or she shall not be the parent of any child born as a result of the procedure, that he or she consents to certain information about himself or herself being recorded in a register and understands that a child born through the use of his or her gamete may access this information and seek to contact him or her. Section 8 of the Act allows a donor of a gamete to, by notice in writing to the DAHR facility to which his or her declaration was made, revoke his or her consent but the revocation of consent will have no effect where it is received after the donated material has been used in the formation of an embryo.

As well as clarifying that the donor will not be the legal parent of the child born as a result of a DAHR procedure, the Act sets out the law on the issue of parentage for intending parents. In every case, the birth mother will be the mother of the donor-conceived child. Section 5(1) provides that where a child is born as a result of a DAHR procedure to which subsection 8 applies, the child's second parent shall be the husband, civil partner or cohabitant of the intending mother. Where a child is born as a result of a DAHR procedure, other than a procedure to which subsection 8 applies, the mother alone shall be the parent of the child. Section 5(8) applies to a DAHR procedure where the intending mother has consented under section 9 to the parentage of the child born as a result of that procedure and in her

declaration, she consents to her spouse, civil partner or cohabitant being the other parent and where the spouse, civil partner or cohabitant of the intending mother has consented under section 11 to be the child's parent. This make it clear that the birth mother, notwithstanding whether or not her egg is utilised in the reproductive process, will be the mother of the child and if the abovementioned consents are in order and applicable, her spouse, civil partner or cohabitant will be recognised as the child's other parent, whether or not his/her genetic material was used. These provisions recognise and record the intentions of all the parties involved when a donation takes place and genetic material is used by intending parents.

Under section 14, where an embryo is formed for the purposes of an assisted human reproduction procedure, and the woman and man on whose request the procedure is to be performed do not wish to use the embryo; they may consent to its use in a DAHR procedure in which neither of them is the intending parent. Both of them are required to have consented and written declarations as above also apply. Pursuant to section 16, a person or couple who had DAHR treatment and who has remaining embryos after he, she or they have finished treatment will have the possibility to donate the embryo to another person or couple for it to be used in a further DAHR procedure. The consent of each member of the couple is required, whether or not the person provided a gamete from which the embryo was formed and a similar declaration to that pertaining to a donor must be made.

The 2015 Act also provides for the establishment of a National Donor-conceived Person Register that will record details of donor-conceived children and details of donors. Sections 33 to 39 of the Act allow a donor-conceived child to procure information about his or her donor, thereby preventing anonymous donation in recognition of a child's right to know his or her identity. Responsibility for the operation of Parts 2 and 3 of the 2015 Act lies with the Minister for Health. The 2015 Act and its provisions therefore put in place the legal structure to deal with diverse parenting situations that arise through the use of assisted human reproduction procedures. At present, pre-commencement of Parts 2 and 3, comment can not yet be made about the operation of the Act. Its enactment, however, is undeniably a beneficial development for the various stakeholders involved in DAHR processes in this jurisdiction and most importantly, the children who are born as a result.

6.2.4 General Scheme of the AHR Bill 2017

Expanding upon the positive step taken to legislate for donor-assisted human reproduction in the 2015 Act, in October 2017, Minister for Health, Simon Harris T.D., published the General Scheme of the Assisted Human Reproduction Bill. This recognises that while the 2015 Act went some way towards giving legal certainty on parentage in cases of donor-assisted human reproduction; outlined clear procedures to be followed by DAHR facilities in the donation and receipt of gametes; and established the National Donor-conceived Person Register, it is limited in its overall remit to one area of assisted procreation. The AHR Bill seeks to introduce a complex package of measures for the area of AHR in its entirety. It concerns not only gamete and embryo donation for use in AHR treatment and research, but also deals with surrogacy; posthumous assisted reproduction; pre-implantation genetic diagnosis and sex selection; and embryonic and induced pluripotent stem cell research. Crucially, it provides for the establishment of the Assisted Human Reproduction Regulatory Authority as a dedicated, independent body to oversee this sector and the general aim of the Bill is to protect and promote the health and safety of children born through AHR, their parents and the other relevant persons involved in the process, including surrogates and donors. The publication of the 2017 Bill is a welcome development in an area that urgently requires regulation and it is hoped that its provisions will ensure a consistent application of AHR procedures throughout the country.

6.2.5 General Principles

Part 2 of the General Scheme contains a number of general principles that apply in the context of all AHR treatments and procedures. Head 5(1) provides: "In all decisions regarding the provision of assisted human reproduction (hereafter referred to as AHR) treatment, due regard shall be given to the health and wellbeing of children born as a result of such treatments and to women who receive such treatments." Head 6(1) contains a similarly broad concept; "AHR treatment may be provided to a person and his or her partner, if he or she has one, subject to a consideration of the welfare of any child who would be born as a result of the proposed treatment". Pursuant to Head 7, a person shall not be provided with AHR treatment unless account has been taken of the welfare of any child who may be born as a result of such treatment.

It is a positive inclusion to have the child as the focus of AHR treatments. It is easy to see how the interests of the intending parents, donors or surrogates could be placed to the fore – the child as the most vulnerable participant, being unable to protect himself/herself and lacking any control over the circumstances of his/her conception or birth. Legislative recognition of the importance of protecting the health, wellbeing and welfare of the child who is ultimately born as a result of any AHR procedure is thus to be welcomed. It is recommended, however, that in these general provisions reference should be made to the "best interests of the child", as opposed to his or her welfare. Given the wording of Article 42A of the Constitution and the provisions of the Children and Family Relationships Act 2015, "best interests" should be the applicable concept. In the 2015 Act, an amendment was made to section 3 of the Guardianship of Infants Act 1964 which had, in its original form, required that the court have regard to the welfare of the child as the primary consideration in determining any application considering guardianship, custody or access to the child. The 2015 Act replaced the reference to the welfare of the child, instead providing that the court shall regard the best interests of the child as the paramount consideration in such cases. The AHR Bill thus should emphasise the paramountcy of the best interests of the child, instead of referring to his or her welfare as is currently set out in Heads 6 and 7, to ensure a coherent approach to the protection of children in all modern legislation, moving towards a broader focus of their "best interests" as opposed to welfare.

A further general principle pronounced in the General Scheme of the AHR Bill is the focus upon counselling. Head 8 provides that all intending parents must receive counselling from a counsellor who is operating on behalf of the AHR treatment provider. The explanatory note to this Head explains that counselling is necessary in such situations given that AHR deviates from the expected norms of natural conception, posing a number of complex ethical, social and legal questions which many people might not have considered prior to their engagement with it. Counselling, therefore, will assist intending parents to explore the various issues raised by AHR and to ensure that consent to treatment is informed and genuine. The emphasis on the provision of counselling services to intending parents is an important inclusion in the General Scheme. It is submitted, however, that Head 8 should explicitly reference a particular direction and subject of counselling, namely counselling focused towards rights of the child born as a result of AHR. This separate focus would involve the provision of advice, recommendations and information from a qualified counsellor to parents on how to broach the subject of AHR with their child who has been born as a result of the

procedure; how to explain to children the origins of their creation from an early stage; and how to ensure a child's right to his or her identity is protected and vindicated. I believe this additional emphasis would help to ensure that donor-conceived offspring, or children carried by a gestational surrogate, would ultimately benefit from the counselling their parents are obliged to receive – as the parents would have the requisite skills to deal with the subject of the child's formation with him/her, using the tools they are taught in counselling sessions.

6.2.6 Surrogacy

Part 6 of the Bill proposes specific conditions under which surrogacy in Ireland will be permitted – thereby introducing regulation for agreements between intending parents and their surrogates for the first time in Irish law. It requires that all surrogacy agreements be pre-authorised by the AHR Regulatory Authority. This means that the Regulatory Authority must approve a surrogacy arrangement before any treatment in a clinic will be allowed to proceed, i.e. treatment to allow implantation of the embryo being used. Head 37 is the relevant provision and it provides, "A person shall not manage or participate in a surrogacy agreement prior to receiving authorisation from the Regulatory Authority". It requires any AHR treatment provider which is to provide AHR treatment to a surrogate or the intending parent(s) to have received written authorisation from the AHR Regulatory Authority in advance of doing so and clarifies that it is the AHR treatment provider that makes the application to the Authority. Prior to the surrogacy agreement being submitted to the Regulatory Authority for approval, the surrogate must first be medically and psychologically assessed and approved as suitable to act as a surrogate by both a registered medical practitioner and by a counsellor.[475] Furthermore, the surrogate is required to have received independent legal advice, independent from that of the intending parents. This ensures that the surrogate's consent to the process is full, free and properly informed. Once the medical and psychological assessment has been completed and the independent legal advice received, the Regulatory Authority may approve the provision of the treatment. Only women over the age of 25 at the time the clinic submits the surrogacy agreement application to the Authority for authorisation, and those under 47 at the time of the embryo transfer, who are habitually resident in Ireland and who have previously given birth to a child may act as a surrogate under Head 38. This ensures that the surrogate has experience of pregnancy and childbirth and that she will have sufficient maturity and life experience when consenting to the

[475] Head 38.

agreement, while the upper age limit is in line with the Bill's overall principle to protect the health and welfare of the surrogate. The General Scheme only regulates situations of gestational surrogacy in Ireland – that is where the surrogate does not use her own genetic material. Traditional surrogacy, where the surrogate provides her gamete to form the embryo, is not permitted by Head 36. Instead, she is the carrier of an embryo created from the genetic material of others. At least one of the intending parents is required to contribute a gamete to the formation of the embryo, pursuant to Head 39.

The approval of the Regulatory Authority, outlined above is needed only in respect of the treatment to be provided to the proposed surrogate. In practical terms, it is solely approving and authorising the provision of such treatment to the surrogate under the surrogacy agreement. It does not, however, approve or make a comment upon the issue of parentage. On the contrary, the General Scheme states that the agreement between the surrogate and the intending parents is not an enforceable contract, except in relation to the payment of expenses. There is nothing in the Bill enabling the Regulatory Authority to approve legal parentage in favour of the intending parent prior to the birth of the child. Legally, the General Scheme reflects the traditional position – that the woman who gives birth to the child shall be the child's legal mother. Only 6 weeks after the birth of the child can the intending parents make an application to court in relation to parentage. The Bill sets out a court-based mechanism through which the intending parents can seek to transfer parentage by applying for a Parental Order. If granted, this will transfer parentage from the surrogate to them after the child's birth and such an application must be made no earlier than 6 weeks after the child's birth and not later than 6 months after said birth. The surrogate must consent to this Order and the surrogacy agreement entered into between the parties cannot be used as evidence of the surrogate's consent. Despite this, the court may dispense with the requirement for the surrogate's consent in certain circumstances, including for any reason the court considers relevant. In making a Parental Order, the Court must be satisfied that the making of the Order is in the best interests of the child concerned.

Dr Brian Tobin, in his recent article, "The General Scheme of the Assisted Human Reproduction Bill 2017: A Hybrid Model for the Regulation of Surrogacy in Ireland"[476] is critical of the approach the Bill has taken in this regard, namely its proposed "hybrid model"

[476] Dr. Brian Tobin, "The General Scheme of the Assisted Human Reproduction Bill 2017: A Hybrid Model for the Regulation of Surrogacy in Ireland" *Irish Journal of Family Law*, 2017, Issue 4.

for regulating surrogacy, whereby parentage is not determined or designated prior to the birth of the child. Instead, approval for treatment is initially required by the Authority, but the Authority makes no declaration as to the legal status of the intending parents pre-birth. Steps must be taken after the birth of the child to obtain the necessary Parental Order through the court process, to reverse the traditional legal concept of the birth-mother being the child's legal mother. Dr Tobin advocates for an alternative model for regulating surrogacy instead of this more-complex hybrid model. He calls for "pre-birth State approval" of parentage for intending parents with a genetic link to the child. He notes that the pre-birth State approval model has been adopted in many U.S. states, allocating legal parentage in favour of the intending parents prior to the delivery of the surrogate-born child, allowing pre-birth parental orders to be granted and both intended parents to be named on the birth certificate immediately.[477] Similarly, Dr Tobin points to recent work in the UK, namely the *Surrogacy UK Working Group on Surrogacy Law Reform*, which also advocated for legislation to pre-authorise surrogacy arrangements so that legal parentage can be assigned and conferred at birth in the UK, as well as the 2005 Commission on AHR in this jurisdiction, which recommended a presumption that a child born via surrogacy is presumed to be the child of the intending parents.[478] Dr Tobin submits that this model would be preferable to that proposed in the General Scheme and argues that if the pre-birth State approval model were to be adopted, this would act as an incentive to prospective parents to use surrogacy as a method of having a child where they require assistance, certain in the knowledge that their rights in respect of the child can be established securely early on in the process.

In light of the concerns raised in Dr Tobin's article, I recommend that the approach set out in the General Scheme of the Bill be comprehensively reviewed and re-assessed. Thought must be given towards greatly altering the position provided for therein. Certainty is a crucial concept where all children are concerned, and especially for new-borns. Preventing the enforceability of surrogacy agreements and only allowing post-birth applications for Parenting Orders creates considerable uncertainty for intending parents and their offspring. Furthermore, this approach fails to give proper weight to the intention of the parties involved in a surrogacy agreement and does not reflect the mutual intention of the surrogate or the parents. Being obliged to enter a court process between 6 weeks to 6 months after the birth

[477] *Ibid.*, at p. 6.
[478] *Surrogacy in the UK: Myth Busting and Reform – Report of the Surrogacy UK Working group on Surrogacy Law Reform* (Surrogacy UK, 2015) at p. 39; *Report of the Commission on Assisted Human Reproduction* (Department of Health, 2005) at p.53.

of a child is not ideal for the intending parents, the surrogate or the child. Not only is this time a particularly challenging time for all involved, it necessitates an adversarial court process, which is contrary to the voluntary nature of the surrogacy agreement and special arrangements reached between the parties during the pregnancy – pitching them against each other in court applications. The process currently enumerated in the General Scheme of the 2017 Bill is thus mainly directed towards the protection of the surrogate, and not the child. It fails to recognise, let alone reflect, the intending parents' rights and does not allow for certainty in surrogacy situations. It is therefore recommended that provision be made for pre-birth approval of parentage by the Regulatory Authority.

It must also be mentioned that if Irish law fails to give definitive legal rights to intending parents who are using a surrogate, this could ultimately discourage surrogacy as an AHR option. The position regarding surrogacy contrasts greatly to the approach taken in the case of donor-assisted human reproduction, where the required certainty has been provided by law. As set out above, the declarations signed by the parties in DAHR arrangements and the provisions of the Children and Family Relationships Act 2015 make it clear that the donor of a gamete or donor of an embryo has no legal rights in respect of any child born as a result of an AHR procedure, notwithstanding his/her genetic link. The birth mother and her partner will be the intending parents – because this is what each party agreed in advance by the declarations sworn in the AHR facility pre-treatment. It is unclear why such a different approach is taken to surrogacy, particularly where the General Scheme is dictating that one of the gametes used in the formation of the embryo implanted in the surrogate must come from one intending parent. The entire premise of legislation is to provide certainty for our citizens and at present, the surrogacy provisions of the AHR Bill are lacking in this regard.

It is worth noting that Head 40 of the Bill explicitly prohibits commercial surrogacy being conducted in Ireland. This approach is taken given the concerns raised in respect of commercial surrogacy, particularly the ethical concerns regarding the commodification of children as well as the potential for exploitation of financially vulnerable women to act as surrogates. The payment of "reasonable expenses" to the surrogate, however, is permitted. This is to cater for travel and accommodation expenses associated with the pregnancy and birth, medical, counselling and legal bills, maternity clothing and such reasonable expenditure in connection with the surrogate's role, including loss of earnings in certain defined circumstances. While the Bill prevents situations of commercial surrogacy, it does

not regulate Irish citizens being involved in international commercial surrogacy agreements in other countries – given the legal and practical complexity of regulating commercial surrogacy in other jurisdictions. I believe the approach taken with regard to commercial surrogacy is an appropriate one, aligned with the concept that a child cannot be bought or purchased. This is a similar stance to the approach taken in adoption legislation and this prohibition is a welcome one.

Recommendations

The AHR Bill should emphasise the paramountcy of the best interests of the child, instead of referring to his or her welfare as is currently set out in Heads 6 and 7, to ensure a coherent approach to the protection of children in all modern legislation, moving towards a broader focus of their "best interests" as opposed to welfare.

Counselling specifically directed toward assisting parents to deal with and manage the subject of AHR with any children born as a result of an AHR procedure should be mandatory within any AHR Act. This would ensure that parents have the requisite tools to discuss AHR issues and the child's origins with him or her at an early stage – ensuring that the child's right to know his or her identity is being protected and vindicated. Counselling therefore should be twofold – directed towards intending parents, but also directed towards the rights of any resulting children.

Further consideration must be given on the approach taken to parentage in cases of gestational surrogacy as provided for in the General Scheme in light of the criticisms raised. It is recommended that the existing approach be reassessed and reviewed. Pre-birth approval of parentage, rather than requiring that Parenting Orders be sought after the birth of the child concerned, may be preferable. Certainty is crucial for all parties involved, including the child born as a result of a surrogacy agreement. A revision of the existing approach set out in the General Scheme of the Bill may therefore be appropriate.