

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

A Report Submitted to the Oireachtas

Dr Geoffrey Shannon

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The Report reflects the law and practice as at December 31, 2014, but it has been possible to include new developments since that date.

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ONE PAGE SUMMARY

As has been the case in past years, this report seeks to examine and report on developments and trends in child protection both internationally and domestically.

Section 1 of the report addresses international developments in the past year. The European Commission completed a comprehensive review of children in criminal judicial proceedings and is in the process of completing a commensurate review of children in civil and administrative judicial proceedings. These reviews specifically address the position in each Member State and it is clear that there remains further room for improvement on such matters in Ireland.

Other developments of note include the ruling of the European Court on Human Rights in *O'Keeffe v. Ireland* and the manner in which the reporting of child protection concerns is to be addressed. Moreover, the tide of international opinion is gathering pace in calls to legally prohibit physical punishment of children.

At a domestic level, we still await the implementation of the amendment to the Constitution on the rights of children. The discussion as to family relations continues and in the last year the issue of surrogacy was considered by the Supreme Court but ultimately left in the hands of the Oireachtas. As Ireland emerges from a climate of austerity, certain subsets of children continue to remain marginalised, most notably young carers. Whilst there has been significant focus on the practices of An Garda Síocahána in the last 12 to 18 months, investigations are now showing that procedures to address the interaction of children with Gardaí are not being implemented nationwide which is a cause for concern.

The Criminal Law (Sexual Offences) Bill 2014 represents a significant piece of proposed legislative reform in the last year in child protection. At present only Heads of the 2014 Bill have been published. In the main, the 2014 Bill is to be welcomed as it addresses a number of previous concerns. However, further advances can be made and should be made as the 2014 Bill works its way through the legislative process. This report makes a number of recommendations in that regard.

EXECUTIVE SUMMARY

SECTION 1: CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

In 2014, the European Commission conducted an extensive review on the involvement of children in criminal judicial proceedings. Along with the other member states of the EU, Ireland was the subject of that review. Whilst it is to be acknowledged that Ireland provides adequate protection for children in respect of some aspects of their involvement in criminal judicial proceedings, it must equally be acknowledged that Ireland fails to do so with regard to other aspects. The European Commission review highlights areas in respect of which Ireland can improve in this regard. The introduction of a new EU Directive in this area is to be welcomed and Ireland's transposition of same into domestic law is to be recommended so as to ensure that children are properly protected in the sphere of criminal judicial proceedings. Moreover, the work of the Irish Youth Justice Service, with its aims of diversion and rehabilitation, is also a very positive development.

The European Commission is in the process of completing a commensurate report in respect of the involvement of children in civil and administrative judicial proceedings. A draft of the intended report has been published and in contrast to measures adopted by Ireland concerning the involvement of children in criminal judicial proceedings, it is apparent that further reform is required in Ireland concerning the involvement of children in civil and administrative judicial proceedings. Many of the issues of concern are to be addressed in the Children and Family Relationships Bill.

Developments are afoot in the EU in terms of reviewing the application of Regulations applicable to children, most notably Council Regulation (EC) 2201/2003 ("Brussels IIa") so as to ensure the continued positive application of same throughout the EU. Of particular note is the application of those provisions of Brussels IIa concerning international child abduction. Whilst there is no great issue in respect of the manner in which the Irish courts have applied same, regard must be had to ongoing research and studies into the application of Brussels IIa so as to ensure that Ireland keeps apace with its EU counterparts.

In addition, the issue of children suffering from disabilities is coming more to the fore at EU level in an attempt to ensure uniform standards are applied and implemented throughout the

EU. Ireland in principle ranks relatively high amongst other EU states in providing for children with disabilities. That said the fundamental problem in Ireland is access to services owing to bureaucratic obstacles placed in the path of parents of such children together with the underlying issue that the entitlement to such services does not arise as a matter of right. Whilst we are living in an era of austerity, we cannot lose sight of the basic right of a person to health regardless of whether that person, in particular a child, suffers from a disability or not. The first step to be taken is to ratify the United Nations Convention on the Rights of Persons with Disabilities. Ireland signed the Convention in 2007 but remains one of only two EU member states yet to ratify it.

Since the last report of the Special Rapporteur, the judgment of the Grand Chamber of the European Court of Human Rights in the case of *O’Keeffe v. Ireland* has been delivered. The net effect of that ruling is that under the European Convention on Human Rights there is an obligation on the state to have in place an effective mechanism through which the ill-treatment of children in state education, albeit managed by a third party, can be properly reported and acted on. This finding dovetails with the previous recommendations of the Special Rapporteur.

On the 25th anniversary of the UN Convention on the Rights of the Child (CRC), it is timely to review areas of protection and welfare that require improvement under the CRC. In Ireland, it remains the case that the law does not treat adults and children equally in situations where there is no justifiable basis for unequal treatment. Reforms need to be effected in that regard. In considering such reforms a review should be undertaken of legal provisions applicable only to children to consider the ongoing relevance and application of same. For example, in 2006 Anti Social Behaviour Orders (“ASBOs”) were introduced into Irish law, which sparked great debate. Yet reports suggest that in the first five years, no more than 10 ASBOs were issued. There is a significant concern that ASBOs are contrary to the welfare of children in general in that the effect of such Orders is to potentially punish children for being children in circumstances where the impugned behaviour would not generate a similar sanction as against an adult. In light of the apparent lack of application of ASBOs, consideration should be given to the removal of such a sanction from the statute book thereby eliminating at least one instance of inequality directed towards children.

Previous reports of the Special Rapporteur have highlighted the global problem of child trafficking. This is not a problem that only affects more ‘exotic’ destinations than Ireland.

Quite the contrary is true. International studies show that Ireland is in fact a destination, source and transit country for trafficked persons, including children. This is intolerable. Stricter surveillance and sanction needs to be imposed on those who engage in and seek to benefit from this modern day form of slavery.

In a most welcome development, it is to be noted that Ireland was one of the first states to ratify the Third Protocol to the Convention on the Rights of the Child on a Communications Procedure thereby enabling children, and their representatives, to submit complaints to the UN Committee on the Rights of the Child about violations of their CRC rights.

In the past year there has been a notable international surge in campaigning to legally prohibit physical punishment of children. Ireland has yet to outlaw such acts and is quickly falling into the minority in that regard from an international perspective. Whilst the manner in which children might be parented is often heavily influenced by deeply held beliefs and cultural practices, which are to be respected, the overriding factor is that the protection of children from physical punishment is a fundamental human rights issue that must by definition trump other considerations. International developments in the past year should provide an impetus for domestic reform on this important issue.

SECTION 2: DOMESTIC DEVELOPMENTS

A number of cases raising salient child welfare and protection issues came before the Irish courts in 2014. Of particular note was the case of *M.R. & Anor v. An tArd Chlaraitheoir & Ors* in which the Supreme Court ultimately overturned a High Court decision recognising the genetic mother of twin babies born by way of a surrogacy arrangement as the person entitled to be registered as the mother of the child upon their birth. This case once again highlighted the need for legislation to account for assisted human reproduction in its various guises. Not only are parents, or persons who desire to become parents, negatively affected by the absence of legislation in this field, but so too are children born with the aid of assisted human reproduction. The status of such children can be unclear and it is far from satisfactory that a child might be raised in a context where the identity of the parents of that child, as a matter of law, remains at issue.

Another judgment of particular significance was that delivered by the Grand Chamber of the European Court of Human Rights in the case of *O’Keeffe v. Ireland*, in which the court found a breach of Articles 3 and 13 of the European Convention on Human Rights in circumstances where the state was found to have failed to have in place proper systems to ensure sexual abuse of a child in a public school (albeit managed by a third party) was reported and responded to effectively.

In 2014, the Children First Bill was published, the aim of which is to place the Children First Guidelines on a statutory footing. Once enacted this piece of legislation will operate in conjunction with the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 and the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 so as to provide a general suite of child protection legislation in the sphere of those working with children.

2014 also provided an opportunity for focus to be brought to a small and often unheard subset of children that require state assistance in the interests of their welfare. There are a significant number of young carers in our society many of whom, by virtue of their circumstances, are caused to miss out on their childhood and the opportunities it may present owing to a necessity to care for a parent or older sibling. The role of carers is one that is in the common good and ought to be promoted and supported by the state. Particular support is required for young carers as they often find themselves exposed to a lifetime of substandard living and indeed poverty as a consequence of having sacrificed opportunities during their childhood whilst caring for another.

State support should also be made available for children who suffer from disabilities. Whilst there has been some progress in this regard over the last number of years with the introduction of legislation, not enough has been done. Ireland has yet to ratify the UN Convention on the Rights of Persons with Disabilities. That should be undertaken as a matter of urgency as this Convention sets the benchmark from which the state ought to address the support and measures that need to be put in place to protect children with disabilities.

The Garda Inspectorate Crime Investigation Report 2014 exposed a number of concerning practices in respect of the interaction of children with Gardaí. Whilst there are policies and procedures in place designed to afford children special treatment as victims, witnesses and

indeed accused persons, it would appear that these policies and procedures are not being followed correctly in all cases. Instead of specially trained interviewers engaging with children who may have been the subject of child sexual abuse there have been instances where regular unit Gardaí conduct such interviews. A Garda who conducts such an interview without the appropriate training may in fact inadvertently harm the welfare of the child in question by causing the child to re-experience the events in question in a traumatic manner during the course of an interview. Steps need to be taken where required to ensure that all policies and procedures concerning children are applied to the fullest extent.

SECTION 3: THE CRIMINAL LAW (SEXUAL OFFENCES) BILL 2014

In November 2014, the Heads and General Scheme of the Criminal Law (Sexual Offences) Bill 2014 was published. This piece of legislation is to be welcomed. It creates a wide range of new criminal offences in relation to child pornography and the grooming of children for sexual exploitation. In particular it seeks to keep pace with developments in modern technology by addressing the role of information communication technology and how it is often used in the commission of offences against children.

The Bill also seeks to address the complicated issue of jurisdiction in respect of offences committed outside of the state. It has been previously recommended that the jurisdictional arm of the Irish courts be extended as far as permissible so as to avoid loopholes enabling persons to travel from Ireland to commit an offence against a child and return unpunished.

The Bill addresses a number of other matters such as sexual activity between two children under the age of consent, an offence that targets the abuse of a position of trust, defilement offences and child prostitution and trafficking. The Bill also addresses the giving of evidence by children in respect of sexual offences.

The Bill has yet to be fully debated. Whilst the Bill represents much needed progress in this field, there are further improvements that can be made to the Bill so as to ensure that children are afforded the greatest degree of protection from sexual exploitation. Careful and rigorous analysis should be brought to bear on the Bill so as to ensure that the final product provides for a robust tool in the fight against the sexual exploitation of children.

RECOMMENDATIONS

SECTION 1: CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

1.2.3 Recommendations

Examine, and where appropriate, amend the law and practice to recognise the gaps in Irish practice identified in the European Commission report entitled “Summary of Contextual Overviews on Children’s Involvement in Criminal Judicial Proceedings in the 28 Member States of the European Union”. The following (non-exhaustive) recommendations are made on the basis of the findings of the report:

- *Consider the examples of practice elsewhere provided by the Commission report, such as the specialisation of professionals in youth justice in France; the training provided to professionals in Belgium and Luxembourg; and alternatives to detention in various states;*
- *Raise the minimum age for criminal responsibility, as it is amongst the lowest in the EU which is unacceptable from a children’s rights perspective;*
- *Change the law which enables the prosecution of children under the minimum age of criminal responsibility, for the same reasons;*
- *Whilst it is positive that Ireland has specialist police units established to work with children, Ireland should extend the remit of these special units to deal with children in all criminal areas, as suspects/offenders and as victims or witnesses. At present in Ireland, these units deal with child suspects or offenders only;*
- *Ensure that children are always detained separately from adults, and that there is adequate infrastructure in place for this purpose;*
- *Amend the law and practice to ensure that victims have a right to legal representation (and free legal aid) as Ireland is one of only three states in which this is not provided for (except in particular sexual assault cases);*
- *Ensure better provision for the right of children to be heard in criminal proceedings, as at present enjoyment of this right is dependent on the discretion of the police and prosecutors.*

Examine, and where appropriate, amend the law and practice to recognise the gaps in Irish practice identified in the report on Ireland, for example:

- *Include in the Garda Charter an obligation to provide child victims with information;*
- *Implement the recommendations of the Joint Committee on Child Protection on child-friendly justice;*
- *Provide extensive training for professionals dealing with children in the area of criminal law;*
- *Ensure that there is a uniform standard of training for all those involved in the administration of justice;*
- *Put mechanisms in place to avoid secondary victimisation of children, particularly where children have been sexually abused;*
- *Ensure that both victims and witnesses have the right to free legal assistance and/or representation;*
- *Permit greater opportunities to seek compensation from the offender and/or the state;*
- *Make provisions for including children in decision-making processes and services;*
- *Implement the 2007 recommendations of the Office of the Ombudsman for Children to establish an effective complaints mechanism, to introduce adequate regulation of services, and to increase dedicated support services for children.*

Adopt the European Commission Measures to ensure best practice for children involved in criminal justice proceedings, and transpose the proposed Directive into Irish law once this is possible.

Implement other recommendations relating to youth justice set out in previous Special Rapporteur reports.

1.3.1 Recommendations

A number of shortcomings in Irish law and practice relating to the rights of children in civil proceedings are identified in the European Commission's draft report; Children's Involvement in Civil and Administrative Judicial Proceedings. The following recommendations are made on the basis of the findings of the report. These recommendations are not exhaustive. Ireland should:

- *Consider the examples of practice elsewhere, such as “youth houses” in France (maisons des jeunes) which provide free legal advice to children;*
- *Amend legislation to provide children with full procedural capacity to initiate proceedings, rather than having to act through a representative in all cases;*
- *Professional bodies should ensure mandatory training on children’s rights for all professionals working with children in civil proceedings;*
- *Ensure that, in line with practice in almost all other EU states, the right to free legal aid applies before proceedings, and in particular, ensure that it is made available generally in the area of family law;*
- *Ensure that children have guardian ad litem representation, particularly where conflicts of interest with parents arise, and that guidance is developed for children’s lawyers and other professionals to ensure children’s views are represented;*
- *Develop mechanisms according to which the quality of guardian services can be monitored;*
- *Ensure that children have a right under law to receive information on the civil and administrative judicial proceedings in which they are involved;*
- *Create a legal obligation that court decisions must be communicated to the child involved in judicial proceedings in a manner adapted to the level of understanding of the child;*
- *Ensure that children have a right to appeal a judgment in their own name instead of appealing through a legal representative, and that this is not only available to children who have had party status in the proceedings in question, but also to children who have not had such status where the proceedings directly concern their interests.*

Implement other recommendations relating to children in civil proceedings included in previous Special Rapporteur reports.

1.4.4 Recommendations

A research study on the conflicts between EU courts when dealing with the matter of international child abduction is at present being conducted by the University of Aberdeen and the University of Sussex. Ireland should ensure that the future outcomes of the study are made widely known once they become available, in order to ensure uniform application of EU standards in Irish courts.

Ireland should also ensure that the outcomes of the recent European Commission report on international child abduction are reflected in Irish law and practice in order to ensure uniform application of EU standards in Irish courts.

Ireland should assist in highlighting the European Commission's information campaign on the rules which exist when international families separate, and the assistance that is available.

1.5.3 Recommendations

Make the European Parliament report on Member States' Policies for Children with Disabilities widely known, including Ireland's strengths and weaknesses in provision for children with disabilities.

The positive aspects of Irish law and practice concerning children with disabilities, such as legal provision for reasonable accommodation and inclusive education, should be recognised.

Greater provision should be made in Ireland to tackle domestic violence against children with disabilities.

Accessibility for children with disabilities, such as access to public buildings and public transport, should be prioritised in Ireland in order to facilitate children's right to participation in society. Information and communication technologies should be given particular priority.

Budget cuts should not unduly affect provision for the rights and needs of children with disabilities. The rights and needs of all children should be given due consideration in budget decision-making in order for Ireland to meet international human rights standards, including those of the UN Convention on the Rights of the Child.

Ireland should improve the provision of information and support to children with disabilities and their families about enforcement and complaint procedures. It should be ensured that official bodies dealing with complaints are child-friendly, which will require training of relevant officials concerning the needs of children with disabilities.

The national legal frameworks which regulate access to assistance should be made less complex, and efficient coordination between competent authorities should be put in place. Information should be freely accessible to children and families, and there should be clarity regarding what benefits are available.

The model of good practice in Spain outlined in the European Parliament report on Member States' Policies for Children with Disabilities should be followed in Ireland, so that provision of free GP care is extended to all individuals under the age of 18 in order to ensure that children with disabilities (and other children) have full access to any health care they may require.

The three pillars referred to in the European Commission Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities by the European Union should be followed in respect of healthcare provision for children in Ireland – Children should have:

- *Access to adequate resources,*
- *Access to affordable services, and*
- *The right to be heard and to participate.*

The European Parliament report on Member States' Policies for Children with Disabilities holds that Ireland only partially recognises the right to education and to inclusive education. Ireland must work to fully recognise these rights in law and practice. It should be acknowledged that Ireland provides relatively well for inclusive education. However there is further work that needs to be undertaken in this area. In particular, provision for the education of children with disabilities should be rights-based.

The European Commission's 2014 Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities by the European Union should be made widely known in Ireland.

The European Commission's Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities by the EU notes significant differences across EU Member States in the way in which the rights of people with disabilities are vindicated. Ireland should ensure that its standards of law and practice in this regard are amongst the highest in the EU.

Ireland should also ensure that, if definitions are standardised across EU Member States, that the highest of standards are set.

It is currently under examination in Ireland how legislation concerning capacity issues for people with disabilities should be modified to meet the requirements of the UN Convention on the Rights of Persons with Disabilities. The matter of the participation of children in decision-making about themselves should also be provided for in any legislative changes, in line with Article 12 of the UN Convention on the Rights of the Child.

The recommendations of the European Parliament report on Member States' Policies for Children with Disabilities include the need to enshrine the principle of the evolving capacities of the child. Ireland has been deemed as having only “partial” implementation of this principle. Irish law and practice need to better recognise gradually increasing self-determination for children as their capacities evolve. Children’s views should not be considered solely based on age, but instead a case-by-case approach to children’s capacities should be ensured. Legal provision should include respect for the views of children with disabilities in proceedings affecting them. In line with the Commission recommendations, efforts should also be made to support children to make better choices from an early age, which requires training for parents and professionals.

Consultation processes and methods of assessment should be developed so that children with disabilities are adequately heard on matters affecting them, particularly in legal proceedings.

1.6.1 Recommendations

Ensure that the European Commission study on Criminal Sanctions in Member States of the EU is considered in the finalisation of the Criminal Law (Sexual Offences) Bill 2014.

Ensure that Irish law and practice relating to child pornography is consistent with other states in the EU.

Ensure that the European Commission study on Criminal Sanctions in Member States of the EU is disseminated amongst relevant professionals, particularly judges.

1.7.1.1 Recommendations

Ensure that there is clarity around reporting of child abuse in schools.

Ensure consistent application of the Children First guidance, and implement the previous recommendation of the Special Rapporteur that a statutory framework be introduced in order to deal with inconsistencies.

Improve the means by which and the regularity with which children are heard on child protection issues, including through the new national participation policy.

1.7.2.1 Recommendations

Ensure targeted assistance and support for families experiencing difficulties, particularly where the individuals involved are especially vulnerable.

Ensure adequate evidence is relied upon where children are placed in foster care or placed for adoption, having regard to the recent case law of the European Court of Human Rights

Ensure there are avenues for retaining a relationship between a family and child where a child is placed for adoption and ultimately adopted, having regard to the recent case law of the European Court of Human Rights.

1.7.3.1 Recommendations

Ensure that asylum proceedings are accessible and effective in practice, for all applicants, including children.

Ensure that the rights of children, including the right to a fair trial and the right to private and family life, are not violated by asylum proceedings.

1.8.1.2 Recommendations

Consider neglected children's rights issues in the Irish context, such as recognition of unjust discrimination that can occur against children on the basis of their young age.

Amend equality legislation to include the prohibition of unjust discrimination against children.

Amend the criminal law in order to outlaw physical punishment to ensure that children are not unjustly discriminated against.

Amend the minimum wage to abolish the permissibility of the payment of a lower minimum wage to younger individuals.

Abolish ASBOs to ensure that children are not unjustly criminalised on the basis of age and consequently discriminated against.

1.8.2.1 Recommendations

The relevant authorities, such as police, social services and businesses, need to be educated about the findings of the 2014 UN Global Report on Trafficking in Persons, particularly concerning its age and gender aspects.

Fully implement recommendations relating to child trafficking in previous Rapporteur reports.

Follow the recommendations of the US Department of State's Trafficking in Persons Report 2014. In particular, increase funding for victim services; enhance the training of social workers working with trafficked children, and establish a national rapporteur to enhance anti-trafficking efforts.

1.8.3.1 Recommendations

The ratification by Ireland of the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure is to be acknowledged and commended.

Steps should be taken to ensure that the ratification by Ireland of the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure is widely reported.

1.9.1 Recommendations

Ireland should implement the recommendations of the report of the Global Initiative to End All Corporal Punishment of Childhood.

In particular, Ireland should legally prohibit physical punishment of children, and should engage in advocacy at both a national and international level on the issue.

SECTION 2: DOMESTIC DEVELOPMENTS

2.13.1 Recommendation

It is recommended that a procedure be introduced whereby vetting information can be obtained in respect of a time period spent outside Ireland by persons that are undergoing vetting. At the moment there is no obligation on the Garda Vetting Unit to seek information from police authorities in a foreign jurisdiction where a person has lived in that country for an appreciable period of time. This might be addressed by protocols or administrative arrangements with police authorities in a foreign jurisdiction. Another method of exchanging information, in relation to criminal convictions, might be established with the passing of the Criminal Records Information Systems Bill 2013 which sets out to provide for exchange of criminal records with other countries. This implements an EU Framework Decision on the exchange of criminal records information. That Bill also provides for the exchange of information with non-EU states.

2.15.1 Recommendations

A clear, positive statement of the rights, value and importance of (heretofore largely unheralded) young carers in society is recommended; with codification and a non-exhaustive, non-limiting enumeration of relevant rights, such as rights to education, participation in social and community life, and to be heard. This initiative would be foundational for the other proposals dealt with here; as the framework provides a useful guide to action and policy.

Any change in policies or strategies at the statutory or non-statutory level must acknowledge the existence of, and contribution made by young carers to society and highlight the necessity for policy and support measures to meet their needs.

Where and as necessary, the establishment, reorganisation and/or expansion of services, institutions and departments with responsibility for the support of young carers and their families are required. This is vital for the aforementioned rights to have any practical effect. Similarly, government level policies or declarations of rights must be made known to the young carers in question for them to have any practical use.

A clear and accessible channel of information must be made available to the young people in question. This is an essential component of any statement of rights or allocation of resources for the benefit of young carers. The lack of adequate information, supports and professional interventions has exacerbated already difficult situations for young carers. Any policy or legislative initiative which aims to improve the lives of young carers must include a detailed plan on how it would be envisaged that young carers can access the information relevant to their rights and the appropriate services and supports they are entitled to.

Whether achieved through statute or statutory instrument, a sharing of relevant data between state agencies, departments and sections is necessary to ensure effective, comprehensive and timely service provision for young carers and their families. Such an initiative would also provide a useful precedent for greater service integration and efficiency in governance generally.

Proceeding from this, the following practical measures and targets are recommended:

- a) Provision of shared care, respite care, counselling, and educational and recreation programmes.*
- b) Access to medical advice and support for young carers and their families, as a matter of priority.*
- c) Commitment to services that are non-intrusive, efficient, responsive and flexible.*
- d) Serious consideration given to the experiences, dynamics, needs and wishes of the carers and their families.*

The promotion of the recommendations and principles set out by the Carers' Association in relation to the additional burdens faced by young carers in terms of education, and the steps that may be taken to assist those individuals.

2.16.1 Recommendations

A provision similar to that contained in section 23(7) of the Children Act 1989 in England and Wales should be inserted into the Child Care Act 1991 in order for the objective of maintaining siblings together to be explicitly set out.

Prior to children being placed in care there should be a comprehensive assessment of the sibling relationship for the purpose of determining whether the children should live together

or whether there are relevant and sufficient reasons based upon their best interests which justify them being placed apart.

It should also be explicitly stated in the Child Care Act 1991, that where it is not possible to accommodate siblings in care together, the CFA shall ensure regular access between siblings and the assessment of the suitability of such access should be conducted independently of the assessment of suitability of access between the children and their parents.

*With regard to any legal or administrative steps that are taken in relation to promoting sibling access or attempts to accommodate siblings in care together, the underlying principle, as set out in *Olsson v Sweden*, must be borne in mind; that administrative difficulties should not be a sufficient reason to justify interference with the Article 8 ECHR rights of children and families.*

2.20.1 Recommendations

The remaining sections of the Education for Persons with Special Education Needs Act 2004 should be commenced without delay and considerable weight should be attached to the principle that every child with special needs should have an education plan.

The United Nations Convention on the Rights of Persons with a Disability should be ratified immediately, as previously recommended in an earlier report.¹

A policy for young children with disabilities availing of the free pre-school year under the early childhood care and education scheme should be implemented so as to ensure that such children and their families are able to access the supports they need in order to take up such a placement, as is the entitlement of any other child of a similar age.

Advocacy services for people with disabilities should entail specific services which are child centred. This might be achieved through joint endeavours between advocates who are trained to work with people with disabilities and GAL's who have experience working with children and ensuring that their voices are heard.

¹ Geoffrey Shannon, Sixth Report of the Special Rapporteur on Child Protection (2013).

Development of specialised foster care and residential care placements to meet the needs of the child with a disability are recommended.

2.22.1 Child Interviews

A procedure should be introduced to limit or prohibit the reporting of an infant ruling in order to protect the privacy of the child involved in such proceedings. The reporting of such a ruling could be made subject to the “in camera” rule or alternatively a new offence could be created to outlaw the reporting of such proceedings.

Any step taken with regard to changing the practice relating to the reporting of infant rulings should be informed primarily by the ‘best interests principle’; that is that the best interests of the child should be the paramount concern in decisions concerning him or her.

SECTION 3: THE CRIMINAL LAW (SEXUAL OFFENCES) BILL 2014

3.2.2 Solicitation and Grooming Offences

A coherent and comprehensive approach should be adopted throughout the Criminal Law (Sexual Offences) Bill 2014 in combatting the use of Information and Communication Technology (ICT) in perpetrating sexual offences against children. Whilst the 2014 Bill addresses this in parts, there are other parts where ICT is not expressly addressed. For example, it is recommended that ICT be expressly referenced in Heads 4, 5 and 6 of the 2014 Bill which create new offences inviting a child to sexual touching, sexual activity in the presence of a child and causing a child to watch sexual activity.

Head 7 of the 2014 Bill addresses the offence of “grooming”. There remains a possible prosecutorial difficulty regarding this offence in proving that an offender was meeting the child or making arrangements to meet the child for the purpose of doing anything that would constitute sexual exploitation. A potential solution to addressing this lacuna could be to include a presumption that the offender was meeting, travelling to meet or arranging to meet the child for the purposes of sexual exploitation, unless the defendant can prove, on the balance of probabilities that he was not so doing.

3.2.4 Child Pornography Offences

The definition of “child pornography” as contained in Head 13(2) ought to be expanded so as to expressly include computer-generated images of abuse and images of fictitious children.

Consideration ought to be given to including an exemption in the 2014 Bill from criminal liability for self-generated pornography involving children who have reached the age of consent where that material is produced and possessed with the consent of those children and only for the private use of the persons involved.

3.3.1 Jurisdiction

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

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

3.4.1 Children Giving Evidence

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

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

The lack of clarity in Head 47 of the 2014 Bill is problematic. Head 47 enables a Judge to direct that a child give evidence in Court behind a screen if, for any reason, a live television link cannot be used. The presence of a child in a courtroom is to be avoided where possible. It is feared that Head 47 might cause children to attend Court. The specific circumstances in

which this may happen need to be set out clearly and debated upon before any such provision might be enacted.

3.5.1 Statutory Definition of Consent

Consideration should be given to providing a statutory definition of consent in the 2014 Bill. The vague nature of the current rules on consent is unsatisfactory. The model of consent set out in sections 75 and 76 of the Sexual Offences Act 2003 in England and Wales provide a useful platform from which to work.

3.7.1 Abuse of Position of Trust

The definition of “person in authority” set out in Head 18 of the 2014 Bill should include a priest.

3.8.1 Defilement Offences

Harsher penalties for those who commit subsequent offences against children ought to be provided for in the 2014 Bill.

3.9.1 Child Prostitution and Trafficking

Heads 10 and 11 of the 2014 Bill address the purchasing of a sexual service. Greater clarity and detail is required as to the actual substance of the offences to be enacted under these Heads. For example a question arises as to the form of consideration that might be exchanged for a sexual service, e.g. drugs. The reference to purchasing a sexual service suggests only monetary consideration will trigger the offence. Such a situation would be unsatisfactory. This needs to be clarified to avoid loopholes.

Head 11 addresses the purchase of sexual services from persons who are trafficked. At present it requires the purchaser to know the person was trafficked. That will give rise to prosecutorial difficulties in establishing such knowledge. Instead it is recommended that the mens rea be amended so as to capture an offender who ought to have known or had a reasonable suspicion that the person was trafficked. In the alternative, Head 11 of the 2014 Bill could be brought in line with section 5 of the Criminal Law (Human Trafficking) Act 2008. That said, in order to provide the best protection from human trafficking, a strict liability approach might be taken as is the case in England, Wales and Northern Ireland.

The 2014 Bill ought to be clarified so that it is made clear that a person need not be convicted for a trafficking offence before a user can be prosecuted for soliciting a trafficked person for the purposes of prostitution.

SECTION 1:

CHILD PROTECTION AND DEVELOPMENTS IN INTERNATIONAL LAW

1.1 Introduction

One of the key aspects of the role of the Special Rapporteur on Child Protection is to monitor and report on international developments in respect of matters of child protection and welfare with a view to analysing same in the context of the child protection and welfare system in Ireland. Such analysis has been a constant feature of the previous Reports of the Special Rapporteur. It is intended to review such international developments over the course of the last year and to identify recommendations therefrom to be implemented in Ireland so as to ensure that the child protection and welfare system in the State is in keeping with international best practice.

1.2 Children’s Involvement in Criminal Judicial Proceedings in the EU: Report on 28 Member States

The area of children’s rights is one in which extensive work has been underway in EU institutions of late. A comprehensive report on children's involvement in criminal judicial proceedings is one such initiative,² spanning the 28 member states of the EU (30 jurisdictions when England and Wales, Northern Ireland and Scotland are considered).

It has been identified that EU judicial systems are not well adapted to the specific needs of children, and considering the high numbers of children facing criminal justice systems each year (approximately 1,086,000 children; which amounts to 12% of the population involved with these systems),³ it was determined that research was needed in this area. Making youth justice more child-friendly was acknowledged as a key action in the 2011 Commission Communication *An EU Agenda for the Rights of the Child*.⁴ A lack of reliable data on the situation of children in EU Member States⁵ was identified as a serious obstacle to policy-making, particularly in the context of child-friendly justice and the protection of especially

² European Commission – Directorate-General for Justice, *Summary of Contextual Overviews on Children’s Involvement in Criminal Judicial Proceedings in the 28 Member States of the European Union* (European Union, 2014).

³ European Commission, *Press Release: Children in Criminal Proceedings: European Commission Proposal to Increase Protection Makes a Decisive Step Forward* (6 June 2014). Available at: http://europa.eu/rapid/press-release_IP-14-636_en.htm (last visited 16 Dec 2014).

⁴ EU Commission Communication, ‘An EU Agenda for the Rights of the Child’ 15 February 2011.

⁵ See further Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2013).

vulnerable children. The European Commission recently sanctioned a report as part of a major study to collect data on the topic, as a measure to support implementation of the Communication.

The Commission's report describes the main findings of the research, outlining data on law and practice in the 28 member states concerning the involvement in criminal judicial proceedings of children as suspects/offenders, victims and witnesses. Key features and variations in law and practice are identified in the report, which also highlights examples of crucial safeguards for children, as well as gaps in the area.⁶ The report provides some interesting and useful information on youth justice issues in Europe. It identifies, for example, that all member states have an age of criminal responsibility under which a child is considered incapable of committing an offence.⁷ In the majority of member states of the EU, the minimum age of criminal responsibility is 14 or 15 years old. Only five jurisdictions have a lower minimum age – the UK (England and Wales, Northern Ireland and Scotland), Ireland and the Netherlands.⁸ Ireland is therefore amongst the states with the lowest minimum age of criminal responsibility in the EU, consequently providing the weakest children's rights protection in this area.

Some other trends are highlighted in the research. Ireland is one of only five jurisdictions (along with Belgium, Latvia, Luxembourg and Poland) in which children under the minimum age of criminal responsibility can be prosecuted for serious crimes.⁹ This is another area in which Ireland has sub-optimal standards for children compared to other EU Member States. Particularly high standards are set for children's rights in 11 jurisdictions, where discretion exists for judges to treat young persons *above* the minimum age of criminal responsibility as not criminally responsible; effectively extending the minimum age. For example in Luxembourg, the minimum age can be extended to 25 years, where the offender's maturity is below the average maturity of individuals at the upper limit.¹⁰

⁶ European Commission – Directorate-General for Justice, *Summary of Contextual Overviews on Children's Involvement in Criminal Judicial Proceedings in the 28 Member States of the European Union* (European Union, 2014), at p. 3.

⁷ *Ibid.*, at p. 6.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.* The age of criminal responsibility in Luxembourg is 18 years.

In eight jurisdictions (including Belgium and Luxembourg), the juvenile courts are not only able to deal with cases involving child suspects or offenders, but they are also competent to deal with cases involving child victims and witnesses.¹¹ Ireland belongs to the category of eleven states which have juvenile courts which deal with child suspects or offenders only. In nine member states, there are no specialist courts for children at all, and youth justice is dealt with by the same judges who oversee cases involving adults.¹² Similarly, there are variations between the operations of specialist police units established to work with children. Ireland is one of fourteen states with a specialist unit; however it is one of four states where these units have competence only to investigate cases involving children as suspects or offenders. In other states, for example Belgium and Luxembourg, special units deal with children in all criminal areas, as suspects/offenders *and* children as victims or witnesses.¹³ This constitutes a much broader provision for all children for specialised treatment on the basis of childhood; a positive approach to vindicate children's rights.

Other forms of specialisation are also identified in the research. For example in France, efforts to increase specialisation in youth justice have extended to various institutions.¹⁴ The youth courts in France (Juges pour Enfants) are involved where cases involve child victims or suspects and can consequently deal with both criminal and civil law matters. They also have the capacity to order that educational or protective measures be taken for child suspects who may be in particular need of such action. These courts are attached to High Courts and have a presence throughout the country.¹⁵ Special police units also deal with youth justice matters and in many cases may interview child victims and witnesses.¹⁶ Specialist training is also necessary for defence lawyers working in youth justice. 70% of France's Bar Associations have specialist children's lawyers groupings and there is an aim in France that all Associations will ultimately have such groupings in place.¹⁷ Public Prosecutors working in youth justice also have training for this purpose, and will be contacted where children are suspected of a crime. They may decide to dismiss the case (possibly with conditions attached) and/or refer a child to a youth court.¹⁸

¹¹ *Ibid.*, at p. 8.

¹² *Ibid.*

¹³ *Ibid.*, at p. 9.

¹⁴ *Ibid.*, at p. 11.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*, at p. 12.

¹⁸ *Ibid.*

It was found in the European Commission research that most EU Member States have specialist training for professionals, although the nature of the training varies widely between states,¹⁹ and most frequently training on child-friendly justice is received by judges.²⁰ Austria is provided as an example of a jurisdiction where child welfare training is provided to judges and prosecutors working in the area of youth justice. These professionals not only receive instruction on children's rights and needs as part of their legal training; they must also have experience working in the fields of social work, education, or another relevant area. The aim is to ensure that they attain "a more rounded understanding of the way children experience criminal proceedings."²¹ Once appointed, they can access continuing education on child psychology and social work, and also have opportunities to engage in international training courses on child-friendly justice.²²

In Luxembourg, police working in the area of youth justice receive multidisciplinary training. They must attend a three-week course covering criminal law, child psychology, communication with children (including specific techniques for child interviews), social issues particular to children, child protection and forensics.²³ They also receive two weeks further training on the specific issue of child sexual abuse. Different government Ministries (e.g. Family and Justice) also provide ongoing training, ensuring co-operation between different services.

A range of measures have been adopted by member states to ensure non-discrimination in youth justice proceedings. In Belgium, for example, failure to provide reasonable accommodation for the needs of children with disabilities is considered discrimination. It is outlined in the report that one aspect of prohibiting discrimination against children which Member States can adopt is the application of the principle of the evolving capacities of the child.²⁴ In this context, it is stated that "children should be treated in an individualised manner,

¹⁹ *Ibid.*, at p. 13.

²⁰ *Ibid.*, at p. 15.

²¹ *Ibid.*, at p. 14.

²² *Ibid.*

²³ *Ibid.*

²⁴ See Article 5 of the UN Convention on the Rights of the Child which states:

"States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

based on their degree of maturity.²⁵ Where children are treated similarly based solely on age, this would constitute discrimination against children who demonstrated higher or lower levels of capacity.²⁶ Mechanisms to assess children's capacities in youth justice settings have been developed in all member states, albeit for different purposes ranging from determining whether they can take part in proceedings to determining the appropriate sentence for a child.²⁷ In Germany, for example, an investigation into the background of a child is conducted immediately where proceedings are initiated against the child. The investigator will examine the child's family background, the child's developmental stage and other factors in order to establish the psychological and emotional state of the child.²⁸

Detailed consideration is also given in the report to the extent that systems in member states are child-friendly. It is identified that in all member states (save Hungary) child suspects have a statutory right to information about their rights and about the criminal justice procedure.²⁹ In some countries, the information provided is extensive whereas in others (for example Denmark) the information provided is quite sparse.³⁰ Nineteen jurisdictions have statutory provisions to ensure that child victims and witnesses receive information regarding their rights and about the criminal procedure.³¹ In 12 jurisdictions, including Ireland, information must be provided to child suspects in a child-friendly format. Austria is one jurisdiction in which a brochure is provided which is specific to child witnesses, in order to prepare them for court.³² It describes attendance at court from the point of view of a fictional child portrayed in a cartoon format. The character describes the court setting and her experiences, illustrated with extensive pictures of the environment in question. It is reported that children are more at ease during proceedings after becoming familiar with the brochure, as they better know what to expect and recognise the setting once they arrive.³³

The report also details safeguards which aim to protect child suspects when they are apprehended by police. In the vast majority of jurisdictions (26, including Ireland) children

²⁵ European Commission – Directorate-General for Justice, *Summary of Contextual Overviews on Children's Involvement in Criminal Judicial Proceedings in the 28 Member States of the European Union* (European Union, 2014), at p. 18.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*, at p. 21.

³⁰ *Ibid.*

³¹ *Ibid.*, at p. 23.

³² *Ibid.*

³³ *Ibid.*

have a right to contact with their parents or another adult when apprehended by police.³⁴ Ireland is one of a minority of countries (seven) which have special rules according to which police must operate when apprehending children in order to account for children's vulnerabilities.³⁵ The report further outlines that pre-trial detention of child suspects as a last resort is a legal obligation in most states (22, including Ireland).³⁶ In some states the criteria for placing a child in pre-trial detention is the same as those for adults (e.g. England and Wales) and in others it differs (e.g. in Italy the seriousness of the offence must be considered).³⁷ There are many alternatives to pre-trial detention in use, such as electronic monitoring (e.g. France); placement in an educational community (e.g. Italy); or placement in the care of a reliable adult who agrees to ensure the child attends hearings (Czech Republic).³⁸ The maximum period of pre-trial detention for children is mostly between three and six months across states, however extensions are sometimes granted for serious crimes.³⁹

In all states but two (Belgium and Portugal), it is mandatory that children are separated from adults when being held in pre-trial detention.⁴⁰ It is emphasised that Ireland is amongst states which find it difficult in practice to implement this rule, due to a lack of the necessary infrastructure.⁴¹

Almost all member states have legal provision for children to be legally represented at all stages of proceedings, and obligations for police to inform children of this right.⁴² The right to legal aid exists for children accused of infringing the law in all states save Hungary and the Netherlands, although the nature of the right varies.⁴³ In most states, free legal aid for child suspects and offenders is subject to a means test, and in 14 states (including Ireland) the merits of the case determine whether children receive free legal aid. In only six states (e.g. Belgium) legal aid is available free of charge to all children without conditions.⁴⁴ Child *victims* have a right to legal representation (and free legal aid) in all states but three; Ireland is one of the

³⁴ *Ibid.*, at p. 24.

³⁵ *Ibid.*, at p. 25.

³⁶ *Ibid.*

³⁷ *Ibid.*, at p. 26.

³⁸ *Ibid.*

³⁹ *Ibid.*, at p. 27.

⁴⁰ *Ibid.*, at p. 28.

⁴¹ *Ibid.*

⁴² *Ibid.*, at p. 29.

⁴³ *Ibid.*, at p. 29.

⁴⁴ *Ibid.*

states which do not provide these rights (except in particular sexual assault cases).⁴⁵ In 17 states child witnesses have a right to legal representation; in 13 (including Ireland) they do not.⁴⁶ Practice differs amongst states which provide legal representation to child witnesses. In the Netherlands, for example, provision depends on the seriousness of the case, but in Denmark it depends on the determination of whether the witness is in need of protection. In Hungary, the defendant may be ordered to cover the expenses of the child witness where they are found guilty.⁴⁷

The report provides extensive information on the right of children to be heard in criminal proceedings in EU member states. All countries provide in legislation for the right of children suspected of infringing or held to have infringed the law to be heard.⁴⁸ The nature of this right can involve the right to information about the investigation, the right to comment on evidence, and in some states the right to consult court files and to interrogate witnesses (for example in Portugal). In 21 states an express right exists for child witnesses to be heard. In nine jurisdictions (including Ireland), the decision as to whether or not child victims are heard is at the discretion of the police and prosecuting authorities.⁴⁹ In some states, consultation with victims by authorities may not be enshrined in law but it is strongly encouraged, for example in England and Wales there exists a Victims' Code of Practice and Witness Charter. In other states, the right of victims to be heard is quite extensive, for example in Hungary it extends to the right of the victim to consult files on the relevant case, and to ask for expert reports to be conducted.⁵⁰

The report also considers the adaptation of the conditions of criminal law settings to the needs of children, for example child-specific interview techniques and the presence of a trusted adult at various stages of investigations and proceedings.⁵¹ Ireland is one of seven jurisdictions which have adapted the physical settings in which child suspects and offenders are interviewed, for example arranging to have the interview in a separate room.⁵² Ireland is also one of 26 jurisdictions in which the manner of interview is also modified, including having

⁴⁵ Legal representation is only available where the child is a victim of sexual violence and the defendant's lawyers wish to question the child on his or her sexual history. *Ibid.*, at p. 30.

⁴⁶ *Ibid.*, at p. 31.

⁴⁷ *Ibid.*, at p. 31.

⁴⁸ *Ibid.*, at p. 32.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, at p. 35.

⁵² *Ibid.*, at p. 35.

trained officers conduct the interview.⁵³ In all member states children may be accompanied by a trusted adult, however in some states the right is restricted. In Ireland for example, police have discretion as to whether or not children are accompanied by a trusted adult.⁵⁴ Almost all states have modified practice for child victims also, for example Ireland is one of a number of states utilising audio-visual techniques to ensure that child victims need not have contact with offenders during the trial. There are many other techniques used across the EU, for example in Cyprus the suspect is physically removed from court when the child victim provides testimony.⁵⁵ In all but ten states there is a requirement that child witnesses can be accompanied by a trusted adult when interviewed or testifying. Ireland does not have this safeguard at present, although this may change when the Criminal Law (Sexual Offences) Bill 2014 is enacted.⁵⁶

The report provides invaluable information on general practice in EU Member States, and in particular, it gives useful case studies in order for states to consider what works well elsewhere. A good indication is given on how Ireland is faring compared to other EU Member States. The report particular to Ireland which was produced as part of this project is also important to consider. It highlights the very positive work being undertaken by the Irish Youth Justice Service which is housed within the Department of Children and Youth Affairs.

1.2.1 Report on Ireland

The research on the Irish context outlines that, whilst historically children in conflict with the law have been neglected in Ireland, there have been significant improvements in recent years. These changes have been underpinned by the Children Act 2001, which initiated substantial progress in the area, such as an emphasis on imprisonment as a last resort.⁵⁷ The establishment of the Irish Youth Justice Service, with its aims of diversion and rehabilitation, is also cited as a very positive development. The Court Accompaniment Support Service and the provisions for child witnesses to give evidence by video link are also identified as progressive steps. That said, a number of areas of concern are identified. The lack of specific provision in the Garda Charter to provide child victims with information, the failure to implement recommendations of the Joint Committee on Child Protection on child-friendly justice, and training for

⁵³ *Ibid.*

⁵⁴ *Ibid.*, at p. 36.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* See also chapter 3 of this Report for a discussion on the changes proposed in the Criminal Law (Sexual Offences) Bill 2014.

⁵⁷ *Ibid.*, at p. 28.

professionals are all cited as areas where improvement is required.⁵⁸ It should be stated that these concerns are addressed in the Heads of the Criminal Law (Sexual Offences) Bill 2014.

One area of particular concern is that there are few mechanisms in place to avoid secondary victimisation of children, particularly where children have been sexually abused.⁵⁹ The report notes that victims and witnesses do not have the right to free legal assistance or representation, that there is no obligation to permit the presence of legal advisors at interviews or proceedings, and that compensation from an offender or the state can only be sought in limited cases.⁶⁰ The failure to include children in decision-making processes and services is also highlighted.⁶¹ The 2007 recommendations of the Office of the Ombudsman for Children to establish effective complaints mechanisms, regulation of services, and to increase dedicated support services for children are also noted.⁶²

1.2.2 European Commission Measures to Protect Children in Criminal Court Proceedings

In June 2014, the European Commission proposed measures to guarantee specific safeguards to protect children in criminal court proceedings.⁶³ It is intended that the measures will be included in a new Directive on the matter. The agreement coincided with the research produced on behalf of the Commission. The proposals aim to ensure that the highest standards possible are guaranteed for children involved in criminal law processes. The measures outline that:

- Children must have legal representation. Children should not be able to waive the right to a legal representative, as their evolving capacities means that they may not understand the consequences of their actions;
- Children should always be detained separately from adults; this is a protective measure to ensure children do not suffer abuse in detention;

⁵⁸ *Ibid.*, at p. 28.

⁵⁹ *Ibid.*, at p. 29.

⁶⁰ *Ibid.*, at p. 29.

⁶¹ *Ibid.*, at p. 29.

⁶² *Ibid.*, at p. 28.

⁶³ European Commission, *Press Release: Children in Criminal Proceedings: European Commission Proposal to Increase Protection Makes a Decisive Step Forward* (6 June 2014). Available at: http://europa.eu/rapid/press-release_IP-14-636_en.htm (last visited 16 Dec 2014).

- Children should never pay for certain safeguards, for example individual assessment, or audio-visual recording, as they do in some states if found guilty. This may prevent them or their representatives from exercising their rights;
- Children should also benefit from other key safeguards. They should be informed promptly of their legal rights, they should be assisted by parents (or other trusted adults), and they should not be questioned in public hearings;
- Children’s interviews should only be filmed where necessary, due to their vulnerability.

The measures set out minimum standards for detention, which include access to rehabilitation services, and ensuring deprivation of liberty is a measure of last resort and in the best interests of the child.

Ireland can decide to be bound by the Directive, as the state has a right to opt-in. It is recommended that Ireland does so in order to ensure good practice for children in conflict with the law in line with EU standards.

The gains made in Ireland in terms of the rights and welfare of children involved with the criminal justice system, and the positive practices outlined in the Commission report, must be acknowledged. That said, a number of recommendations for improvement of the system can be made on the basis of the report.

1.2.3 Recommendations

Examine, and where appropriate, amend the law and practice to recognise the gaps in Irish practice identified in the European Commission report entitled “Summary of Contextual Overviews on Children’s Involvement in Criminal Judicial Proceedings in the 28 Member States of the European Union”. The following (non-exhaustive) recommendations are made on the basis of the findings of the report:

- *Consider the examples of practice elsewhere provided by the Commission report, such as the specialisation of professionals in youth justice in France; the training provided to professionals in Belgium and Luxembourg; and alternatives to detention in various states;*

- *Raise the minimum age for criminal responsibility, as it is amongst the lowest in the EU which is unacceptable from a children's rights perspective;*
- *Change the law which enables the prosecution of children under the minimum age of criminal responsibility, for the same reasons;*
- *Whilst it is positive that Ireland has specialist police units established to work with children, Ireland should extend the remit of these special units to deal with children in all criminal areas, as suspects/offenders and children as victims or witnesses. At present in Ireland, these units deal with child suspects or offenders only;*
- *Ensure that children are always detained separately from adults, and that there is adequate infrastructure in place for this purpose;*
- *Amend the law and practice to ensure that victims have a right to legal representation (and free legal aid) as Ireland is one of only three states in which this is not provided for (except in particular sexual assault cases);*
- *Ensure better provision for the right of children to be heard in criminal proceedings, as at present enjoyment of this right is dependent on the discretion of the police and prosecutors.*

Examine, and where appropriate, amend the law and practice to recognise the gaps in Irish practice identified in the report on Ireland, for example:

- *Include in the Garda Charter an obligation to provide child victims with information;*
- *Implement the recommendations of the Joint Committee on Child Protection on child-friendly justice;*
- *Provide extensive training for professionals dealing with children in the area of criminal law;*
- *Ensure that there is a uniform standard of training for all those involved in the administration of justice;*
- *Put mechanisms in place to avoid secondary victimisation of children, particularly where children have been sexually abused;*
- *Ensure that both victims and witnesses have the right to free legal assistance and/or representation;*
- *Permit greater opportunities to seek compensation from the offender and/or the state;*
- *Make provisions for including children in decision-making processes and services;*

- *Implement the 2007 recommendations of the Office of the Ombudsman for Children to establish an effective complaints mechanism, to introduce adequate regulation of services, and to increase dedicated support services for children.*

Adopt the European Commission Measures to ensure best practice for children involved in criminal justice proceedings, and transpose the proposed Directive into Irish law once this is possible.

Implement other recommendations relating to youth justice set out in previous Special Rapporteur reports.

1.3 Children's Involvement in Civil and Administrative Judicial Proceedings in the EU

In addition to its work in the area of children's rights in criminal proceedings, the Commission has also initiated a large-scale study on children's involvement in civil and administrative judicial proceedings in the EU. The resultant draft report outlines key features in the legal and institutional contexts within and across member states of the EU, including quantitative information, statutory and policy measures, and examples of law and practice in the area.⁶⁴ The involvement of children in a wide range of civil proceedings is considered, including the areas of child protection, family law and tort law.⁶⁵ The report collates important and insightful data on children in civil and administrative proceedings which is of great relevance to the Irish context. In particular the extent to which justice is child-friendly⁶⁶ is considered in this report. Gaps in the provision of safeguards that aim to protect children in such settings are also considered.⁶⁷

The report provides a quantitative examination of factors put in place by states which the report describes as 'safeguards' to protect children's rights in judicial and administrative proceedings. The right of children to information about their case and the right to appeal an outcome are two examples of such safeguards, all of which are considered in more detail below. It is to be noted that the report ranked states according to two criteria:

⁶⁴ European Commission: Directorate-General for Justice, *Draft: Summary of Contextual Overviews on Children's Involvement in Civil and Administrative Judicial Proceedings in the 28 Member States of the European Union* (European Union, 2014), at p. 3.

⁶⁵ *Ibid.*

⁶⁶ The Council of Europe Guidelines on Child Friendly Justice are particularly relied upon in the report.

⁶⁷ *Ibid.*

- Safeguards in place for children involved in all civil and administrative proceedings;
- Safeguards in place for children involved in family and child care law proceedings (as these are the proceedings in which children are most commonly involved).⁶⁸

Some of the substantive issues considered in the report will now be outlined, as they provide a useful indication of the types of changes which must be made in Ireland in this area.

The ability of children to initiate proceedings is one aspect of children's involvement in civil proceedings which is examined in the report. It is established that in 15 jurisdictions, for example Hungary and Italy, children enjoy the right to initiate particular types of proceedings in court.⁶⁹ Various minimum ages are in place for this purpose, ranging between 12 and 16 years, with children under these minimum ages being required to act through a representative. In 15 jurisdictions, including Ireland, children do not have the right to initiate cases themselves, as only those over 18 years enjoy full procedural capacity to initiate proceedings. In eight of these 15 jurisdictions, there are exceptions for those over 16 years in certain circumstances, but in the remaining six (Ireland included) children must always act through a representative when initiating proceedings.⁷⁰

The right to be heard, and to have one's views given due weight, is a vital children's rights issue which has been considered in many of the Special Rapporteur's previous reports.⁷¹ The report of the European Commission on children's involvement in civil proceedings in the EU provides much information on this topic. In five states, there are minimum ages at which children can be heard in proceedings, sometimes varying according to the nature of the proceedings in question (e.g. in Romania children of 10 years will be heard in family law cases).⁷² In most states, however, there is no minimum age established over which children may be heard in proceedings affecting them. This type of legal provision is advocated by the UN Committee on the Rights of Child, as it ensures that children are not excluded on the basis of generalised assumptions about age-related capacities.⁷³ In Austria, for example, children must always be heard in adoption proceedings, and in the Netherlands children will be heard

⁶⁸ *Ibid.*, at p. 104.

⁶⁹ *Ibid.*, at p. 12.

⁷⁰ *Ibid.*, at p. 13.

⁷¹ See e.g. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014).

⁷² *Supra.*, n.64.

⁷³ Committee on the Rights of the Child, *General Comment No. 12: The Right to be Heard* (1 July 2009) CRC/C/GC/12, para. 52.

from age 12, though younger children can request to be heard.⁷⁴ It is noted that in “several” jurisdictions (e.g. France, Ireland, the Netherlands, and England and Wales) the court is obliged by law to hear children’s views and to give due weight to them before reaching a decision about a child, if the child has the necessary capacities.⁷⁵ It is also specified that in at least three jurisdictions, courts are *not* under a legal obligation to consider children’s views. The Children and Family Relationships Bill 2015 and the recent amendment to the Constitution make explicit provision for children’s rights.⁷⁶

Monitoring of children’s involvement in proceedings is a crucial part of ensuring that their rights are vindicated in this arena. It is stated that in 25 jurisdictions (including Ireland), monitoring mechanisms such as Ombudspersons exist which have the capacity to review law and practice relating to children, (including in judicial proceedings) to ensure compatibility of domestic and international standards.⁷⁷ It is noted that Ireland is one of 15 jurisdictions where such mechanisms apply in respect of all areas of law⁷⁸ – in other states the role of the monitoring mechanism can be limited to specific areas.⁷⁹ This indicates that Ireland is doing very well in this regard in comparison to other EU states, as the role of the Ombudsman for Children is relatively broad.

Information is also provided on the extent to which professionals working in the area receive training on children’s rights. It is noted that not all jurisdictions provide such training, and that the nature of such training can vary significantly, for example as to whether it is mandatory or voluntary.⁸⁰ In seven jurisdictions, professionals working in all areas of law relating to children receive initial training in children’s rights (e.g. England and Wales).⁸¹ Continuous training for professionals in this area is provided in 18 jurisdictions.⁸² In Slovenia, for example, guardians *ad litem* are appointed for unaccompanied children seeking asylum. The guardian must complete an initial mandatory training, which includes family law, social work and psychology. Every five years thereafter, guardians must complete an advanced training

⁷⁴ *Supra.*, n.64.

⁷⁵ *Ibid.*, at p. 19.

⁷⁶ See e.g. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014).

⁷⁷ European Commission: Directorate-General for Justice, *Draft: Summary of Contextual Overviews on Children's Involvement in Civil and Administrative Judicial Proceedings in the 28 Member States of the European Union* (European Union, 2014), at p. 20.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, at p. 26.

⁸¹ *Ibid.*

⁸² *Ibid.*, at p. 27.

course.⁸³ The laws of ten jurisdictions, including Estonia and France, oblige professionals to engage in training on how to communicate effectively with children in proceedings. Such training aims to ensure, for example, that judges, prosecutors, lawyers, guardians and social workers have the skills required in these circumstances.⁸⁴ It is also noted that 17 jurisdictions, including Ireland, provide non-mandatory opportunities for the education of professionals in communicating with children involved in proceedings. Such opportunities are most commonly available to judges.⁸⁵

The importance of providing information to children in civil and administrative proceedings is emphasised in the report as an essential factor to protect children's wellbeing. It is outlined that in 24 states, children have a right under law to receive information on the civil and administrative judicial proceedings in which they are involved. Ireland is one of only six states in which this right does not exist. Such information may relate to the consequences of the judicial or administrative procedure; the time and place at which they occur, outcomes, rights of remedy; and available support services.⁸⁶ In France, when a court summons concerns a child, it must include information for parents on the child's right to be heard and related matters such as the possibility of legal representation and legal aid. Parents must confirm that they have informed the child of the right to be heard in a written sworn statement.⁸⁷ Some judges are trained to work with children in civil proceedings, and any judge may require an expert trained in working with children (e.g. a social worker) to provide information to children who are the subject of proceedings. There are also many opportunities provided to children to receive advice and information on legal matters, for example through local Bar Associations, as well as "youth houses" (maisons des jeunes).⁸⁸

It is specified that in 13 jurisdictions (for example Hungary and Ireland) a legal obligation exists whereby court hearings with children must be conducted in a child-friendly environment. In some states, however, the legal obligation only applies where children are under a certain age, for example in the Netherlands the age set is 12 years. Ireland does not set such restrictions. The President of the District Court in Ireland has introduced many innovations in this area.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, at p. 28.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, at p. 30.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, at pp. 30-31.

There are various ways in which states attempt to achieve a child-friendly environment. Examples include conducting hearings in private (e.g. in Cyprus); conducting the child's examination outside the court-room (for example in the judge's office, as happens in France); and by conducting the child's hearing in a way that is "as informal as possible while still consistent with the administration of justice" (for example in Ireland).⁸⁹

The report considers the extent to which children enjoy legal assistance and legal representation in civil proceedings. In 24 jurisdictions, including Ireland, children have the statutory right to legal representation "in their own name" where potential conflicts of interest exist between the child and parents.⁹⁰ It is also highlighted that the right of children to free legal aid exists in all jurisdictions, save the Czech Republic. The right applies at all stages of proceedings in every state but three. Ireland is one of these states – the right of children to free legal aid does not apply before proceedings, and as previously noted, it does not apply in the area of family law at any stage.⁹¹ In seven jurisdictions (e.g. Finland and England and Wales), guidance has been developed for children's lawyers to ensure children's views are represented. In Luxembourg, legal representation is actually compulsory for children (as it is for adults) in civil proceedings, except before Magistrate's Courts, where children may appear in person or have the representation of a lawyer or another adult. Children have access to free legal aid including advice and representation based on income considerations.⁹²

The appointment of a guardian *ad litem* to represent children where conflicts of interest exist with parents is provided for in all jurisdictions save Ireland and Latvia.⁹³ Thirteen jurisdictions, for example Portugal and Northern Ireland, have mechanisms according to which the quality of guardian services can be monitored. Such mechanisms generally apply to guardians working in all areas, although in England and Wales it only applies in family law.⁹⁴ It is a matter which has been frequently emphasised that guardians *ad litem* in Ireland require a monitoring body in order to ensure consistent and high quality representation for children's rights and interests.⁹⁵

⁸⁹ *Ibid.*, at p. 46.

⁹⁰ *Ibid.*, at p. 53.

⁹¹ *Ibid.*, at p. 54.

⁹² *Ibid.*, at pp. 55-56.

⁹³ *Ibid.*, at p. 56.

⁹⁴ *Ibid.*

⁹⁵ See e.g. Aoife Daly, "Limited Guidance: The Provision of Guardian *ad litem* Services in Irish Family Law" 13 *Irish Journal of Family Law* 8 (2010).

The Committee on the Rights of the Child consistently emphasises the need to inform children of outcomes in proceedings concerning them.⁹⁶ It is established in the European Commission report that court decisions must be communicated to the child involved in judicial proceedings in 23 jurisdictions, including Austria and Denmark.⁹⁷ Ireland is not included in this category of 23 jurisdictions. Children have a right to have the decision explained in a manner adapted to the level of understanding of the child in 10 jurisdictions, including France and Italy.⁹⁸ Guidance for lawyers or other relevant professionals on the communication of a decision to a child in an understandable manner is only present in four jurisdictions (e.g. Belgium and Finland).⁹⁹

The right to appeal is also considered in the report.¹⁰⁰ In all states save for seven (Ireland is one of the exceptions), children involved in civil proceedings have a right to appeal a judgment in their own name instead of appealing through a legal representative, though this is subject to minimum age conditions in some states.¹⁰¹ In about half of the states which provide for this, it applies in all areas of the law. In most jurisdictions (16, including Italy and Latvia), this right applies only to children who have had party status in the proceedings in question.¹⁰²

Although there are some areas in which Ireland has good practice, it is clear that there are a number of areas in which change is needed.

1.3.1 Recommendations

A number of shortcomings in Irish law and practice relating to the rights of children in civil proceedings are identified in the European Commission's draft report; Children's Involvement in Civil and Administrative Judicial Proceedings. The following recommendations are made on the basis of the findings of the report. These recommendations are not exhaustive. Ireland should:

⁹⁶ The Committee states, for example, that “[j]udges and other decision makers should, as a rule, explicitly state and explain the outcome of the proceedings, especially if the views of the child could not be accommodated.” Committee on the Rights of the Child, *Day of General Discussion on the Right to be Heard*, Forty-third session, 11-29 September 2006, para. 41.

⁹⁷ European Commission: Directorate-General for Justice, *Draft: Summary of Contextual Overviews on Children's Involvement in Civil and Administrative Judicial Proceedings in the 28 Member States of the European Union* (European Union, 2014), at p. 72.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, at p. 73.

¹⁰⁰ *Ibid.*, at p. 67.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

- *Consider the examples of practice elsewhere, such as “youth houses” in France (maisons des jeunes) which provide free legal advice to children;*
- *Amend legislation to provide children with full procedural capacity to initiate proceedings, rather than having to act through a representative in all cases;*
- *Ensure mandatory training on children’s rights for all professionals working with children in civil proceedings. It is imperative that there is a uniform standard of training for all those involved;*
- *Ensure that, in line with practice in almost all other EU states, the right to free legal aid applies before proceedings, and in particular ensure that it is made available generally in the area of family law;*
- *Ensure that children have guardian ad litem representation, particularly where conflicts of interest with parents arise, and that guidance is developed for children’s lawyers and other professionals to ensure children’s views are represented;*
- *Develop mechanisms according to which the quality of guardian services can be monitored;*
- *Ensure that children have a right under law to receive information on the civil and administrative judicial proceedings in which they are involved;*
- *Create a legal obligation that court decisions must be communicated to the child involved in judicial proceedings in a manner adapted to the level of understanding of the child;*
- *Ensure that children have a right to appeal a judgment in their own name instead of appealing through a legal representative, and that this is not only available to children who have had party status in the proceedings in question, but also to children who have not had such status where the proceedings directly concern their interests.*

Implement other recommendations relating to children in civil proceedings included in previous Special Rapporteur reports.

1.4 Developments in Europe – International Child Abduction

1.4.1 Conflicts of EU Courts on Child Abduction

The University of Aberdeen and the University of Sussex are conducting a joint research study on the conflicts between EU courts when dealing with the matter of international child

abduction, defined as “unlawful removal or retention of the child” by the Hague Convention on International Child Abduction 1980 (“Hague Convention”).¹⁰³ The work will be completed in November 2015. The study will examine cases where the state to which a child has been taken does not order the return of the child under Article 13 of the Hague Convention. It will, in particular, analyse the interpretation of Council Regulation (EC) No.2201/2003 (“Brussels Iia”) by courts in EU states, where the courts of the state from which the child has been taken overrides the non-return order by the courts of the state to which the child was taken. It is reported that approximately half of requests submitted to the Office of the European Parliament Mediator for International Parental Child Abduction involve complaints concerning irregularities in the application of EU law in this area, therefore it is important that application of the relevant standards are evaluated adequately.¹⁰⁴ This research project is a very welcome development.

Brussels Iia applies to EU countries (except Denmark) and covers issues of jurisdiction and the recognition and enforcement of judgments in matters relating to marriage and to parental responsibility. The protections afforded to children by the Regulation apply to them regardless of the marital status of their parents, and certain matters (e.g. maintenance) are excluded from its remit.¹⁰⁵ The Regulation includes provisions on child abduction, aiming as it does to combat child abduction in the EU. In this sense, the Regulation complements the Hague Convention by providing clarity on its application in the EU.¹⁰⁶ The Regulation establishes, for example, that all judgments from EU member states will be automatically recognised in other EU member states,¹⁰⁷ subject to certain exceptions, for example if recognition of a judgment would be contrary to public policy, or if a child who is the subject of proceedings was not heard on the matter. The Regulation also establishes provisions governing scenarios where conflicting return and non-return orders are issued in different EU countries.

¹⁰³ See University of Aberdeen, Law School. Available at: <http://www.abdn.ac.uk/law/research/2column-page-417-417.php> (last visited 5 December 2014).

¹⁰⁴ European Commission, *Press Release: Children in Criminal Proceedings: European Commission Proposal to Increase Protection Makes a Decisive Step Forward* (6 June 2014). Available at: http://europa.eu/rapid/press-release_IP-14-636_en.htm (last visited 16 December 2014).

¹⁰⁵ See e.g. Europa: Summaries of Legislation, available at: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133194_en.htm (last visited 5 December 2014).

¹⁰⁶ European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* (2014), at 12.

¹⁰⁷ Article 47.

The researchers are gathering information on the implementation of Brussels IIa as it relates to international child abduction via a questionnaire which those with experience of relevant cases are being asked to complete.¹⁰⁸ The research will in particular focus on whether parties and children have been heard, as well as “the distinction between a return order and a custody order.”¹⁰⁹ The project aims to determine whether the approach to implementation is uniform across the EU and whether changes to the Regulation are necessary.

1.4.2 European Commission Report on Application of the Brussels IIa Regulation

The European Commission has submitted a report on the application of the Regulation to the European Parliament, the European Council and the European Economic and Social Committee.¹¹⁰ The report considers the application of the Regulation on the basis of information supplied by EU countries. The Commission states that the Regulation is a useful instrument which is working well in facilitating cross-border litigation; with provisions on child abduction proving particularly useful.¹¹¹ By identifying which EU countries are responsible for cases relating to family law matters, the Regulation has assisted in preventing judicial proceedings occurring simultaneously in different countries in the EU. A system of cooperation between the Central Authorities (the responsible authorities for such matters) in EU countries also assists in ensuring the prompt return of children in cases of international parental child abduction.¹¹²

It is stated by the Commission, however, that there are areas which require improvement. The Commission intends to review the matter of the enforcement of decisions, particularly in the area of child abduction where procedural standards for hearing children may be different. The Commission will be considering whether to introduce “common minimum enforcement standards” in this regard.¹¹³ The Commission also intends to consider other concerns identified in the report. For example, the lack of uniform rules on jurisdiction in all scenarios will be assessed. Furthermore the accessibility of judgments in all relevant cases is not yet guaranteed

¹⁰⁸ See University of Aberdeen, Law School, available at: <http://www.abdn.ac.uk/law/research/2column-page-417-417.php> (last visited 5 December 2014).

¹⁰⁹ *Ibid.*

¹¹⁰ European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* (2014).

¹¹¹ *Ibid.*, at p.15.

¹¹² *Ibid.*

¹¹³ *Ibid.*

in full, as there are still processes in place which require specific types of judgments to undergo lengthy procedures before recognition in another EU country. The ways through which cooperation between the Central Authorities of member states can be improved, particularly concerning the sharing of information in child abduction cases, will also be examined. The Commission is currently engaging in policy evaluation of the implementation of the Regulation. This evaluation included a public consultation¹¹⁴ which ran from April to July 2014.¹¹⁵

Ireland takes part in the application of this Regulation (of the EU states, only Denmark does not) and therefore this study, and the evaluation of the Committee, will be of great interest.

1.4.3 Awareness Campaign on International Child Abduction

The European Commission has initiated an awareness-raising campaign on the rules which exist when international families separate, and the assistance that is available. The campaign provides information on custody and access rights, as well as international child abduction.¹¹⁶ For each topic, the Commission has introduced both a leaflet and a video. These are currently available in all the languages of the EU, and the videos can be watched and downloaded from the YouTube channel of the European Commission Directorate-General for Justice.¹¹⁷

1.4.4 Recommendations

A research study on the conflicts between EU courts when dealing with the matter of international child abduction is at present being conducted by the University of Aberdeen and the University of Sussex. Ireland should ensure that the future outcomes of the study are made widely known once they become available, in order to ensure uniform application of EU standards in Irish courts.

Ireland should also ensure that the outcomes of the recent European Commission report on international child abduction are reflected in Irish law and practice in order to ensure uniform application of EU standards in Irish courts.

¹¹⁴ *Ibid.*, at p. 16.

¹¹⁵ European Commission, available at http://ec.europa.eu/justice/newsroom/civil/opinion/140415_en.htm (last visited 13 December 2014).

¹¹⁶ See European Commission: Press Release, available at http://europa.eu/rapid/press-release_IP-14-451_en.htm (last visited 21 December 2014).

¹¹⁷ Available at <https://www.youtube.com/user/EUJustice> (last visited 21 December 2014).

Ireland should assist in highlighting the European Commission's information campaign on the rules which exist when international families separate, and the assistance that is available.

1.5 Developments in Europe – Disability

1.5.1 European Parliament Report on State Policies relating to Children with Disabilities

The European Parliament published a report in 2013 on the policies in place within EU Member States regarding children with disabilities.¹¹⁸ The aim was to assess the situation of children with disabilities within the EU, particularly because the EU is now party to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD),¹¹⁹ the UN instrument which establishes rights particular to people with disabilities across the spectrum of civil and political and economic, social and cultural rights. The instrument also contains provisions specific to children with disabilities. The high level of ratification of the UN Convention on the Rights of the Child (CRC) by EU Member States is another influential factor on the production of the European Parliament report.¹²⁰

The report emphasises that the rights and principles of the UNCRPD applicable to children are recognised by and (to a certain degree) implemented through EU law and policy.¹²¹ However it is acknowledged that the approach to the area is mainly sectoral, for example, focusing on matters such as employment or immigration. The report considers the rights of persons with disabilities from a distinctly child-centred perspective; taking the approach that children with disabilities face multiple discrimination. Consequently, the matters of age and disability must be considered together, and measures must be shaped accordingly to ensure that children's particular needs are recognised and accounted for.¹²²

¹¹⁸ European Parliament – Directorate General for Internal Policies, *Member States' Policies for Children with Disabilities* (European Parliament, 2013).

¹¹⁹ See further section 1.5.2 below.

¹²⁰ European Parliament – Directorate General for Internal Policies, *Member States' Policies for Children with Disabilities* (European Parliament, 2013), at p. 12.

¹²¹ *Ibid.*, at p. 13.

¹²² *Ibid.*

The research constitutes a comparative analysis of the legal frameworks of 18 Member States of the EU (including Ireland).¹²³ A set of criteria was developed which permitted a comparison of data from each country. The criteria are based on aspects of rights enshrined within both the UNCRPD and the CRC. The focus is on the rights most relevant to the situation of children with disabilities,¹²⁴ such as the right to be heard and the right to non-discrimination.¹²⁵ Special emphasis is placed in the report on issues considered particularly relevant to children with disabilities, such as violence against children, inclusive education and gender vulnerability.¹²⁶ The study provides analysis of whether the systems in place in the selected Member States are sufficiently protecting the rights and needs of children with disabilities.¹²⁷ It also examines the legal and institutional frameworks in place, reviewing implementation of international standards and identifying both problems and best practices. The report aims to contribute to the improvement of implementation of the rights of children with disabilities.¹²⁸

Some positive practice in the Irish context is identified in the report. Ireland is recognised as one of only six states which have fully enshrined the requirement of reasonable accommodation by legally ensuring access for all persons with disabilities to major areas of their lives, such as education.¹²⁹ It is also noted that all 18 Member States have established complaint mechanisms to deal with discrimination, including Ireland.¹³⁰ It is further stated that Ireland is one of the states which has adopted family or community-based care for children with disabilities, as alternatives to institutionalisation: “In Ireland, only children with severe and profound disabilities requiring around the clock care are institutionalised.”¹³¹

Many shortfalls were noted as regards implementation of the rights of persons with disabilities in Member States. The report emphasises that children with disabilities are far more likely than other children to suffer violence, a point which I have noted in previous years.¹³² As children are almost always living within a family unit, domestic violence is a significant issue

¹²³ The states included in the study were: Belgium, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, the Netherlands, Malta, Poland, Romania, Slovenia, Spain, Sweden and the United Kingdom. *Ibid.*, at p. 13.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, at p. 26.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, at p. 66.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, at p. 91.

¹³² See e.g. Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2013) at p. 82.

for children with disabilities. It often remains unnoticed by authorities because of its hidden nature.¹³³ Violence against children in institutions is also emphasised as a significant issue, and the need for adequate inspections and monitoring procedures is highlighted. In the report, it is noted that:

In Ireland, the Health Information and Quality Authority has the power to inspect children’s residential centres. Since 2013, it will be also operating in institutions catering for persons and children with disabilities. The introduction of this competence is considered to have immediate positive effects on the protection of children from violence.¹³⁴

Accessibility for children with disabilities is considered in the report.¹³⁵ It is stated that, in spite of a wealth of legislation in most Member States in this area, there are many practical barriers which exist when it comes to access for people with disabilities to public buildings and public transport.¹³⁶ This interferes significantly with the enjoyment by children with disabilities of participation in society and in particular their social, economic and cultural lives. Information and communication technologies were cited as particularly requiring improved access for people with disabilities.¹³⁷ Ireland is mentioned as a state citing budget cuts as being responsible for such shortcomings.¹³⁸ This is certainly an area which needs to be tackled, as the rights and needs of children with disabilities should be given due consideration in budget decision-making in order for Ireland to meet international human rights standards, including those of the CRC.¹³⁹

Irish practice is also described as inadequate concerning the provision of “guidance, information and support to families”¹⁴⁰ about enforcement and complaint procedures. As in many other states, such procedures can be difficult to access for both parents and children with disabilities themselves, who are often not well informed or may even be totally unaware of possibilities for complaint. The report points out that official bodies dealing with complaints

¹³³ European Parliament – Directorate General for Internal Policies, *Member States’ Policies for Children with Disabilities* (European Parliament, 2013), at p. 86.

¹³⁴ *Ibid.*, at p. 86.

¹³⁵ *Ibid.*, at p. 66.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*, at p. 67.

¹³⁹ See e.g. Aoife Daly, “Editorial: Children should be a Primary Consideration in Budgets” 14 *Irish Journal of Family Law* 1 (2011).

¹⁴⁰ European Parliament – Directorate General for Internal Policies, *Member States’ Policies for Children with Disabilities* (European Parliament, 2013), at p. 67.

are rarely sufficiently child-friendly and in particular, “[j]udicial officials are not trained or sensitised to children with disabilities’ needs.” As a consequence, the needs of this group, as well as the violations of their rights, are often unreported, which can increase marginalisation.¹⁴¹

Another crucial issue for children with disabilities is to have their views heard and taken into account. As stipulated by the CRC, this should be done in conformity with the principle of the evolving capacities of the child.¹⁴² The report considers the legal implementation of this principle in the 18 Member States examined.¹⁴³ Provision for two elements within the legal systems of states was considered. The first criterion is “[g]eneral provision of evolving capacities of the child.”¹⁴⁴ This involves provision for the principle in major legal acts relating to children. It should include recognition of gradually increasing self-determination for children as their capacities evolve, and should not solely base this on age, but instead ensure a case-by-case approach to children’s capacities. It should also involve a requirement that the views of children with disabilities are respected in accordance with their evolving capacities in proceedings affecting them.¹⁴⁵ The second criterion is “[p]rocedural safeguards related to children’s evolving capacities.”¹⁴⁶ To meet this standard, procedural safeguards should be in place, aiming to ensure that the evolving capacities of the child are taken into account in decisions related to the child “such as the adaptation of content of the education curricula, the provision of assistance by social security or participation in cases concerning custody, adoption or divorce of the parents.”¹⁴⁷ It should also involve efforts to support children to make better choices from an early age, and training for parents and professionals. Ireland is described as having “partial”¹⁴⁸ implementation of both criteria.

The report concludes that though there is a good element of legal recognition of the right of children with disabilities to be heard within domestic systems, substantial change is necessary in order for the right to be implemented in practice. Children with disabilities encounter various barriers to participation, and they do not enjoy participation in public life to the extent

¹⁴¹ *Ibid.*

¹⁴² See Articles 5 and 12.

¹⁴³ European Parliament – Directorate General for Internal Policies, *Member States’ Policies for Children with Disabilities* (European Parliament, 2013), at p. 71.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

that children without disabilities do. Consultation processes and methods of assessment need to be developed so that children with disabilities are adequately heard in Member States; as such processes are rarely in place, according to the report.¹⁴⁹

The report considers assistance provided to children with disabilities and their families, and analyses the legal framework within Member States. It uses two criteria in order to identify the level and quality of provision within states. The first criterion is “provision o[f] special assistance”,¹⁵⁰ and under this heading it is established whether states have legislation in place which guarantee the provision of special assistance for families of children with disabilities. The second criterion is the “[n]ature of special assistance provided by the State.”¹⁵¹ States should have different types of assistance for children with disabilities to ensure the enjoyment of their CRC and UNCRPD rights. It is specified in the report that “[a]ssistance should include financial support to children (with disabilities) and their parents, social assistance and medical coverage to access health care.”¹⁵² It is established in the report that Ireland has both criteria in place, in that families receive special assistance, and there are different types available. However, it is also recognised that the national legal frameworks in Ireland which regulate access to assistance are complex, creating a barrier in accessing assistance in practice. This is similar to the situation in many other states, and it is emphasised in the report that efficient coordination is required between competent authorities. It is also stated that information should be freely accessible to children and families, and there should be clarity regarding what benefits are available.¹⁵³

It is reported that access to health care and social services for children with disabilities is particularly insufficient.¹⁵⁴ Some good practice examples are provided, for example Spain. In this state, healthcare is based on the principle of universality. The right to health care of all residents in the territory of Spain is recognised, as it is considered that healthcare, which is provided through the general budget, is due to all individuals, since they pay their own healthcare portion through general taxes.¹⁵⁵ Ireland is praised for the introduction of

¹⁴⁹ *Ibid.*, at p. 78.

¹⁵⁰ *Ibid.*, at pp. 93-94.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, at p. 95.

¹⁵⁴ Save for a handful of Member States where systems have been described as ‘quite-well developed’ (Finland) and ‘significant’ (France). *Ibid.*, at p. 96.

¹⁵⁵ *Ibid.*, at p. 96.

Children's Disability Teams; specialised, multi-disciplinary teams which provide assistance to children aged 6 to 18 years. The teams consist of professionals such as health care support workers and social workers, who engage with both parents and children, providing a broad range of services, information and support.¹⁵⁶ However there are a number of areas in which general provision for children's health in Ireland could be improved. It is positive that it is intended that there will be free GP care for all children under 6 years of age from 2015.¹⁵⁷ However it would be much more beneficial for the rights and needs of children with disabilities (and of course, all children) if the model of good practice in Spain was followed in respect of children. The provision of free GP care should be extended to all individuals under the age of 18 in order to ensure that children with disabilities (and other children) have full access to any health care they may require. The right of children to health is a fundamental human right, as highlighted in my last report.¹⁵⁸

The level of enjoyment of the right to education for children with disabilities is considered under three headings. The first is "[g]eneral recognition of the right to education and to inclusive education". This involves recognition of the right in the national Constitution, with implementing legislation ensuring effective application of this right. The freedom of children with disabilities and their families to freely choose the school of their choice must be in place. For children with disabilities this would include the right to inclusive education. The second criterion is "[p]rimary and secondary education." Primary and secondary education should be both compulsory and free of charge for all children. The third criterion is "[s]upport and access to education." National legislation should necessitate the provision of support and assistance to children with disabilities in order to facilitate effective education including "architectural and sensorial assistance to access mainstream schools." The final criterion is "acceptance of children with disabilities at school" which requires particular legal measures or mechanisms to ensure that mainstream schools accept children with disabilities and that schools make reasonable accommodation for their needs.¹⁵⁹ It is assessed that Ireland has implemented these criterion, but the first, "[g]eneral recognition of the right to education and to inclusive education", only partially.

¹⁵⁶ *Ibid.*, at p. 97.

¹⁵⁷ See e.g. Health Service Executive, <http://www.hse.ie/under6contract/>.

¹⁵⁸ See e.g. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014).

¹⁵⁹ European Parliament – Directorate General for Internal Policies, *Member States' Policies for Children with Disabilities* (European Parliament, 2013), at pp. 98-99.

The right to inclusive education is considered in the report. It is stated that access to mainstream education for children with disabilities is limited in practice in the EU, in spite of the fact that this issue is considered a priority in many member states. It seems that the majority of children with disabilities still attend special schools. Certain Member States appear to have had success in implementing the right to integrated education, with Sweden and Malta having the highest proportion of students with disabilities attending inclusive education amongst the 18 states included in this study. Ireland has fared well in this regard, as it is amongst the next five best states, with under 20% attending special schools.¹⁶⁰ As noted above, reference is made to state provision for education in Irish law.¹⁶¹

The relative success of Ireland in this area must be acknowledged. There are, however, significant problems with educational provision for children with disabilities in Ireland, as demonstrated through numerous research studies.¹⁶² The fact that provision is not rights-based is a particular problem, with educational services frequently at the discretion of schools and other providers, which can cause significant stress for children with disabilities and their families. The following paragraph from the research of Shevlin *et al.* demonstrates the consequences of the lack of rights-based legislation in this area in Ireland. A parent with a child with disability remarked on seeking education for her child:

You were always cap-in-hand, as in I'm not entitled or she wasn't entitled to the same treatment and it's the same thing about approaching schools. We did it but for a lot of parents it's a very difficult thing to walk up and say 'I have a child who has a disability, Will you take her?' You're very vulnerable and if anyone says a wrong word you bring it to the grave with you.¹⁶³

The report provides valuable information on implementation of the rights of children with disabilities amongst 18 EU states. In particular it provides the opportunity for comparisons between Ireland and other states in this area. The strengths and weaknesses of law and practice

¹⁶⁰ *Ibid.*, at p.101.

¹⁶¹ Article 42 of the Constitution of Ireland states (*inter alia*) that:

The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

¹⁶² See e.g. Shevlin, M., Kenny, M. Loxley, A., *A Time of Transition: Exploring special educational provision in the Republic of Ireland*, Dublin, National Institute for Intellectual Disabilities, February, 2009 and Shevlin, M. (2009) 'Special Educational Needs' in B. Walsh & R. Dolan, *A Guide to Teaching Practice in Ireland*, Dublin, Gill and MacMillan, at pp. 116 – 135.

¹⁶³ *Ibid.*, Shevlin et al., 2009, at p. 37.

in Ireland concerning children with disabilities should be considered, as should instances of best practice in other states.

1.5.2 European Commission Report to UN Committee on the Rights of People with Disabilities

The European Commission produced in June 2014 its first report on the ways in which the EU is implementing the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).¹⁶⁴ The Convention was the first instrument to which the EU became a party, and the EU became the first international organisation to become a formal party to the instrument.¹⁶⁵ Parties to the Convention commit to ensuring the full and equal enjoyment by people with disabilities of their rights. In the EU context, this means that EU level legislation, policies and programmes must comply with the provisions of the UNCRPD insofar as the limits of EU responsibilities permit.¹⁶⁶ Ratifying states must ensure that people with disabilities have access to education, employment, public buildings, transport, infrastructure, the right to vote and other political participation, and must ensure full legal capacity for people with disabilities.¹⁶⁷ States which are party to the Convention must submit reports to the UN Committee on the Rights of Persons with Disabilities on how the Convention is being implemented at domestic level, and the UN Committee on the Rights of Persons with Disabilities subsequently prepares concluding observations and recommendations in response. The 2014 report to the UN Committee on the Rights of Persons with Disabilities was prepared by the European Commission¹⁶⁸ in line with these obligations.

The Commission report provides a valuable overview of initiatives at EU level to protect and enhance the rights of people with disabilities, and there are many points relevant to child protection outlined which are useful to cover in this report.

The report emphasises that promoting and protecting children's rights is a key aim of the EU, as outlined in the Treaty on European Union, which states that the EU will contribute to the

¹⁶⁴ See European Commission: Press Release, available at http://europa.eu/rapid/press-release_MEMO-14-396_en.htm (last visited 21 December 2014).

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ European Commission, *Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union* (European Commission, 2014).

protection of rights, in particular those of children.¹⁶⁹ The EU Charter, which also recognises children’s rights, places emphasis on the right of children to protection and care, and to express their views freely.¹⁷⁰ The report also references the 2011 EU Agenda on the Rights of the Child, which outlines actions in which the EU will bring added value to children’s rights including bringing a children’s rights perspective to EU rights policy, using evidence-based policies, child-friendly justice and tackling violence against children. The special position of children with disabilities is highlighted in the Agenda which acknowledges that they will require particular protection.¹⁷¹

The 2013 Commission Recommendation, *Investing in children: breaking the cycle of disadvantage*,¹⁷² is cited in the report. This Recommendation seeks to tackle “disadvantage to children at risk of poverty and social exclusion.” The Recommendation ensures a focus on the needs and rights of children with disabilities, having as a guiding principle the protection of children with multiple disadvantages, including disability. The Recommendation also calls on Member States to ensure particular attention within health systems to children with disabilities, and proposes three pillars for integrated service provision: “access to adequate resources, access to affordable services and the child’s right to be heard and to participate.”¹⁷³

The report also outlines the research which EU bodies are currently conducting which is relevant to children with disabilities. The first is a study which aims to map law, policy and practice affecting child participation. The study has a particular focus on vulnerable children, such as those with disabilities; seeking to demonstrate examples of good practice in this area.¹⁷⁴ The EU’s Fundamental Rights Agency is engaging in research on the harassment of children with disabilities. The Agency has also developed indicators to monitor implementation of children’s rights in the EU, and is conducting a mapping of EU Member States’ child protection systems, including systems for protecting children with disabilities”.¹⁷⁵ The Commission’s report also highlights the European Disability Strategy 2010-2020 which

¹⁶⁹ The Treaty on European Union, Article 3(5).

¹⁷⁰ Charter of Fundamental Rights of the European Union, Article 24. *Supra. n.* 168, at p. 182.

¹⁷¹ European Commission, *Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union* (European Commission, 2014), at pp. 183-4.

¹⁷² European Commission, *Investing in children: breaking the cycle of disadvantage*, (2013) 778 final (20 February 2013). *Supra. n.* 168, at p. 185.

¹⁷³ European Commission, *Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union* (European Commission, 2014), at p. 185.

¹⁷⁴ *Ibid.*, at p. 188.

¹⁷⁵ *Ibid.*

aims to empower people with disabilities to enjoy their rights and to ensure further implementation of the UNCRPD at both EU and national level.¹⁷⁶ The needs of children are referenced (although not extensively) in the Strategy.¹⁷⁷

The report outlines how the Commission proposed a directive in 2013 on procedural safeguards for children in conflict with the law to ensure that they can adequately understand criminal proceedings.¹⁷⁸ The proposed directive includes elements such as the obligation on states for children to have access to a lawyer at all stages of proceedings, the obligation to promptly inform children of their rights, the right of children to be assisted by parents or other adults, the right of children not to be questioned in public hearings, and the right of children to receive a medical examination where they are deprived of their liberty.¹⁷⁹

The report also outlines initiatives targeted against violence, in particular highlighting the Daphne Programme under which the Commission has funded numerous projects tackling violence against children (as well as other vulnerable groups). One such project included a “campaign against violence and bullying of young people with learning disabilities.”¹⁸⁰ It is also outlined that a 2011 EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography¹⁸¹ relates in particular to children with disabilities. Sexual offences are defined in the Directive as taking various factors into account, including the uniquely vulnerable situation of children. Physical or mental disability are to be considered relevant factors here, and it is required that it is to be a criminal offence within Member States to engage in sexual activities with especially vulnerable children, in particular because of a disability.¹⁸²

¹⁷⁶ See European Commission, *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe* COM(2010) 636 final (15 November 2010).

¹⁷⁷ *Ibid.* The Strategy states that the EU will “address the diverse situation of men, women and children with disabilities” (Section 1); raise “awareness of the situation of people with disabilities living in residential institutions, in particular children and elderly people” (Section 2); and the Strategy also considers children’s needs in the context of education and training (Section 5).

¹⁷⁸ European Parliament, *Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings* COM(2013) 822 (22 May 2014). See also European Commission, *Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union* (European Commission, 2014), at p. 18.

¹⁷⁹ European Commission, *Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union* (European Commission, 2014), at p. 188.

¹⁸⁰ *Ibid.*, at p. 78.

¹⁸¹ Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography. See also Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2013).

¹⁸² It is specified however that disability does not necessarily rule out the ability to consent to sexual relations.

The 2012 Commission report on Education and Disability/Special Needs — policies and practices in education, training and employment for students with disabilities and special educational needs in the EU is also considered in the report to the UN Committee on the Rights of Persons with Disabilities. The 2012 report demonstrated that many students with special needs do not enjoy inclusive education and often have inadequate support, despite the commitment to inclusive education which states profess. Member states are called upon in the report to do more to ensure that educational barriers are removed, and that people with disabilities enjoy inclusive education systems.

The report also points to significant differences between states regarding the ways in which children with special needs are identified and the ways in which their needs are provided for. The need to standardise definitions across EU member states when it comes to identification of children with special needs and provision for their education is highlighted by the report.¹⁸³

Ireland signed the UNCRPD in 2007, but has not yet ratified the Convention. Incorporating legislation at domestic level must be passed before the Convention becomes Irish law and before the rights of the UNCRPD can be invoked in court. It appears that this is at least in part because of the perception that Irish laws in respect of adults lacking some or all mental capacity to make decisions are inadequate.¹⁸⁴ Doyle and Flynn argue that the compatibility of potential new legislation [the Assisted Decision-Making (Capacity) Bill] with the UNCRPD is unclear. It seems that it will still be possible to remove legal capacity from individuals whose decision-making abilities fail to meet a certain standard, and it is not intended “that supported decision-making systems will fully replace substitute decision-making regimes in the new legislation.”¹⁸⁵ It is hoped that these issues will be considered in the context of the participation of children in decision-making about themselves, and that the needs of children with disabilities are considered as part of the discourse on capacity legislation in Ireland. It is also important, considering Ireland is one of only two EU states who have failed to ratify the UNCRPD, that Ireland resolves these issues as soon as possible, and ratifies the Convention.

¹⁸³ European Commission, *Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union* (European Commission, 2014), at pp. 125-126.

¹⁸⁴ Suzanne Doyle and Eleanor Flynn, “Ireland’s ratification of the UN convention on the rights of persons with disabilities: challenges and opportunities” 41 *British Journal of Learning Disabilities* 171 (2013), at p. 172.

¹⁸⁵ *Ibid.*, at p. 179.

The various documents from the European Commission outlining the treatment of the rights of children with disabilities are very insightful. There are many points which Ireland should consider. Ireland has some praise-worthy schemes which are cited with approval in the European Commission report on the implementation of the rights of children with disabilities. However Ireland does not fare well on a number of points in the report. In particular the effects of cuts on services for children with disabilities in Ireland emerges as an issue and this should be considered in the formation of policy in the area and in service provision for this group.

1.5.3 Recommendations

Make the European Parliament report on Member States' Policies for Children with Disabilities widely known, including Ireland's strengths and weaknesses in providing for children with disabilities.

The positive aspects of Irish law and practice concerning children with disabilities, such as legal provision for reasonable accommodation and inclusive education, should be recognised.

Greater provision should be made in Ireland to tackle domestic violence against children with disabilities.

Accessibility for children with disabilities, such as access to public buildings and public transport, should be prioritised in Ireland in order to facilitate children's right to participation in society. Information and communication technologies should be given particular priority.

Budget cuts should not unduly affect provision for the rights and needs of children with disabilities. The rights and needs of all children should be given due consideration in budget decision-making in order for Ireland to meet international human rights standards, including those of the UN Convention on the Rights of the Child.

Ireland should improve its provision of information and support to children with disabilities and their families about enforcement and complaint procedures. It should be ensured that official bodies dealing with complaints are child-friendly, which will require training of relevant officials concerning the needs of children with disabilities.

The national legal frameworks which regulate access to assistance should be made less complex and efficient coordination between competent authorities should be put in place. Information should be freely accessible to children and families, and there should be clarity regarding what benefits are available.

The model of good practice in Spain outlined in the European Parliament report on Member States' Policies for Children with Disabilities should be followed in Ireland, so that provision of free GP care is extended to all individuals under the age of 18 in order to ensure that children with disabilities (and other children) have full access to any health care they may require.

The three pillars referred to in the European Commission Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities by the European Union should be followed in respect of healthcare provision for children in Ireland – Children should have:

- *Access to adequate resources,*
- *Access to affordable services, and*
- *The right to be heard and to participate.*

The European Parliament report on Member States' Policies for Children with Disabilities holds that Ireland only partially recognises the right to education and to inclusive education. Ireland must work to fully recognise these rights in law and practice. It should be acknowledged that Ireland provides relatively well for inclusive education. However there is further work that needs to be undertaken in this area. In particular, provision for the education of children with disabilities should be rights-based.

The European Commission's 2014 Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities by the European Union should be made widely known in Ireland.

The European Commission's Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities by the EU notes significant differences across EU Member States in the ways in which the rights of people with disabilities are vindicated. Ireland should ensure that its standards of law and practice in this regard are amongst the highest in the EU.

Ireland should also ensure that, if definitions are standardised across EU Member States, that the highest of standards are set.

It is currently under examination in Ireland how legislation concerning capacity issues for people with disabilities should be modified to meet the requirements of the UN Convention on the Rights of Persons with Disabilities. The matter of the participation of children in decision-making about themselves should also be provided for in any legislative changes, in line with Article 12 of the UN Convention on the Rights of the Child.

The recommendations of the European Parliament report on Member States' Policies for Children with Disabilities include the need to enshrine the principle of the evolving capacities of the child. Ireland has been deemed as having only "partial" implementation of this principle. Irish law and practice need to better recognise gradually increasing self-determination for children as their capacities evolve. Children's views should not be considered solely based on age, but instead a case-by-case approach to children's capacities should be ensured. Legal provision should include respect for the views of children with disabilities in proceedings affecting them. In line with the Commission recommendations, efforts should also be made to support children to make better choices from an early age, which requires training for parents and professionals.

Consultation processes and methods of assessment should be developed so that children with disabilities are adequately heard on matters affecting them, particularly in legal proceedings.

1.6 European Commission Report on Criminal Sanctions

In 2014, the European Commission published a study on criminal sanctions in 11 Member States of the EU.¹⁸⁶ Sanctions for child pornography offences is one of the areas considered in the report. The other areas are drug trafficking, facilitating illegal entry, fraud with no cash means of payment and money laundering. It is explained in the report that "[a]ll these criminal offences selected stem from national legislation implementing EU Framework Decisions or Directives on substantive criminal law and have high practical relevance, in terms of large number of cases prosecuted in court and adjudicated in the Member States."¹⁸⁷

¹⁸⁶ European Commission, *Study on criminal sanction legislation and practice in representative Member States: Final Report* (European Commission, 2014).

¹⁸⁷ *Ibid.*, at p. 7.

Ireland was not one of the states examined in the report, however there is still much to learn from the research. The report concludes that the relevant EU legislation has resulted in a significant level of harmonisation of national legislation amongst Member States (although gaps in implementation persist), with the five offences in question found by the researchers to be present in almost all national legislations of the states examined.¹⁸⁸ The report emphasises, however, that Member States have very different sanctions for the crimes considered in the report, resulting in some states having lenient sentences for these crimes compared to other states. For the offence of acquisition or possession of child pornography, for example, the lowest maximum sentence is one year in Germany (for minors) and Spain, and the highest maximum sentence is 10 years, in Poland and Romania. For the offence of distribution or transmission of child pornography, the lowest maximum penalty is one year in Spain compared to 12 years in Italy (for commercialising child pornography).¹⁸⁹

There can clearly be widely varying sentences for the same offence across EU Member States. It is recommended in the report that common minimum rules are introduced at an EU level to provide a definition of criminal offences, and that minimum rules on the sanctions for these crimes (e.g. minimum prison sentences) should also be introduced. This will mitigate the risk of criminals choosing member states with low level sanctions as ‘safe havens’.

My previous reports consider extensively the areas in which laws in Ireland require reform in order to adequately protect children from sexual abuse and exploitation.¹⁹⁰ This European Commission study brings these necessary changes into clear focus. In particular, my seventh report highlighted the fact that Ireland has not yet transposed into law the EU Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.¹⁹¹ It is very positive that the new Criminal Law (Sexual Offences) Bill 2014 in Ireland will incorporate this Directive; bringing wide-ranging reforms of the law in Ireland, including in the area of child pornography.¹⁹² In line with previous recommendations which I have made, the Child Trafficking and Pornography Act 1998 will be amended so that “child” for the purposes of child trafficking and pornography now refers to those under the age of 18, rather

¹⁸⁸ *Ibid.*, at p. 286.

¹⁸⁹ *Ibid.*, at p. 288.

¹⁹⁰ See e.g. Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014).

¹⁹¹ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (13 December 2011).

¹⁹² See Criminal Law (Sexual Offences) Bill 2014 and <http://www.justice.ie/en/JELR/Pages/PR14000349>.

than 17 years, strengthening protection for children. The new legislation will also make it a criminal offence to knowingly obtain access to child pornography through information and communication technology, and the offence may lead to a maximum of five years in prison.

It is important that the European Commission study on criminal sanctions in Member States of the EU is considered in the finalisation of the Sexual Offences Bill, in particular to ensure that Irish law and practice on punitive measures for those persons accessing, disseminating and producing child pornography is consistent with other states in the EU. This is vital to ensure that Ireland does not serve as a ‘safe haven’ for those committing offences in this area; a potential problem highlighted in the European Commission report. The study should also be disseminated widely amongst relevant professionals, particularly judges.

1.6.1 Recommendations

Ensure that the European Commission study on criminal sanctions in Member States of the EU is considered in the finalisation of the Criminal Law (Sexual Offences) Bill 2014.

Ensure that Irish law and practice relating to child pornography is consistent with other states in the EU.

Ensure that the European Commission study on criminal sanctions in Member States of the EU is disseminated amongst relevant professionals, particularly judges.

1.7 European Convention on Human Rights

It is notable that University College Cork’s Child Law Clinic is working on the development of a European Court of Human Rights Child Law Reporting Project,¹⁹³ in which the child law-related decisions of the European Court of Human Rights (“ECtHR”) are compiled chronologically as they are decided. A comprehensive series of summaries of child law-related cases for 2014 is currently available as part of the pilot for this project. The project aims to achieve wider dissemination and greater accessibility of the child law-related jurisprudence of the ECtHR.¹⁹⁴ Three of the child-related cases of the ECtHR from 2014 most relevant to child protection will now be considered.

¹⁹³ University College Cork, Child Law Clinic, Available at: <http://www.ucc.ie/en/childlawclinic/resources/ecthrchildlawcases/> (last visited 5 January 2014).

¹⁹⁴ *Ibid.*

1.7.1 *O’Keeffe v. Ireland*

It was outlined in my previous (seventh) report that a case had been taken against Ireland concerning child sexual abuse within the Irish primary school system. In the 2012 case of *O’Keeffe v. Ireland*,¹⁹⁵ the applicant, Ms O’Keeffe, sought to establish the responsibility of the state for the abuse which she had suffered at the hands of her school principal in a Catholic-run school, asserting that a civil remedy should be available against the state. The school principle, LH, had been subject to criminal proceedings, and Ms O’Keeffe received compensation from the Criminal Injuries Compensation Tribunal. She went on to seek civil remedies against the state, but it was decided at Supreme Court level that, though the primary school system was funded by the state, the state could not be held vicariously liable for a teacher’s actions where the church provides school management. The ECtHR decided in 2012 that choosing to sue the state was a reasonable avenue to take, and that Ms O’Keeffe was not required to sue the relevant bishop, as the state argued.

The case proceeded to be heard by the Grand Chamber of the ECtHR and a judgment was delivered in 2014.¹⁹⁶ The Grand Chamber found that under Article 3 of the European Convention on Human Rights (“ECHR”), the right to freedom from inhuman and degrading treatment, the Irish state had an “inherent positive obligation” to protect children from abuse, an obligation which is of particular importance in the context of primary education.¹⁹⁷ The state should have been aware of the risk of child sexual abuse in Irish primary schools, and when it delegated the management of most Irish schools to a third party, a mechanism of controlling that risk should have been put in place by the state. The fact that the teacher who had abused Ms O’Keeffe had abused over 20 victims without detection by the state pointed to a plainly ineffective child protection system. The ECtHR also found that the lack of an opportunity to establish the culpability of the state and to access a remedy for that culpability constituted a violation of the right to an effective remedy under Article 13. The conviction of LH did not constitute an effective remedy in and of itself.¹⁹⁸

O’Mahony and Kilkelly consider the consequences of the judgment. They make the point that the test which the ECtHR requires is:

¹⁹⁵ Application no. 35810/09, judgment 26 June 2012.

¹⁹⁶ *O’Keeffe v. Ireland*, Application no. 35810/09, judgment 28 January 2014.

¹⁹⁷ *Ibid.*, at para. 168.

¹⁹⁸ *Ibid.*, at para. 179. See Conor O’Mahony and Ursula Kilkelly ‘O’Keeffe v Ireland and the Duty of the State to Identify and Prevent Child Abuse’ 36 *Journal of Social Welfare and Family Law* (2014).

[W]hether the state took reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. At its simplest, it requires that the State have in place a mechanism that enables complaints about the ill-treatment of children to reach those empowered to respond.¹⁹⁹

Where states fail in these obligations, the ECtHR emphasised that victims of child abuse should not only be entitled to establish the state's liability for failing to provide appropriate systems to respond effectively to a report of abuse, but should also be in a position to seek to be awarded compensation on that basis. It is submitted that the obligations emphasised by the case are directly relevant to the state's child protection duties in settings such as schools, in which children are especially vulnerable. This is particularly important in Ireland, considering that state education at primary level is delivered by private organisations, and the legal accountability for children's welfare between schools and the state is unclear.

It is evident from this judgment that accountability is necessary both at the level of the Department or Minister for Education and at the level of primary schools themselves. *Children First: National Guidance on the Protection and Welfare of Children* is a policy document which provides guidance to all organisations working with children in Ireland, establishing a framework to be implemented at local level to appropriately deal with concerns about children's welfare. In previous reports I have recommended that a clear legislative framework be introduced for the reporting of child abuse.²⁰⁰ In this regard, the new Children First Bill includes a provision that certain professionals would be obliged to report suspected child abuse.²⁰¹

The inconsistent application of the Children First guidance is also engaged by this case.²⁰² In previous reports I have urged the adoption of a statutory framework in order to deal with these inconsistencies. The Ombudsman for Children has also made a similar recommendation.²⁰³ As stated in my report last year, the implementation of the right of children to be heard needs to be improved in the area of child protection.²⁰⁴ Mechanisms are needed to ascertain views and concerns and, to respond to them. A new national participation policy and the referendum

¹⁹⁹ *Ibid.*, at p. 328.

²⁰⁰ See Geoffrey Shannon, *Third Report of the Special Rapporteur on Child Protection* (2010).

²⁰¹ See <http://www.rte.ie/news/2014/0414/608783-long-awaited-children-first-bill-published/>.

²⁰² O'Mahony and Kilkelly, *supra* n.198, at p. 328.

²⁰³ *Ibid.*, at p. 328.

²⁰⁴ *Ibid.*

outcome which includes provision for children's rights in the Constitution of Ireland will contribute to the progression of children's participation rights in child protection.²⁰⁵

With regard to practical concerns relating to child participation in proceedings concerning them, the marked difference in the facilities available in the Criminal Courts of Justice and those available in the civil courts in respect of hearing the voice of the child must be highlighted. Practical resources should be available to the courts of lower jurisdiction, and in particular District family law courts, so as to provide child-friendly participation in civil matters. At best the facilities for hearing the voice of the child in civil cases are substandard, with a lack of private consultation rooms, no child-friendly waiting areas, long delays and an intimidating courtroom in which the child will sometimes speak with the judge. This is in stark contrast to the very impressive facilities available in respect of cases heard before the Criminal Courts of Justice. The establishment of a specific family court system is promised in the Programme for Government and is a necessary development for a fair and effective forum to vindicate the rights of children and families. Any such system ought to appropriately and sufficiently facilitate child participation in proceedings and reflect the progress made in relation to criminal proceedings in the Criminal Courts of Justice.

1.7.1.1 Recommendations

Ensure that there is clarity around reporting of child abuse in schools.

Ensure consistent application of the Children First guidance, and implement my previous recommendation that a statutory framework be introduced in order to deal with inconsistencies.

Improve the means by which and the regularity with which children are heard on child protection issues, including through the new national participation policy.

1.7.2 Zhou v. Italy

In this case,²⁰⁶ the applicant, Ms Zhou, complained to the ECtHR about the placement of her child with a foster family by Italian authorities. Ms Zhou, a Chinese national living in Italy, had been housed in a state accommodation facility. When she found employment, she

²⁰⁵ *Ibid.*

²⁰⁶ Application no. 33773/11, judgment 21 January 2014.

engaged elderly neighbours in the care of her child during working hours and failed to inform social services. Once the state Prosecutor was informed of this situation, adoption proceedings were initiated in respect of the child on the basis that his mother was incapable of caring for him. The child was placed with a foster family and although initially the mother had visiting rights, they were suspended on the advice of a psychologist, who stated that mother and child had not formed a bond and the visits were disruptive for him. The applicant complained that her Article 8 ECHR right to respect for private and family life had been violated by the placement of her child with a foster family in anticipation of adoption, and also by the prevention of contact between mother and child for ten months.

The ECtHR found that the adequacy of the evidence relied upon (in concluding that the care the mother provided was not conducive to healthy development) was questionable. The state, the ECtHR opined, should have taken concrete steps in order to enable the mother to care for the child before he was placed for adoption. Furthermore, the mother had sought “simple” adoption, whereby contact between mother and child would have been retained rather than “full” adoption (where there would be no contact), however this option was rejected by authorities and the Italian courts. The ECtHR also found this decision questionable as it was not clear that it was in the best interests of the child. The ECtHR emphasised the obligations of authorities to provide assistance and advice to individuals experiencing difficulties, particularly where they are especially vulnerable. The need to retain family ties between mother and son had not been given the necessary consideration by authorities, who instead merely assessed the difficulties of the applicant without ensuring targeted assistance and support. This meant that the severing of family ties was not justified and the applicant’s Article 8 ECHR rights had been violated.

I have highlighted in previous reports²⁰⁷ the fact that there are increased numbers of children being taken into care in recent years in Ireland, and that we need targeted supports to ensure children are not propelled into the care system due to poverty. The decision in *Zhou v. Italy* serves as a reminder that authorities are obliged under the ECHR to ensure that targeted assistance and support for families is provided by social services to those experiencing difficulties, particularly where the individuals involved are especially vulnerable. It also highlights the obligation on states to ensure contact between parents and children in care or

²⁰⁷ See Geoffrey Shannon, *Fifth Report of the Special Rapporteur on Child Protection* (2012).

adoption settings, and that adequate evidence is relied upon where children are removed from the care of their parents.

1.7.2.1 Recommendations

Ensure targeted assistance and support for families experiencing difficulties, particularly where the individuals involved are especially vulnerable.

Ensure adequate evidence is relied upon where children are placed in foster care or placed for adoption.

Ensure there are avenues for retaining a relationship between a family and child where a child is placed for adoption and ultimately adopted.

1.7.3 Josef v. Belgium

In this case,²⁰⁸ the applicant, who was an asylum seeker and was also HIV positive, had applied on medical grounds to remain in Belgium.²⁰⁹ This request was rejected by the Belgian authorities on the basis that the medication the applicant required was available in Nigeria, from where she had come. She and her three children were asked to leave Belgium. Her appeals were rejected by Belgian authorities and the applicant submitted to the ECtHR that for her and her children to return to Nigeria was a violation of Article 3 ECHR, the prohibition of torture, inhuman and degrading treatment, because her medical condition put her at risk of suffering in Nigeria. She also claimed that the removal of her and her children was a violation of her Article 8 ECHR right to private and family life. She further argued that the complicated asylum proceedings constituted a violation of Article 13 ECHR, the right to an effective remedy.

The ECtHR held that Article 13 ECHR had been violated. The Belgian appeal process in deportation cases; designed in order to accommodate more expeditious conclusions of the cases of asylum seekers from “safe” countries; was too complex to negotiate even with legal assistance. A stay on a deportation order could only be achieved through a limited “extreme

²⁰⁸ Application no. 70055/10, judgment 27 February 2014.

²⁰⁹ See further European Database of Asylum Law, Available at: <http://www.asylumlawdatabase.eu/en/content/ecthr-decision-josef-v-belgium-application-no-7005510-27-february-2014> (last visited 5 January 2014). The judgment is available in French only.

urgency procedure” and this meant that, in practice, there was not an effective, accessible remedy for the applicant in these proceedings in Belgium.²¹⁰

It was held, however, that there was no violation of the applicant’s Article 3 ECHR rights, as to find such a violation necessitated “compelling” humanitarian grounds. A significant reduction in life expectancy was insufficient to find a violation. As the applicant was not in a critical condition, there was no Article 3 ECHR violation, notwithstanding the fact that medical treatment for HIV is inaccessible for the majority of people in Nigeria, and the fact that her three children would witness the deterioration in health which she would experience on her return to Nigeria. The ECtHR also held that Belgium had not violated the applicant’s Article 8 ECHR rights. Although it would not necessarily be in the family’s favour to move to Nigeria, the children should be able to settle there due to their young age, and the family would stay together.²¹¹

1.7.3.1 Recommendations

Ensure that asylum proceedings are accessible and effective in practice, for all applicants, including children.

Ensure that the rights of children, including the right to a fair trial and the right to private and family life, are not violated by asylum proceedings.

1.8 Child Protection Developments concerning the United Nations

1.8.1 Equality for Children

2014 marked the 25th anniversary of the adoption of the UN Convention on the Rights of the Child (CRC) in 1989. The CRC was the first international instrument recognising children’s rights – in particular children’s participation rights – and it has been ratified faster and by more states than any other UN human rights instrument.²¹² A meeting was held to commemorate the anniversary at the UN Headquarters in New York.²¹³ The main challenges

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² See further Children’s Rights International Network, Available at <https://www.crin.org/en/home/what-we-do/crinmail/crinmail-1404> (last visited 5 January 2014). All states save South Sudan, Somalia and the United States have ratified the CRC.

²¹³ *Ibid.* See further UNICEF, Available at http://www.unicef.org/crc/index_73962.html (last visited 5 January 2014).

in progressing children's rights, including discrimination against children, were considered, as were ways in which these challenges can be tackled.²¹⁴ The CRC was acknowledged as a powerful human rights tool, and a number of important issues were discussed in the context of violation of children's rights, for example child mortality and violence against children.²¹⁵

UNICEF launched a global initiative to mark the anniversary, #IMAGINE, which aims to promote global engagement in advancing children's rights.²¹⁶ The initiative involves the establishment of *action/2015*, a coalition consisting of close to 1000 organisations from over 120 states. It seeks to encourage world leaders to tackle "inequality, poverty and climate change in 2015".²¹⁷ An international conference was held at Leiden University, Netherlands entitled '25 Years CRC' gathering over 300 global children's rights experts to consider the achievements of the CRC and how to improve implementation of children's rights.²¹⁸ The significant impact of Article 12 of the CRC, the right of children to be heard, was a strong focus of the event.

Children's organisation Children's Rights International Network (CRIN) marked the CRC's 25th anniversary by examining 25 new or neglected children's rights issues.²¹⁹ The first issue considered was age discrimination. It was highlighted that age discrimination is primarily considered in the context of ageism towards seniors. However a neglected concern is the age discrimination which children experience because of their youth. In many states children are excluded from activities on the basis of their youth, for example arbitrary age limits can prevent children joining an association on the basis of generalisation of the capacities of all under-18s. These age discrimination-based obstacles can particularly limit children's participation in society.²²⁰

²¹⁴ UNICEF, Available at http://www.unicef.org/crc/index_73962.html (last visited 5 January 2014).

²¹⁵ See further Children's Rights International Network, Available at <https://www.crin.org/en/home/what-we-do/crinmail/crinmail-1404> (last visited 5 January 2014).

²¹⁶ See UNICEF, Available at http://www.unicef.org/crc/index_73962.html (last visited 5 January 2014).

²¹⁷ *Ibid.*

²¹⁸ See Leiden University, Available at http://www.unicef.org/media/media_78348.html (last visited 7 January 2014).

²¹⁹ See further Children's Rights International Network, Available at <https://www.crin.org/en/home/what-we-do/crinmail/crinmail-1404#25> (last visited 5 January 2014).

²²⁰ See e.g. Equality Commission for Northern Ireland/Northern Ireland Commissioner for Children and Young People, *Strengthening Protection for Children and Young People: Protecting children and young people against unlawful age discrimination in the provision of goods and services* (2013).

CRIN also point to the fact that national anti-discrimination policies rarely include children in categories protected from discrimination. Ireland is a state which fails to legislate for unfair discrimination against children. Clearly for some purposes discrimination on the basis of youth is justifiable in order to protect children (as outlined further below). However there is no justification for failing to provide for a prohibition of *unjust* discrimination against children. If the discrimination is not proportionate to the aims sought, then it should not be permissible under Irish law.²²¹

The Equal Status Acts 2000-2008 in Ireland seek to promote equality, prohibiting specific types of discrimination across nine grounds.²²² Children are excluded from this. It is illegal according to this equality legislation to discriminate on the basis of age (but this does not apply to those under the age of 18 years), gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the traveller community. The Acts apply to those who provide and manage goods and services; accommodation; and educational establishments. The Acts are founded on the understanding that everyone should enjoy equal participation in society, and that individuals should be treated on their own merits rather than on the basis of a stereotype. This principle should apply to children as it does to everyone else. Yet by excluding those under 18 years of age (save for the provision of car insurance), the law potentially permits unfair discrimination against this group, and this issue needs to be addressed.

There are many age limits set in Ireland which aim to protect children. For example, age limits on the permissibility of drinking alcohol and engaging in sexual activity can be argued to be a legitimate means of ensuring children's health and welfare are not unduly affected by their lack of experience in decision-making. Other age limits, however, are much less justifiable. As noted in last year's report, physical punishment is permitted against children in Ireland. Perpetrated against adults, such behaviour would be considered assault. This discrimination needs to be dealt with in order to protect children's rights in Ireland. Another clear area of discrimination on the basis of childhood concerns the national minimum wage. Although since 2011 the minimum wage is set at €8.65 per hour, those aged under 18 are only guaranteed

²²¹ See e.g. Claire Breen, *Age Discrimination and Children's Rights* (Brill, 2005).

²²² See Equality Authority, *Your Equal Status Rights Explained: Guide to the Equal Status Acts 2000–2008* (Equality Authority, 2009).

70% of the minimum wage, so in effect the minimum wage for children is €6.06 per hour.²²³ This can lead to situations where children are being paid significantly less than adults for the same work, simply on the basis of their youth. The justification for discriminating on the basis of age rather than merit in this area is unclear. Such action plainly constitutes unjust discrimination and also needs to be addressed.

The CRIN research cites “status offences”, stating that “[A]cts that would not be criminal if committed by adults (e.g. violations of curfews and antisocial behaviour orders, running away, and even simple disobedience) show that a status offender’s conduct is considered unacceptable not because it is harmful, but solely on the basis of age.”²²⁴ In Ireland, Anti-Social Behaviour Orders (ASBOs), which are widely used in England and Wales, were introduced through the Criminal Justice Act 2006.²²⁵ The legislation offers various options for the means through which orders are handed down to children and adults engaging in what is deemed to be anti-social behaviour. The legislation sets out an incremental approach to addressing such behaviour, with ASBOs as a measure of last resort.²²⁶ There was resistance at the time of the introduction of the legislation by groups such as the Irish Penal Reform Trust and the Children’s Rights Alliance, who had concerns that the introduction of ASBOs would criminalise ordinary behaviour of children and young people, such as hanging around in the streets. Their widespread use in England and Wales²²⁷ has led to criticisms of the practice on this very basis.²²⁸

As the law stands in Ireland, a Garda can issue an “anti-social behaviour warning” to a child, detailing for the parents in writing the type of behaviour in question. By 2012, there had been a total of 2,121 such warnings issued to children. If the behaviour does not cease, the next step is the drawing-up of a “good behaviour contract”.²²⁹ If this is also unsuccessful, police may then recommend that the child engage with a juvenile diversion programme, or (where they are over 12 years) they may apply to the Children’s Court for a “behaviour order” (ASBO).

²²³ S.I. No. 331/2011 - National Minimum Wage Act 2000 (Section 11) (No. 2) Order 2011.

²²⁴ *Supra. n.219.*

²²⁵ See Part 11.

²²⁶ See further Thejournal.ie, ‘Explainer: Why have just seven ASBOs been issued in Ireland in five years?’ 17 June 2012, Available at: <http://www.thejournal.ie/asbos-ireland-asbo-criminal-justice-alan-shatter-485523-Jun2012/> (last visited 3 January 2015).

²²⁷ Kirstey Varley, ‘Opinion: The ASBO survives. For now....’ 2 October 2014, 24Dash.Com. Available at <http://www.24dash.com/news/housing/2014-10-02-Opinion-The-ASBO-survives-For-now> (last visited 3 January 2015).

²²⁸ See further Thejournal.ie.

²²⁹ See further Thejournal.ie.

The consequences of such an order can be severe: it stays in place for two years, and if it is violated children can receive up to three months in a detention school, or a fine of up to €800.²³⁰

There have, however, been very low numbers of ASBOs handed down to children in Ireland since the Act came into effect. By 2012 there had been only three orders made.²³¹ It is very positive that fears of a heavy-handed approach by authorities have not been borne out, and it may indicate that less severe approaches are working for authorities in terms of dealing with children's anti-social behaviour. However it does beg the question as to why these divisive ASBOs, heavily criticised in the UK for their criminalisation of children, are provided for in the legislation in Ireland if there is no use for them. Their effectiveness is also in question: The Irish Penal Reform Trust argues that ASBOs have little impact in changing anti-social behaviour and that the priority should be tackling the causes of such behaviour rather than labelling those engaged in it.²³²

There do not appear to be any plans to review the legislation, in spite of the fact that ASBOs for children are essentially not being used. However these orders could be very harmful to children's rights, as the UK experience demonstrates. They have the potential to criminalise behaviour engaged in most frequently by children as opposed to adults because of the nature of childhood. For example, children 'hang around' street corners because they do not have the facilities provided for them to engage in other activities (adults on the other hand have more access to resources and engage less in this behaviour), and ASBOs in the UK frequently criminalise such behaviour. ASBOs can therefore be argued to be discriminatory towards children as pointed out by CRIN. It is crucial, therefore, that the law is reformed and that provision for these unused, yet potentially harmful, orders is removed from Irish law.

Acknowledging that age discrimination occurs on the basis of youth is an important step towards vindicating the rights established in the CRC. It is, as highlighted by CRIN, a neglected issue which needs revisiting on the 25th anniversary of the CRC. There are clearly many areas in Irish law which need reform in order to ensure that children are not unjustly

²³⁰ See new section 257F in the Children Act 2001.

²³¹ See further Thejournal.ie.

²³² *Ibid.*

discriminated against. Where children are treated differently to adults by law, the treatment should be justifiable.²³³

1.8.1.2 Recommendations

Consider neglected children's rights issues in the Irish context, such as recognition of unjust discrimination that can occur against children on the basis of their young age.

Amend equality legislation to include the prohibition of unjust discrimination against children.

Amend the criminal law in order to outlaw physical punishment to ensure that children are not unjustly discriminated against.

Amend the minimum wage to abolish the permissibility of the payment of a lower minimum wage to younger individuals.

Abolish ASBOs to ensure that children are not unjustly criminalised on the basis of age and consequently discriminated against.

1.8.2 Reports on Trafficking in Persons

I have covered extensively the matter of child trafficking and its relevance to Ireland in a number of previous reports.²³⁴ The 2014 Global Report on Trafficking in Persons was released in November 2014 by the United Nations Office of Drugs and Crime.²³⁵ The age and gender aspects of trafficking were clear issues identified in the report. It was highlighted that one in three victims of trafficking in persons is a child. 70% of victims are female, and they are more at risk than males of being forced into modern slavery. In regions such as Africa and the Middle East, child trafficking is a major issue, and children make up 62% of victims.²³⁶ Human trafficking for forced labour has risen over the past five years, with typical contexts for

²³³ See e.g. Claire Breen, *Age Discrimination and Children's Rights* (Brill, 2005).

²³⁴ See Geoffrey Shannon, *First Report of the Special Rapporteur on Child Protection* (2007), Geoffrey Shannon, *Second Report of the Special Rapporteur on Child Protection* (2008) and Geoffrey Shannon, *Fourth Report of the Special Rapporteur on Child Protection* (2011).

²³⁵ United Nations Office of Drugs and Crime, *2014 Global Report on Trafficking in Persons* (United Nations Office of Drugs and Crime, 2014).

²³⁶ *Ibid.*, at pp. 29-32.

forced labour involving domestic work, textile production and the manufacturing and construction sectors.²³⁷

The report provides valuable insight into the geographical nature of trafficking. It is highlighted that, where human trafficking occurs across continents, the aim is usually to reach wealthy states, whereas most trafficking occurs within states or within a region. Most trafficking in persons occurs within regions, with over 6 out of 10 victims being trafficked across at least one state border.²³⁸

The report also reveals that traffickers often operate with impunity. There were few or no convictions for human trafficking in 40% of states.²³⁹ The Executive Director of the United Nations Office of Drugs and Crime remarks that “over the past 10 years there has been no discernible increase in the global criminal justice response to this crime, leaving a significant portion of the population vulnerable to offenders.”²⁴⁰

In my sixth report I considered the matter of child trafficking in detail, including standards at both international level and within Ireland and provided a number of recommendations to protect children in Ireland from trafficking. Although improvements have been made since this report was published, a number of areas still require change.

The US Department of State’s *Trafficking in Persons Report 2014* states that “Ireland is a destination, source, and transit country for women, men, and children subjected to sex trafficking and forced labour” and that there has been an increase in the identification of Irish children being used in sex trafficking within the country.²⁴¹ Other shortcomings in Irish law and practice are also identified.²⁴²

The report points, however, to significant efforts being made in Ireland to tackle the issue, including legislative reform; support services provided in Ireland to victims of trafficking; an

²³⁷ *Ibid.*, at pp. 43-50.

²³⁸ *Ibid.*, at pp. 68-69.

²³⁹ *Ibid.*, at p. 29.

²⁴⁰ United Nations Office of Drugs and Crime Executive Director, Yury Fedotov. UN New Centre, ‘Trafficking in children on the rise, says new UN report’ (24 November 2014). Available at: <http://www.un.org/apps/news/story.asp?NewsID=49423#.VK6cvvuj-K5> (last visited 20 December 2014).

²⁴¹ US Department of State, *Trafficking in Persons Report*, at p. 213.

²⁴² *Ibid.*, at p. 213.

increase in convictions of traffickers; and education for professionals and the general public.²⁴³ The report provides a number of recommendations for practice in Ireland, including:

- Increasing funding for victim services;
- Enhancing the training of social workers responsible for trafficked children, “including training on meeting the needs of unaccompanied migrant or asylum seeking children who are victims of trafficking”; and
- Considering the establishment of a national rapporteur “to enhance anti-trafficking efforts and to better assess needed improvements in victim identification.”

These reports provide much information on trafficking in both the global and Irish contexts. It is important that their findings are utilised in Ireland in order for law and practice to be evidence and rights-based.

1.8.2.1 Recommendations

The relevant authorities, such as police, social services and businesses, need to be educated about the findings of the 2014 UN Global Report on Trafficking in Persons, particularly concerning its age and gender aspects.

Fully implement recommendations relating to child trafficking in previous Rapporteur reports.

Follow the recommendations of the US Department of State’s Trafficking in Persons Report 2014. In particular, increase funding for victim services; enhance the training of social workers working with trafficked children, and establish a national rapporteur to enhance anti-trafficking efforts.

1.8.3 Ratifications of the Third Optional Protocol to the UN Convention on the Rights of the Child

As noted in last year’s report, the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure was drafted in 2010. The protocol permits children and their representatives to petition the Committee on the Rights of the Child on the basis of violations of children’s CRC rights. The Protocol opened for signature in 2012 and as of

²⁴³ *Ibid*, at p. 214.

January 2015 it has 45 signatures and 10 ratifications. After receiving the ten necessary ratifications, the Protocol entered into force on 14 April 2014.²⁴⁴

It is a very welcome development that Ireland ratified and acceded to the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.²⁴⁵ Ireland has become one of the first states to do so, leading globally in ensuring high standards for children's rights. Together with Monaco and Andorra, Ireland joined 11 other States that had already ratified the complaints mechanism.²⁴⁶ The announcement was made in September 2014 that Ireland would do so, with the Minister for Children and Youth Affairs acknowledging the importance of the Protocol for progressing children's rights; stating that:

[T]he Protocol will reinforce and complement national mechanisms allowing children to submit complaints for violations of their rights. It is right that children in Ireland should have the same facility to access this new UNCRC rights mechanism as their counterparts in other participating countries.²⁴⁷

The Protocol entered into force with respect to Ireland on 24 December 2014, which means that children and their representatives will now be able to submit complaints to the UN Committee on the Rights of the Child about violations of their CRC rights which occur after that date.

1.8.3.1 Recommendations

The ratification by Ireland of the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure is to be acknowledged and commended.

Steps should be taken to ensure that the ratification by Ireland of the Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure is widely reported.

²⁴⁴ See UN Treaty Collection, Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en (last visited 3 January 2015).

²⁴⁵ Eurochild, 'Ireland announces OP3 CRC ratification'. Available at: http://www.eurochild.org/news/news-details/article/ireland-announces-op3-crc-ratification/?tx_news_pi1, 17 September 2014 (last visited 20 December 2014).

²⁴⁶ The first eleven states to sign and ratify are Albania, Belgium, Bolivia, Costa Rica, Gabon, Germany, Montenegro, Portugal, Slovakia, Spain and Thailand.

²⁴⁷ Department of Children and Youth Affairs, 'Minister for Children and Youth Affairs Announces Ireland to sign United Nations protocol aimed at further enhancing the rights of children.' 17 September 2014. Available at: www.dcy.gov.ie/ (last visited 20 December 2014).

1.9 International Developments Concerning Violence against Children

Previous reports have considered in some detail the issue of violence against children in Ireland, and the fact that physical punishment of children by parents has yet to be outlawed. The international standards in this area are clear: physical punishment of children is a violation of children's rights and should be prohibited at a domestic level. The UN Committee on the Rights of the Child has commented that "... eliminating violent and humiliating punishment of children, through law reform and other necessary measures, is an immediate and unqualified obligation of States parties [to the Convention on the Rights of the Child]."²⁴⁸ This is an area in which much activity has been occurring at an international level this past year.

In June 2014, a conference was hosted by Sweden's Ministry of Health and Social Affairs in Stockholm in celebration of both the 35th anniversary of the adoption by Sweden of a ban on physical punishment of children (Sweden was the first state in the world to do so) and the 25th anniversary of the adoption of the UN Convention on the Rights of the Child.²⁴⁹ The event involved the launch of a Swedish initiative to work for progress on the prohibition of physical punishment in other countries, and to review global progress achieved.²⁵⁰ Experts were brought together from 22 countries which either have legislation banning physical punishment of children, or intend to introduce such legislation.

It was emphasised at the conference that law reform alone is insufficient in order to end physical punishment of children, and that other measures are also important. Experiences were shared at the conference regarding such measures as "policies to support positive parenting, awareness raising, capacity building and social mobili[s]ation initiatives to influence a change in attitudes and behavio[u]r condoning violence."²⁵¹ Nevertheless, Marta Santos Pais, Special Representative to the United Nations Secretary General on Violence against Children,²⁵² stated at the conference that a prohibition of physical punishment of children is an essential

²⁴⁸ Committee on the Rights of the Child, *General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (Forty-second session, 2006), U.N. Doc. CRC/C/GC/8 (2006).

²⁴⁹ See Special Representative to the United Nations Secretary General on Violence against Children. Available at: http://srsg.violenceagainstchildren.org/story/2014-06-04_1011#sthash.Fe3ESbb3.dpuf. (last visited 6 January 2014).

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² See Special Representative to the United Nations Secretary General on Violence against Children. Available at: http://srsg.violenceagainstchildren.org/video/2014-11-20_1183 (last visited 6 January 2014).

component of attempts to end violence against children, and a necessary factor for creating respect for children and their dignity.²⁵³

The event also facilitated various initiatives with the common aim of progressing children's rights in this area. The Global Initiative to End All Corporal Punishment of Childhood produced a special progress report on the topic for the conference.²⁵⁴ The report points to strikingly high rates of physical punishment of children, with the vast majority of children in both low to middle income countries experiencing such punishment.²⁵⁵ Across West and Central Africa the average proportion of children experiencing physical punishment is 90%. High income countries, however, also fare badly in this area. The report cites one research study which demonstrates that in 2010, 65% of three year olds in the US had been "spanked" in the past month.²⁵⁶ Another 2007 study found that 87% of French parents had at least once smacked their child.²⁵⁷ Moreover, 2013 research found that 62% of parents in Ireland had hit their child for punishment at some time.²⁵⁸

However increasing numbers of states across the world (37 states by May 2014) have legally prohibited physical punishment of children, including in the home.²⁵⁹ Another 46 states have committed to introducing a prohibition through the UN Universal Periodic Review procedure or through other official avenues.²⁶⁰ The report also notes the various initiatives by intergovernmental bodies in the area, such as the initiative to end physical punishment by the Council of Europe,²⁶¹ as well as the South Asia Initiative to End Violence against Children, which has started a campaign to prohibit physical punishment in the eight countries of the South Asian Association for Regional Cooperation.²⁶²

²⁵³ *Ibid.*

²⁵⁴ Global Initiative to End All Corporal Punishment of Childhood, *Free from corporal punishment – changing law and practice* (Global Initiative to End All Corporal Punishment of Childhood, 2014).

²⁵⁵ *Ibid.*, at p. 17.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ The countries are: Albania, Austria, Bulgaria, Congo, Republic of Costa Rica, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Honduras, Hungary, Iceland, Israel, Kenya, Latvia, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Moldova, Romania, South Sudan, Spain, Sweden, TFYR Macedonia, Togo, Tunisia, Turkmenistan, Ukraine, Uruguay and Venezuela. See at p. 5.

²⁶⁰ *Supra. n.254* at p. 4. The countries are: Afghanistan, Algeria, Armenia, Azerbaijan, Bangladesh, Belize, Benin, Bhutan, Bolivia, Brazil, Burkina, Faso, Cape Verde, Ecuador, El Salvador, Estonia, India, Lithuania, Maldives, Mauritius, Mongolia, Montenegro, Morocco, Nepal, Nicaragua, Niger, Pakistan, Palau, Panama, Papua New Guinea, Peru, Philippines, Samoa, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, South Africa, Sri Lanka, Tajikistan, Thailand, Timor-Leste, Turkey, Uganda, Zambia and Zimbabwe. See at p. 5.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

The report envisages a significant role for states in tackling the issue and provides a number of recommendations for states in order to work towards vindication of children to be free from violence, including prohibition of physical punishment. States should ensure that there is a clear rights basis for the prohibition of physical punishment, so that children have the right to equal protection of their physical integrity under the law. States should highlight the unjust nature of a lack of protection of children under the law in this regard. It is also recommended that states should include the issue in the UN Universal Periodic Review process through questions to states which have not fully prohibited the physical punishment of children. States are to work towards a clear commitment at UN level to prohibit physical punishment of children, for example through Human Rights Council and UN General Assembly resolutions.²⁶³

The report points to the post-2015 development framework as an opportunity for states to include ending violence against children (including physical punishment) through development strategies and urges states to promote the issue through the drafting process. Countries are also urged in the report to continue intergovernmental work to further the issue, and to consider the provision of support to other states on ending physical punishment. Moreover, states should ensure that initiatives to tackle domestic violence logically include working to eliminate violence against children in the family.²⁶⁴

It is also highlighted that it is crucial that states engage in advocacy which presents physical punishment of children from a variety of different perspectives “including gender and disability; also health and public health, early years care and development, education without violence”. States must facilitate dissemination of key documents and standards on the issue, including General Comment No. 8 of the Committee on the Rights of the Child - *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*. States are also to advocate the wide body of research demonstrating the harmful effects of physical punishment, and the positive impact of prohibiting it. Furthermore, States must have government-lead plans to implement the prohibition, and share information with other states on successes, in order for successful models to become known.²⁶⁵

²⁶³ *Ibid.* at p. 8.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

Prohibiting physical punishment of children at domestic level is not a straightforward task. Physical punishment is intimately linked to deeply-held beliefs and cultural practices and law reform alone will not tackle the issue. This report of the Global Initiative to End All Corporal Punishment of Childhood is an invaluable guide for states on actions which can be used in conjunction with law reform to ensure that professionals and the general public understand the benefits of ending physical punishment of children, and the fact that it is a fundamental human rights issue. The report also provides guidance for states which have prohibited physical punishment to work towards banning the practice elsewhere in the world.

1.9.1 Recommendations

Ireland should implement the recommendations of the report of the Global Initiative to End All Corporal Punishment of Childhood.

In particular, Ireland should legally prohibit physical punishment of children, and should engage in advocacy at both a national and international level on the issue.

SECTION 2: DOMESTIC DEVELOPMENTS

2.1 Introduction

A number of cases raising salient child protection issues came before the Irish courts in 2014. Some of the issues emerging include the question of maternity in surrogacy arrangements; various issues relating to Council Regulation (EC) 2201/2003 (Brussels IIa); applications concerning children pursuant to Article 40 of the Constitution; the nature of supports given to parents; the *in camera* rule; the right to the provision of aftercare services; home schooling; and recent developments relating to marital breakdown and children, among various other issues.

2.2 Surrogacy

The Supreme Court in *M.R. & Anor v. An tArd Chlaraitheoir & Ors*²⁶⁶ overturned a decision of the High Court which had declared the genetic mother of twins born through a surrogacy arrangement to be the person entitled to be registered as the legal mother of those children on their birth certificate. The Supreme Court, in reversing the High Court decision, stated that the legal mother in the case was the woman who gave birth to the children and not the genetic mother. The Chief Justice stated that the issue of assisted human reproduction was quintessentially one for the legislature and not the courts to address. The case clearly merits the legislature addressing the issue of surrogacy given the lacuna in the law about certain rights, especially of children born through such arrangements.

2.3 Jurisdiction, Transfer of Proceedings and Council Regulation (EC) 2201/2003

The Supreme Court in *Child and Family Agency (CFA) v. R.D.*²⁶⁷ rejected the argument that the Irish courts did not have jurisdiction to hear a particular case brought under Council Regulation (EC) 2201/2003 (“Brussels IIa) (dealing with jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility) and adjourned its decision on the question of whether the child at issue should be returned to England where there was a care order in place. The approach of the Supreme Court in this case is interesting in that the court indicated that the return was to be brought about by an Irish

²⁶⁶ [2014] IESC 60.

²⁶⁷ [2014] IESC 47.

order under Article 20 of Brussels IIa (which deals with provisional measures) rather than the enforcement of the English order for return.

The case of *C.M.H. v. J.P.D.*²⁶⁸ concerned the wrongful removal by the father of a child from England to Ireland. A defence was raised pursuant to Article 13 of the Hague Convention (under the Hague Convention on the Civil Aspects of International Child Abduction) by reason of the child's objection to returning to England. The mother argued that the child, insofar as he was expressing his view about where he wished to live, had been manipulated by the father. Article 13 of the Hague Convention provides:

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

The court analysed the child's objection to returning to England and assessed his level of maturity/capability of forming his own views. The judge proceeded to order the return of the child noting that he had taken the child's views into account but that the child's views were not determinative of the order that the court should make.

In *F v. G*²⁶⁹ the High Court refused to mirror an order that had been made by a Californian Court. The court also refused to accept an undertaking from one of the parents that he/she would not file any proceedings in this jurisdiction in relation to custody or visitation issues concerning the child. The judge stated that, bearing in mind the court's constitutional and statutory obligation to consider the welfare of the child as the first and paramount consideration it would be contrary to public policy to receive from the parent of a child an undertaking in such terms. In a previous decision in the same case (*F v. G*²⁷⁰), the court refused an application by the mother of the child to have the father appointed guardian. The court refused the application on the basis that section 6A of the Guardianship of Infants Act 1964 only permits the application to be made by a child's father.

In *Case C-376/14* the Irish Supreme Court requested a preliminary ruling from the Court of Justice of the European Union ("CJEU"). The case concerned the father of a French child who

²⁶⁸ [2014] IEHC 261.

²⁶⁹ [2014] IEHC 153.

²⁷⁰ [2014] IEHC 152.

had brought proceedings in Ireland pursuant to the Hague Convention alleging that the mother was wrongfully retaining the child in Ireland. One of the questions referred to the European Court was whether the existence of the French proceedings relating to the custody of the child precluded the establishment of habitual residence of the child in Ireland. The second question was whether either the father or the French courts continued to maintain custody rights in relation to the child so as to render wrongful the retention of the child in Ireland. Thirdly the European Court was asked to decide whether the Irish courts were entitled to consider the question of habitual residence of the child in the circumstances where she had resided in Ireland since July 2012, at which time her removal to Ireland was not in breach of French law. The European Court of Justice adopted the view that the crux of the issue was whether the child was habitually resident in France immediately before the alleged wrongful retention and that this was an issue of fact to be determined by the national court in accordance with the principles set out in *Mercredi v. Chaffe*²⁷¹. It was held that, in making that assessment, the courts in Ireland must take into account that the judgment of the French court authorising the removal was only provisionally enforceable and that an appeal had been brought against it and these factors were not conducive to a finding that the child's habitual residence had changed. However, the court stated that all the circumstances had to be taken into account including the time which had elapsed between the removal and the judgment allowing the appeal against the order which permitted such removal. The court further held that any decision to refuse the application for return under the Hague Convention was without prejudice to the father's right to enforce the judgment of the French court pursuant to Chapter III of the Brussels IIa and a change in the child's residence would not constitute a factor which would justify the non-enforcement of an order pursuant to Chapter III of Brussels IIa.

In the case of *A.J. v. L.J.*²⁷² the Court had to determine the habitual residence of the child immediately prior to her being removed to Ireland. In assessing the question of habitual residence the trial judge applied Irish and English case law. She did not mention or adopt the approach set out in *Mercredi v. Chaffe*. She referred to the judgment of the United Kingdom Supreme Court in *In re LC (Children)*²⁷³. In that case the UK Supreme Court indicated that in assessing the habitual residence of an adolescent child it was relevant to have regard to the state of mind of that child. The court held that “[w]hat can occasionally be relevant to whether

²⁷¹ [2011] EWCA Civ 272.

²⁷² [2014] IEHC 92.

²⁷³ [2014] 2 WLR 124.

an older child shares her parent's habitual residence is her state of mind during the period of her residence with that parent²⁷⁴.”

Finlay Geoghegan J. in *A.J. v. L.J.* held on the facts that the child was not habitually resident in a particular State in the United States as alleged by the father in his proceedings. She noted in passing that this conclusion was consistent with the state of mind of the child although this was not a matter which she had taken into account in reaching her conclusion.

The case of *M.J.T. v. C.C.*²⁷⁵ concerned a preliminary issue in child abduction proceedings. The mother of the child, the subject of the proceedings, had died and the father had ‘rights of custody’ for the purposes of the Hague Convention. However the evidence before the court indicated that the father had no contact and did not maintain a relationship with the child for a period of three years prior to the application. The trial judge held that the father was obliged to put before the court *prima facie* preliminary evidence that not only did he have rights of custody but that he was exercising such rights of custody during a significant period of time prior to the removal of the child. To satisfy that burden it was sufficient to show that he kept or sought to keep regular contact or a relationship with the child. The payment of maintenance alone did not suffice. It was held that as the preliminary burden of proof had not been satisfied the application should be dismissed without the necessity of conducting an interview to have regard to the views of the child.

*D.F. v. E.M.*²⁷⁶ was a judgment in regard to an application to stay High Court proceedings. Amongst the relief sought was a declaration that the father had wrongfully retained the children in Rhode Island in the United States. Relief was also sought pursuant to the Hague Convention. Prior to the issue of the High Court proceedings, the father had commenced proceedings concerning custody and access in Rhode Island. At the time of the hearing of the stay application in the High Court, the American proceedings had been adjourned to a date on which the court would consider whether it had jurisdiction. The application was in relation to the Hague Convention proceedings and was seeking the appointment of an assessor to interview the child. The purpose of such interview was to ensure that the child's views were before the Court.

²⁷⁴ *Ibid.*

²⁷⁵ [2014] IEHC 196.

²⁷⁶ [2014] IEHC 510.

The Trial Judge felt that it would be premature to make such an order and that it was impossible at that stage to establish the exact nature of the issues in respect of which the child should be heard. The court also stated that it would not be in the interests of the child to have multiple interviews. It was held that the issue of hearing the views of the child and the matters in respect of which such views should be heard should be adjourned to the hearing of the action.

2.4 Applications pursuant to Article 40 of the Constitution

The case of *M.C. v. Director of Oberstown Detention School*²⁷⁷ concerned an application pursuant to Article 40.4 of the Constitution on behalf of a young boy challenging the legality of his pre-trial detention in Oberstown Detention School. The judge was satisfied that the nature and degree of the seriousness of the offences which it was considered might be committed justified the refusal of bail in the case. The boy was charged with theft, fraud and assault offences and had recently been arrested for four other robberies. The judge confirmed that refusal of bail to a minor is contemplated under the provisions of the Children Act 2001. The court noted that refusal of bail to minors is not the norm, but in this case the nature and extent of the applicant's history of delinquency and the complete absence of effective domestic supervision and control contributed to the reluctant refusal of bail under section 2 of the Bail Act 1997.

The case of *W v. HSE*²⁷⁸ was another case concerning Article 40 of the Constitution. That case also contained a due process element whereby the parents of a child in respect of whom an interim care order had been granted complained that they had not been given an opportunity to be heard at the emergency care order hearing. Counsel for the parents argued that, given the importance of the issue raised and despite the fact that the child was now back in the care of his parents the case should still be heard by the court notwithstanding the fact that the matter was moot. The issue of public importance, argued the parents, was the fact that the parents in a situation such as that case (where an emergency care order is sought and granted) were not entitled to be heard until the interim stage. The Supreme Court held that the constitutionality of section 13 of the Child Care Act 1991 was not in question and on the basis that the matter was moot because the child was back in the care of his mother, did not consider the general question of a respondent's right to be heard at an emergency care order hearing.

²⁷⁷ [2014] IEHC 222.

²⁷⁸ [2014] IESC 8.

2.5 Nature of Supports Given to Parents of Children Placed into Care

In *CFA v. O.M.*²⁷⁹ the District Court judge, in granting a care order under section 18 of the Child Care Act 1991, requested that the CFA give consideration not merely to the supports the mother may need but also to how those supports could be provided having regard to her particular psychological needs.

2.6 *In Camera* Rule

The case of *CFA v. R*²⁸⁰ dealt with an application by the CFA 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. The Gardaí wanted access to the reports (a report from a paediatrician and a report from an independent specialist child sexual abuse unit) in order to determine whether further matters relevant to the criminal investigation had come to light. The judge referred to Article 1.1.1 of the Children First National Guidelines and a report entitled *National Review of Sexual Abuse Services for Children and Young People* which stipulates the key characteristics of ‘best practice’ in undertaking such investigations. That report emphasises the need for liaison, the need to avoid multiple interviews of the child, and the necessity to formally record inter-agency engagements. The court granted the Gardaí (and the mother) access to the reports on a strictly limited basis and on the understanding that they pertained to proceedings that were otherwise subject to the *in camera* rule. It is of note that the child in this case was interviewed on three occasions by the specialist child sexual abuse unit, who were providing a report to the CFA for the purpose of pending child care proceedings. Furthermore, six electronically recorded video interviews had been conducted by An Garda Síochána’s child specialist investigators with the child. This demonstrates that the Memorandum of Understanding between An Garda Síochána and Tusla in respect of the interviewing of child victims of sexual abuse is not operating to the optimum as it would appear that children are being interviewed on more than one occasion, thereby re-victimising the child victim. This also has the potential of undermining the evidential value of the evidence of a child abuse victim.

The case of *M.F. & Anor v. CFA*²⁸¹ was an application by two parents to discharge a care order that had been made in respect of their children. The judge, in refusing the parents’

²⁷⁹ [2014] IEDC 05.

²⁸⁰ [2014] IEDC 03.

²⁸¹ [2014] IEDC 07.

application, noted that the application had consisted of 16 court applications and a hearing lasting two days. The judge also noted that it was unfortunate that the parents felt that the only mechanism by which they could establish what needed to be undertaken by them was to lodge the application in order to initiate the various assessments which resulted in a “roadmap” being set out for them. It is implicit in the comments of the learned judge that the assessments would presumably not have been carried out were it not for the matter being before the court.

The case of *A.B. v. C.D.*²⁸² concerned an application pursuant to section 40 (3A) of the Civil Liability and Courts Act 2004 to exclude the press from attending the hearing of an application in family proceedings. In his judgment, Keane J. analysed and applied the relevant factors set out in section 40 (3A). In this respect, he held that there was a mandatory obligation pursuant to section 40 (3A) (c) (i) (ii) to have regard to the views of any child to whom the proceedings relate if he or she is capable of forming his or her own views. In discharging this obligation, the court interviewed two of the children. They indicated to the court that they had already been identified locally and if the press were allowed to attend the application they believed the situation would only get worse. Keane J. expressed a view that some degree of local identification must be closer to the norm than the exception in family litigation. He held that the application before him raised an issue in regard to the attempted interference with the administration of justice. In such a case the presence of the press was desirable with a view to promoting public confidence in the administration of justice. Keane J. refused to exclude the press but as an alternative imposed some reporting restrictions. In particular nothing was to be published concerning any underlying custody or access issue. There was to be no contemporaneous social media reporting – e.g. by Twitter. Times Newspapers, who were represented at the application to exclude the press, were to appoint a designated reporter to attend at and report on the proceedings. In *A.B. v. C.D. (No. 2)*²⁸³ the judge refused to set aside the order of Abbott J. and rejected the claims of bias or failure to apply fair procedures.

2.7 The Right to the Provision of Aftercare Services

In *L.H. and Child and Family Agency & Ors*,²⁸⁴ a young person (the subject of a care order) applied for directions under section 47 of the Child Care Act 1991 relating to his/her own aftercare. At the hearing the young person was represented by a solicitor and counsel and

²⁸² [2014] IEHC 180.

²⁸³ [2014] IEHC 450.

²⁸⁴ [2014] IEDC 08.

supported by an advocate. The main part of the application related to clarification being sought for the young person's accommodation once he/she "aged out" of the care system when he/she turned 18. Section 45 of the Child Care Act 1991 contains the obligations placed on the CFA in relation to the provision of aftercare services to children in care. Section 45(1) states:

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

(b) Where the Child and Family Agency is assisting a person in accordance with subsection (2)(b), and that person attains the age of 21 years, the Agency may continue to provide such assistance until the completion of the course of education in which he is engaged.

The judge stated that it was clear that any directions given by the court pursuant to section 45, notwithstanding their all-encompassing nature, are limited to when the child is a child and that the court cannot direct the provision of services after the child is 18. Referring to a document entitled *The National Policy and Procedure Document for Leaving and Aftercare Services*, the learned judge stated that it imposed a requirement that a child must be in continuous care for a period of 12 consecutive months prior to his or her 18th birthday in order to meet the primary eligibility criteria for aftercare services. The judge, however, stated that "it is also clear that [the child] has a statutory right under section 45 to have his/her aftercare needs assessed in light of his/her individual needs and cannot be excluded from the provision of aftercare services by way of an apparently arbitrary eligibility criteria which has no legislative basis, merely by its inclusion in a National Policy."

The court noted that, despite the 12 month requirement referred to above, the CFA had assessed the young person according to his/her individual requirements and proposed to provide him/her with aftercare services, mainly focussing on the young person's accommodation needs. The judge went on to say that he did not accept that the provision of an allocated aftercare worker was necessary for the young person to be considered for aftercare funding. The judge directed that the designated social worker continue to support the child and directed that it was not necessary to specifically allocate an aftercare worker.

2.8 Liability for Past Abuse of Children

As discussed in para.1.7.1 above, the Grand Chamber of the European Court of Human Rights (ECtHR) in *O’Keeffe v Ireland*²⁸⁵ found that Ireland had violated Article 3 of the European Convention on Human Rights (ECHR) which prohibits torture or inhuman or degrading treatment or punishment as well as Article 13 ECHR (the right to an effective remedy). Ireland was found to have failed to have in place proper systems to prevent or punish sexual abuse in this particular case, where the sexual abuse took place in the early 1970s. Ireland was judged by the ECtHR to have failed in its positive obligations towards Louise O’Keeffe to prevent and punish the torture, inhuman and degrading treatment that she suffered. The ECtHR found that there was an inherent obligation on a government to protect children from ill-treatment especially in a primary school context. A salient feature of the decision was the fact that the school in question had known of complaints of sexual abuse prior to the abuse of Ms. O’Keeffe.

Two decisions of the Superior Courts in 2014 dealt with the issue of victims who make complaints in relation to past abuse and the principles and thresholds that are applied in order to determine whether such cases can be heard.

*B.F. v. Residential Institutions Redress Board & Ors*²⁸⁶ concerned the time periods applicable to cases that fell under the Residential Institutions Redress Act 2002. Applicants for redress under the 2002 Act generally have three years from the establishment day to submit their claims. The High Court overruled an earlier decision of the redress board and extended the time for the applicant in this case to seek redress under the 2002 Act on the basis that he had been suffering from depression at the time he should have applied.

The Supreme Court ruled in July of 2014 that a woman who was taking a civil action against her brother, for abuse she suffered as a child, could proceed with her case notwithstanding the fact that she had not first applied to the Injuries Board for authorisation.²⁸⁷ The alleged abuse had occurred in the 1970’s when the applicant was a teenager.

²⁸⁵ Application no. 35810/09, judgment 28 January 2014.

²⁸⁶ [2014] IEHC 129.

²⁸⁷ ‘Abuse case to go ahead after Supreme Court ruling on personal injuries Act’ Irish Times, 31st July, 2014.

2.9 Home Schooling

In September 2014, a mother of six was briefly imprisoned after she refused to pay a fine handed down to her by a court for her refusal to register her children as being home schooled.²⁸⁸ The Education (Welfare) Act 2000 requires parents of children who are being “educated in a place other than a recognised school” to have the child concerned registered. The parents in the case objected to an assessment being carried out of their children and for that reason, they were refusing to register the children as being home schooled. Section 14(5) of the 2000 Act determines that as soon as a child is registered as receiving home schooling the CFA shall conduct an assessment of the education being provided to determine whether the child is receiving a “certain minimum education.” If an authorised person is unable to make a determination on this matter the Act permits another authorised person to enter the place where the child is being educated, inspect the premises, equipment and materials and carry out an assessment of the child in relation to his or her intellectual, physical and emotional development.

2.10 Marital Breakdown

The case of *R.S. v. T.S.*²⁸⁹, which was an application for judicial separation together with orders by way of ancillary relief, raised a significant issue concerning the custody and access arrangements in relation to the children. A report pursuant to section 47 of the Family Law Act 1995 had been ordered and an expert gave evidence at the trial in relation to the children. His view was that it would not be in the best interests of the children to spend equal periods of time with each parent given the absence of mutual co-operation and respect between the parents. The trial judge rejected this approach for a number of reasons. First, the older child had expressed a view that he wished to spend equal time with each parent. Second, the judge could see no logical connection between the existence of high levels of conflict and low levels of mutual trust between parents and the need to divide custody of the children unequally. Third, there was no logical basis for the proposition that the equal division of custody between parents provided less regularity and predictability for the children. Fourth, on the facts of the particular case there was no basis for the suggestion that the equal division of custody would provide less stability given that the husband had acquired a home in the same area as the existing family home to ensure no disruption to the children’s school or social activities.

²⁸⁸ ‘Home schooling mother jailed and released for not paying fine’ Irish Times, 3rd September, 2014.

²⁸⁹ [2014] IEHC 257.

Fifth, the judge referred to a previous authority of *D.McA. v. K.McA.*²⁹⁰, where week on/week off custody of children had been recommended by a psychiatrist and directed by the Court. Keane J. directed that the living arrangements for the children should be that they should spend alternative weeks with each parent.

2.11 Better Outcomes, Brighter Future

In April 2014, the Department of Children and Youth Affairs launched ‘*Better Outcomes, Brighter Future: Report of the National Policy Framework for Children and Young People 2014-2020*’. The Framework has as its objective the setting out of “transformation goals and outcomes for children and young people and new structures reporting to the Cabinet Committee on Social Policy.” The Minister for Children and Youth Affairs stated that the Framework is about “moving on from addressing the legacy of failings to promoting a new culture and cross-government approach to improving outcomes for all children²⁹¹.”

‘*Better Outcomes: Brighter Futures*’ is the first overarching national policy framework for children and young people aged from birth to 24 years and will be implemented by the Department of Children and Youth Affairs in collaboration with all Government departments and key state agencies. The Framework contains over 160 commitments including:

- Focusing on early interventions and quality services to promote best outcomes for children, particularly in the vitally-important early years;
- Working better together to protect young people who are marginalised, at-risk or who demonstrate challenging or high-risk behaviour;
- Setting a target of lifting 70,000 children out of poverty by 2020;
- Improving childhood health and wellbeing in line with the goals of ‘Healthy Ireland’;
- Enhancing job opportunities for young people – building on the ‘Action Plan for Jobs’ and the Youth Guarantee;
- Delivering better supports for families and parenting.

The ‘transformation goals’ set out in the Framework consist of support for parents; earlier intervention and prevention; listening to and involving children and young people; ensuring quality services; strengthening transitions; cross-government and inter-agency collaboration and coordination.

²⁹⁰ High Court, Unreported, Herbert J., 17 December 2002.

²⁹¹ <http://www.dcy.gov.ie/viewdoc.asp?DocID=3151>.

The stated ‘better outcomes’ include children being:

- active and healthy with positive physical and mental wellbeing;
- achieving their full potential in all areas of learning and development;
- being safe and protected from harm;
- having economic security and opportunity;
- being connected, respected and contributing to their world.

The Framework sets out various entities and strategies that will ensure implementation and accountability (of these transformations and outcomes). These include a cabinet committee on social policy; a children and young people’s policy consortium; an advisory council; an implementation team; national strategies by age and priority areas.

The stated vision of the Framework is for Ireland to be “one of the best small countries in the world in which to grow up and raise a family and where the rights of all children and young people are respected, protected and fulfilled; where their voices are heard and where they are supported to realise their maximum potential now and in the future²⁹².”

The Framework sets a target of lifting at least 70,000 children out of poverty by 2020. It is imperative that the aspirations and goals set out in ‘*Better Outcomes: Brighter Futures*’ are consciously implemented against a backdrop of an increase in the number of children living in poverty in Ireland today. The framework refers to the ‘*Growing Up in Ireland*’ study, conducted by the ESRI and TCD and sets out some of the statistics garnered from that study:

- 15%-20% of children were classified as showing significant levels of emotional or behavioural problems.
- While most children are healthy, 25% are overweight or obese.
- While 92% of children complete secondary education, only 13% of Traveller children do.
- While most children are safe and supported, we have over 21,000 child welfare and 19,000 child abuse referrals annually to Tusla, the Child and Family Agency.

²⁹² ‘*Better Outcomes, Brighter Future: Report of the National Policy Framework for Children and Young People 2014-2020*’, at p. (viii).

If ‘*Better Outcomes: Brighter Futures*’ is to achieve what it has set out to achieve, these figures, representing individual and real challenges, must form the basis of all steps taken to implement the goals set out in the Framework.

The Framework seeks to promote a shift in policy toward earlier intervention and to ensure the provision of quality early years services and interventions, aimed at promoting best outcomes for children and disrupting the emergence of poor outcomes. The importance of such an approach cannot be overstated and early intervention serves many interests, but most of all the children in question, alleviating the need for therapeutic and support services later in life, which will very often only be sought when the situation has become critical. This Framework seeks to make sure that young people who are marginalised or ‘at risk’ or who demonstrate challenging or high-risk behaviour have access to an integrated range of supports and services to help them achieve their best possible outcomes. It also seeks to ensure that no young person falls through the cracks because of fragmented services. Undoubtedly, such an approach is of paramount importance. Too often cases are reported of young people who have been known to be at risk, for whatever reason, suffering extremely serious and often fatal consequences.

The Framework seeks to better understand and respond to the increasing influences on childhood of new technologies, digital media, sexualisation and commercialisation; to ensure that children, young people, parents and society in general are best equipped to respond to these influences; and to foster a culture that promotes positive influences for childhood. This stated goal is welcome and necessary in a world where the law and child protection policies are constantly battling to keep pace with technology. Indeed, I have stated publicly that I believe the internet to be the new child protection frontier.

In relation to health and well-being, the Framework confirms a cross-Governmental approach, in line with the goals of *Healthy Ireland*, to seek to improve all aspects of health and wellbeing, and to reduce risk-taking behaviour in children, with a particular focus on promoting healthy behaviour and positive mental health and in disrupting the emergence of poor outcomes such as diet-related non-communicable diseases arising from childhood obesity.

2.12 Children First Bill

The Children First Bill 2014, which will put elements of the *Children First: National Guidance for the Protection and Welfare of Children (2011)* on a statutory footing was published by the Houses of the Oireachtas on 14 April 2014. As stated by the Department of Children and Youth Affairs, the introduction of this legislation has been a key Programme for Government commitment, and will form part of a suite of child protection legislation which already includes the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 and the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012²⁹³.

The Bill provides for a number of key child protection measures including:

- A requirement on organisations providing services to children to keep children safe and to produce a Child Safeguarding Statement;
- A requirement on defined categories of persons (mandated persons) to report child protection concerns over a defined threshold to the Child and Family Agency (the Agency);
- A requirement on mandated persons to assist the Agency in the assessment of a child protection risk, if so requested to do so by the Agency;
- Putting the Children First Inter-departmental Group on a statutory footing.

It is envisaged that the provisions of the Bill will ensure that concerns about children will be brought to the attention of the CFA without delay and improve the quality of reports made to the Agency and the quality of follow up on concerns. The new legislation will operate in tandem with the existing *Children First: National Guidance for the Protection and Welfare of Children 2011*.

The policy objective of the Bill (to raise awareness of child abuse and neglect and to require certain persons to report child protection concerns) can only be viewed in a positive light. Similarly, the commitment to provide for inter-agency working and information-sharing in relation to assessments by the Agency, if comprehensively achieved, would no doubt result in better outcomes for children who may be involved with services provided by the state for the improvement of their welfare. The obligation on organisations to undertake an assessment of

²⁹³http://www.dcy.gov.ie/viewdoc.asp?fn=%2Fdocuments%2FChildren_First%2FChildrenFirstLegislation.htm.

any risks to a child while the child is availing of its services, and the requirement to use this as the basis for developing a Child Safeguarding Statement is to be welcomed. Certain persons, who are classified as ‘mandated persons’ in the Bill, are required to report information to the CFA if they believe there is a risk of a child being at harm (section 11). Schedule 2 of the Bill sets out the list of people who will be classified as ‘mandated persons’. These include medical practitioners, social workers, teachers, members of An Garda Síochána and youth workers, among others.

Required action to ensure child protection set out in the Bill includes:

- i) Section 9 which states that a provider of a relevant service shall ensure, as far as practicable, that each child availing of the service from the provider is safe from harm while availing of that service;
- ii) Section 10 which states that service providers undertake an assessment of any potential for harm to a child while availing of the service and prepare a written statement specifying the service being provided and the principles and procedures to be observed to ensure as far as practicable, that a child, while availing of the service, is safe from harm.
- iii) Section 11 which states that where a mandated person knows, believes or has reasonable grounds to suspect, that a child has been harmed, is being harmed or is at risk of being harmed he or she shall, as soon as practicable, report that knowledge, belief or suspicion, as the case may be, to the Agency. The same section requires a mandated person to report any disclosures of harm made to them by a child to the Agency.
- iv) Section 13 which states that the CFA may require a mandated person, who has reported a concern in relation to a child, to give to the Agency such information and assistance as it may reasonably require.
- v) Section 17 of the Bill which provides for the establishment of a *Children First Inter-Departmental Implementation Group* to perform the functions assigned by the legislation. The function of the Group will include promoting compliance of the requirements under the Act and monitoring the implementation of guidelines in the Act.

2.13 National Vetting Bureau (Children and Vulnerable Persons) Act 2012

The purpose of the Vetting Act 2012 was to provide a legislative basis for the vetting of persons who seek positions of employment relating to children or vulnerable persons. Previously, persons applying for such positions were vetted on a non-statutory basis. This Act makes vetting mandatory. Under the Act certain people will be subject to vetting if they are involved in any work or activity which is carried out by a person, a necessary and regular part of which consists mainly of the person having access to, or contact with children in a variety of situations including:

- Childcare Services;
- Schools;
- Hospitals and health services;
- Residential services or accommodation for children or vulnerable persons;
- Treatment, therapy or counselling services for children or vulnerable persons;
- Provision of leisure or physical activities to children or vulnerable persons (unless this is incidental to the provision of services to a mixed group including adults);
- Promotion of religious beliefs.

The Act does not apply to an individual who works in the course of a private arrangement for their own benefit, or for a child or vulnerable person who is a member of the individual's own family. However the Act applies where such involvement includes coaching, mentoring, counselling, teaching or training of the children or vulnerable persons.

At the moment there is no obligation on the Garda Vetting Unit to seek information from police authorities in a foreign jurisdiction where a person has lived in that country for an appreciable period of time. Nor does the Vetting Act provide a framework to obtain vetting information in respect of the period of time persons spend out of the country. Legislative action is required to address this lacuna.

2.13.1 Recommendation

It is recommended that a procedure be introduced whereby vetting information can be obtained in respect of a time period spent outside Ireland by persons that are undergoing vetting. At the moment there is no obligation on the Garda Vetting Unit to seek information from police authorities in a foreign jurisdiction where a person has lived in that country for

an appreciable period of time. This might be addressed by protocols or administrative arrangements with police authorities in a foreign jurisdiction. Another method of exchanging information, in relation to criminal convictions, might be established with the passing of the Criminal Records Information Systems Bill 2013 which sets out to provide for exchange of criminal records with other countries. This implements an EU Framework Decision on the exchange of criminal records information. That Bill also provides for the exchange of information with non-EU states.

2.14 Education (Admission to Schools) Bill

The Draft General Scheme of the Education (Admission to Schools) Bill was published by the Minister for Education in September 2013. The purpose of the Bill is to regulate the admission of children to primary and post primary schools. It is envisaged that the regulations proposed in the Bill will underpin a fair and transparent enrolment process that precludes school places being allocated on the basis of waiting lists and stop schools seeking deposits or payments as part of the admission process. The objective of the Bill is to improve access to schools for all pupils and will ensure that there is consistency, fairness and transparency in the admission policies of all schools.

The Bill seeks to remove the burden from parents of appealing school decisions refusing a place in a school to their child. This will see an end to the current system of appeals to the Department of Education under section 29(1) of the Education Act 1998 (which will be repealed). The proposed measures require the parties to cooperate where disputes around admissions arise and the Minister for Education or a patron will be able to appoint an independent person to operate the enrolment/admission process in certain circumstances. The draft regulations, which will accompany the Bill, seek to bring a level playing pitch for families newly settled or returning to live in an area and to ensure a parent's income or ability to pay admission fees cannot be a factor that will determine school admission. The regulations also seek to bring an end to the "soft barriers" that can affect children with educational needs.

2.14.1 Other Proposals Contained in the Bill Include the Following:

- That schools will not be able to conduct interviews with parents and children ahead of enrolment;

- Schools that have waiting lists in place, may by way of a derogation, be allowed to clear those waiting lists over a number of years;
- Schools will be able to prioritise places for an applicant who is a sibling of an existing or former student;
- Appeals will be dealt with at school level under simplified arrangements.

Head 3 of the Bill requires that a school admission policy state that a school will not discriminate in its admission policy. In particular, a school will not discriminate on any of the following grounds;

- i) the student having a disability or special educational need;
- ii) the student's sexual orientation;
- iii) the student's family status;
- iv) the student being a member of the Traveller community;
- v) the student's race;
- vi) the student's civil status;
- vii) the student's gender;
- viii) the student's faith or religious tradition; or
- ix) the student having no faith.

To this end a school must include in its enrolment policy an explicit statement that it will not discriminate against an applicant for admission on any of the above grounds. Other relevant provisions of the Bill include:

- Head 6 which makes it clear that it is the function of a school principal to implement a school's admission policy.
- Head 8 which repeals section 10 of the Education for Persons with Special Needs Act 2004. That section enabled the National Council for Special Education to designate a particular school to admit a child. Section 10 has never been commenced.
- Head 11 enables the Minister for Education to require cooperation between schools in certain circumstances where the Minister is of the opinion that a common admissions process should operate.
- Section 19 of the Education (Welfare) Act 2000 is to be repealed by Head 14. The Bill will provide a comprehensive framework within which issues such as the

circumstances in which decisions to refuse enrolment may be made, information to accompany applications and timeframes for decisions will be addressed.

2.15 Young Carers

In order to support and protect the rights of young carers and their families, it is worthwhile to look to available literature on the subject for guidance. The study “*Young Carers in the Irish Population*²⁹⁴” is of particular value in this regard. It puts forward a proposal designed to assist young carers and makes practical recommendations to effect actual change. Four objectives were emphasised in the study’s findings that, if implemented, would benefit young carers significantly. The first is the basic aim of affirming, enumerating and protecting the rights of young carers. Secondly, targeted and specialised services specifically tailored to young carers are proposed in order to apply the aforementioned aim in practice. The third objective is to encourage and facilitate informal support networks that will operate alongside state support and fourthly, it is recognised that raising awareness and knowledge of young carer issues among relevant professionals and indeed the wider public is necessary to bring their rights to the fore in Irish society.

To ensure the success of these recommendations, a detailed, coordinated strategy will be required. The objectives can be said to represent a four-pronged proposal to protect the rights of vulnerable young carers and all need to be implemented together to secure their effectiveness. Determining the best way in which each individual objective will be met is crucial and both legislative and executive action will be required to bring these objectives into the realm of reality. This will necessarily involve the passage of legislation and statutory instruments, but will also require ground level work such as the preparation of best practice and departmental policy, training staff and organising social service providers.

Being a young carer undoubtedly has a huge and long-lasting impact on those young people involved. Research has shown that the lives of young carers are usually negatively affected by their role and in “*Hidden Voices; An Exploratory Study of Young Carers in Cork*”, caring as a child or teenager was found to influence many different aspects of life, including education, career, physical and mental health, social life, life chances and choices.²⁹⁵ The *Hidden Voices* study interviewed a number of young carers to gain their perspective on how their lives had

²⁹⁴ “*Young Carers in the Irish Population*” Office of the Minister for Children and Youth Affairs, 2010.

²⁹⁵ “*Hidden Voices; An Exploratory Study of Young Carers in Cork*” Combat Poverty Agency, October, 2008.

been affected by their caring responsibilities. Some former young carers spoke about how they had almost entirely missed out on education and this in turn affected their work choices and career paths. The ability to pursue social relationships and have active social lives was also recognised by young carers as suffering as a result of their caring obligations. They had less time to spend with their friends and partake in other social activities. Similarly, the aforementioned study highlighted that being a young carer can have a detrimental impact on the health, both mental and physical, of the young people involved. One of the most notable consequences of being a young carer, however, is having to cope with poverty or financial hardship. “*Hidden Voices*” demonstrates that financial hardship is often linked directly to the young carer’s position, as some young carers interviewed lived alone with a parent on illness or disability benefit and were therefore entirely dependent on social welfare payments for their income.

As discussed above, education is an area in which young carers have noted difficulty at times. Attendance at school can suffer and homework can be left undone. Without the necessary supports in schools, which are sometimes unaware of a young carer’s responsibilities, the result can be a lost education. This has been recognised by the young carers unit of the Carers’ Association which proposes to provide a framework of support for carers in education at school-level.²⁹⁶ It recommends that a school lead or leadership body be set up in every school which would act as a support structure for young carers. This school lead body should identify and support young carers and in this way, prevent them from underachieving, which is demonstrated in the *Hidden Voices* study to be an unfortunate reality for young carers. The Carers’ Association suggests that schools treat young carers as any other pupil, but at the same time reflect the understanding that their caring responsibilities place on their shoulders an additional burden which may make their educational lives more difficult.

In terms of the informal support network for young carers, the importance of involving the wider family unit as a means of ensuring that “the person needing care does not rely on the child to provide levels of care which impact on their wellbeing and life chances” has been stressed in the UK.²⁹⁷ Encouraging closer family involvement in the care of vulnerable family members is a welcome approach. This, however, should not be used in a way that would enable the state to abrogate its moral duty to provide much-needed assistance to

²⁹⁶http://www.youngcarers.ie/researchersteachers_howyoucanhelp_resourcesforschools_supportmodel#a1.

²⁹⁷ “*The Health and Wellbeing of Young Carers*”, February 2005.

disadvantaged citizens. It is crucial to recognise that the wider family and the state have different competencies, both of which are equally important in protecting the welfare of young carers. The advantages of the involvement of family members is that they tend to have extensive background knowledge and ‘insider information’ on the circumstances, personalities and challenges involved in the particular case. In addition, they can potentially serve, if necessary, as a mediator between the young carer, the cared-for, and the intervening social services. The state, on the other hand, has access to funding and practical resources. Similarly, the technical information and manpower available to the state can be of great importance and utility. Ultimately, it is submitted that both parties are required to support and vindicate the rights of young carers and for the protection of their welfare, neither should abrogate their duty to the other.

To ensure that families and the state are encouraged to work together towards the goal of protecting young carers, it is recommended that a statement recognising this at a departmental policy level should be made. The process to give support for young carers will be a lengthy one, however it is submitted that any such process must begin with understanding, conciliation, and a non-patronising approach to education, information and direction by social services. Eventually, the aim should be to allow those affected by these issues to set the terms of their engagement where appropriate and within reason, thereby empowering said parties to take control of their affairs, a facility which would otherwise have been lost to them through incapacity on the one hand, and the demands of caring on the other.

2.15.1 Recommendations

A clear, positive statement of the rights, value and importance of (heretofore largely unheralded) young carers in society is recommended; with codification and a non-exhaustive, non-limiting enumeration of relevant rights, such as rights to education, participation in social and community life, and to be heard. This initiative would be foundational for the other proposals dealt with here; as the framework provides a useful guide to action and policy.

Any change in policies or strategies at the statutory or non-statutory level must acknowledge the existence of, and contribution made by young carers to society and highlight the necessity for policy and support measures to meet their needs.

Where and as necessary, the establishment, reorganisation and/or expansion of services, institutions and departments with responsibility for the support of young carers and their families are required. This is vital for the aforementioned rights to have any practical effect. Similarly, government level policies or declarations of rights must be made known to the young carers in question for them to have any practical use.

A clear and accessible channel of information must be made available to the young people in question. This is an essential component of any statement of rights or allocation of resources for the benefit of young carers. The lack of adequate information, supports and professional interventions has exacerbated already difficult situations for young carers. Any policy or legislative initiative which aims to improve the lives of young carers must include a detailed plan on how it would be envisaged that young carers can access the information relevant to their rights and the appropriate services and supports they are entitled to.

Whether achieved through statute or statutory instrument, a sharing of relevant data between state agencies, departments and sections is necessary to ensure effective, comprehensive and timely service provision for young carers and their families. Such an initiative would also provide a useful precedent for greater service integration and efficiency in governance generally.

Proceeding from this, the following practical measures and targets are recommended:

- a) Provision of shared care, respite care, counselling, and educational and recreation programmes.*
- b) Access to medical advice and support for young carers and their families, as a matter of priority.*
- c) Commitment to services that are non-intrusive, efficient, responsive and flexible.*
- d) Serious consideration given to the experiences, dynamics, needs and wishes of the carers and their families.*

The promotion of the recommendations and principles set out by the Carers' Association in relation to the additional burdens faced by young carers in terms of education, and the steps that may be taken to assist those individuals.

2.16 Sibling Access of Children in Care

When asked to enumerate their concerns as part of a consultation process of children in care in 2010, the most consistent theme that emerged from the young people who had been consulted was the complexity and importance of regular access to birth parents and siblings²⁹⁸.

When children are taken into the care of the state, one of the major challenges facing either private carers or foster carers is whether siblings can be accommodated together. Section 3(2)(c) of the Child Care Act 1991 states that, in the performance of its function, the CFA shall “have regard to the principle that it is generally in the best interests of a child to be brought up in his own family”. This provision should be interpreted by the CFA as meaning that the Agency and those working around the issue of children in care will strive to enable children to remain in their homes with their parents and will strive towards reunification of children that have been placed in care. Where children cannot remain in their own homes the issue of access between siblings in care is a hugely significant one and something that requires attention.

Ideally siblings will be accommodated together in the unfortunate event that they are taken into care but this is not always possible. Where this is not possible, the challenge that is then faced is how frequently access can be facilitated between siblings who are living in different locations.

In *Olsson v Sweden (No.2)*²⁹⁹, three children who had been taken into care in Sweden were placed in separate foster homes and restrictions were imposed on access. The applicant parents in the cases argued, among other issues, that the restrictions on access imposed on the children had given rise to a breach of Article 8 ECHR. The ECtHR found that there had been a violation of Article 8 ECHR. In deciding the matter, the ECtHR noted that what will be decisive is whether the national authorities had made such efforts to arrange the necessary preparations for reunion as could reasonably be demanded under the special circumstances of each case. The ECtHR unanimously held that there had been a violation of Article 8 ECHR on account of the restrictions imposed regarding access with the children. Significantly the court

²⁹⁸ *Listen to Our Voices: Hearing Children and Young People Living in the Care of the State*, Department of Children and Youth Affairs, July 2011.

²⁹⁹ *Olsson v Sweden No.2* (Application No. 13441/87).

in *Olsson* held that administrative difficulties could not be an explanation or justification for an interference with Article 8 ECHR rights.

Section 23(7) of the Children Act 1989 in England and Wales states that:

Where a local authority provides accommodation for a child whom they are looking after, they shall, subject to the provisions of this Part and so far as is reasonably practicable and consistent with his welfare, secure that—

....

(b) where the authority are also providing accommodation for a sibling of his, they are accommodated together.

The right to grow up with one's siblings is a right which should be protected by Article 8 ECHR (the right to respect for private life and family life). Once private and family life is established pursuant to Article 8, any interference with or restriction on that right must be in accordance with the law, for one or more of the specified aims in Article 8(2) and necessary in a democratic society.

For too long the focus has been on parent-child relationships at the expense of sibling relationships. Where children are in care the sibling ties represent a significant and comforting part of the child's identity. Siblings should have the right to grow up together unless that is shown to be contrary to their best interests.

2.16.1 Recommendations

A provision similar to that contained in section 23(7) of the Children Act 1989 in England and Wales should be inserted into the Child Care Act 1991 in order that the objective of maintaining siblings together is explicitly set out.

Prior to children being placed in care there should be a comprehensive assessment of the sibling relationship for the purpose of determining whether the children should live together or whether there are relevant and sufficient reasons based upon their best interests which justify them being placed apart.

It should also be explicitly stated in the Child Care Act 1991, that where it is not possible to accommodate siblings in care together, the CFA shall ensure regular access between siblings

and the assessment of the suitability of such access should be conducted independently of the assessment of suitability of access between the children and their parents.

*With regard to any legal or administrative steps that are taken in relation to promoting sibling access or attempts to accommodate siblings in care together the underlying principle, as set out in *Olsson v Sweden*, must be borne in mind; that administrative difficulties should not be a sufficient reason to justify interference with the Article 8 ECHR rights of children and families.*

2.17 Children with Disabilities

In Chapter 1 of this Report, I discussed in the international context the issue of children with disabilities. At a domestic level, there is no doubt that children with disabilities and their families face enormous difficulties in all aspects of their lives and are among the most deserving of protection and support. The two main sources of legislation relating to children with disabilities in Ireland are the Disability Act 2005 and the Education for Persons with Special Educational Needs Act (EPSEN) 2004, a large part of which remains to be commenced.

Article 23 of the United Nations Convention on the Rights of the Child provides:

State parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which enjoy dignity, promote self-reliance and facilitate the child's active participation in the community.

The National Council for Special Education (NCSE) estimates that 18% of children have special educational needs. For planning purposes the CFA uses an estimate of 4% for children who have complex ongoing needs for health supports, with a further 10% having occasional needs for health intervention³⁰⁰.

A report published in August 2013 entitled "*Outcomes for Children and their Families*"³⁰¹ sets out six outcome statements for children and young people as follows:

- i. Children and young people have a voice in matters which affect them and their

³⁰⁰ *Report of the National Reference Group on Multidisciplinary Disability Services for Children aged 5-18*, December 2009.

³⁰¹ "*Outcomes for Children and their Families*" Report on an Outcomes-Focused Performance Management and Accountability Framework for Early Intervention and School Age Disability Network Teams, Standards and Performance Reporting Working Group, August 2013.

- views will be given due weight in accordance with their age and maturity;
- ii. Children and young people enjoy the best possible health;
 - iii. Children and young people are safe;
 - iv. Children and young people have friends and get on well with other people in their lives;
 - v. Children and young people learn skills to help them to be independent;
 - vi. Children and young people take part in home life, school life and community life.

It is noteworthy and deliberate that the outcome statements refer to universal outcomes. That is, outcomes which are relevant and meaningful in real-world daily life for all children and all families. They are not ‘special’ outcomes.

2.18 Inter-Agency Co-Operation

One issue that was highlighted in the above-mentioned report was the proposed inter-agency co-operation between service providers in the area of children with disabilities. Certain draft protocols from the Cross Sectoral Team (a joint committee of representatives of the Department of Health, the Department of Children and Youth Affairs, the Department of Education and Skills, the HSE (now CFA), and the NCSE) propose pathways to assessment for children over five years old. These include:

- An application under the Disability Act for an assessment of need;
- An initiation of an assessment by the CFA under the EPSEN Act;
- School principals or NCSE arranging an assessment of need.

Inter-agency co-operation is vital in ensuring a holistic and comprehensive suite of supports for children with disabilities and their families. For example, ongoing co-operation between the Department of Health and the Department of Children and Youth Affairs is essential when a child with a disability starts school and the focus of the interdisciplinary team becomes more school-orientated as education becomes a major part of the child’s life, and health intervention and supports contribute to the extent to which the child can fully access the curriculum.

2.19 Equity of Care and Planning

There is no doubt that children born with disabilities face a plethora of extra challenges and hurdles throughout their lives. We must ensure that the same thresholds and criteria regarding child protection are applied to a child with a disability as compared with a child without a

disability. UNICEF has acknowledged that children with disabilities often experience barriers to the effective enjoyment of their human rights and inclusion in society.³⁰²

To give an example, a free pre-school year for children was introduced by the government in 2010. The take-up of such places by children with disabilities varies across the country depending on the services and supports available to disabled children in the particular part of the country they reside in. Complaints have been made to the Office of the Children's Ombudsman in this respect. It is essential that the best interests of children is at the centre of all policy developments concerning those same people and that planning for children with disabilities is a key part of that process.

We must ensure that all children are treated equally, whether disabled or not. As discussed in detail in Chapter 1 of this Report, the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) enshrines numerous rights to equality for people with a disability. Article 7 of that Convention holds that:

1. State parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interest of the child shall be a primary consideration.
3. State parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age appropriate assistance to realise that right.

Ireland has yet to ratify the UNCRPD but this should be done immediately. The requirement in Article 6 to hear the voice of the child (with the appropriate assistance) is something which is particularly necessary where, for example, children with disabilities may be the subject of court proceedings under the Child Care Act 1991 or other legislation. Section 26 of the Child Care Act 1991 allows the court to appoint a *guardian ad litem* (GAL) for a child in child care

³⁰² See Kilkelly, U. & O'Mahony, C., "The Proposed Constitutional Rights Amendment: Running to Stand Still?", (2007) 10(2) I.J.F.L. 19, 25. Kilkelly, U., "Children's Rights and the Family: Myth and Reality" *Studies Issue* 385, Vol. 97, Spring 2008.

proceedings, and under s.25 of the 1991 Act it is possible to make a child a party to all or part of the child care proceedings.

Article 12(3) of the UNCRC declares that: “State parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” Whereas it may, in certain circumstances, be appropriate to appoint a GAL or a solicitor (under the 1991 Act both cannot be appointed) to act on behalf of a child with a disability, the more appropriate method of assistance may be provided through an independent advocacy service, with a specific focus on children with disabilities. This approach may be possible under section 32(2) of the Guardianship of Infants Act 1964, if section 63 of the Children and Family Relationships Bill is enacted.

2.20 Specialist Care Facilities for Children with Disabilities

When children with disabilities come into the care system particular challenges emerge regarding how to support those children and provide them with the services they require. The same is true for children with disabilities who live in a residential centre. It is of paramount importance, in this regard, for care plans to be detailed enough to provide the child’s carer, whether in a foster home or a residential centre, with guidance as to the child’s needs so that the carer can make a comprehensive assessment and plan for the child’s care.

Reports have emerged of residential centres for children with disabilities having no care plans in place for those children on inspection.³⁰³ Where a child with a disability, of whatever kind, comes into care or lives in a residential institution, specialised foster care and residential care placements are essential to meet the needs of the child.

2.20.1 Recommendations

The remaining sections of the Education for Persons with Special Education Needs Act 2004 should be commenced without delay and considerable weight should be attached to the principle that every child with special needs should have an education plan.

³⁰³ ‘Home for disabled children had no care plans for residents’, Irish Times, 27th June 2014.

The United Nations Convention on the Rights of Persons with a Disability should be ratified immediately, as previously recommended in an earlier report.³⁰⁴

A policy for young children with disabilities availing of the free pre-school year under the early childhood care and education scheme should be implemented so as to ensure that such children and their families are able to access the supports they need in order to take up such a placement, as is the entitlement of any other child of a similar age.

Advocacy services for people with disabilities should entail specific services which are child centred. This might be achieved through joint endeavours between advocates who are trained to work with people with disabilities and GAL's who have experience working with children and ensuring that their voices are heard.

Development of specialised foster care and residential care placements to meet the needs of the child with a disability.

2.21 Suggested Offence of Reporting on an 'Infant Ruling'

So called 'infant rulings' occur when a minor has suffered a personal injury and an adult close to the child (usually a parent) acts as a 'next friend' in taking an action for damages on behalf of the child. Where the matter has been processed by the Injuries Board pursuant to the Personal Injuries Assessment Board Act 2003 and an assessment has issued from the Board an application may be made to court for approval of the settlement.³⁰⁵ A defendant can also make a settlement offer which has to be ruled by the court. Infant rulings are heard in open court at present and there is a concern that this practice may infringe upon the privacy of the children involved in these proceedings. The reporting of these cases at present can include photographs, details such as the age and address of the child, injuries suffered as well as any subsequent disfigurements or side effects among other things. Online media reports of such cases can expose vulnerable children (who may not have developed sufficient maturity to appreciate the impact or consequences of these newspaper reports) to potential risks where there may be family law issues or other concerns (such as bullying in schools etc.).

³⁰⁴ Geoffrey Shannon, Sixth Report of the Special Rapporteur on Child Protection (2013).

³⁰⁵ Order 22, rule 10 of the Rules of the Superior Courts (as amended by S.I. 517 of 2004).

The reporting in the media or elsewhere of infant rulings engages and arguably violates Article 8 ECHR rights which enshrine the right to private and family life. Article 6(1) ECHR which deals with the right to a fair trial holds that:

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

It is therefore explicitly envisaged by the ECHR that the right to privacy of children may be infringed by the fact that proceedings involving them are open to the public and as a consequence the press.

The approach of the ECtHR to the definition of family life under Article 8 ECHR together with the Irish courts' interpretation of 'the family' under Article 41 of the Constitution and the new Constitutional provisions dealing with the rights of the child afford protection to children which is arguably being violated by the media in reporting on these civil cases whilst in criminal cases they must not identify the child.

A number of suggestions for change can be put forward which may serve to better protect children who are the subject of infant rulings. One option would be to create an offence of reporting on an infant ruling. If such an offence were to be created, it would be impermissible and punishable for any member of the press or other person to report on an infant ruling.

An alternative solution might be to have infant rulings cases heard "*in camera*" in order to safeguard and protect the privacy of children and to protect children from issues of identification and salacious reporting. The "*in camera*" rule presently applies in family and child law cases, although it has been amended recently by the Courts and Civil Law (Miscellaneous Provisions) Act 2013 which permits *bona fide* members of the press to report on such proceedings as long as, in doing so, they do not publish any information which would likely lead members of the public to identify the parties to proceedings or any child to whom the proceedings relate.³⁰⁶

³⁰⁶ Section 40A of the Civil Liability and Courts Act 2004, as amended by section 6 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013.

2.21.1 Recommendations

A procedure should be introduced to limit or prohibit the reporting of an infant ruling in order to protect the privacy of the child involved in such proceedings. The reporting of such a ruling could be made subject to the “in camera” rule or alternatively a new offence could be created to outlaw the reporting of such proceedings.

Any step taken with regard to changing the practice relating to the reporting of infant rulings should be informed primarily by the ‘best interests principle’; that is that the best interests of the child should be the paramount concern in decisions concerning him or her.

2.22 Garda Inspectorate Report - Child Protection Elements

There are a number of issues of concern from a child protection perspective contained in the Garda Inspectorate Crime Investigation Report 2014. I have raised some of these matters in my previous reports. The issues in need of immediate attention are outlined below.

2.22.1 Child Interviews

- It was found that regular unit Gardaí were being used to interview in serious crimes such as child sexual abuse. In this regard it is recommended in the Report that the Garda Síochána conducts a review of the availability and deployment of child specialist interviewers and reviews with the CFA the process of creating interview scripts. Specifically, it is recommended that specialist interviewers take statements from child victims of sexual or physical abuse or serious neglect.
- During meetings with investigators, concerns were raised in some divisions about time delays in completing interviews. Gardaí stated that it can take up to six months before a child interview is conducted.
- The Inspectorate Report recommends that the Garda Síochána addresses the existing skills gap for Gardaí trained in interview techniques, statement taking and disclosure relating to crimes involving children.

2.22.2 Child Sexual Abuse

- Reference is made to a 2010 Garda Inspectorate Report entitled ‘Responding to Child Sexual Abuse’ which identified a failure by An Garda Síochána to record child sexual offences as crimes. The late reporting of such crimes was also a major issue identified in the 2010 report.³⁰⁷ The latest Report states that the late reporting of crimes remains a problem. Other recommendations from the 2010 Report include: (i) immediately creating a PULSE record for each complaint received; (ii) ensuring adherence to crime counting rules and to other Garda directives on crime recording; (iii) that only specially trained front line Gardaí take reports alleging child sexual abuse. The Report states the recommendations arising from the 2010 Report will be the subject of a separate review of the Garda Inspectorate.
- It is stated in the Report that the Garda Síochána has developed Key Performance Indicators (KPIs) for all crimes that involve child sexual abuse and sexual assault. When a case is recorded in these categories, and in the absence of a detection, it continues to feature on the KPIs and remains as a monitored case. If a crime is reclassified and the narrative is changed, a crime of this nature will no longer feature on the KPIs.
- Child sexual abuse was one of the serious crimes identified in the Report that was investigated by regular unit Gardaí contrary to assurances by senior Gardaí that only detectives investigate serious crimes. The Inspectorate Report, as stated, does not agree with garda policy that the investigation of serious sexual offences can be performed by all front-line Gardaí and states that rape and serious sexual assault cases should always be investigated by detectives and supervised by a senior detective.
- The case of *CFA v. R*³⁰⁸ is particularly relevant with regard to the issues of child sexual abuse and the interviewing of child victims. As discussed above, this case dealt with an application by the CFA 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. The child in this case was interviewed on

³⁰⁷ Report of the Garda Síochána Inspectorate, Responding to Child Sexual Abuse, November 2010.

³⁰⁸ [2014] IEDC 03.

three occasions by the specialist child sexual abuse unit, who were providing a report to the CFA for the purpose of pending child care proceedings. In addition, six electronically recorded video interviews had been conducted by An Garda Síochána's child specialist investigators with the child. Judge Horgan noted in her judgment:

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 the Child and Family Agency, which is set out in PART 111 of the Children First National Guidelines. The learned Judge 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 the CFA) 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.

This demonstrates that the Memorandum of Understanding between An Garda Síochána and Tusla in respect of the interviewing of child victims of sexual abuse is not operating to the optimum. It appears that Tusla insist on a credibility test in respect of allegations of child abuse by a child. Moreover, it seems that children are being interviewed on more than one occasion. This has the effect of re-victimising the child victim and can also potentially undermine the evidential value of the evidence of a 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.

2.22.3 Miscellaneous Issues

- It was also highlighted in the Report that there are a significant number of children under the age of seven and infants under the age of one on PULSE intelligence records. The Inspectorate recommends in the Report an urgent review of the recording of children on PULSE.

- Garda Youth Diversion Projects (GYDPs) are addressed in the Report and it is stated that the Irish Youth Justice Service will roll out the full version of an assessment tool to all diversion programmes which can be used to develop an intervention plan for the children referred. Following on from this it is recommended in the Report that an information sharing protocol be introduced between Juvenile Liaison Officers and diversion programmes to assist in the identification and treatment of behavioural issues.
- In relation to young offenders the Report promotes the use of restorative processes in accordance with the Children Act 2001. The Report outlines ways in which this may take place. In a restorative justice conference, a victim can speak directly to a young person about the hurt and harm that they have caused. In some cases, an agreement is reached on a way that the child can compensate the victim or do something positive such as an apology. Other options include financial or other reparations to the victim or an initiative with the child's family and community that might help to prevent re-offending.
- Non-reported cybercrimes were identified as a major threat to police services and victims of child exploitation or human trafficking were identified as the type of victims that may be reluctant to report crimes.
- In relation to the failure to record certain crimes the Inspectorate Report observes that a lack of action in cases such as domestic violence can impact adversely upon, and potentially leave children in danger. The United Kingdom Human Rights Act 1998 is cited as an example of legislation that places a positive obligation on police officers to take reasonable action to safeguard the rights of victims and children.
- It is stated in the report that the forensic analysis of personal computers or laptops seized as exhibits is taking an unreasonable amount of time. A substantial part of this backlog relates to the examination of computers seized from those suspected of possessing indecent images of children. The delays are impacting on the progress of investigations and the management of potentially high-risk offenders.

- In relation to the management and application of intelligence, it is stated in the Inspectorate Report that professional, effective intelligence management involves linking information from a wide range of sources to build a composite picture.
- In relation to feedback to the Gardaí from partner organisations, the Inspectorate Report notes that there is a need to develop encrypted e-mail systems to enable the sharing of more intelligence electronically e.g. details of children to be discussed at case conferences.
- In relation to case management for young offenders, the Report highlights Garda Youth Case Management as a tool to help identify young people at risk and to engage and coordinate all appropriate services and stakeholders with a view to achieving a positive outcome for the child.
- In relation to the Sex Offenders Management Unit, it is stated in the Report that divisions are required to nominate an inspector with responsibility for monitoring sex offenders so as to ensure that convicted sex offenders are accounted for. The Inspectorate recommends that the Garda Síochána, HSE and the Probation Service conduct annual reviews of the progress of individual Sex Offender Risk Assessment and Management units (SORAMs) and recommends that the Garda Síochána assesses the working practices and technology needs of the Sexual Offences Management Unit and the Paedophile Investigation Unit.
- It is stated in the Report that many Gardaí raised the recording of court convictions on PULSE as an area that needs improvement. An example of a conviction that was not recorded on PULSE was given of an offender who was sentenced to seven years imprisonment for endangerment of a child.

SECTION 3:

THE CRIMINAL LAW (SEXUAL OFFENCES) BILL 2014

3.1 Introduction

In November 2014, the Heads and General Scheme of the Criminal Law (Sexual Offences) Bill 2014 was published after a lengthy wait for significant development in this integral area of child protection. With technological advances continuing and internet usage amongst children in Ireland exceeding the European average, the requirement for legislation to be introduced to protect children online has been highlighted as being a crucial and pressing concern.³⁰⁹ The Criminal Law (Sexual Offences) Bill 2014 is very much to be welcomed for creating a wide range of new criminal offences in relation to child pornography and the grooming of children for sexual exploitation and in particular for addressing the role of Information and Communication Technology (ICT) in committing such offences. In addition, the 2014 Bill introduces other important reforms of current legislation, including providing for a proximity clause with regard to consensual sexual activity amongst teenagers and creating a specific offence, with a hefty sentence, to deal with those who abuse their authority over a child for sexual purposes.

In some ways, however, further clarifications are required before the Bill lives up to what it is expected to be. One area particularly lacking clarity is Part 5 dealing with Children's Evidence. Prior to the implementation of what appears to be an overall very promising step toward better tackling the sexual exploitation of children, therefore, it is recommended that certain amendments be made to ensure that the Bill, in its final form, realises its full potential.

3.2 Sexual Exploitation of Children

In recent years, there have been a number of developments internationally aimed to combat the sexual exploitation of children. The Convention on Cybercrime (the Budapest Convention) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) both seek to provide a coherent approach to the protection of children within Europe. Similarly, the 2011 EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography obliges Member States to criminalise certain conduct, requires minimum penalties to be set and deals

³⁰⁹ See Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection* (2014).

specifically with the use of ICT to exploit children. Ireland, however, has been slow to take action with regard to these international standards and at present, we have neither ratified the aforementioned Conventions nor transposed the Directive into Irish law. The new Criminal Law (Sexual Offences) Bill 2014 is designed to alter this unsatisfactory position. Frances Fitzgerald, Minister for Justice and Equality, on the publication of the Heads and General Scheme of the Bill declared that the Bill, when enacted, will implement the EU directive and will pave the way for Ireland to ratify both of the Council of Europe Conventions.

Major reform is thus required in Ireland regarding the solicitation of children and grooming offences. Currently, Irish legislation is limited in its reach and fails to deal with sexual exploitation carried out through social media, the internet and other such technology. The 2014 Bill seeks to radically overhaul these offences. In the area of child pornography, the growth of ICT has made what was once regarded as a somewhat remote crime more accessible. Technology has allowed child pornography to be disseminated in a way that allows much of the offending behaviour to be hidden.³¹⁰ While Irish legislation is already in place to deal with these offences, there are notable gaps in child pornography offences and significant amendments to the existing legislation are made in the Bill to address these weaknesses.

3.2.1 Solicitation and Grooming Offences

Enclosed within Heads 3 to 8 of the Criminal Law (Sexual Offences) Bill 2014 are a number of new offences designed to tackle the solicitation and grooming of children. With regard to solicitation, Head 3 of the Bill vastly expands upon existing legislation of this kind. Currently in Ireland, soliciting a child is governed by section 6 of the Criminal Law (Sexual Offences) Act 1993, as amended. This provision states that a person who solicits or importunes a child, being a person under 17, for the purpose of committing sexual assault or a defilement offence (namely sexual intercourse, buggery, section 4 rape and aggravated sexual assault) is guilty of an offence, punishable by a maximum sentence of 5 years' imprisonment following conviction on indictment.

In Head 3, not only is it a crime to solicit or importune a child, it is also an offence to pay, give, offer or promise to pay or give, a child or another person money or any other form of

³¹⁰ Gillespie, *Sexual Exploitation of Children* (2008) at p.121.

remuneration or consideration; to provide, offer or promise to provide, a child to another person; or to obtain a child for oneself or for another person, for the purpose of the sexual exploitation of a child by that person or any other person. This, therefore, greatly increases the circumstances that may come under the offence of solicitation and deals with situations where a child is given rewards or presents by the exploiting adult. Furthermore, it provides that the offender does not have to carry out one of the aforementioned acts for either the purpose of committing a defilement offence or sexually assaulting the child. If he does so for the purpose of the *sexual exploitation* of a child, he shall be criminally liable. Given the broad definition of “sexual exploitation” under Part 1 of the Bill,³¹¹ which encompasses and expands upon those offences named above, the proposed amendment will serve to cover more eventualities, thereby better protecting children. With this proposal, a loophole that has been long since recognised will be addressed. Gillespie noted that where an offender’s intention is for the child to touch him or herself, then this would be outside the scope of the soliciting offence as provided for in section 6 of the 1993 Act.³¹² Such behaviour would not come under sexual assault, as a child cannot assault itself, and certainly does not come within the defilement offences. With the development of the solicitation offence in the Bill, however, encouraging a child to touch him or herself would presumably come within part (d) of the definition of sexual exploitation, namely “inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act” and thus will be within the scope the soliciting offence.³¹³ Further appropriate amendments to the existing offence include raising the age limit of a child for the purposes of this offence from 17 to 18 and increasing the maximum penalty that can be imposed on conviction on indictment to 10 years.

Entirely new offences are created in Heads 4, 5 and 6 of the Bill. They criminalise the invitation of a child to sexual touching, sexual activity in the presence of a child and causing a child to watch sexual activity. These offences closely follow those contained in sections 10, 11 and 12 of the UK Sexual Offences Act 2003 respectively and serve to criminalise behaviour that has previously gone unpunished in Ireland. Head 4, for instance, similarly closes the loophole discussed earlier whereby a person cannot be convicted of sexual assault where he causes the child to touch him as discussed above, specifically making it an offence to

³¹¹ The definition of “sexual exploitation” contained in the Bill is the same as the definition contained in section 3(5) of the Child Trafficking and Pornography Act 1998 Act, as amended.

³¹² Gillespie, *Sexual Exploitation of Children* (2008) at p.121. The Law Reform Commission similarly recognised this loophole in its 1990 Report on Child Sexual Abuse.

³¹³ In any event Head 4 of the Bill explicitly creates a new offence of inviting a child to sexually touch the offender, themselves or a third party.

invite a child to sexually touch the offender, themselves or a third party. While these Heads contribute towards the ultimate goal of curbing the sexual exploitation of children and fill noticeable voids in current legislation, it might be suggested that further consideration be given to the use of ICT in the context of these offences. While Head 8 discussed below, specifically deals with the use of ICT to facilitate the sexual exploitation of children, it might be prudent to ensure a coherent approach throughout the Bill to counter information and communication technology being used to commit a crime. In this way, for the purpose of certainty, ICT should be specifically referenced in Heads 4, 5 and 6. For instance, in Head 6, it is an offence for a person to intentionally cause a child (i) to watch another person engaging in any sexual activity or (ii) to look at an image of that person or another person engaging in any sexual activity. To recognise the possible role of the internet and other technology in such an offence, adding the phrase “through information and communication technology or otherwise” at the end of part (ii) may be a prudent step. While the word “image” would obviously cover photographs and magazines, to definitively prohibit a situation where a child is being shown streamed pornographic videos online or sent the links to such videos by an offender, specifying ICT in the Head itself would provide further certainty as to the scope of the offence. Again in Head 4, clarifying that inciting a child to touch his or herself through ICT or otherwise would likewise criminalise a situation where a child, through online chatting, is being coerced to sexually touch him or herself by a predator.

At present, the two offences created by the Criminal Law (Sexual Offences) (Amendment) Act 2007 which ostensibly deal with “grooming” remain far removed from the international standards outlined in the Conventions and the Directive. The 2007 Act makes it an offence for any person to intentionally meet or travel with the intention of meeting a child, within the state, having met or communicated with that child on two or more previous occasions, and does so for the purpose of sexually exploiting that child. It also criminalises the same behaviour taking place outside the state, by a citizen or someone who is ordinarily resident in the state. As recognised previously, these provisions do not adhere to international requirements.³¹⁴ Both the Lanzarote Convention and the Directive demand that member states criminalise a proposal to meet a child, made through ICT, where that proposal was followed by material acts leading to such a meeting, for example arranging a place to meet.³¹⁵ This essentially prohibits the act of grooming itself, once preparatory acts are taken following

³¹⁴ See Geoffrey Shannon, Seventh Report of the Special Rapporteur on Child Protection (2014) at p.137.

³¹⁵ This provision is contained in Article 23 of the Lanzarote Convention and Article 6(1) of the Directive.

initial communication with a child. The criminal conduct is not dependent on the offender actually meeting or travelling to meet the child, as is currently the case in this jurisdiction. Existing legislation in Ireland fails to adequately protect children as only the effects of grooming are criminalised and not the act of grooming itself. In addition, there is no requirement under international standards for at least two separate contacts as are mandated by the 2007 Act, indeed no minimum is set at all in the Convention or Directive.

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

One potential prosecutorial difficulty regarding this offence however, could be the problem in proving that the offender was meeting the child or making arrangements to meet him or her for the purpose of doing anything that would constitute sexual exploitation. The grooming process may be different in each case, but it often involves the attempt to establish a relationship with a child, one more in the realm of friendship than a sexual relationship at the

outset. The contact leading to the meeting may appear innocent, though sexual intentions lie behind this seemingly innocuous communication. Without something concrete, such as sexually explicit text messages, proving that the offender's intention was to meet the child for the purposes of sexually exploiting him or her could be difficult, particularly if he or she denies same and all the contact between the offender and child has been seemingly harmless or friendly. A potential way of addressing this could be to include a presumption that the offender was meeting, travelling to meet or arranging to meet the child for the purposes of sexual exploitation, unless the defendant can prove, on the balance of probabilities that he was not so doing. This might be an area of the offence that warrants further exploration.

A notable gap in existing Irish legislation has been rectified by Head 8 of the Bill. At present, sexual exploitation that takes place entirely online is not prohibited in criminal legislation. As discussed above, an offline meeting is required for an offence to take place under section 3(2A) and 3(2B) of the 1998 Act, as inserted by the 2007 Act. A situation where a child is encouraged by a predator to send pornographic images of themselves online or through their mobile phones is not explicitly dealt with in current statutes and Irish law has until now been silent with regard to a situation where an offender exposes themselves through ICT to a child without attempting to solicit reciprocal behaviour from the child. Specific offences addressing the sexual exploitation of children carried out solely through the use of information and communication technology have not yet been introduced in Ireland and are greatly needed. Head 8(1) of the Bill addresses this lacuna in the law and provides that it is an offence for a person over 18 ("the sender") to communicate with another person ("the recipient") through ICT where the purpose of the communication is to facilitate the sexual exploitation of the recipient by the sender or another adult, and the sender does not reasonably believe the recipient is aged 17 or over. In addition, under sub-head 3, sending sexually explicit material to a child under 17 by means of ICT is criminalised. Given the real danger of online sexual exploitation, the developments that seek to be implemented by Head 8 of the Bill demonstrate a practical and stringent approach to criminalising predatory behaviour using the internet and other communication technologies.

3.2.2 Recommendations

A coherent and comprehensive approach should be adopted throughout the Criminal Law (Sexual Offences) Bill 2014 in combatting the use of Information and Communication Technology (ICT) in perpetrating sexual offences against children. Whilst the 2014 Bill

addresses this in parts, there are other parts where ICT is not expressly addressed. For example, it is recommended that ICT be expressly referenced in Heads 4, 5 and 6 of the 2014 Bill which create new offences inviting a child to sexual touching, sexual activity in the presence of a child and causing a child to watch sexual activity.

Head 7 of the 2014 Bill addresses the offence of “grooming”. There remains a possible prosecutorial difficulty regarding this offence in proving that an offender was meeting the child or making arrangements to meet the child for the purpose of doing anything that would constitute sexual exploitation. A potential solution to addressing this lacuna could be to include a presumption that the offender was meeting, travelling to meet or arranging to meet the child for the purposes of sexual exploitation, unless the defendant can prove, on the balance of probabilities that he was not so doing.

3.2.3 Child Pornography Offences

Heads 13 to 17 inclusive of the Bill address the particular concern of child pornography. Under the current legislation dealing with child pornography, the Child Trafficking and Pornography Act 1998, a child is defined as a person under the age of 17 years. Head 13 of the Bill amends section 2 of the 1998 Act to define a child as a person under the age of 18 years. Neither the Lanzarote Convention nor the Directive permit Member States to select an age lower than 18, thus at the outset this amendment appropriately brings Irish law into compliance with these international conventions and further protects young people.

One expansion of the definition of “child pornography” contained in Head 13(2) is suggested. Section 2(2) of the 1998 Act confirms that imagery which conveys the predominant impression that it represents a child will be considered to be child pornography, catering specifically for situations where adult images are modified to make it look like that of a child. Though it is arguable that computer-generated images of abuse and images of fictitious children already come within the remit of the existing legislation, for the purposes of absolute certainty, this section ought to be clarified by adding that computer generated images of children or realistic images of non-existent children come within the definition of child pornography. Given the present opportunity to effect change, an effort to clarify any grey areas such as this should be made.

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

A major gap in the 1998 Act that has been addressed by the 2014 Bill is the inclusion of an offence of *viewing* child pornography. Section 6 of the 1998 Act merely provides that it is an offence to be knowingly in possession of child pornography. Unfortunately, the legal concept of “possession” does not cover situations where persons view this type of material, for example by streaming videos or accessing videos or images stored in clouds or virtual storage devices that can be watched without actively downloading the data in question. Nor might material which has been downloaded but deleted be regarded as being within the defendant’s possession.³¹⁶ In computer terms, therefore, section 6 only covers instances where child pornography is downloaded. This impractical and nonsensical lacuna has been recognised as a significant failing of the current legislation. Head 17 of the Bill seeks to improve the current situation providing that any person who acquires or possesses child pornography or who knowingly obtains access to pornography by means of information and communication technology shall be guilty of an offence. This provision vastly expands upon the existing Irish law on child pornography and strengthens the protection of children. Offenders who view child pornography are punished in the same way as those who traditionally came under the concept of possession, with a maximum term of imprisonment of five years if convicted on indictment. In addition, an amendment of this nature ensures Ireland’s compliance with the Directive and international instruments which require the viewing of such material to be criminalised.

3.2.4 Recommendations

The definition of “child pornography” as contained in Head 13(2) ought to be expanded so as to expressly include computer-generated images of abuse and images of fictitious children.

³¹⁶ See *DPP v. Power* [2007] IESC 31.

Consideration ought to be given to including an exemption in the 2014 Bill from criminal liability for self-generated pornography involving children who have reached the age of consent where that material is produced and possessed with the consent of those children and only for the private use of the persons involved.

3.3 Jurisdiction

Head 54 of the Sexual Offences Bill vastly extends Ireland's jurisdiction over offences committed outside the state. At present, the Sexual Offences (Jurisdiction) Act 1996, as amended, provides that the state has jurisdiction over offences committed outside the state if certain criteria are fulfilled, namely that the behaviour constitutes an offence in the place in which it is committed and would constitute an offence in Ireland if it had been committed here. Furthermore, the offence must be one listed in the Schedule to that Act and notably, the production, distribution or possession of child pornography is not included in said Schedule. Under Head 54, where a person who is an Irish citizen or ordinary resident in the state does an act against a child abroad that if done in Ireland would constitute rape, sexual assault, any of the defilement offences and any of the solicitation, grooming and child pornography offences, he is guilty of an offence. A full range of child sex offences are thus provided for in the Bill and the behaviour no longer has to constitute an offence in the place in which it is committed - signalling a relaxation of the dual-criminality rule. The Bill therefore ensures that Ireland will permit the exercise of jurisdiction based both on the territoriality principle and based on nationality or ordinary residence.

A victim-centred jurisdiction rule, however, is still absent from Irish legislation, with no provision for same being included in the Bill. Article 17(2) of the Directive permits member states to establish jurisdiction where the offence is committed against one of its nationals or a person who is a habitual resident in its territory. This would close certain jurisdictional loopholes that may arise. For example, in relation to the grooming offence in Head 7 of the Bill; 7(1) criminalises grooming by any person within the state and 7(2) criminalises grooming that takes place outside the state by an Irish citizen or a person who is ordinarily resident here. What about the situation where a foreign resident grooms an Irish child and makes a proposal to meet in Ireland? Head 7(2) will not apply as the person is neither a citizen nor ordinarily resident in Ireland and it appears that 7(1) is unlikely to apply as it provides that any person who *within the state* meets, travels to meet or makes arrangements to meet a child is criminally liable. Allowing a victim-centred jurisdictional rule would protect Irish children

against foreign predators and bring Irish law in line with Article 25(2) of the Lanzarote Convention which provides that each convention state shall endeavour to establish jurisdiction over an offence whether that offence is committed against one of its nationals or a person habitually resident in its territory. In addition, further consideration might be given to Article 17(3) of the Directive, whereby offences committed using ICT are regarded as coming within the jurisdiction of the state where the technology is accessed, thereby preventing a situation where material is accessed from within the EU, but is hosted on a server located outside the EU.³¹⁷ As in the Seventh Report, it is again submitted that the broadest possible approach should be taken towards the matter of jurisdiction, in order to ensure the prosecution of those who commit these offences regardless of the location of their internet server.

3.3.1 Recommendations

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

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

3.4 Children Giving Evidence

Part 5 of the General Scheme of the Criminal Law (Sexual Offences) Bill 2014 introduces new provisions regarding children giving evidence in criminal prosecutions. It is presented as introducing sensitive measures designed at minimising the trauma on victims of sexual offences. I believe, however, that more far reaching reform is required to aid children giving evidence at trial. In support of this recommendation, I refer to the Law Reform Commission's Report on *Sexual Offences and Capacity to Consent* (2013).

At present in Ireland, certain provisions are already in place to protect vulnerable witnesses such as children. Section 13 of the Criminal Evidence Act 1992 provides that child witnesses under 18 in prosecutions for violent or sexual offences may give their evidence via live

³¹⁷ See Geoffrey Shannon, Seventh Report of the Special Rapporteur on Child Protection (2014) at p.140.

television link, unless the court sees good reason to the contrary. This allows a TV link to be used for all children, whether they are the person in respect of whom the offence was committed or whether they witnessed same. Section 16(1)(b)(i) goes one step further for children who are the victim of a crime. It states that a video recording of any statement made during an interview with a member of the Garda Síocahána or any other competent person by a child under 14 in respect of whom a violent or sexual offence has been committed shall be admissible as examination-in-chief, provided they are available for cross-examination. At present, therefore, a recording taken in interview shall be admitted as a child's evidence-in-chief where the child is under 14 and is the complainant, unless the court is of the opinion that in the interests of justice, this should not be done. Section 16(1)(b)(ii) allows such a video recording to be adduced in evidence taken from a person under 18, being any witness other than the accused, solely regarding certain offences under the Child Trafficking and Pornography Act 1998 and the Criminal Law (Human Trafficking)(Amendment) Act 2008. Head 50 of the new Sexual Offences Bill expands upon this, extending section 16(1)(b)(ii) to all sexual offences.

It is submitted, however, that this new amendment does not adequately protect all children who are required to give evidence in a criminal trial. Those aged between 14 and 17 in respect of whom an offence involving violence or the threat of violence has been committed cannot use a video-recording made in interview as their direct evidence and neither may any child under 18 who witnessed such a violent crime, but was not the victim. The amendment proposed merely allows this special measure to be utilised regarding offences of a sexual nature and it is difficult to understand why violent crimes are excluded. It is respectfully submitted that the distinction is arbitrary and fails to give recognition to the difficulty that all children may have in coming into court and giving evidence. Giving an account of events for a child might be frightening and traumatic whether they were 16 and were the victim of a violent assault or aged 12 and witnessed a rape taking place. Expanding Irish law by permitting the admission of a video-recorded statement given in interview by *any* child under 18, whether complainant or not, in respect of a violent or sexual crime, may serve to better protect children. As Delahunt discusses, using the video-recording given in an interview as the child's evidence in chief allows the child to give his or her account of the incident closer to the time when it occurred, aiding their recollection of events. It spares them the trauma of

waiting for the case to come to trial and alleviates the necessity for the child to have to repeat his or her version of events on a number of different occasions.³¹⁸

Looking at the position in the UK could aid reform in this jurisdiction. In England and Wales, sections 21 and 22 of the Youth Justice and Criminal Evidence Act 1999 make special provisions for child witnesses. Phipson describes the primary rule for children under 17 as follows; the court *must* provide for the admission in evidence of any video recording of an interview with a child made for the purpose of adducing it as evidence-in-chief, and where no such video recording has been made, the court *must* provide for the child's evidence to be given by means of a live link, unless under section 21(4), the court is satisfied that the special measures direction would not be likely to maximise the quality of the witness's evidence.³¹⁹ The caveat set out in section 21(4) does not apply to proceedings relating to sexual offences or offences of kidnapping or assault, thus here all child witnesses for these types of offences are automatically deemed to be in need of special protection. This may be a good model to look more closely at in order to address weaknesses in Ireland. Here, there are no different categories for children under 14 and under 18, all children under 17 are treated the same, whether a witness or complainant and the emphasis is on a video recording as the first port of call, before using a TV link.

A recent Law Reform Commission Report on *Sexual Offences and Capacity to Consent* (2103) discusses the special measures put in place to protect children and those with intellectual disabilities. It appears that while the Commission recognises that section 16(1)(b) of the Criminal Evidence Act 1992 represents a significant practical step towards making the testimony of vulnerable witnesses more easily heard within the criminal justice system, it is of the view that the benefits of same are undermined by the requirement that the witness be available for cross-examination. The Report states that; “the Commission considers that the law as it stands creates difficulties for witnesses by splitting their testimony in two and requiring the witness to be available for cross-examination at trial after such a lengthy period of time has elapsed.”³²⁰ It thus recommends that cross-examination of the complainant take place at the same time as the giving of evidence in-chief and calls for the 1992 Act to be amended to allow for pre-trial cross-examination and re-examination if necessary, of

³¹⁸ Delahunt, “Video Evidence and section 16(1)(b) of the Criminal Evidence Act 1992” (2011) *The Bar Review*, at pp. 1-2.

³¹⁹ Phipson, *The Law of Evidence* (2013), 18th ed., Sweet & Maxwell, at p. 328.

³²⁰ Law Reform Commission *Report on Sexual Offences and Capacity to Consent* (2013) at paras. 5.62-5.65.

complainants and witnesses who are eligible under the Act. This would serve to maximise the beneficial effects of pre-trial recording of examination-in-chief by reducing the delay between the giving of examination-in-chief and cross-examination and sparing the complainant the trauma of waiting for the trial to come to hearing. The recording of the cross-examination should be made in the absence of the accused but in circumstances where he can see and hear the witness being examined and communicate with his counsel (if represented) and the witness' legal representative. The pre-recording should not be admitted as evidence if certain safeguards have not been met and a Code of Practice outlining directions for the use of pre-recording should accompany this amendment. The 2014 Sexual Offences Bill, while protecting vulnerable witness against cross-examination by the accused personally in Head 49, is silent with regard to addressing the abovementioned proposals of the Law Reform Commission. Further consideration should be given to allowing pre-trial cross-examination take place in this recommended way in future drafts of the Bill.

Head 47 introduces a new section 14A into Part 3 of the Criminal Evidence Act 1992. This provides that where a child is giving evidence, whether as a witness or victim, regarding a violent or sexual offence and for any reason a live television link is not used, the judge may direct that the evidence be given in the courtroom from behind a screen so that the witness does not see the accused. This will only take place where the judge is satisfied that such a direction is necessary in the interests of justice. Though initially appearing as an attempt to protect a child, this Head of the Bill may prove problematic. The provision of a screen means that the child still has to attend the intimidating atmosphere of a courtroom and remain there for the duration of his or her evidence, knowing the accused is only a few feet away. This is hardly a desirable situation and should be employed only as a last resort. Yet, there is no real guidance in the Bill as to when a screen would be used, except vaguely stating that a screen may be used in circumstances where, for any reason, a live television link is not used. What circumstances these may be are not enumerated. It is hard to imagine circumstances where a screen would be preferable to a live TV link, except on the rare occasion that a child wishes to opt out of giving evidence by a TV link. If, say for a technical reason, the TV link system was not operational on the day of a trial when the child is due to give evidence, using a screen should not be seen as a viable alternative – the child's evidence should be postponed until the problem is fixed. The uncertainty of Head 47 could lead to situations where a screen is being used out of habit because it is the easier option. In all the circumstances, therefore, it is recommended that Head 47 requires further consideration. A possible alteration would be to

state that a screen may be used only if the child witness opts out of giving their evidence by television link, subject to the approval of the court, having regard to the child's wishes. A review of the provision in the Youth Justice and Criminal Evidence Act 1999 in the UK may be of some assistance in framing an amendment in line with that proposed above. This would allow a measure of protection for a child where they choose to be present in court, but would not allow screens or other such devices to become the norm.

3.4.1 Recommendations

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

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

The lack of clarity in Head 47 of the 2014 Bill is problematic. Head 47 enables a Judge direct that a child give evidence in Court behind a screen if, for any reason, a live television link cannot be used. The presence of a child in a courtroom is to be avoided where possible. It is feared that Head 47 might cause children to attend Court. The specific circumstances in which this may happen need to be set out clearly and debated upon before any such provision might be enacted.

3.5 Statutory Definition of Consent

The vague nature of the current rules on consent is unsatisfactory. I believe the Criminal Law (Sexual Offences) Bill 2014 provides a unique opportunity to set out a positive statutory definition of consent. Other jurisdictions, with a similar common law tradition to that in Ireland, have provided a legislative definition of consent. The model of consent elaborated on in sections 75 and 76 of the Sexual Offences Act 2003 in England and Wales is worthy of particular attention. The creation of a definition of consent would obviate the need for the presence or absence of consent being determined by the judge and jury having regard to the particular circumstances of the case.

3.5.1 Recommendation

Consideration should be given to providing a statutory definition of consent in the 2014 Bill. The vague nature of the current rules on consent is unsatisfactory. The model of consent set out in sections 75 and 76 of the Sexual Offences Act 2003 in England and Wales provides a useful platform from which to work.

3.6 Two Year Proximity Clause

In the aftermath of the seminal *C.C. v. Ireland*³²¹ decision, the age of consent to sexual activity was at the forefront of media attention and prior to the introduction of the Criminal Law (Sexual Offences) Act 2006 Act it was proposed that consensual sexual activity between teenagers of a proximate age should not be criminalised. No such exemption was introduced under that statute, however, and as the law currently stands prosecutorial discretion alone is relied upon to prevent the prosecution of teenagers who engage in non-exploitative consensual sexual activity. In my Third Report, the absence of such a provision in the legislation was highlighted and a call was made for this to be addressed, particularly having regard to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2007. Similarly, in the 2007 Report of the Criminal Law Rapporteur for the Legal Protection of Children, Professor Finbarr McAuley states that it seems entirely inappropriate that sexual experimentation between children could result in prosecution and conviction for a serious criminal offence nor is it right that we should have to rely on prosecutorial discretion as the only means of avoiding such an outcome.³²² He submits that where a particular activity does not fit the pattern of wrongdoing contemplated by the legislature, it should not have been criminalised in the first place.

Under the 2014 Bill, a proximity clause will now be introduced into Irish law. Head 20 of the Bill affirms the present age of 17 to consent to sexual activity and specifically provides that it will be a defence for an accused charged with an offence against a complainant who is 15 but under 17, that the sexual activity was non-exploitative and consensual and that there is less than 2 years between the complainant and the accused. This allows for sexual relationships between peers where there is no more than two years in age difference between the parties. This clear legislative provision is preferable than placing any reliance on the uncertainty of

³²¹ [2006] IESC 33.

³²² Professor Finbarr McAuley, Report of the Criminal Law Rapporteur for the Legal Protection of Children (2007) at paras. 4.14-4.15.

prosecutorial discretion and brings the position in Ireland in line with the United States and the majority of Council of Europe States which only criminalise sexual conduct between minors where the age-gap is greater than two years.

3.7 Abuse of Position of Trust

Following a number of calls for the link between child sex offending and the abuse of a position of trust to be addressed, the 2014 Bill changes the way Ireland deals with offenders who use their position of influence to perpetrate crimes upon children. In 2006, the Joint Committee on Child Protection noted that the Lanzarote Convention requires the criminalisation of the abuse of a recognised position of trust, authority or influence over the child, including within the family. It therefore recommended that a specific offence to cover sexual abuse in such situations be introduced, carrying a maximum sentence of life imprisonment.³²³ The Joint Committee also advised that this offence criminalise situations where the child is over the ordinary age of consent of 17, due to the fact that the abuse of trust remains regardless of the child's age.

Head 21 of the Criminal Law (Sexual Offences) Bill 2014 follows the recommendations that have been long since made. Now not only is the abuse of the child penalised in an offence, legislation will specifically criminalise the abuse of the trust that has been placed on the offender. A very broad definition of "person in authority" is contained in Head 18 of the Bill, for the first time clearly enumerating the types of relationships that will fall under the new offence. A teacher, youth worker, sports coach, school transport driver and counsellor, among others, are all set out as being persons in authority over children. One position not specifically referenced is a priest and perhaps for the sake of certainty it should be included in the Bill. In terms of sentence, a person found guilty of an offence under this new Head shall be liable to a maximum term of imprisonment of 15 years where a child is under 17 and 10 years where a child is under 18. This will serve to act as a serious deterrent to persons in authority abusing their relationship of trust.

3.7.1 Recommendation

The definition of "person in authority" set out in Head 18 of the 2014 Bill should include a priest.

³²³ Joint Committee, *Report on Child Protection*, at para. 7.6.1.

3.8 Defilement Offences

Following the Supreme Court decision in *C.C. v Ireland*, the old offence of statutory rape was replaced by two new offences of defilement of a child introduced in the Criminal Law (Sexual Offences) Act 2006. Section 2(1) criminalises defilement of a child under the age of 15, providing that a person who engages in a sexual act with a child under 15 shall be guilty of an offence. In similar terms, section 3(1) prohibits defilement of a child under 17. Both offences of defilement cover sexual intercourse, buggery, aggravated sexual assault and the penetration of the mouth and anus by the penis and by other objects, and are gender neutral in respect of both offenders and victims. Proving that the child against whom the offence is alleged to have been committed consented to the sexual act in question is no defence to a prosecution for defilement. The Sexual Offences Bill 2014, in Heads 19 and 20, amends sections 2 and 3 of the 2006 Act. On one hand the Bill takes an important step towards better protecting children by restricting the currently subjective defence of mistaken age, however on the other hand harsher penalties for subsequent offences are no longer provided for in the Bill.

In relation to each offence, as a result of the Supreme Court decision in *C.C.*, in section 2(3) and section 3(5) respectively, there exists a defence of mistake of fact as to the victim's age; thereby providing the perpetrator with a defence if he can prove on the balance of probabilities that he *honestly believed* that his victim had attained the relevant age at the time of the alleged offence. As Professor McAuley recognises, the question of whether the defendant honestly believed his victim had attained the relevant age is to be judged subjectively, although the Act specifically provides that the court shall have regard to the presence or absence of reasonable grounds for the alleged belief when deciding this issue.³²⁴ This defence has attracted criticism. In the 2007 Report of the Criminal Law Rapporteur for the Legal Protection of Children, Professor McAuley commented that; "it is regretted that the [legislature] saw fit to tether the new defence to the doctrine that mistakes need only be honest in order to excuse."³²⁵ He went on to state that the requirement of reasonable belief would have afforded a higher level of protection to victims rather than the subjective criterion. Gillespie noted that there does not appear to have been any discussion in either House of the Oireachtas as to whether the defence to be introduced should be one of honest belief or reasonable belief. While in *C.C.*, the Supreme Court dismissed the state's submission to limit any defence of mistaken age to one of

³²⁴ Professor Finbarr McAuley, Report of the Criminal Law Rapporteur for the Legal Protection of Children (2007) at para. 4.09.

³²⁵ Professor Finbarr McAuley, Report of the Criminal Law Rapporteur for the Legal Protection of Children (2007) at para. 4.23.

reasonable belief, it did so to not blur the line between the judiciary and the legislature and not because a defence of reasonable belief would be unconstitutional.³²⁶

Having faced much criticism, therefore, the defence of honest belief is amended in the Sexual Offences Bill 2014. The Bill provides that it will be a defence for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 or 17 (whichever is the case depending on the section).³²⁷ Where the court has to decide whether the offender was reasonably mistaken as to the age of the victim, the court is required to consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the said age. No longer is the standard a subjective one and it is submitted this change will bring additional protection for children. The tribunal of fact will now be able to consider whether the defendant was acting reasonably in believing if the child was aged 17 or over, rather than being required to focus on whether his belief, reasonable or not, was honestly held. As there are situations where an honest belief may be unreasonable, absurdities can arise. Introducing the objective standard prevents such situations from arising, protects victims of abuse and is a welcome strengthening of the defilement offences.

At present, defilement of a child under the age of 15 carries with it a maximum penalty of life imprisonment. Section 3(1) of the 2006 Act, defilement of a child under 17, provides for a maximum penalty of 5 years, with the same penalty for an attempt under section 3(2). Where a person has been convicted of an offence under section 3(1), he faces a possible sentence of up to 10 years imprisonment in respect of any subsequent conviction of an offence under that subsection. Similarly, where an offender is charged with an attempted offence under section 3(2) and has previously been convicted for attempted defilement, the maximum sentence is increased to 10 years. This has been recognised as a loophole in the current legislation – whereby the maximum sentence is only raised where the offender has been previously convicted of the *same* offence as that which he is later charged. For example if his first conviction is for defilement regarding a 16 year old under section 3(1) and he is convicted a number of years later for an attempt under section 3(2), he is not liable for the increased

³²⁶ Gillespie, *Sexual Exploitation of Children* (2008) at p. 66.

³²⁷ Head 19 inserts a new section 2 into the 2006 Act and Head 20 inserts a new section 3 into the Act. This defence is contained in subsection 3 of each section.

sanction. Nor does the existing legislation increase the maximum sentence where the offender's previous conviction is one under section 2 of the Act. Increasing the maximum sentence available in only these limited circumstances seems illogical, according to Gillespie, given that the reasoning behind heavier sentencing is to recognise the potential danger that a repeat offender poses to children.³²⁸

Rather than close the aforementioned gaps, however, the Sexual Offences Bill 2014 removes entirely the sections of the 2006 Act that provide for these increased sanctions.³²⁹ Instead, Head 20 provides that a person who engages in a sexual act with a child under 17 or attempts to do so shall be liable for a term of 7 years imprisonment. While the offence itself now attracts a heavier penalty than the 5 years originally provided for in the existing legislation, there no longer appears to be any harsher sanction for those persons committing subsequent offences of a similar nature. Rather than a deletion of the increased penalty provisions, it is submitted that an extension and clarification of these measures ought to have been introduced in the Bill. Including a provision in section 3 to impose a lengthier prison sentence on a person who has been previously convicted of any offence under section 2 or section 3 and is subsequently charged with any offence under section 3 would act as a deterrent to offenders. The Bill in its current form appears to be silent on the issue of subsequent offences and it is submitted that this ought not to be the case given the threat posed to children by those who repeatedly offend in this manner.

3.8.1 Recommendation

Harsher penalties for those who commit subsequent offences against children ought to be provided for in the 2014 Bill.

3.9 Child Prostitution and Trafficking

In Chapter 1 and in a number of previous editions of this Report, the issues of child trafficking and prostitution have been discussed at length.³³⁰ The sexual exploitation of children is one of the main purposes of child trafficking and stringent legislation has been called for to attempt to eliminate the demand for this. In particular, the Fourth Report specifically recommended

³²⁸ Gillespie, *Sexual Exploitation of Children* (2008) at p. 72.

³²⁹ This may be due to the recommendations made by the Law Reform Commission's *Report on Mandatory Sentences* (2013).

³³⁰ See Geoffrey Shannon, Fourth Report of the Special Rapporteur on Child Protection (2010) and Geoffrey Shannon, Sixth Report of the Special Rapporteur on Child Protection (2012).

that consideration be given to the position in Sweden and Norway, in which the purchase of sexual services has been penalised, with a view to introducing a similar system in this country.³³¹ The Criminal Law (Sexual Offences) Bill 2014 does just this – creating new offences regarding the purchase of sexual services. These target the persons who are purchasing rather than those who are selling the sexual services and are described by Minister Fitzgerald as sending “a clear message that purchasing sexual services contributes to exploitation.”

Head 10 of the Bill introduces a new section 5A into the Criminal Law (Sexual Offences) Act 1993. This provides that where, in the context of prostitution, a person purchases a sexual service from another person, *in any place*; he or she shall be guilty of an offence. It expands existing law whereby it is only an offence to solicit or importune another person for the purposes of prostitution in a street or public place.³³² Head 11 criminalises a situation where, for the purpose of the prostitution of a trafficked person, a person knowingly purchases a sexual service from that person, in any place. While these provisions are to be welcomed as a positive development, their content is lacking in detail and require further clarification. One question that arises is whether any form of consideration provided in exchange for sexual services falls under these Heads, such as the provision of drugs, or whether it is only money that must change hands for the offences to be met. Given that the solicitation offence contained in Head 3 of the Bill specifically criminalises a person who pays, gives, offers or promises to pay or give, a child or another person money *or any other form of remuneration or consideration* for the purpose of sexually exploiting a child – Head 10 and 11’s failure to enumerate what exactly is meant by “purchases” could arguably exclude situations where a person is providing some other form of remuneration in return for sexual services. It is recommended, therefore, that the broadest definition of same, as in Head 3, be specifically set out in Heads 10 and 11.

For a person to be found guilty of an offence under Head 11(3) that person must knowingly purchase a sexual service from a trafficked person for the purposes of prostitution. This provision provides for tougher sentences for those who purchase these services from trafficked persons as opposed to non-trafficked persons. Users are threatened with terms of imprisonment in Head 11, compared with Head 10 where fines are proposed as the penalty.

³³¹ Geoffrey Shannon, Fourth Report of the Special Rapporteur on Child Protection (2010) at p. 114.

³³² Criminal Law (Sexual Offences) Act, section 7.

This is designed to address the trafficking and exploitation associated with prostitution, reducing demand. One problem which may arise in the course of prosecutions under Head 11, however, is the difficulty in proving that the offender *knowingly* purchased the sexual service from a trafficked person. Direct knowledge of trafficking is unlikely and a purchaser is more likely to avoid making any enquiries as to whether trafficking has taken place. Instead, as discussed in this author's Sixth Report, consideration should be given to criminalising the purchasing of sexual services from trafficking victims where a user ought to have known or had a reasonable suspicion that it involved trafficking.³³³ Alternatively, it may be preferable to bring Head 11 in line with section 5 of the Criminal Law (Human Trafficking) Act 2008. This section criminalises the solicitation of a trafficked person for the purposes of prostitution, but allows for a defence where the defendant proves he 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 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.³³⁴ It is worth noting, however, that in England, Wales and Northern Ireland, strict liability is imposed for these types of offences. In the Policing and Crime Act 2009, where a person purchases sexual services from a prostitute who is subjected to exploitative conduct from a third person (i.e. force, threats, coercion, deception), it is irrelevant whether the purchaser is aware that the third party has engaged in exploitative conduct, he is still guilty of an offence. To ensure the best protection for those trafficked and exploited persons, further consideration should be given to the stance taken in the UK regarding such offences.

Finally, as the definition of "trafficked person" in Head 11 has the same meaning as in section 5 of the 2008 Act, perhaps an opportunity should be taken at this point in time to clarify that definition. A "trafficked person" is defined as a person in respect of whom a trafficking offence has been committed or a child who has been trafficked for the purpose of exploitation. There is concern that someone needs to have been convicted for a trafficking offence before a user can be prosecuted for soliciting a trafficked person for the purposes of prostitution. It might now be clarified in the new Bill that no such requirement is needed. This prevents situations arising where users of sexual services from trafficked persons cannot be prosecuted

³³³ Geoffrey Shannon, Sixth Report of the Special Rapporteur on Child Protection (2012) at pp. 226-227.

³³⁴ 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.

or convicted under Head 11 or section 5 of the 2008 Act because, for whatever reason, a conviction for trafficking offences in respect of that person has not first been obtained.

3.9.1 Recommendations

Heads 10 and 11 of the 2014 Bill address the purchasing of a sexual service. Greater clarity and detail is required as to the actual substance of the offences to be enacted under these Heads. For example a question arises as to the form of consideration that might be exchanged for a sexual service, e.g. drugs. The reference to purchasing a sexual service suggests only monetary consideration will trigger the offence. Such a situation would be unsatisfactory. This needs to be clarified to avoid loopholes.

Head 11 addresses the purchase of sexual services from persons who are trafficked. At present it requires the purchaser to know the person was trafficked. That will give rise to prosecutorial difficulties in establishing such knowledge. Instead it is recommended that the mens rea be amended so as to capture an offender who ought to have known or had a reasonable suspicion that the person was trafficked. In the alternative, Head 11 of the 2014 Bill could be brought in line with section 5 of the Criminal Law (Human Trafficking) Act 2008. That said, in order to provide the best protection from human trafficking, a strict liability approach might be taken as is the case in England, Wales and Northern Ireland.

The 2014 Bill ought to be clarified so that it is made clear that a person need not be convicted for a trafficking offence before a user can be prosecuted for soliciting a trafficked person for the purposes of prostitution.