

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

A Report Submitted to the Oireachtas

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EXECUTIVE SUMMARY

SECTION 1: MANDATORY REPORTING OF CHILD ABUSE

The publication of a number of reports on the issue of child abuse occurred during 2009. It is very much a topic in the forefront of society today. General calls are being made to improve our child protection services. A common criticism is the lack of uniformity and consistency in the provision of child protection services throughout the State. The *Children First* Guidelines were published in 1999. These Guidelines seek to put in place a structure for the proper identification and reporting of child protection concerns. However, the application of these Guidelines has been far from satisfactory primarily due to a failure to impose them on a statutory basis thus leading to inconsistency in their application.

Legislating for the mandatory reporting of child abuse or alleged child abuse has been mooted as a potential reform. Traditionally mandatory reporting systems carry a sanction for failure to comply, but provide protection in the form of immunity from suit for those who report in good faith in accordance with the system. The burden of mandatory reporting can rest on those who work with children, or on every person. Mandatory reporting is very much a single element in any child protection system. Its purpose is to alert the relevant authorities to possible child protection concerns. There are both advantages and disadvantages to the introduction of mandatory reporting. Whilst it might be said that mandatory reporting would lead to the early detection of child welfare concerns, it can equally be said that it may overload the system.

The purpose behind mandatory reporting is to alert the relevant authorities to child protection concerns. The response is then a matter for the authorities. To that end a “differential response” model has developed in some jurisdictions. Such a model entails a departure from the traditional approach of simply investigating a complaint and determining whether there are welfare concerns or not. Rather, the differential model causes the relevant authorities to engage with the family at an early stage with a view to involving them in the process of addressing the concerns raised. Instead of automatically proceeding down the investigative route steps may be taken in advance to meet the welfare of the child.

SECTION 2: CHILD PROTECTION AND THE CRIMINAL JUSTICE SYSTEM

In the wake of the Supreme Court decision in *C.C. v Ireland*, the Oireachtas Joint Committee on the Constitutional Amendment on Children has recommended that legislation as opposed to a constitutional amendment be introduced in respect of child protection issues. This recommendation in conjunction with the Criminal Law (Sexual Offences) Act 2006 (the “2006 Act”) gives rise to a number of issues. Section 5 of the 2006 Act exempts a female child under the age of 17 years from an offence under the Act, but does not provide a similar exemption for male children thus giving rise to gender discrimination concerns both at a constitutional and European Convention on Human Rights level. Consideration ought to be given to introducing through legislation the exclusion of non-exploitative sexual behaviour between peers. Article 8 of the European Convention on Human Rights (hereinafter referred to as “ECHR”) permits proportionate interferences with the privacy of individuals. A means of adopting such a proportionate approach may be achieved through the application of an age-gap mechanism in the regulation of sexual behaviour of teenagers.

The 2006 Act provides for the defence of honest mistake to the offence of defilement. Despite the entitlement of the court to have regard to reasonable grounds for the defendant’s belief, arguably the defence as it currently stands is too subjectively orientated. In the *C.C.* case, the court criticised the lack of a mental element to the offence of statutory rape. Thus, a purely objective defence to any such offence may encounter similar legal difficulties. A distinction also must be drawn between situations in which the offender is a person in authority to the child and alternatively a stranger to the child. Arguably, a more objectively weighted defence of mistake is permissible in circumstances where the accused is a person in authority to the child, whereas if the accused person is a stranger to the child then an element of subjectivity will be required. This can be achieved through the enactment of legislation without the need for a constitutional amendment.

There is a growing consensus that the defence of honest mistake under the 2006 Act transfers the legal burden of proof onto the accused person. This may be deemed to be an unconstitutional infringement of an accused person’s presumption of innocence.

That said, it should be noted that the presumption of innocence is not absolute and there are statutory exceptions to it. Equally jurisprudence of the European Court of Human Rights permits proportionate infringements on this presumption. This is coupled with an accused person's right to a fair trial which may necessitate the cross-examination of a child complainant. Such cross-examination raises concerns as to the re-victimisation of a child complainant. The videotaping of evidence or the giving of evidence through a television link are already provided for in our legislation and mechanisms such as these may be utilised to minimise the stresses that such a situation would bring to a child complainant.

SECTION 3: FURTHER CHILD PROTECTION ISSUES

The Report of the Commission to Inquire into Child Abuse, commonly referred to as the "Ryan Report", dominated discourse in the past year in terms of issues concerning children. The Report is comprehensive and sets out a number of recommendations. A change in focus is required when it comes to child welfare and protection. The central concern ought to be the child, and his/her rights and dignity. The level of services provided in this State for children needs to be evaluated. Greater accountability and governance must be introduced. The causes for past failings are innumerable, but there is one common thread that can be found and that is the lack of a statutory framework regulating all facets of child welfare and protection. It is no longer sufficient to provide children with the opportunity to be heard. They must now be listened to.

The Government responded to the Ryan Report with an Implementation Plan. Whilst it makes several statements of reform, its true benefit will only be realised if those reforms are introduced in the context of a statutorily regulated regime of child welfare and protection. This includes the need to establish future inquiries into matters concerning children on a statutory basis thus making them truly effective. This would enable any such inquiries to compel the cooperation of certain parties thus avoiding unsatisfactory delays as have been experienced in the past and ensuring its composition is independent and thus effective.

SECTION 4: RECENT CASE LAW

Due to the *in camera* rule there are very few reported judgments on family law cases each year, and even fewer relating to issues concerning children. Nonetheless, this section provides a commentary and analysis of reported judgments concerning the welfare and protection of children since October 2008.

The voice of the child in Irish law has always been a topic of considerable debate. In *N. v N. (hearing a child)*, Finlay Geoghegan J. adopted an enlightened approach to this issue. The case concerned a six year old boy at the centre of child abduction proceedings. In finding that the child was entitled to be provided with the opportunity to be heard, Finlay Geoghegan J. applied the law with a degree of pragmatism that is to be applauded. She recognised the ability of young children to voice an opinion and accordingly held that they should be provided the opportunity to do so.

The case of *HSE v Information Commissioner* touches on the subject of certain professionals, e.g. teachers, reporting concerns as to the welfare of children at home and the implications that this may have. In that case the Information Commissioner directed that certain documentation gathered during the course of an investigation into the welfare of a child be disclosed to the parent. This decision was upheld in the High Court.

A challenge to the constitutionality and compatibility with the ECHR of the Criminal Law (Sexual Offences) Act 2006 has been brought. This arises from the prosecution of an underage boy who engaged in sexual activity with an underage girl. Having concluded that there was a fair question to be tried, Clarke J. granted the defendant an order staying the criminal proceedings until such time as his challenge to the 2006 Act is determined.

RECOMMENDATIONS

SECTION 1: MANDATORY REPORTING OF CHILD ABUSE

It is difficult to come down on either side of the argument in relation to mandatory reporting as it would appear that while there are very strong criticisms of such a system, a considerable amount of those criticisms could be addressed. It should be pointed out, however, that the benefits pointed to by proponents of mandatory reporting are easily refuted.

It is suggested that what is most important in ensuring an effective and professional child protection service is the type of system in place. At the moment Ireland seems to be straddling both the child protection system and a family services system with a large amount of inconsistency throughout the jurisdiction.

It is recommended that the *Children First* Guidelines be reviewed and amended with a view to ensuring that a differential response model is blended into the child protection system in Ireland.

It is recommended that the differential response model be piloted in a number of areas and reviewed to ensure it is effective.

If the system operates effectively and the review is positive, it is recommended that the amended *Children First* Guidelines be placed on a statutory footing to ensure consistency of approach throughout the jurisdiction.

It is not recommended that mandatory reporting be introduced on a legislative basis.

SECTION 2: CHILD PROTECTION AND THE CRIMINAL JUSTICE SYSTEM

Consideration ought to be given to excluding non-exploitative sexual behaviour between peers from prosecution so as to preserve the autonomy and privacy of individuals in accordance with Art. 8 of the ECHR. Any interference with Art. 8, ECHR must be proportionate. A means of complying with this requirement may be through the enactment of age-gap focussed legislative provisions.

The defence of honest mistake as it currently stands in the Criminal Law (Sexual Offences) Act 2006 needs to be reassessed. It is felt that it lacks a sufficient degree of objectivity so as to preclude accused person's from relying on their own ignorance as to the age of a child in seeking to mount the defence. It is recommended that stronger objective elements be introduced to the application of this defence whilst maintaining a subjective standard particularly for those accused persons not in a position of authority to the child.

In terms of providing adequate protection to children from sexual offenders through the forum of the criminal law, it is thought that an amendment to the current legislation would be sufficient as opposed to a constitutional referendum.

Lawyers and judges involved in the hearing of cases of child sexual abuse or sexual offences against children should undergo training to perform their functions in a manner least traumatic for child complainants and witnesses.

An accused person should not be permitted to cross examine a child complainant in person. Instead, it should be done through an intermediary or lawyer.

The taking of statements of child complainants should be a joint operation between members of An Garda Síochána and specially trained assessment personnel.

SECTION 3: FURTHER CHILD PROTECTION ISSUES

The rights and welfare of children as the main priority for the child care system should be enshrined in law and policy.

A National Child Protection Clearinghouse should be established.

Child care services should be subject to regular evaluation to assess outcomes in child care and protection. Data should be gathered on an ongoing basis and independent research experts should then collate and evaluate that data.

Managers need to be adequately trained on how best to develop and maintain a culture of implementation of rules and standards.

All care facilities should receive independent and thorough inspections. The Department of Health and Children should prepare immediately the necessary legislation to provide a legal basis for inspection of residential centres for children with intellectual disabilities and there should be immediate commencement of the relevant legislation to enable inspections of facilities for unaccompanied children seeking asylum.

It is recommended that service providers be given more comprehensive guidelines on obligations to consult children in care and that the Social Services Inspectorate outline in its annual reports how and whether children are consulted during inspections.

It is recommended that the guidelines for the appointment, role and qualifications of guardians ad litem published by the Children Acts Advisory Board be enacted on a statutory basis. In addition, a regulatory body for guardians ad litem should also be established.

Suspected fundamental failings of the child care system should be responded to with independent, statutory inquiries. Such inquiries should also be public unless there are circumstances which preclude this.

A Committee on Child Welfare and Protection should be established to oversee inquiries into serious failings of the child protection system. Such a Committee should be based within the Office of the Minister for Children and Youth Affairs.

An independent national review of the current child protection system should be carried out. The review should involve examination of child protection data, international practice, and consultations with stakeholders to identify the primary child protection concerns and areas in need of reform.

SECTION 1: MANDATORY REPORTING OF CHILD ABUSE

1.1 Introduction

The problem of child abuse has been brought sharply into focus in light of the recent publication of the Report of the Commission to Inquire into Child Abuse.¹ Not unsurprisingly, this focus of attention on child abuse has brought with it calls to review the child protection system in Ireland. Over the past number of decades, there have been persistent calls by a number of voluntary children's agencies for the introduction of legislation mandating the reporting of child abuse.² Mandatory reporting is a broad term which encompasses placing a legal requirement on certain groups of people or professionals, or indeed all individuals, to report a suspicion³ that a child is being abused to the appropriate authorities.

Many jurisdictions have legislated for mandatory reporting – Australia, Canada, Sweden and the United States of America to name but a few. However, Ireland has resisted the introduction of such measures. This is despite recommendations from children's rights groups (as noted above), a number of child abuse inquiries,⁴ and the Law Reform Commission in the context of its Report on Child Sexual Abuse.⁵ Instead, Ireland has relied on a system of guidelines which aid in identifying the signs of abuse and lay down an inter-agency approach to tackling such abuse.⁶ The *Children First* Guidelines give clear advice to professionals and lay persons working with children on the issue of abuse and how to handle it.

A number of advantages and disadvantages of the mandatory reporting of child abuse have been identified. It has been argued by proponents of the scheme that it signifies a

¹ Report of the Commission to Inquire into Child Abuse, May 2009.

² Barnardos, *Annual Review 2008*. ISPC, "ISPC calls for adequate protections to ensure that our children are safe" 4 October, 2007.

³ The standard of belief the person should have before reporting the alleged abuse varies from jurisdiction to jurisdiction.

⁴ South Eastern Health Board, *Kilkenny Incest Investigation*, (Stationary Office, Dublin, 1993); *The Kelly Fitzgerald Report 1996*; *The West of Ireland Farmer Inquiry 1995*.

⁵ Law Reform Commission, *Report on Child Sexual Abuse* (LRC 32-1990).

⁶ Department of Health, *Children First: National Guidelines for the Protection and Welfare of Children*, (Dublin, 1999).

commitment to the protection of children from abuse and would raise public awareness of the seriousness of the issue. It has also been suggested that it would ensure that child abuse would be uncovered and that there would be a consistent approach by persons working with children in the handling of such cases. Those who oppose the introduction of such legislation point to the likelihood that the system would be flooded with reports of child abuse and the current structures would be unable to cope with such pressures. This in turn could lead to investigations only being instigated when a very high level of suspicion exists, thereby decreasing the protection of children. Fear has also been expressed that placing a requirement on those who work with children to report suspicions of abuse might damage the relationship between the professional and the child.

The Department of Health and Children published a discussion document on the issue of mandatory reporting in 1996⁷ which was followed by a document which produced the findings on mandatory reporting.⁸ It stated that the introduction of mandatory reporting was to be delayed and that the focus would be on introducing an improved quality of service. The aim was to provide a system that would be structurally appropriate in dealing with child abuse based on inter-agency and inter-professional communication. The then Taoiseach, Bertie Ahern, TD included in the Government's *Action Programme for the Millennium*, a promise that mandatory reporting of child abuse would be legislated for.⁹ This promise has not yet come to pass.

1.2 Children First Guidelines – A Brief Overview

The *Children First* Guidelines were drawn up in 1999 by the Department of Health and Children. In the foreword, the then Minister of State with Special Responsibility for Children, Frank Fahey, TD stated that the Guidelines were to be “applied consistently by health boards, Government Departments and by organisations which provide services to children” and that they were “to support and guide health professionals, teachers, members of the Garda Síochána and the many people in

⁷ Department of Health, *Putting Children First: Discussion Document on Mandatory Reporting* (Dublin, 1996).

⁸ Department of Health, *Putting Children First: Promoting and Protecting the Rights of Children* (Dublin, 1997).

⁹ 486, *Dáil Debates.*, cc. 872 (3 February 1998) where An Taoiseach stated that “[t]he mandatory reporting of child abuse is a commitment in *An Action Programme for the Millennium*. It remains a commitment and will be introduced in the lifetime of this Government”.

sporting, cultural and community and voluntary organisations who come into regular contact with children and are therefore in a position of responsibility in recognising and responding to possible child abuse.”¹⁰

The Guidelines have four main objectives:

- Improve the identification, reporting, assessment, treatment and management of child abuse;
- Facilitate effective child protection work by emphasising the importance of family support services and the need for clarity of responsibility between various professional disciplines;
- Maximise staff and organisations to protect children effectively by virtue of their relevance and comprehensiveness;
- Consolidate inter-agency co-operation based on clarity of responsibility, co-ordination of information and partnership arrangements between disciplines and agencies.

These objectives are to be achieved using the procedures detailed in the Guidelines. Child abuse is sub-divided into neglect, emotional abuse, physical abuse and sexual abuse. A list of “child abuse indicators” for each type of abuse are given and individuals are required to consider the possibility of abuse, look for signs of abuse and record any information which would indicate abuse.

If a person has “reasonable grounds for concern” or a “reasonable suspicion” that a child is being or has been abused or is at risk of abuse, he/she should alert the HSE, or in the case of an emergency, the Gardaí. The Guidelines also suggest that in the case of disclosure of past abuse by an adult, the person to whom the disclosure is made must consider risk to any children who may currently be in contact with the alleged abuser and, if such a risk exists, the allegation of abuse should be reported to the HSE immediately.

Any person who makes such a report to designated officers of the HSE or the Gardaí “reasonably and in good faith” will be immune from civil liability under the Protections for Persons Reporting Child Abuse Act, 1998. This piece of legislation was introduced to counter-act the fear of litigation of persons and professionals who reported child abuse or suspected child abuse.

¹⁰ *Op.cit.*, note 6, at p. 9.

The Guidelines also provide procedures to deal with the issues of confidentiality and the exchange of information once a report of abuse has been made. They reflect the principle behind the Child Care Act, 1991 that it is generally in the best interests of the child to be brought up within his own family and seek to ensure positive involvement of parents in the process under the Guidelines.

1.3 Analysis of *Children First* Guidelines

In July 2008, the Office of the Minister for Children and Youth Affairs published a review of compliance with the Guidelines.¹¹ The report found that the main problem with the Guidelines was variations in the implementation of the procedures at a local level.¹² This, it was felt, was not a fundamental problem with the Guidelines that would require their replacement. Instead a number of recommendations were made which would improve the level of child protection and the consistency of approach in cases of abuse across the country. The conclusion of the report that the Guidelines did not need to be placed on a statutory basis was severely criticised by a number of voluntary organisations. Barnardos stated that by putting the Guidelines on a statutory footing, a clear message was being sent that child abuse would not be endured and it would also improve public confidence in our child protection system. The codifying of the Guidelines, it was argued, would also tackle the problem of inconsistencies in implementation. The Office of the Minister for Children and Youth Affairs has recently stated that it intends to publish “a revised edition” of the *Children First* Guidelines in 2009.¹³ These revised guidelines are to be published by December 2009.

The Report of the Commission to Inquire into Child Abuse, commonly referred to as the “Ryan Report”, published in May 2009 recommended that the *Children First* Guidelines be uniformly and consistently implemented throughout the State in dealing with allegations of abuse. In July 2009, the Office of the Minister for Children and

¹¹ Office of the Minister for Children and Youth Affairs, *National Review of Compliance with Children First: National Guidelines for the Protection and Welfare of Children* (Dublin, 2008). Available online at http://www.omc.gov.ie/documents/publications/CF_Compliance.pdf.

¹² *Ibid.*, at p.3.

¹³ Report of the Commission to Inquire into Child Abuse, 2009: Implementation Plan, (Office of the Minister for Children and Youth Affairs, July 2009), p.55

Youth Affairs published an Implementation Plan in response to this report.¹⁴ It notes the calls for the *Children First* Guidelines to be placed on a statutory footing so as to ensure the consistent application of same throughout the State. The Implementation Plan has committed to legislation putting the *Children First* Guidelines on a statutory footing. Such legislation is to be drafted by December 2010 and will apply to staff employed by the State and agencies in receipt of exchequer funding.¹⁵ In addition, and in keeping with past recommendations, the Implementation Plan calls for a uniform and consistent implementation of the *Children First* Guidelines throughout the State.

1.4 Reporting Systems in Other Jurisdictions

Traditional mandatory reporting regimes try to encourage people to report by creating the threat of a criminal or civil sanction for failure to adhere to this standard, enhanced further by protecting those who report in good faith from civil action by any person against whom the abuse is alleged.

1.4.1 Australia – Mandatory Reporting

New South Wales

Mandatory reporting exists in some form or another in every jurisdiction in Australia. It was first introduced in New South Wales in 1977 when medical practitioners were required to report suspicions of child abuse. The current provisions under the Children and Young Persons (Care and Protection) Act 1998 details the individuals who are mandated to report suspicion of abuse: “a person who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children’s services, residential services or law enforcement, wholly or partly, to children”¹⁶ and a “person who holds a management position in an organisation, the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children’s services, residential services or law enforcement, wholly or partly to children.”¹⁷

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at p.55.

¹⁶ Section 27(1)(a), Children and Young Persons (Care and Protection) Act, 1998, NSW.

¹⁷ Section 27(1)(b), Children and Young Persons (Care and Protection) Act, 1998, NSW.

The reporter must have “reasonable grounds to suspect that a child is at risk of harm” which must arise during the course of the individual’s work.¹⁸ If such a suspicion arises the report must be made immediately. The legislation in New South Wales contains a broad scope of abuse which is mandated to be reported: physical abuse, sexual abuse, emotional or psychological abuse, neglect and exposure to family violence.

The report itself can be made anonymously. However, the Act also contains provisions which protect the reporter from defamation proceedings or general civil proceedings. Protections regarding disclosure of the identity of the reporter are also covered. The penalty for failing to comply with the obligations under the Act is financial and could be a fine of \$22,000.

Once the report is made, the Director-General of the Department of Community Services must investigate to determine whether the child in question is actually at risk of harm. If the Director-General determines that the child is not at risk, no further action is required.¹⁹ In considering these matters, the Director-General must have regard to the wishes of the child in question and also any possible risk to other children.

The legislation grants a significant amount of power to the Director-General should he determine that the child in question is at risk in that it empowers him to “take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child or young person”.²⁰ This can include non-interventionist responses such as providing support for the child and his family or at the other end of the scale can involve the removal of the child from his family. Such an extreme response can only occur where it is necessary to protect the child from a risk of serious harm.²¹

Northern Territories

The Northern Territories has one of the broadest mandatory reporting laws in the world under the Care and Protection of Children Act 2007. The legislation requires

¹⁸ Section 27(2), Children and Young Persons (Care and Protection) Act, 1998, NSW.

¹⁹ Section 30, Children and Young Persons (Care and Protection) Act, 1998, NSW.

²⁰ Section 34, Children and Young Persons (Care and Protection) Act, 1998, NSW.

²¹ Section 36(1)(c), Children and Young Persons (Care and Protection) Act, 1998, NSW.

any person who has a reasonable belief that “a child has been or is likely to be a victim of a sexual offence;²² or otherwise has suffered or is likely to suffer harm or exploitation”²³ to report his beliefs.

This legislation is the only one of its kind in Australia in that it places a legal obligation on every person to report, not merely persons working with children. Even more unusual is the scope of matters which are to be reported. The obvious categories of physical abuse, sexual abuse, emotional or psychological abuse and neglect are covered. However, the Act goes further and requires firstly that any exposure to physical violence be reported. This could, it is suggested, encompass watching older siblings having a physical row. Secondly, the wording of the Act also mandates any person who is aware or has a reasonable belief that a child under the age of 16 years has engaged in sexual activity (a sexual offence) to report that activity to the relevant authorities. This requirement has caused considerable controversy in the Northern Territories with a number of professional organisations condemning it. The Royal Australian College of General Practitioners stated that it could deter minors from seeking appropriate health care and has the potential to increase the number of teenage pregnancies and the number of sexually transmitted diseases contracted by teenagers.²⁴

The penalty for failure to report under the legislation is explicitly criminal in nature and a fine of up to \$22,000. While the provisions safeguarding the identity of the reporter are not as robust as in the New South Wales legislation, protections are provided for reporters who make the report in good faith from criminal or civil suit. Once a report is made, inquiries must be made about the child’s well-being.²⁵ If a report is made to the Police, notification must be sent to the Chief Executive Officer of the Department of Health and Families. That said, the Police can also make inquiries as to the well-being of the child.²⁶ There is a legal obligation placed on certain categories of persons to provide specified information to the Chief Executive

²² Section 26(1)(a)(i), Care and Protection of Children Act, 2007, NT.

²³ Section 26(1)(a)(ii), Care and Protection of Children Act, 2007, NT.

²⁴ http://www.racgp.org.au/policy/mandatory_reporting_and_Northern_Territory.pdf.

²⁵ Section 32, Care and Protection of Children Act, 2007, NT.

²⁶ Section 33, Care and Protection of Children Act, 2007, NT.

Officer/police officer in relation to the child.²⁷ Failure to comply with a request for information, unless falling within one of the specific statutory defences, is a criminal offence.

If the Chief Executive Officer or police officer determines that there is a reasonable belief that the child in question is in need of protection, an investigation can be initiated regarding the circumstances of the child. On completion of an investigation by a police officer a report is sent to the Chief Executive Officer who will determine whether further action needs to be taken. Similar to the provisions in New South Wales, the Chief Executive Officer is given a significant discretion in determining the course of action to take – the overriding principle being to promote the well-being of children generally.²⁸

Western Australia

This Australian jurisdiction possesses the narrowest version of mandatory reporting. However, it has been recently extended by the Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008.²⁹ The Western Australian legislation originally contained targeted requirements of reporting alleged abuse that arose in the context of Family Court cases. As such, court personnel, counsellors, family dispute resolution practitioners, arbitrators or legal practitioners representing the child's interests are mandated to report allegations or suspicions of child abuse³⁰ in the context of Family Court cases.³¹ A number of regulations³² also provide that licensed providers of child care or outside-school-hours care services must also report allegations of abuse.

²⁷ Parent or family member, police officer, person employed or engaged by the Department, an operator of child-related services, an operator of children's services, a health practitioner, person in charge of a hospital or other health facility, person in charge of a school or educational facility, service provider for a protected child or other person as stipulated by regulation, as noted in s.34(2) of the Care and Protection of Children Act, 2007, NT.

²⁸ Section 42(1)(a) Care and Protection of Children Act, 2007, NT.

²⁹ These amendments came into force on January 1, 2009.

³⁰ Including physical, sexual, emotional or psychological abuse and neglect.

³¹ Section 160, Family Court Act, 1997, WA.

³² Child Care Services Regulations 2006, reg. 20; Child Care Services (Family Day Care) Regulations 2006, reg. 19; Child Care Services (Outside School Hours Family Day Care) Regulations 2006, reg. 20; Child Care Services (Outside School Hours Care) Regulations 2006, reg. 21.

The 2008 Act extends the requirement to report abuse to teachers, doctors, police officers, nurses and midwives³³ by inserting a new section into the Children and Community Services Act 2004.³⁴ These individuals are required to make a report only where they have reasonable grounds for believing that child sexual abuse has occurred or is occurring. The new provisions require that the report be made to the Chief Executive Officer or his representative at the Department for Child Protection. The Chief Executive Officer can then make inquiries regarding the well-being of the child under s.31 of the 2004 Act. If it is determined that action should be taken to safeguard or promote the well-being of the child, a wide range of options are available to the Chief Executive Officer under s.32 of the 2004 Act similar to those in New South Wales. It should be noted, however, that the range of actions which the Chief Executive Officer in this jurisdiction can take are expressly laid down and there is no general power, as in New South Wales, to take whatever action is necessary to safeguard the welfare of the child.

This jurisdiction, similar to the other jurisdictions, protects the identity of the reporter to some degree and imposes criminal liability for failure to report with a fine of up to \$6,000.

1.4.2 United States of America – Mandatory Reporting

Every State in the U.S. has legislation mandating the reporting of child abuse. Indeed, federal legislation on this matter was enacted in 1974.³⁵ While obviously there are significant differences between the legislation enacted in each State it is significant that some version exists in all jurisdictions. In each State, the legislation covers who is required to report, the standard of suspicion that the reporter must possess, the matters on which he must report, penalties for failure to report and for making knowingly false reports, the anonymity or otherwise of the reporter, the existence or abrogation of privilege and the procedures in place to make such a report.

³³ Section 5, Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008, WA.

³⁴ Section 124B of the Children and Community Services Act 2004, WA.

³⁵ Child Abuse Prevention and Treatment Act 1974, as amended.

A large number of States place a legal obligation on all citizens to report child abuse.³⁶ The majority of States, however, place the reporting requirement on certain professionals, the most common being physicians, teachers, social workers and law enforcement officials. Two specific examples are given below.

Delaware

This is one of the many States which obliges all persons to report that a child has been abused where the reporter knows or, in good faith, suspects such abuse.³⁷ The legislation expressly places the obligation on a number of professionals.³⁸ The report is to be made to the Division of Child Protective Services of the Department of Services for Children, Youth and their Families and should be made orally initially (to ensure expedition of the matter) and thereafter in writing. Failure to report can result in a \$1000 fine and or up to 15 days imprisonment. Provision is also made to protect privileged communications between attorney and client and also between priest and penitent but only in the context of communications arising during confession.

The report is to be made to the Division of Child Protective Services of the Department of Services for Children, Youth and their Families. There is to be an immediate check to see if a report has been made in relation to the child in question previously, or indeed any siblings or family members.³⁹ The report will then be forwarded to the relevant staff who will determine, according to protocols, whether an investigation or the family assessment and services approach should be used to respond to the allegation.

Minnesota

The mandatory reporting provisions in Minnesota are amongst the narrowest in the U.S.⁴⁰ A legal obligation to report neglect, physical or sexual abuse is imposed on a number of professionals only – those involved in the healing arts, social services,

³⁶ Approximately 18 states. Legislation is however continuously changing. For example, in New Jersey all persons must report where they have reasonable cause to believe that a child has been abused (N.J. Stat. §9 : 6 – 8.10). In contrast, see Fla Stat. § 39.201 which lists a number of professionals on whom the obligation to report abuse or neglect is placed when they have knowledge or reasonable cause to suspect such abuse or neglect. It also, however, places the obligation on all persons to report.

³⁷ 16 Del. C. § 903.

³⁸ Physicians, persons in the healing arts, doctors and trainee doctors, nurses, school employees, social workers, psychologists and medical examiners.

³⁹ 16 Del. C. § 905(d).

⁴⁰ Minnesota Stat. 626.556 Subd. 3.

hospital administration, psychological or psychiatric treatment, child care, education or law enforcement. The report can be made to the local welfare agency, the Department of Education, the police department or the sheriff's office.

In making a report, the reporter must have knowledge or reasonable belief of the existence of child abuse. Penalties for failure to report are provided for with a particularly serious penalty imposed on a parent, guardian or caretaker who fails to report when he/she knows or should reasonably know that the child's health is in serious danger and a child suffers substantial or serious bodily harm from lack of medical care.⁴¹ This penalty becomes a felony where the child dies from lack of medical care.⁴²

Similar to the Delaware provisions, privilege is accorded to communications imparted in the context of an attorney/client relationship and also in the context of a confession to a member of the clergy.

The local welfare agency determines, within 24 hours, whether the report is accepted for assessment⁴³ or investigation⁴⁴ to ensure prevention of child maltreatment or the provision of a remedy for child maltreatment. Provisions are made for the gathering of information in relation to the child in question to ensure the agency can determine the best interests of the child. The report on either assessment or investigation must be completed within 45 days of the receipt of a report. After conducting a family assessment, the local welfare agency determines whether services are needed to address the safety of the child and other family members and the risk of subsequent maltreatment.⁴⁵ After conducting an investigation, the local welfare

⁴¹ This is expressly classified as a gross misdemeanor, Minnesota Stat. 626.556 Subd. 6.

⁴² *Ibid.*

⁴³ Assessment means a comprehensive assessment of child safety, risk of subsequent child maltreatment, and family strengths and needs that is applied to a child maltreatment report that does not allege substantial child endangerment. Family assessment does not include a determination as to whether child maltreatment occurred but does determine the need for services to address the safety of family members and the risk of subsequent maltreatment. Minnesota Stat. 626.556 Subd. 2(a).

⁴⁴ Investigation means fact gathering related to the current safety of a child and the risk of subsequent maltreatment that determines whether child maltreatment occurred and whether child protective services are needed. Minnesota Stat. 626.556 Subd. 2(b).

⁴⁵ Minnesota Stat. 626.556 Subd.10e(b).

agency makes two determinations: first, whether maltreatment has occurred; and second, whether child protective services are needed.⁴⁶

1.4.3 Canada – Mandatory Reporting

The Canadian approach to mandatory reporting is relatively uniform with all but one jurisdiction⁴⁷ requiring individuals and certain professionals to report child abuse or a suspicion thereof.⁴⁸ There has been a substantial increase in the number of reports of abuse and neglect in recent years. For example, Ontario experienced a 44% rise in the reporting of abuse and neglect between 1993 and 1998.⁴⁹ The types of abuse that must be reported varies quite significantly from jurisdiction to jurisdiction. However, physical and sexual abuse are common reporting requirements but generally fall under the concept of “in need of protection”. This phrase is given quite a broad remit in some statutes with Newfoundland including where a child has been exposed to spousal abuse as a matter to be reported under this heading.⁵⁰

Generally, the mandatory reporting statutes require that a penalty be imposed for failure to report. Ontario and New Brunswick are unusual in this regard as criminal liability will only be imposed on professionals who fail to report despite a general requirement on all individuals to report. Such a decision is based on balancing the protection of children with the reality that professionals who are trained will be likely to recognise the signs of abuse whereas lay persons may not. Specific jurisdictions are examined below.

⁴⁶ Minnesota Stat. 626.556 Subd.10e(c).

⁴⁷ Yukon does not legally require all individuals to report child abuse or suspected child abuse. It does, however, place legal obligations on teachers and day care workers to report child abuse under relevant professional legislation.

⁴⁸ British Columbia: Child, Family and Community Service Act, R.S.B.C. 1996, c. 46; Saskatchewan: Child and Family Services Act, S.S. 1989-90, c. C-7.2; Manitoba: Child and Family Services Act, R.S.M. 1987; Ontario: Child and Family Services Act, R.S.O. 1990, c. C-11; Quebec: Youth Protection Act, R.S.Q. 1977, c. P-34.1; Prince Edward Island: Child Protection Act, R.S.P.E.I. 2000, c-5.1; Nova Scotia: Children and Family Services Act, S.N.S. 1990, c. 5; New Brunswick: Family Services Act, S.N.B. 1980, c. F-2.2; Newfoundland: Child Welfare Act, R.S. Nfld. 1990, c. C-12; North West Territories: Child Welfare Act, R.S.N.W.T. 1988, c. C-6; Yukon: Children’s Act, R.S.Y. 1986, c. 22.

⁴⁹ Trocmé, Knott and Knoke, “An Overview of Differential Response Models”, (2003) C.E.C.W. Information 1. Available online at <http://www.cecw-cepb.ca/sites/default/files/publications/en/DifferentialResponse4E.pdf>.

⁵⁰ Child Welfare Act, R.S. Nfld. 1990, s.2(b).

British Columbia

The issue of mandatory reporting in this jurisdiction is covered by the Child, Family and Community Services Act, R.S.B.C. 1996. The Act requires that a person who has reason to believe that a child needs protection must promptly report the matter to a director.⁵¹ “In need of protection” is given a broad definition under the Act. However, there is a very significant emphasis on abuse or neglect that arises as a result of deficiencies in the relationship between child and parent. For example, a child is stated to be in need of protection if the child has been or is likely to be harmed by the child’s parent;⁵² if the child has been or is likely to be sexually abused or exploited by the child’s parent;⁵³ if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child’s parent is unwilling or unable to protect the child;⁵⁴ if the child has been, or is likely to be, physically harmed because of neglect by the child’s parent;⁵⁵ and if the child is emotionally harmed by the parent’s conduct.⁵⁶ Sexual abuse is defined in the Act as including encouraging or helping a child to engage in prostitution or coercing or inveigling a child into engaging in prostitution.

Similar to provisions in state legislation in the U.S., privilege is accorded to communications emanating from the solicitor/client relationship. Immunity from civil suit is granted for a person who makes a report unless he did so knowing that it was false. Such a false report will render the reporter criminally liable. Criminal liability can also be imposed for failure to make a report where the individual had a reasonable belief that a child was in need of protection.

A report should be made to the Ministry of Children and Family Development. Once received it will be assessed to consider whether to offer support services to the child and family, refer the child and family to a community agency, or investigate the child’s need for protection.⁵⁷ Provision is made to apply to the court to provide the

⁵¹ Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, s.14.

⁵² Section 13(1)(a), Child, Family and Community Service Act, R.S.B.C. 1996.

⁵³ Section 13(1)(b), Child, Family and Community Service Act, R.S.B.C. 1996.

⁵⁴ Section 13(1)(c), Child, Family and Community Service Act, R.S.B.C. 1996.

⁵⁵ Section 13(1)(d), Child, Family and Community Service Act, R.S.B.C. 1996.

⁵⁶ Section 13(1)(e), Child, Family and Community Service Act, R.S.B.C. 1996.

⁵⁷ Section 16(2), Child, Family and Community Service Act, R.S.B.C. 1996.

assessing Director with access to the child where it is being denied and there are reasonable grounds to believe the child needs protection.⁵⁸ A wide range of responses are available to the Ministry where a report has been made and range from mediation, provision of support within the family, to the intervention of the criminal law and the removal of the child from its family. Extreme responses are only used when absolutely necessary.

Manitoba

The Manitoban jurisdiction requires that a person make a report to a child and family services agency or the child's parents or guardians⁵⁹ where the reporter reasonably believes that the child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.⁶⁰ This definition, similar to legislation in British Columbia, encompasses suffering abuse or potentially suffering abuse due to child pornography.⁶¹

Recent amendments to the legislation⁶² have introduced the requirement to report a reasonable belief that a representation, material or recording is, or might be, child pornography.⁶³

Similar to other jurisdictions, failure to report will result in criminal liability being imposed. The penalty is particularly severe – up to \$50,000 and/or up to 24 months imprisonment. Privilege is accorded to utterances between a solicitor and client only. Protection is afforded to the reporter's identity and he is also granted immunity from suit for providing information in good faith.

Once the report is made to the agency or an individual, there is a legislative requirement to immediately investigate the matter under s.18(4)(1) of the Child and Family Services Act, R.S.M. 1987 and if it is concluded that the child is in need of protection, further steps must be taken.

⁵⁸ Section 17(1) and (2), Child, Family and Community Service Act, R.S.B.C. 1996.

⁵⁹ Section 18(1.1)(b), Child and Family Services Act, R.S.M. 1987 states that the parents or guardians should not be informed where there is a reasonable belief that the parent/guardian has caused the child to be in need of protection or is unwilling or unable to protect the child.

⁶⁰ Section 18(1), Child and Family Services Act, R.S.M. 1987.

⁶¹ Section 17(2)(e), Child and Family Services Act, R.S.M. 1987.

⁶² Child and Family Services (Amendment) Act (Child Pornography Reporting), R.S.M. 2008.

⁶³ Section 18(1.0.1), Child and Family Services Act, R.S.M. 1987.

Yukon

This is the sole Canadian jurisdiction that does not place a legal obligation on all individuals to report child abuse or suspected child abuse. There are, however, legal requirements for teachers and day care workers to report such matters.⁶⁴

The Children's Act 1986 (as amended) legislates for voluntary or discretionary reporting where a person has reasonable grounds to believe that a child may be in need of protection.⁶⁵ When making the report, the Act requires that the individual report the information upon which the belief is based rather than the belief itself. This would suggest that the reporter should have satisfactory grounds to substantiate any claim of child abuse.

Similar to the mandatory reporting provisions of the other Canadian jurisdictions, the Yukon legislation protects a reporter from legal action of any kind (including disciplinary action) unless the report was made maliciously and falsely.⁶⁶ Malicious and false reporting is deemed to be a criminal offence.

1.4.4 New Zealand – Discretionary Reporting

Prior to 2005, New Zealand had a very similar reporting system to Ireland in that it was based on the discretion of the professional or individual. Guidelines were laid down by the Child Youth and Family statutory body as to signs of abuse. Once a report was made, the Children, Young Persons and their Family Act 1989 (as amended) required that the report was investigated.⁶⁷ Procedures were also in place as to how Child Youth and Family would deal with the notification of abuse or suspected abuse. Different response procedures were put into place for different types of abuse. New Zealand has a high rate of child abuse and in response to this, the New Zealand Government specifically introduced a differential response model of child protection⁶⁸ in 2005 through legislation.⁶⁹

⁶⁴ Section 168(n), Education Act, R.S.Y. 2002, c.61 and s.37 Child Care Act, R.S.Y. 2002, c.30.

⁶⁵ Section 117(1), Children's Act, R.S.Y. 1986.

⁶⁶ Section 117(2), Children's Act, R.S.Y. 1986.

⁶⁷ Section 17, Children, Young Persons and Their Families Act 1989.

⁶⁸ See below for more detailed discussion of the differential response model.

⁶⁹ Children, Young Persons and Their Families Bill (No. 6).

1.4.5 United Kingdom – Discretionary Reporting and Underpinning Child Protection Policies

The reporting system in the United Kingdom is based on voluntary obligations underpinned by inter-agency protocols. The legislative basis for the English child protection system is found in the Children Act 1989 (as amended). The system was restructured under the Children Act 2004 which, while not introducing mandatory reporting, has created an alternative mandatory system. Section 12 of the Act provides for the creation by the Secretary of State of information databases about children called the Information Sharing Index. The responsibility for compiling rests with the local authority. The databases contain a significant volume of information about every child including the name and contact details of any person providing primary medical services to the child, information as to the existence of any cause for concern in relation to the child and the name and contact details of a person providing a sensitive service⁷⁰ to the child.⁷¹ Disclosure of this information is, for the most part, mandatory.⁷²

The changes introduced under s.12 of the Children Act 2004 were brought in as a direct result of the inquiry into the death of Victoria Climbié.⁷³ It must be noted, however, that s.12 appears to be more about ensuring that problems in relation to a child are identified as early as possible and is not solely concerned with typical child abuse as many mandatory reporting schemes are. It would seem that the database is considered an important part of a child protection scheme that is proactive on all aspects of child protection rather than reactive. Buckley has suggested that these reforms were instituted by the Government “to re-focus services away from a forensic-style approach to one which responded to children and families in ‘need’” although not necessarily successfully.⁷⁴

One interesting aspect of the law in Northern Ireland is that a general mandatory reporting requirement exists in relation to all arrestable offences under s.5(1) of the

⁷⁰ A sensitive service is described as a specialist or targeted child service relating to sexual health, mental health or substance abuse.

⁷¹ Schedule 1, s.9, Children Act 2004 Information Database (England) Regulations, 2007.

⁷² Exceptions exist in relation to the provision of a sensitive service.

⁷³ Laming H, 2003. *The Victoria Climbié Inquiry: Report of an Inquiry by Lord Laming*. The Stationery Office: London.

⁷⁴ Buckley, H., “Differential Responses to Child Protection Reports”, (2007) 10(3) *I.J.F.L.* 3 at 4.

Criminal Law Act 1967. The vast majority of offences against children would fall underneath this heading. However, the provision is not solely directed towards child protection and is not supported by the normal procedural requirements of a mandatory reporting law directed towards child abuse.

1.5 The Operation of Mandatory Reporting within Alternative Child Protection Systems

While a number of general criticisms or benefits of the mandatory reporting systems can be pointed to, it should first be noted that the overall child protection system in which the mandatory reporting scheme operates must be considered.

Buckley has noted that many of the jurisdictions discussed above – Australia, Canada, New Zealand and the US – have recognised the need to change the direction of the child protection system since the 1990s.⁷⁵ Part of the reason for this was that the system was developing a response to child protection that was based on procedure and investigation once a certain threshold of concern was met. This threshold of concern was normally met when there were “visible defects”⁷⁶ in child welfare. This was then followed up with an investigation into the situation of the child and involved resolving who was to blame for any abuse or neglect. Where the abuse was visible and/or significant, this was generally followed with legal action. If the abuse was not visible and more intangible such as emotional abuse, frequently no action was taken.⁷⁷ Buckley suggests that these developments were primarily as a result of “a legacy of child abuse inquiries, together with rising expectations and the increasing popularity of risk assessment tools”.⁷⁸ Gilbert terms this system the “child protection orientation”.⁷⁹

While such an investigative approach would seem to re-enforce the view that child abuse should be taken seriously and tackled in an aggressive manner, investigation

⁷⁵ *Ibid.*

⁷⁶ *Op. cit.*, note 74.

⁷⁷ Buckley notes that “in New Zealand in 2005, only 30 per cent of cases investigated by child protection social workers were deemed to constitute actual or potential harm. The remaining 70 per cent tended to be closed, often without any other services being provided.” *Op. cit.*, at note 74.

⁷⁸ *Op. cit.*, Buckley at note 74.

⁷⁹ Gilbert, N., *Combating Child Abuse*, (1997: Oxford University Press).

alone can lead to a number of deficiencies in the overall protection of the child. Most importantly, it can fail to address the position of the child within the family and to provide support for that position. In a large number of cases, what may be most appropriate is ensuring that the family unit in which the child is situated is given assistance.

As a result of the acknowledgement of the deficiencies of the child protection orientation, a number of jurisdictions attempted to move away from the investigative model towards one where the response to child abuse or suspected child abuse could be any one of a number of responses. Significantly, the differential response model seeks to involve voluntary and community based agencies in the provision of support to families rather than just statutory bodies. Generally, the statutory body will complete an initial assessment of the report and then the report will either be channelled towards a full investigation if warranted or a more complete assessment will be carried out by the statutory body or a community agency. Buckley suggests that the differential response model provides a “customised”⁸⁰ approach.

1.6 Examples and Analysis of the Differential Response Model

Minnesota

In 2000, Minnesota began the process of transforming its child protection system into one based on the differential response model. The transformation began in 20 counties as a demonstration project. A review of the project began in 2001 and between 2001 and 2004, the differential response was put into action in all Minnesotan counties. Legislation in Minnesota mandates when an investigation has to occur. If there is no requirement to carry out an investigation, the differential response model “does not focus on the reported incident other than by way of explaining to the family what precipitated the interest of the child protection agency and as a guide to establishing the immediate safety of the child”.⁸¹

⁸⁰ *Op. cit.*, Buckley at note 74, p.6.

⁸¹ Loman, L., and Siegel, G., “Alternative Response in Minnesota: Findings of the Programme Evaluation”, (2004) Institute of Applied Research, Missouri, at. p.1. Available online at <http://www.iarstl.org/papers/ARFinalEvaluationReport.pdf>.

Loman and Siegel noted that there were two main differences between the differential response model introduced and the traditional model that previously existed as the sole response to reports of child maltreatment. Firstly, when a report was received and was dealt with under the differential response model, the family would be approached as a unit and in a positive and inclusive manner. The family was viewed as part of the decision making process. In addition, the differential response model sought to develop positive elements of the family unit through the assistance and support for the family which may not have been forthcoming under the traditional investigative model.⁸²

The review of the differential response model in Minnesota has been quite positive thus far. At a conference held by the Children Acts Advisory Board, evidence was presented of the change in response to child abuse in Minnesota by Rob Sawyer and Suzanne Lohrbach of Olmstead County Community Services.⁸³ They noted that there were:

- Fewer investigations;
- Less repeat child maltreatment;
- Less children in placement;
- Less court involvement;
- More children served;
- More family involvement.

Specifically they noted that between 1996 and 2001, there had been an increase of 117% in child protection assessments or investigations. This had decreased 19% between 2001 and 2006. In addition, of all children who were victims of substantiated child abuse and/or neglect during 2001, 14.3% had another substantiated report within a 6 month period. This figure had decreased to 2.1% in 2006.

⁸² *Ibid.*, at p.30.

⁸³ Children Acts Advisory Board, Evidence to Practice Seminar, *A Different Response Model: Refocusing from Child Protection to Family Support*, 22 May, 2008. Post-Seminar Report available online at <http://www.caab.ie/getdoc/eacb0ad0-bccb-4d58-ab65-d69ab1a80ff3/DRM-Post-Seminar-Final-Report-web.aspx>.

New Zealand

As noted above, New Zealand's differential response model was only introduced in 2005. The pre-2005 system was very similar to Ireland's in that reporting of child abuse was discretionary and procedures for dealing with such reports were based on guidelines and protocols. Similar to Ireland, New Zealand has also had a series of child abuse scandals.

Under the new system, the Child, Youth and Family statutory body (CYS) conducts a preliminary assessment to decide what the most appropriate route to take is. Following the preliminary assessment, the CYS can respond by initiating a child and family assessment or an investigation. It can refer the report to other statutory or non-statutory organizations for the provision of services. Under the Children, Young Persons and their Families Act 1989 as amended, the CYS can take any of the statutory measures provided for or, indeed, it can decide that no further action is required.

Similar to the approach in Minnesota, the child and family assessment seeks to take a different direction to the traditional investigative procedures in that it aims to focus on "identifying the support needs of the child, young person and their family, and any services they may require to improve or restore their wellbeing".⁸⁴ This is achieved not through establishing the existence or non-existence of abuse. However, while conducting the child and family assessment, the assessor must bear in mind the possibility of the existence of abuse. If the assessor suspects harm to the child or young person, he or she has to refer the case back to the CYS for re-evaluation.

1.7 Ireland and Differential Response

While Ireland does not operate a complete "child protection orientation" model, in that there is flexibility of response to a report of child abuse, it is far from operating a differential response model. It is suggested that in light of the Report of the Commission to Inquire into Child Abuse, the time is now ripe to reconsider and overhaul the structure of the child protection system in Ireland. The Children Acts

⁸⁴ Waldgrave, S., and Coy, F., "A Differential Response Model for Child Protection in New Zealand: Supporting More Timely and Effective Responses to Notifications", (2005) 25 *Social Policy Journal of New Zealand* 32 at p.41. Available online at <http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj25/25-pages32-48.pdf> .

Advisory Board suggested at its Evidence to Practice Seminar in May 2008⁸⁵ that an existing Children Services Committee area be designated as a pilot area for the differential response model. Alternatively, it was suggested that a Local Health Office which is “in readiness” be pinpointed to pilot the approach. It is proposed that these pilots of the scheme should be established and reviewed.

The changes that may derive from instituting a differential response model in Ireland are noted by Buckley. She suggests that the use of the differential response model would see “consistent methods of preliminary and full assessment used.”⁸⁶ This uniformity should go a long way to combating the problems of inconsistency noted in the review of the implementation of the *Children First* Guidelines.⁸⁷ It would also see the increasing involvement of voluntary community agencies in providing support and assistance for families. In some jurisdictions this development of links between the statutory and voluntary bodies has resulted in the creation of databases of shared information on children and families.

1.8 Critical Analysis of Mandatory Reporting

As noted above, the context in which mandatory reporting of child abuse operates is important to consider in analyzing the effect of such a system. However, as previously mentioned there are general points that have been made in relation to mandatory reporting systems regardless of the child protection framework in which they operate. It is proposed to outline the benefits and detriments to such systems.

⁸⁵ Children Acts Advisory Board, Evidence to Practice Seminar, *A Different Response Model: Refocusing from Child Protection to Family Support*, 22 May, 2008. Post-Seminar Report available online at <http://www.caab.ie/getdoc/eacb0ad0-bccb-4d58-ab65-d69ab1a80ff3/DRM-Post-Seminar-Final-Report-web.aspx>.

⁸⁶ *Op. cit.*, note 74, at p.6.

⁸⁷ Office of the Minister for Children and Youth Affairs, *National Review of Compliance with Children First: National Guidelines for the Protection and Welfare of Children*, (Dublin, 2008). Available online at http://www.omc.gov.ie/documents/publications/CF_Compliance.pdf.

1.8.1 Benefits of Mandatory Reporting of Child Abuse

- a) One of the main arguments that is put forward in favour of mandating the reporting of child abuse is that it sends a clear message that the Government/State is serious about tackling child abuse.

While this assertion is not necessarily disputed, it is suggested that what should be at the root of the decision to introduce any changes to the child protection/welfare system is that such changes will actually improve the protection/welfare of children. It should not be a political tool used as a response to the Ryan Report or indeed, any other child abuse report. Therefore, additional suggested benefits of mandatory reporting should be considered.

- b) The introduction of mandatory reporting could make the public more aware of the issue of child abuse and educate them of the signs of abuse and how to make the appropriate authorities aware of such abuse.

It is suggested that an educational campaign would inform the public equally well regarding the signs of child abuse and the route to take if abuse is suspected.

- c) Mandatory reporting will identify children who are being neglected or abused or at risk thereof at an early stage and provide for early intervention which will be in the best interests of the child.

Evidence that such an argument were true would weigh heavily in favour of the introduction of mandatory reporting. This would be particularly so where the system operated under a differential response model and appropriate responses to the situation could be initiated. Harries and Clare suggest that such early intervention does not arise from mandatory reporting.⁸⁸ They suggest that mandatory reporting leads to an overloading of the system which results in a delay in dealing with reports and a raising of the threshold for

⁸⁸ Harries, M., Clare, M., "Mandatory Reporting of Child Abuse: Evidence and Options", (2002) Report by the Discipline of Social Work and Social Policy, University of Western Australia for the Western Australian Child Protection Council.

intervention by the system. Buckley points out that high profile cases in Ireland including the *Kilkenny Incest Case*, the *Kelly Fitzgerald case*, the *West of Ireland Farmer case* or the *Roscommon Incest case* were all reported to the appropriate authorities at an early stage. The same can be said of instances of abuse investigated as part of the Ryan report.

- d) Mandatory reporting will increase the protection available to children and lead to a decrease in abuse-related deaths.

Again, proof of this outcome would be a major consideration as to whether or not mandatory reporting should be introduced. However, as noted above, in recent high profile child abuse cases in Ireland, reports had been made to the appropriate authorities but this did not result in increased protection for the children in question. It is difficult to see how mandatory reporting would alter this outcome. It has also been noted by a number of jurisdictions where mandatory reporting is in existence that despite reporting of child abuse being a legal requirement, there is a high level of re-reporting.⁸⁹

- e) Mandatory reporting will increase our compliance with internationally recognized human rights standards for children.

The Committee on the Rights of the Child issued concluding observations in relation to the second periodic report submitted by Ireland under the Convention in September 2006. In its conclusions, the Committee expressed concern that “no comprehensive national strategy or measures for the prevention of child abuse are in place and that there are delays in accessing support services”.⁹⁰ In light of these concerns, the Committee recommended *inter alia* that all reported cases of abuse and neglect be properly investigated and if necessary, prosecuted. It also recommended formulating “a comprehensive child abuse prevention strategy, including developing adequate

⁸⁹ See above report of Sawyer and Lohrbach at Children Acts Advisory Board, Evidence to Practice Seminar, *A Different Response Model: Refocusing from Child Protection to Family Support*, 22 May 2008 where it was noted that in 2001 14.3% of children had another report made within 6 months of a previous substantiated report. Post-Seminar Report available online at <http://www.caab.ie/getdoc/eacb0ad0-bccb-4d58-ab65-d69ab1a80ff3/DRM-Post-Seminar-Final-Report-web.aspx>.

⁹⁰ Committee on the Rights of the Child, *Concluding Observations: Ireland (CRC/C/IRL/CO/2)* (29 September, 2006), p.8.

responses to abuse, neglect and domestic violence; facilitating local, national, and regional coordination, and conducting sensitization, awareness-raising and educational activities”.⁹¹ Such recommendations do not require the introduction of a mandatory reporting system to ensure compliance.

- f) Mandatory reporting will increase the levels of reports of child abuse and neglect.

This is universally acknowledged to be a consequence of the introduction of mandatory reporting laws. It is disputed, however, that this is automatically an argument in favour of mandatory reporting. Indeed, a large number of jurisdictions have experienced significant problems as a result of the considerable increase in reports of child abuse. Unless the jurisdiction has the resources to deal with such increases, it is suggested that the introduction of mandatory reporting could result in genuine cases not receiving proper attention. Buckley points out that in New South Wales in 1999-2000, there were 30,398 reports which increased to 195,599 by 2007-2008. Of this number, 75% of the reports were made by mandated reporters which in New South Wales encompasses various professionals.⁹² Only 12% of reports were substantiated.⁹³

1.8.2 Disadvantages of Mandatory Reporting

- a) Mandatory reporting overloads the system thereby forcing social work professionals to raise the threshold of concern that has to be met before assessment of the report will be undertaken.

This is a common criticism of mandatory reporting and to some extent is valid. It is suggested, however, that such a consequence could be overcome by firstly ensuring an appropriate level of resources are in place to cope with the

⁹¹ *Ibid.*

⁹² Buckley, H., “Reforming the Child Protection System: Why we need to be careful what we wish for”, (2009) 12(2) *I.J.F.L.* 27 at 29, quoting Australian Institute for Health and Welfare Child Protection Australia 2007-2008, (Canberra: AIHW, 2009).

⁹³ *Ibid.*

increased level of reporting. (It is accepted that such an allocation of resources is unlikely to occur in the current economic climate.) In addition, the scope of mandated reporters could be kept purposefully narrow by identifying those groups of professionals who have the most contact with children and requiring only those professionals to report child abuse. The scope of abuse could be kept specific as well as under the *Children First* Guidelines as opposed to introducing broad categories which would, as in the Northern Territories, encompass matters such as underage sex.

Finally, it is suggested that were such a mandatory reporting system to be introduced in light of a change in direction for the child protection system towards differential responses, the increased workload could possibly be shared with voluntary community organizations.

- b) It would be unlikely that a Government would remove mandatory reporting once introduced even if it were not operating as hoped.

While this is a valid point, it is not necessarily a reason for refusing to introduce mandatory reporting. Much can be gleaned from the experience of other jurisdictions in the operation of mandatory reporting. As noted above, it appears that countries where mandatory reporting has been the traditional tool in bringing child abuse to the fore (Canada, the United States and Australia) have had to alter the direction of their systems to improve the level of child protection in place. Such a change in direction has also occurred in New Zealand where mandatory reporting was not in operation. It would appear therefore that the existence or non-existence of mandatory reporting is not the key component in ensuring a proper child protection model.

- c) There is no evidence to show that mandatory reporting increases the protection of children from child abuse and neglect.

There seems to be little empirical evidence to support the idea that mandatory reporting improves child protection. In a 2007 report by the N.S.P.C.C.⁹⁴, the

⁹⁴ Wallace, I., and Bunting, L., "An examination of local, national and international arrangements for the mandatory reporting of child abuse: the implications for Northern Ireland", (2007) N.S.P.C.C., N.I. Policy Research Unit.

incidence of abuse related deaths was looked at in this context. It was pointed out that while the U.S., which has long had mandatory reporting had a very high incidence of abuse related deaths, there didn't seem to be any particular discernable trend in relation to abuse related deaths and countries where mandatory reporting existed. A comparison was then looked at in terms of the type of child protection system in place in nine countries. Wallace and Bunting cautiously concluded that there was some evidence to suggest that models based on investigation and intervention offered less protection than those based on the provision of family services.⁹⁵

- d) The introduction of mandatory reporting would place pressure on the relationship between the professional and the child and ultimately deter the child from placing full trust in the professional.

Such an argument would obviously be very difficult to prove. However, in the Northern Territories where there is an obligation to report underage sex, it would seem that there is a valid concern that such a requirement might deter young people from seeking advice on contraception, sexually transmitted diseases and pregnancy. This concern could, however, be addressed by ensuring that the categories of abuse in a mandatory reporting scheme remain those that are addressed under the *Children First* Guidelines but also by providing that the wishes of the child (or adult reporting abuse as a child) be taken into account. Such consideration would obviously differ depending on the age and maturity of the child, his emotional and mental health and the abuse or neglect in question.

1.9 Recommendations

It is difficult to come down on either side of the argument in relation to mandatory reporting as it would appear that while there are very strong criticisms of such a system, a considerable amount of those criticisms could be addressed. It should be pointed out, however, that the benefits pointed to by proponents of mandatory reporting are easily refuted.

⁹⁵ *Ibid.*, at pp.18 and 19.

It is suggested that what is most important in ensuring an effective and professional child protection service is the type of system in place. At the moment Ireland seems to be straddling both the child protection system and a family services system with a large amount of inconsistency throughout the jurisdiction.

It is recommended that the *Children First* Guidelines be reviewed and amended with a view to ensuring that a differential response model is blended into the child protection system in Ireland.

It is recommended that the differential response model be piloted in a number of areas and reviewed to ensure it is effective.

If the system operates effectively and the review is positive, it is recommended that the amended *Children First* Guidelines be placed on a statutory footing to ensure consistency of approach throughout the jurisdiction.

It is not recommended that mandatory reporting be introduced on a legislative basis.

SECTION 2: CHILD PROTECTION AND THE CRIMINAL JUSTICE SYSTEM

2.1 Introduction

The Criminal Law (Sexual Offences) Act 2006 (hereinafter referred to as the “2006 Act”) represented the beginning of a process of comprehensive consideration of the important issue of the creation of a just system of child protection. Since its establishment, the Oireachtas Joint Committee on the Constitutional Amendment on Children has been canvassed by a number of expert and lobby groups in respect of child protection issues and the Second Report of the Committee was published in May 2009. The Committee in its Second Report has recommended introducing new legislation to protect children from adult sex offenders rather than holding a constitutional referendum on the issue. This chapter of the report seeks to analyse the 2006 Act, highlight areas of concern to be addressed in the proposed new legislation, discuss the reasons why a legislative approach rather than a constitutional referendum may be the preferred approach and how to increase access to justice for children.

This chapter begins with a brief description of the reasoning behind the *C.C. v. Ireland*⁹⁶ judgment and its implications. Particular provisions of the 2006 Act are critically analysed and consideration is given to legislation in other jurisdictions. Recent Irish case law in respect of this area is also considered in conjunction with legal developments abroad. Finally, when addressing why a legislative approach as opposed to a constitutional referendum may be the favoured approach, consideration will be given to such issues as legislation adopting an objective test in respect of the defence of mistake as to age, the issue of prosecutorial discretion, steps to be taken in order to minimise the effects of cross-examination on child witnesses and complainants, and to maximize upon effective child protection measures. It is essential to state that the creation of a just system of child protection is one that not only necessitates legislation but the effective implementation of a system that supports the legislation must also be undertaken by the State.

⁹⁶ [2006] 4 I.R. 1.

2.2 The Implications of the C.C. Decision

The unanimous ruling by the Supreme Court in the *C.C.* case that s.1(1) of the Criminal Law (Amendment) Act, 1935 (hereinafter referred to as the “1935 Act”) was inconsistent with fundamental principles of justice as enshrined in the Constitution represented a measured and carefully considered appraisal of the importance of the operation of the criminal justice system. Essentially, s.1(1) of the 1935 Act was deemed unconstitutional on the basis that it wholly removed the mental element of an offence and expressly criminalised the mentally innocent. In a civilised justice system, the concept of justice must adhere to fair procedures. By contrast, s.1(1) of the 1935 Act criminalised and exposed, to a maximum of life imprisonment, a person without mental guilt, contrary to the principles of natural justice and fair procedures guaranteed under Article 40.3.1° of the Constitution. The primary purpose of the 2006 Act was to restore the offence of unlawful carnal knowledge and to accommodate the *C.C.* decision by providing for a defence of honest mistake where the child has attained the age of fifteen or seventeen years of age.

2.3 The New Defence

In accordance with the previous law under the 1935 Act, consent was not a defence to a charge of an offence under ss.2 or 3 of that Act. Following the striking down of s.1 of the 1935 Act in the case of *C.C.*, the Oireachtas introduced two new offences in the 2006 Act. Sections 2 and 3 of the 2006 Act introduced the offences of the defilement of a child under the age of 15 years and 17 years respectively. A person would be guilty of such an offence if proved to have engaged in a “sexual act” with such a child. “Sexual act” is defined in the 2006 Act as including sexual intercourse, buggery, aggravated sexual assault and rape under s.4 of the Criminal Law (Rape) (Amendment) Act, 1990. The defilement of a child under the age of 15 years carries a maximum sentence of life imprisonment. The 2006 Act was amended by the Criminal Law (Sexual Offences)(Amendment) Act 2007 so that the offence of defilement of a child under the age of 17 years or an attempt to do so now carries a maximum sentence of 5 years, but if the offender is a person in a position of authority with respect to the child the maximum sentence is 10 years imprisonment. The 2006 Act provides for a defence of mistake as to age in ss.2(3) and 2(4) and ss.3(5) and 3(6) respectively as required by the *C.C.* judgment. It is a defence to proceedings for an offence under ss.2 or 3 for the defendant to prove that he or she honestly believed

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 years respectively.

2.4 Potential Legislative Reforms: Section 5 of the Criminal Law (Sexual Offences) Act 2006

Potential legislative reforms in this area should consider s.5 of the 2006 Act in light of the High Court challenge launched in April 2008 by a Donegal teenager to the 2006 Act.

The teenage male was charged with the statutory rape of a 14 year old girl in 2006 when he was aged 15. The criminal trial was set down for hearing for the 28th of April, 2009. However, the accused successfully obtained a High Court injunction preventing the commencement of that trial pending his constitutional challenge to the 2006 Act.⁹⁷ The High Court case challenging the 2006 Act was heard in December 2009. It challenged s.5 of the Criminal Law (Sexual Offences) Act 2006 on the basis that it constituted a breach of Art. 14 of the European Convention on Human Rights (hereinafter referred to as the “ECHR”), by its discrimination on grounds of gender. In addition, the case also challenged the 2006 Act on the grounds that the decision of the Director of Public Prosecutions to prosecute the young male represented a breach of his right to privacy enshrined under Art. 8 of the ECHR.

The ECHR has been ratified by Ireland and is binding on the State. The Convention is given effect in Irish law by virtue of the European Convention on Human Rights Act, 2003. It places a duty on the “organs of the State” to act in a manner that is Convention compliant.⁹⁸ Furthermore, Irish courts must interpret and apply statutory provisions in a manner compatible with the State’s obligations under the ECHR.⁹⁹

Section 5 of the 2006 Act states as follows:

“A female child under the age of 17 years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse.”

The 15 year old male challenged the non-availability of this defence to him under the

⁹⁷ *O’D (a minor) v Ireland* [2009] I.E.H.C. 206 (unreported, High Court, Clarke J., 21 April, 2009).

⁹⁸ European Convention on Human Rights Act, 2003, s.3

⁹⁹ European Convention on Human Rights Act, 2003, s.2.

2006 Act as a breach of Art. 14 of the ECHR, which provides that the enjoyment of Convention rights shall be secured without discrimination “on any ground such as” sex, religion, language, “birth or other status”. While Art. 14 of the ECHR permits difference in treatment, this differential treatment is only permitted where there is a reasonable and objective justification for such differential treatment. The case of *Petrovic v Austria* illustrates that substantial grounds for justification will be required in instances of a gender bias.¹⁰⁰ The justification argument may fail if the differential treatment does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means used and the aim sought. The explanatory memorandum to the 2006 Act stated that s.5 was being introduced “primarily to protect females in the age group who might be pregnant”. It may be argued that in a move to prevent the criminalisation of motherhood, the criminalisation of teenage fathers has not concerned the legislature and has resulted in a further discrimination against young males. The argument could be made that the 2006 Act criminalises parenthood, yet exempts one parent on the sole basis of gender.

The ECHR has adopted a strict approach in relation to certain grounds of prohibited discrimination such as the following:

- distinctions on the basis of religion;
- distinctions on the basis of nationality;
- distinctions between marital and non-marital children;
- distinctions on the basis of sex and sexual orientation.

Whilst contracting States enjoy a margin of appreciation in deciding whether and to what extent differences justify a different treatment in law, this margin of appreciation differs according to the circumstances, the subject matter and the background. Taking such factors into account, it may be considered that the majority of States in the Council of Europe only criminalise sexual conduct between minors where the age-gap is greater than two years. Germany’s laws, for example, do not criminalise consensual sex between young people less than 18 years of age. The other States’ laws are based upon the same objectives as that of the 2006 Act, namely to protect children and to prevent girls from prosecution but it may be found that the 2006 Act has utilised

¹⁰⁰ (1998) 33 E.H.R.R. 307.

disproportionate measures in the pursuit of those same objectives.

It is important to note that the judgment in the *C.C.* case contained numerous references to the gender inequality aspect in the 1935 Act. The accused argued that there was “discrimination on grounds of sex arising from the fact that where two persons engaged in consensual sexual intercourse only the male appears to be guilty of a criminal offence”. Such observations by the court in that instance would suggest the potential acceptance of the gender bias argument in the High Court challenge to the 2006 Act due to the fact that gender differentiation continued in the 2006 Act. Moreover, it is unclear whether the same differences of capacity and of social function that may have applied to the 1935 Act, can apply to the phraseology of the 2006 Act.

Consideration also needs to be given to the propriety of labelling young males criminals in respect of an act done for which young females are immune from prosecution. The law is entitled to label certain acts as crimes. However, in so doing it must operate proportionality. The criminal law does not act within a vacuum, but rather is predicated, and even regulated, on the concerns of society. The criminal law is a mechanism through which social standards can be maintained. Notwithstanding that, a distinction needs to be drawn between what is right to do as opposed to what is politically prudent to do. This issue is referred to as “fair labelling”.¹⁰¹ The labelling of what is a criminal offence and what is not is justified, or fair, provided there is in fact a justifiable distinction between the two acts. It is questionable whether there is in fact a justifiable distinction between the act of a male under the age of 17 years having sexual relations with a female under 17 years, both of whom are peers, with only the male being exposed to possible criminal liability. Arguably, the manner in which the 2006 Act operates, having regard to s.5, infringes upon the fair labelling principle.

The rationale for s.5 of the 2006 Act has been stated as a measure to avoid stigmatising young mothers, but not all instances of underage sex result in pregnancy. Therefore, the question is whether the criminalisation of young males may be justified

¹⁰¹ See Ashworth, *Principles of Criminal Law*, (5th Ed., Oxford, 2006), pp.88-91.

on the grounds of differences of capacity, physical, moral and social function. It is suggested that the exclusion of non-exploitative sexual behaviour between peers could resolve this issue.

2.5 Exclusion of Non-Exploitative Sexual Behaviour between Peers

Before the enactment of the 2006 Act, it was proposed that an exemption should be provided for consensual sexual activity between teenagers who were both aged between 14 and 16 years. It was suggested that no offence would be committed if there was no more than a two year age gap between them. However, such consensual acts between teenagers are criminalised by the 2006 Act. The absence of a provision in the legislation to ensure teenagers of a proximate age engaging in consensual sexual acts are exempt from prosecution before the courts must be addressed. Criminalising peer-to-peer consensual sexual behaviour is contrary to the natural development of adolescents. The Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse 2007 advises that a special exemption from prosecution should be available where non-exploitative sexual relations occur between minors.

The reliance upon prosecutorial discretion as a mechanism to prevent the prosecution of teenagers who engage in non-exploitative consensual sexual activity is wholly unsatisfactory. The uncertainty caused by any continuation of prosecutorial restraint in cases involving sexual relations between persons of a comparable age can be resolved by setting out the law as clearly as possible.

The Second Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children notes that certain members of the Committee recommended that legislative provision be enacted for discretion not to prosecute in circumstances where the parties are proximate in age, no coercion is involved, and neither party is in a position of trust or authority in relation to each other. Such clear, specific legislative provision is preferable to general prosecutorial discretion that would result in uncertainty in the law.

2.6 Potential breach of Article 8, ECHR: The Right to Respect for Private and Family Life

The definition of the offence as provided in the 2006 Act ignores the important moral distinction between the conduct of an adult exploiting a child and the conduct of age-peers which generally does not exploit any imbalance of power. The question remains as to whether prosecution for consensual sexual activity between age-peers could be in breach of Art. 8 of the ECHR in light of the penalties involved and the serious nature of the offence.

Article 8 of the ECHR provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

Article 8 of the ECHR was raised but not argued directly in the case of *R. v G.*¹⁰². Commentary on the case stated that Art. 8 “gives special protection to that part of a person’s conduct that is a significant aspect of, or that contributes directly to, the person’s lifelong journey of self-discovery and personal development”. It was further stated that Art. 8 is not incapable of capping the State’s ability to penalise children and teenagers “in their own best interests” for non-forced, mutually desired sexual interactions below the age of consent.

Ireland must pay particular regard to such a potential breach in light of the fact that the age of consent is 17 years of age, which is higher than other European States. In nearly all jurisdictions, sexual relations are legal from the age of 16 onwards. Should the defence of mistake be removed in the form of the introduction of a strict or absolute liability offence, the likelihood of a breach would increase considerably. It should be noted that honest mistake about age removes liability in almost all European countries. In the majority of jurisdictions, negligent error removes

¹⁰² *R. v G.* [2008] U.K.H.L. 37.

liability.¹⁰³

It may be stated that in principle, formative sexual activities and experiences fall within the protective scope of Art. 8 of the ECHR. The State may intervene by virtue of Art. 8(2) when sexual activities violate the rights of others or for the protection of public health and morals. Moreover, the State has a duty to protect vulnerable individuals from violations of their physical or psychological integrity. However, when mutually voluntary sexual interactions between children below the age of consent are rendered criminal, such protection is over-reaching and liable to be a breach of Art. 8 of the ECHR.

If the age limit is set too high the law can readily result in conflict with the entitlement of adolescents to personal autonomy including sexual liberty. Legislators in the majority of European jurisdictions have sought to attain a reasonable balance between the pursuit of protecting adolescents from unwanted sex and their need for self-determined sexual relationships.

2.7 Comparisons with Similar Provisions in other Jurisdictions

The majority of States in the Council of Europe only criminalise sexual conduct between minors where the age-gap is greater than two years. As noted above Germany's laws do not criminalise consensual sex between young people less than 18 years of age.

The Criminal Code of Canada offers an interesting alternative in that it does not criminalise non-exploitative, consensual sexual activity with or between persons who are aged 16 years of age or older, unless it occurs in a relationship of trust or dependency, in which case sexual activity with young persons can constitute an offence, notwithstanding their consent.

Another potential model is offered by France, which requires a significant age gap between a perpetrator and victim of non-coerced underage sex.

¹⁰³ Bullough and Graupner, *Adolescence, Sexuality, and the Criminal Law: Multidisciplinary Perspectives*, (2005, Taylor and Francis), see Chapter 11 "Sexual Consent: The Criminal Law in Europe and Outside of Europe".

Article 8(2) of the ECHR permits interference with the right to private and family life where the grounds of interference are in accordance with the law, pursue a legitimate aim and are necessary and proportionate. Other European states pursue the same objective, namely child protection but achieve this objective by less restrictive means, such as the age-gap provisions utilised by France. Therefore, it would be particularly difficult for the State to refuse to exempt such activity from prosecution or introduce a strict or absolute liability offence in relation to age-peers when the same objective is achieved by other States without any such interference.

2.8 Advantage of Legislative Change vs. Constitutional Amendment

The Second Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children considered the following Constitutional amendment in respect of strict liability:

“Art 42 (A) 5.2. No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.

Art 42 (A) 5.3 The provisions of this section of this Article do not, in any way, limit the powers of the Oireachtas to provide by law for other offences of absolute or strict liability.”

Both Articles provide for the creation of absolute and strict liability offences. The first provision seeks to remove the defence of honest mistake necessitated by the *C.C.* judgment and provided for in the 2006 Act. The aim of the proposed constitutional amendment as a whole is to protect children from sexual exploitation and to increase the levels of protection afforded to children. Family members or persons known to children commit the majority of acts of sexual abuse against children. Therefore, the defence of honest mistake is unavailable to the majority of child abusers. Fears that the defence would be open to abuse by the minority (i.e. strangers to the child) could be allayed by amending the defence as contained in the 2006 Act to require that the defendant’s belief is both honest and reasonable as opposed to the current test which leads to a person’s acquittal unless it is proven that he or she honestly believed the young person in question was below the specified age. Whilst the court is to “have regard to” the presence or absence of reasonable grounds and any other relevant circumstances in deciding whether the accused in fact believed the child was of full

age, the possibility remains that the honest belief, even if unreasonable, could be deemed to afford a defence.

An analysis of the current reasonableness element in the defence of mistake and potential improvements to new legislation, which would deal with concerns about the defence, should be considered as an alternative to the proposed constitutional amendment.

2.8.1 Potential Inadequacy of Current Reasonableness Element

The 2006 Act states as follows:

“It falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, [and] ...the court shall have regard to the presence or absence of reasonable grounds for the defendant’s so believing and all other relevant circumstances.”¹⁰⁴

The phrase “have regard to” has been considered in *McEvoy v Meath County Council*¹⁰⁵ in respect of regional planning, which held that the requirement “have regard to” obliged the planning authority to fully inform itself of and to give reasonable consideration to any regional planning guidelines which are in force in the area which is subject to the development plan in order that the objectives and policies contained in the guidelines would be taken into consideration. Quirke J. continued that whilst it was desirable that planning authorities should endeavour to accommodate the objectives and policies contained in the relevant regional planning guidelines when drafting and adopting the development plan, this did not necessarily mean that planning authorities were bound to comply with the guidelines and could depart from guidelines for *bona fide* reasons consistent with the proper planning and development of the area for which the planning authority had planning responsibilities. Therefore, could it be stated that if such a principle was applied to the interpretation of the phrase “have regard to” in the context of the case-law under the 2006 Act, the court would simply be required to take into consideration the presence or absence of reasonable grounds for the defendant’s belief that the victim was of full age as well as any other relevant circumstances and thereafter simply choose not to make a decision based on these factors if the court determined a *bona fide* reason for

¹⁰⁴ Sections 2(4) and 3(6).

¹⁰⁵ [2003] 1 I.R. 208.

not doing so?

The test as it stands is arguably a subjective one and is consistent with the law on rape as set out under s.2(2) of the Criminal Law Rape Act, 1981 which made provision for the need to have regard to the presence or absence of reasonable grounds in relation to consent. In effect, s.2 of the Criminal Law Rape Act, 1981 in Ireland codified the controversial decision of *DPP v Morgan*.¹⁰⁶ That decision has now been abandoned in England and Wales as a result of s.1 of the Sexual Offences Act 2003. In England and Wales a defendant's belief that his victim was consenting to sexual intercourse must now be based on reasonable grounds in order to ground a defence, thus introducing an objective criterion.

The implementation of an objective reasonableness element so that the belief must be honest and reasonable would mean that a person would not escape conviction unless the jury was satisfied not only that the accused person honestly believed that the young person in question was below the specified age but that such a belief was also reasonably held. Accordingly, the aim of child protection does not necessitate the re-introduction of a strict liability offence by constitutional amendment.

Legislation is granted a degree of flexibility that is not afforded to constitutional provisions. Any legislation that would be enacted under the proposed Constitutional amendment would still have to balance the rights of a suspected abuser with the aim of protecting children. Any legislation that failed to achieve that balance would remain subject to a constitutional challenge.

2.8.2 Further arguments in favour of an Objective Element: Honest and Reasonable

It has been stated that the task of prosecuting is vastly more difficult since the introduction of the 2006 Act, as the Act does not require a belief as to age to be objectively reasonable. Whilst the court is to have regard to the presence or absence of reasonable grounds and any other relevant circumstances in deciding whether the accused in fact believed the child was of full age, the question remains whether the

¹⁰⁶ [1976] A.C. 182.

honest belief, even if unreasonable, could be deemed to afford a defence.

The Second Report of the Joint Oireachtas Committee on the Constitutional Amendment on Children highlighted the proposal of applying a purely objective standard which would mean that it is irrelevant what the accused's actual belief was. Rather the test to be applied is the standard of what the reasonable person would have believed in the circumstances. When analysing what would be reasonable in the circumstances, considerations such as the reasonableness of the belief the person had would perhaps be judged in accordance with his or her age, level of maturity and other characteristics. Such an approach would, however, lead to precisely what was stated in the *C.C.* case being invoked whereby a person would be convicted in the absence of moral or mental guilt. Lord Steyn in the House of Lords Appeal case of *B v DPP* stated as follows:

“There has been a general shift from objectivism to subjectivism in this branch of the law. It is now settled as a matter of general principle that mistake, whether reasonable or not, is a defence when it prevents the defendant from having the *mens rea* which the law requires for the crime with which he is charged”.¹⁰⁷

The application of such an objective standard would represent a significant change from the well-established constitutional and criminal model in this jurisdiction and may well require a constitutional amendment.

It also should be noted in reaching its decision, the Supreme Court noted that the Law Reform Commission in 1990 had recommended that the law should include a defence of honest mistake “genuinely believed” on “reasonable grounds” with the exception of a person in authority over a minor.

In respect of the Law Reform Commission's proposed exclusion of persons in authority over a minor from the “genuine belief on reasonable grounds” test, it may be based on the fact that an objective test in the context of sexual offending, where defendant and victim are in close proximity to one another is not nearly as objectionable as when a defendant is a stranger to the child. Therefore, any such provision would have to state that the reasonableness of a defendant's mistake as to the victim's age would have to be considered according to the circumstances of

¹⁰⁷ *B. v DPP* [2000] 1 ALL E.R. 850.

particular cases, including the relevant characteristics of the defendant.

A “genuine belief based on reasonable grounds” rule that excludes those in authority over a minor and instances in which victims are aged less than 15 years could be created whereby the onus is on the accused and specific evidential rules are applied. It would follow that in the instance of victims between 15-17 years, if the accused could establish reasonable grounds for believing that the victim is aged 17 or over, the onus would be on the accused to prove such grounds. No such defence would be permitted in the instance of victims under 15 years nor would such a defence be available to defendants who are persons in authority over a minor. The constitutionality of such an approach would require careful consideration.

It should be stated that the courts are not prepared to discard subjectivism and due process values, particularly in light of the ECHR which now forms part of their decision-making process. However, the introduction of stronger objective elements than those provided in the 2006 Act whilst maintaining a subjective standard for those not in a position of authority to the child may be the preferred route.

2.8.3 Comparison with Similar Provisions in other Jurisdictions

The Canadian Criminal Code states that the accused cannot raise a mistaken belief in the age of the victim unless the accused took all reasonable steps to ascertain the age of the complainant. Under the New Zealand Crimes Act 1961, the defendant must show that that he had reasonable cause to believe and did believe that the victim was above the statutory age. The application of such a due diligence test has been proposed in the Second Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children.¹⁰⁸

The Australian approach in respect of mistake and strict liability is demonstrated in *Chard v Wallis*¹⁰⁹ in which Roden J. of the Supreme Court of New South Wales held that a reasonable mistaken belief as to age was a defence to a charge of soliciting a male under 18 years to engage in an act of homosexual intercourse.

¹⁰⁸ Oireachtas Joint Committee on the Constitutional Amendment on Children Second Report – May 2009, pp.48-50.

¹⁰⁹ (1988) 12 N.S.W.L.R. 453.

2.8.4 Proposed Recommendation

The Supreme Court in the *C.C.* case stated that there was obviously “more than one form of statutory rape provision which would pass constitutional muster”. Despite this statement, assumptions were made that the only solution was a constitutional amendment. In light of the proposals stated above, it is arguable that an amendment to the current legislation to require that the defendant’s belief be both honest and reasonable would advance the objective of child protection further than the proposed constitutional amendment.

2.9 The Onus and Standard of Proof

The 2006 Act provides, in relation to the defence of mistake as to age, that “it shall be a defence...for the defendant to prove...”. The Second Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children states its interpretation of this provision as meaning that “the prosecution is not required to prove a guilty mind, but it is open to the accused to prove otherwise.”¹¹⁰ The Report further states as follows:

“Having regard to the seriousness of sexual offences against children and the importance of the protection of children, this appears to the Committee to be a reasonable and proportionate adjustment of the normal onus of proof in criminal proceedings.”¹¹¹

The presumption of innocence guarantees that in a criminal trial the prosecution have to prove each element of the offence beyond reasonable doubt, while the defendant does not have to prove any of those elements, including his own defence. An exception to this presumption occurs if the defence of insanity is raised;¹¹² if a prosecution or defence witness gives evidence to support any other defence such as self-defence or provocation then it is for the prosecution to disprove it beyond a reasonable doubt.¹¹³ For example, if in a murder case a prosecution witness states that

¹¹⁰ Oireachtas Joint Committee on the Constitutional Amendment on Children Second Report – May 2009, p.51.

¹¹¹ *Ibid.*, at p.51.

¹¹² If a person pleads guilty by reason of insanity he must prove he is or was actually insane. This is because it is separate to the events and is almost impossible for the prosecution to disprove on its own. By contrast, other defences such as self-defence or provocation are based on the facts and events of the offence in question, and the defendant need only raise the issue (and then the prosecution must disprove it beyond a reasonable doubt).

¹¹³ *The People (Attorney General) v Quinn* [1965] I.R. 366 as per Walsh J: “When the evidence in a case, whether it be the evidence offered by the prosecution or by the defence, discloses a possible

the defendant was in fact attacked by his victim, such a statement may be deemed adequate evidence for the judge to put the defence of self defence to the jury, without the defendant offering such evidence himself. Therefore, the defendant may avail of the defence without actually testifying in court. Should the defendant wish to raise a defence, he must put forward enough evidence that, if it is credible and not disproved by the prosecution, the jury could believe it as true. While the defendant must produce some level of evidence, he does not have to prove to the jury that it is true, or more likely to be true than the prosecution's case. The prosecution still bears the burden of disproving the defendant's defence beyond a reasonable doubt.

The requirement of the 2006 Act "for the defendant to prove"¹¹⁴ his honest belief creates two potential difficulties. The first difficulty arises from the apparent suggestion that because the defendant must prove his honest and reasonable belief, he may not raise this defence solely on the evidence of prosecution witnesses. This may potentially lead to a situation whereby the defendant must testify if he wishes to avail of the defence.

The burden of proof represents the second potential difficulty. The legal burden and the evidential burden are the two different types of burden of proof in a criminal trial. The legal burden requires the prosecution to prove the case i.e. the guilt of the defendant. An evidential burden means that the defendant does not have to prove anything, but either the defendant, or another witness, must produce some evidence that is credible and could be accepted as true by the jury.

Several common statutory defences are phrased "it is a defence to show that", or simply "it is a defence that". Such phrasing establishes an evidential burden of proof. The wording of the 2006 Act suggests that it is not enough that there is some evidence which is believable and could be accepted as true as to the defendant's honest belief, but that he must actually prove it. This suggestion is further strengthened by the

defence of self-defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the offence charged. The onus is never upon the accused to raise a doubt in the minds of the jury."

¹¹⁴ Sections 2(3) and 3(5).

Oireachtas Joint Committee's interpretation.¹¹⁵ Therefore it may be deemed that the legal burden of proof has been shifted onto the defendant, potentially violating his presumption of innocence and constitutional rights.

The 2006 Act should arguably place only an evidential, not a legal, burden on the defendant. In situations whereby there are two or more interpretations of a statute, the courts are bound to select the interpretation that is constitutionally acceptable.¹¹⁶ An evidential burden would be constitutionally acceptable, as it would mean that provided that there is some evidence that the defendant honestly believed the alleged victim was 15 or 17 years old or over, it remains for the prosecution to disprove this belief. While there is no clear Irish judgment as to whether or not such a shift in the legal burden of proof would be constitutional, if the effect of this provision is to shift the legal burden of proof onto the defendant, the provision will inevitably be the subject of a constitutional challenge.

In assessing the basis for any possible constitutional challenge to the 2006 Act it is first salutary to note that the presumption of innocence as protected under Art. 38.1 of the Constitution is not absolute.¹¹⁷ There are a number of exceptions, some of which are statutory based. Due to the differing nature of statutes it is important to analyse the nature and effect of each statutory provision individually in considering whether there is a shift in the legal burden of proof on to the accused person. Costello J. in the High Court in *O'Leary v Attorney General* provided a means of determining this, stating:

“if the effect of the statute is that the court *must* convict an accused should he or she fail to adduce exculpatory evidence then its effect is to shift the legal burden of proof ... whereas if its effect is that notwithstanding its terms the accused *may* be acquitted even though he calls no evidence because the statute has not discharged the prosecution from establishing the accused's guilt beyond a reasonable doubt then no constitutional invalidity could arise.”¹¹⁸

¹¹⁵ Oireachtas Joint Committee on the Constitutional Amendment on Children Second Report – May 2009, p.51.

¹¹⁶ *McDonald v Bord na gCon* [1965] I.R. 217.

¹¹⁷ *O'Leary v Attorney General* [1995] 1 I.R. 254.

¹¹⁸ [1993] 1 I.R. 102, at 109. (Emphasis in original).

In the case of *Hardy v Ireland*,¹¹⁹ Hederman J. stated the following in respect of the constitutional requirement of fair procedures;

“It protects the presumption of innocence; it requires that the prosecution should prove its case beyond all reasonable doubt; but it does not prohibit that, in the course of the case, once certain facts are established, inferences may not be drawn from those facts and I include in that the entitlement to do this by way even of documentary evidence. What is kept in place, however, is the essential requirement that at the end of the trial and before a verdict can be entered the prosecution must show that it has proved its case beyond all reasonable doubt.”¹²⁰

However, it should be noted that Hederman J. held that the legislation in question in that case¹²¹ merely shifted the evidential burden of proof as opposed to the legal burden onto the accused person. Whereas, Murphy J. in the same case concluded that the legislation did in fact shift the legal burden of proof on to the accused person, but nonetheless deemed it consistent with Art. 38.1 of the Constitution. In so doing he stated as follows:

“I do not see that there is any inconsistency between a trial in due course of law as provided for by Article 38, s.1 of the Constitution and a statutory provision... which affords to an accused a particular defence of which he can avail if, but only if, he proves the material facts on the balance of probabilities.”¹²²

In the more recent case of *O’Leary v Attorney General*,¹²³ however, the Supreme Court considered the Canadian Case of *R. v Oakes*¹²⁴ in which the Canadian Chief Justice interpreted s.8 of the Canadian Narcotics Act, 1970 as follows:

“Upon a finding beyond reasonable doubt of possession of a narcotic, the accused has the legal burden of proving on a balance of probabilities that he or she was not in possession of the narcotic for the purpose of trafficking. Once the basic fact of possession is proven, a mandatory presumption of law arises against the accused that he or she had the intention to traffic. Moreover, the accused will be found guilty of the offence of trafficking unless he or she can rebut this presumption on a balance of probabilities.”

The Canadian Court held that such a provision violated the presumption of innocence in the Canadian Charter of Rights and Freedoms. The Irish Supreme Court seems to have accepted the Canadian Courts’ reasoning but it did not directly apply to the facts

¹¹⁹ [1994] 2 I.R. 550.

¹²⁰ *Ibid.*, at p.565.

¹²¹ Explosive Substances Act, 1883, s.4(1).

¹²² *Ibid.*, at p.568.

¹²³ [1995] 1 I.R. 254.

¹²⁴ [1986] 1 S.C.R. 103.

in the *O’Leary* case that dealt with s.24 of the Offences Against the State Act, 1939. Section 24 provided that where a person is charged with the offence of being a member of an unlawful organisation, proof that the accused had in his possession an incriminating document relating to the unlawful organisation “shall, without more, be evidence until the contrary is proved that such person was a member of the said organisation at the time alleged”. O’Flaherty J. at page 265 stated as follows:

“It is clear that such possession is to amount to *evidence* only; it is not to be taken as proof and so the probative value of the possession of such a document might be shaken in many ways: by cross-examination; by pointing to the mental capacity of the accused or the circumstances by which he came to be in possession of the document, to give some examples. The important thing to note about the section is that there is no mention of the burden of proof changing, much less that the presumption of innocence is to be set to one side at any stage.”

Depending on the interpretation of the defence, it could merely require that evidence be put before the court that the defendant honestly believed that the alleged victim was over 15 or 17 years. This evidence can come from any witness, even the alleged victim, and would be constitutionally acceptable. However, as per the Second Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children, the interpretation of the new defence appears to require the defendant to prove his honest belief, and if the court agrees with this interpretation of the provision, the court must also determine whether this shift in the burden of proof is constitutionally valid.¹²⁵ In so doing, it is respectfully submitted that the appropriate test to adopt is the proportionality test.

Regard must also be had for the compatibility of this aspect of the 2006 Act with the ECHR. The presumption of innocence is also protected under Art. 6(2) of the ECHR, which states as follows:

“Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.”

The interpretation given to the presumption of innocence by the European Court of Human Rights (hereinafter referred to as the “ECtHR”) is somewhat similar to that of the Irish courts. In *Barberà, Messegué and Jabardo v Spain*, the ECtHR stated as follows:

¹²⁵ Oireachtas Joint Committee on the Constitutional Amendment on Children Second Report – May 2009, p.51.

“Paragraph 2 embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.”¹²⁶

The ECtHR has recognised the operation of both legal and factual presumptions in the legal systems of signatory States. It has held that the ECHR does not prohibit the operation of such presumptions, provided they operate “according to law”.¹²⁷ Notably, the phrase “according to law” includes the protections under the ECHR, thus precluding signatory States from seeking to avoid such protections through the enactment of domestic legislation. Thus, signatory States are required to confine the operation of such presumptions of law or fact within the criminal law to “reasonable limits which take into account the importance of what is at stake and maintain rights of the defence.”¹²⁸ The ECtHR has stated the proportionality test as the appropriate means of determining where such “reasonable limits” are to lie. The court stated in *Janosevic v Sweden* as follows:

“Thus, in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved.”¹²⁹

In that case, the ECtHR accepted that the presumption in question was quite difficult to rebut, but nonetheless was not insurmountable in that the defendant was not left without any means of defence. That case concerned tax law in Sweden and the imposition of penalties in the form of tax surcharges. In applying the proportionality test and finding no violation of Art. 6(2), the ECtHR took into account the financial interests of the State. Thus in any possible challenge to the compatibility of ss.2 and 3 of the 2006 Act with the ECHR, the court could have regard to the aims of the State in seeking to protect children and balance this against any alleged infringements on an accused’s presumption of innocence.

¹²⁶ Application No. 10590/83. Unreported, 6 December, 1988, para.77.

¹²⁷ *Salabiaku v France* (1988) 13 E.H.R.R. 379, para.28.

¹²⁸ *Ibid.*

¹²⁹ (2002) 38 E.H.R.R. 473, para.101.

2.10 Restriction of Cross-Examination

Upon the introduction of the 2006 Act and the new “mistake as to age” defence, concerns were raised about the adversarial court procedure which would result in young complainants being cross-examined as a result of defence attempts to prove to the court that the accused honestly believed that the complainant was over the age of consent. In fact, it may be stated that support for the re-introduction of a pre *C.C.* case type offence (i.e. no defence of mistake as to age) in relation to statutory rape was primarily based upon the limited scope it afforded for cross-examination of the injured party. Concern for the potential re-victimisation of the injured parties due to the stress caused by testifying in open court is a valid concern but should not deny the right of the accused to a fair trial. However, regard must be had for the jurisprudence of the ECtHR and the application of the proportionality test in the context of an accused’s presumption of innocence. The application of the 2006 Act must provide the accused with some means of presenting a defence as to mistake. The only means of doing so may be through the cross-examination of the victim. If that is the case then a restriction on the accused in so doing may constitute a disproportionate violation of his presumption of innocence.

The inclusion of reasonableness as to the belief of the accused removes much of the perceived “severity” of an honest belief. However, it does little to remedy the stated concerns as to the cross-examination of a child. Defence counsel when representing a client accused of sexual conduct in relation to an under-age child would need to persuade a jury of the reasonableness of the belief. When seeking to support a defence that the defendant believed that the complainant was older than she actually was, it is difficult to justify the exclusion of evidence as to the manner in which the complainant acted or conducted herself, including lying about her age. Can it be stated that such evidence is irrelevant to the defence? An accused person is constitutionally entitled to a fair trial and to adduce evidence and cross-examine a witness in relation to a matter that may be relevant to an issue in the case.

2.10.1 Evidence of Prior Sexual History

Section 3 of the Criminal Law (Rape) Act, 1981 states that if a person is charged with a sexual assault offence to which he pleads not guilty, then, except with the leave of the trial judge “no evidence shall be adduced and no question shall be asked in cross-

examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience (other than that to which the charge relates) of a complainant with any person.” This restriction has been applied to the new offences of “defilement” created by ss.2 and 3 of the 2006 Act.

Section 3(2)(b) of the Criminal Law (Rape) Act, 1981 provides that the trial judge shall give leave to adduce evidence of, or cross-examine a witness on, the complainant’s sexual experience “if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked ...”.

In *People (DPP) v G.K.*,¹³⁰ the court stated that cross-examination as to prior sexual experience would be undesirable when the complainant is of a young age. However, if evidence of the complainant’s sexual experience in the context of an offence under the 2006 Act is to be excluded, can such a further exclusion be justified having regard to the personal rights of both the complainant and the defendant when the defendant bears the burden of proving a mistaken belief. This may result in the accused being restricted from proving his mistaken belief on the basis of evidence as to how the complainant acted or conducted himself/herself and potentially risks an adverse inference being drawn from the accused’s failure to mention the alleged mistake as to age or the grounds therefor when questioned by the Gardaí. The totality of the measures proposed by the Second Report of the Joint Oireachtas Committee on the Constitutional Amendment on Children arguably prevent any attempt to balance the rights between the complainant and the defendant despite the provision of the defence of mistake as to age.

2.10.2 Addressing Concerns relating to the Cross-Examination of the Complainant

A number of issues arise when addressing the concerns relating to the cross-examination of young complainants. First, regard must be had to a child’s right to have his/her evidence heard in accordance with the United Nations Convention on the Rights of the Child 1989. Second, the court must seek to ensure that the child

¹³⁰ [2007] 2 I.R. 92.

provides a full, accurate and coherent account of his/her experiences.

In cases involving sexual abuse, a child's testimony is of fundamental significance due to the fact that other corroborating evidence may be absent. Therefore methods to minimize the stress caused to children giving evidence are essential.

The Second Report of the Joint Oireachtas Committee recommends further study of appropriate ways of ensuring that cross-examination of child witnesses and complainants is fairly conducted. When analysing such a proposal, consideration should firstly be afforded to the existing developments in this area which were introduced by way of the Criminal Evidence Act, 1992 and the Children Act, 1997.

2.10.3 Hearsay Evidence

The rule against hearsay is an evidentiary rule which excludes evidence of a statement made by a person other than a person testifying in the proceedings in which it is sought to be admitted if offered as evidence of the truth of any fact asserted therein.¹³¹ However, there are many exceptions to this rule. The Court has discretion to permit the inclusion of hearsay evidence in the context of public child law cases. The Supreme Court in a case that dealt with the admissibility of a videotape interview with the child has confirmed this proposition.¹³²

Section 23 of the Children Act, 1997 furthermore allows the inclusion of hearsay evidence of any fact in all proceedings relating to the welfare of a child, public or private when the child cannot give evidence because of his age or where the giving of evidence is not conducive with the child's welfare. The court is granted a broad discretion to exclude any such evidence, or part thereof, in the interests of justice and must consider any potential unfairness to any of the parties involved.

Section 24 of the Children's Act, 1997 relates to the weight to be granted to such evidence deemed admissible under s.23 Act, with consideration to be afforded to all the circumstances from which inferences as to its accuracy or otherwise can be made, and a list of other considerations in s.24(2).

¹³¹ See McGrath, *Evidence*, (2004, Roundhall), Chapter 5.

¹³² *Southern Health Board v C.H.* [1996] 1 I.R. 219.

Evidence regarding the child's credibility is admissible under s.25 where information is given in a statement admitted in evidence pursuant to s.23.

2.10.4 Pre-trial Video Recorded Testimony

Important advantages are inherent in the videotaping of children's evidence for tendering at a trial. Concerns relating to prejudicial delay, the stress of testifying and the quality of the evidence are significantly allayed by such a measure. Section 15 of the Criminal Evidence Act, 1992 facilitated such video recording of children's evidence. However, section 15(2) only permitted such evidence where two pre-conditions are satisfied, firstly, the particular witness must be available for cross-examination and secondly, that the court is satisfied that it will not result in unfairness to the accused.

Section 15(1)(b) of the Criminal Evidence Act, 1992 should be considered when seeking methods as to assist the provision of child evidence. This section provides that in the instance of a child under the age of 14 years of age, video recordings of any statement by a victim of an offence is admissible where the statement is made to a member of the Garda Síochána or to "any other person who is competent for that purpose". This would arguably encompass the admissibility of video recordings made between a child abuse victim and a child psychologist in a child sexual abuse assessment unit. Counsel involved in such cases have stated the report of the assessment centres contains notably more information which would signify greater abuse than that stated in the initial statement to the Gardaí. Therefore, such a recording would reduce the stress associated with a criminal trial for the child witness.

Moreover, the availability of such pre-trial video recorded testimony would enable the pre-trial preparation and resolution of issues such as admissibility of parts of the child's evidence and the child's testimonial competence. Such a system would provide advantages to both the defence and the prosecution. However, the effectiveness of s.15(1)(b) is limited by s.15(2) which states that a video recording will not be admitted in evidence if the trial judge takes the view that it should be excluded, particularly if he considers that its admission would "result in unfairness to the accused". It may be argued that the decision of the trial judge should also take into account the circumstances of the case as a whole or the age of the victim when

addressing the question of whether the admission of such evidence would result in unfairness to the accused.

2.10.5 Evidence by means of a television link

Section 22 of the Children Act, 1997 permits evidence in civil cases provided by means of a television link, to be conveyed via an intermediary. This is permitted provided that the court is satisfied that, having regard to the age and mental condition of the child, evidence should be gathered through such an intermediary.¹³³ Research in this area has revealed that many vulnerable witnesses using television links are unwilling to testify in any other way.¹³⁴

Section 13 of the Criminal Evidence Act, 1992 permits the provision of evidence through television link in criminal cases. It applies to persons under the age of 18 years whether the child is in Ireland or not, unless the “court sees good reason to the contrary”. Unfortunately, however, this section has been commenced in a piecemeal manner and therefore only operates in designated regions of the country.¹³⁵ For a more detailed analysis of this, see Section 1.4 of the Second Report of the Special Rapporteur on Child Protection (October 2008).

In the case of *Eastern Health Board v M.K. and M.K.*,¹³⁶ the Supreme Court considered the use of the television link and intermediary in child law proceedings. The remarks of the Supreme Court were in the main favourable to video link evidence and two of the judges commented that the veracity of the evidence could be assessed by examining the conduct of the interview.

¹³³ Section 22(1).

¹³⁴ B.Hamyln *et al*, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (June 2004, Home Office Research, Development and Statistics Directorate) Home Office Research Study 283.

¹³⁵ See S.I. No. 288/1993 Criminal Evidence Act 1992 (Sections 13, 15(4), 16, 17 and 19) (Commencement) Order 1993; commenced section 13 for the Dublin Metropolitan District of the District Court. S.I. No. 221/2005 Criminal Evidence Act 1992 (Section 13) (Commencement) Order 2005; commenced section 13 before the Cork Circuit Criminal Court. S.I. No. 296 of the 2005 Criminal Evidence Act 1992 (Section 13)(Commencement)(No.2) Order 2005; commenced section 13 for the District Court sitting in District No. 19. Section 13 commenced for the Circuit Court sitting in the South Eastern Circuit and the District Court sitting in District No. 8 by the Criminal Evidence Act 1992 (Section 13) (Commencement) Order 2007 (No. 52 of 2007) with effect from February 12, 2007. S.I. No. 572 of the 2007 Criminal Evidence Act 1992 (Section 13)(Commencement)(No.2) Order 2007 commenced section 13 for the Circuit Court sitting in the Midland Circuit and the District Court sitting in District No. 9 from August, 20, 2007.

¹³⁶ [1999] 2 I.L.R.M. 321.

2.10.6 Additional proposals

The concept of the intermediary special measure is a simple one which ensures that vulnerable witnesses at interview, pre-recorded testimony and trial, comprehend questions which are put to them and that their responses are understood. In 2008, the UK Government implemented on a nationwide basis the intermediary special measure, introduced in s.29 of the Youth Justice and Criminal Evidence Act 1999. Those vulnerable witnesses, aged less than 17 years are eligible for intermediary use as a right.

There are provisions in Ireland for the use of intermediaries both in civil and criminal law. An intermediary must assist communicative competence in the court and to that end he/she has an important function in the interests of justice by effecting the correct approach in phrasing questions. A recent UK study involving interviews with young witnesses reported that the majority of those encountered a problem in understanding or otherwise dealing with questions at court and only half of those surveyed felt confident to relay their difficulty to the court.¹³⁷

An evaluation of the scheme showed that the intermediaries contribution was welcomed with almost all with whom they interacted. The scheme illustrated the intermediary's potential to increase access to justice for children but it has been stated that the introduction of intermediaries should not entirely compensate where the communication skills of criminal justice professionals are poor.¹³⁸ Such commentary illustrates the importance of the recommendation by the Second Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children that all lawyers involved in the prosecution and defence of cases of child sexual abuse or sexual offences against children, and all judges hearing such cases should be required to undergo training to perform their function in a manner least traumatic for child complainants and witnesses.¹³⁹ Communicative competence and a recognition of developments relating to children's responses to the criminal justice system are essential. Indeed, the implementation of training programmes and the delivery of

¹³⁷ Plotnikoff and Woolfsen, "Evaluating Young Witness Support: Examining the Impact on Witnesses and the Criminal Justice System" (2007) www.justice.gov.uk.

¹³⁸ Plotnikoff and Woolfsen, "Making the best use of the intermediary special measure at trial" (2008) *Crim.L.R.* 91.

¹³⁹ See Section 1.4 Second Report of the Special Rapporteur on Child Protection (October, 2008).

effective advocacy training should in the future obviate the need for intermediary use during cross-examination.

2.10.7 Further Potential Safeguards to Allay Concerns

In 2008, when addressing the Oireachtas Joint Committee on the Constitutional Amendment on Children, the Director of Public Prosecutions advocated the denial of a defendant's right to cross-examine the complainant in person. The Second Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children recommends that personal cross-examination of child complainants and of child witnesses on the offence by the accused be prohibited in the case of a sexual offence against a child. Provisions may be implemented which require the defendant to be represented by a lawyer or if unrepresented, that any questions be relayed through the judge to the complainant. Such a proposed reform would further address concerns in this regard. Cross examination is an integral part of natural and constitutional justice and appears to be guaranteed under Art. 38 of the Constitution. It then becomes a question of balance. It is submitted that requiring an intermediary or a lawyer to pose questions in such circumstances is reasonable. An accused does not, however, have a right to face to face confrontation with a complainant.¹⁴⁰ In the UK, the Criminal Justice Act 1991 provides that for minors under 17 years in sexual abuse cases, cross-examination of such a witness by an unrepresented defendant is prohibited.

2.11 Other Proposals

2.11.1 Initial Statements

The taking of complaints of sexual crimes involves the discussion of sensitive subject matter by the complainant and a stranger. The relaying of the complaint by a child is inevitably more difficult. The importance of the initial statement cannot be underestimated when in particular, an assessment of whether or not to prosecute is based primarily upon this statement. Practitioners report that it is not uncommon to see the statement to the Gardaí which lists a brief complaint, whereas the report of the assessment centres contains notably more information which would signify greater abuse than that stated in the initial statement to the Gardaí. It has been proposed that the taking of statements from children should be conducted jointly by the Gardaí and

¹⁴⁰ *Donnelly v Ireland* [1998] 1 I.R. 321 and *White v Ireland* [1995] 2 I.R. 268.

assessment personnel in order to reduce the number of times children must relay the complaint of abuse. In addition, such a joint interview would reduce the need to re-question the child for clarification of any issues.¹⁴¹

2.11.2 Social Worker Participation

The Second Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children recommends further study, with the assistance of An Garda Síochána and the Health Service Executive, of the submission that social workers participate in Garda interviews of child complainants.

2.11.3 Training Programmes

The Second Report of the Oireachtas Joint Committee on the Constitutional Amendment on Children has recommended adapting the criminal trial process to protect the welfare of child complainants and witnesses, such as the establishment of a child witness support service and training programmes for lawyers.

2.12 Conclusion: Full Legal Protection for Fundamental Rights of both Defendants and Victims

Any recommendations are insufficient in the absence of mandatory requirements that such measures are implemented. The qualification for the implementation of such measures being dependent on the availability of resources is unsatisfactory when seeking to protect the exploitation of children. It should be a Government priority to ensure an automatic availability of special protection measures for all child complainants. The Government has previously expressed regret for the delay in implementing the measures initially proposed by the Criminal Evidence Act, 1992. We need to carefully monitor the implementation of such measures. The creation of a just system of child protection should guarantee that such measures are established and maintained. A just system of child protection is achievable by these measures. Parity between the rights of defendants and victims should be sought. Legislation and protective measures must strengthen and safeguard both sets of rights. Weakening the rights of the defendant will not simply advance child protection. The fundamental principles of the criminal process must not be compromised. The real rights of

¹⁴¹ For further analysis see Ring, “Trial and Error: Current Problems in the Trial of Sexual Offences: A Prosecutor’s Perspective” (2003) *I.C.L.J.* 3.

children in the criminal justice process will remain unrealized in the absence of real protection, real support and a real remedy.

2.13 Recommendations

Consideration ought to be given to excluding non-exploitative sexual behaviour between peers from prosecution so as to preserve the autonomy and privacy of individuals in accordance with Art. 8 of the ECHR. Any interference with Art. 8, ECHR must be proportionate. A means of complying with this requirement may be through the enactment of age-gap focussed legislative provisions.

The defence of honest mistake as it currently stands in the Criminal Law (Sexual Offences) Act 2006 needs to be reassessed. It is felt that it lacks a sufficient degree of objectivity so as to preclude accused person's from relying on their own ignorance as to the age of a child in seeking to mount the defence. It is recommended that stronger objective elements be introduced to the application of this defence whilst maintaining a subjective standard particularly for those accused persons not in a position of authority to the child.

In terms of providing adequate protection to children from sexual offenders through the forum of the criminal law it is thought that an amendment to the current legislation would be sufficient as opposed to a constitutional referendum.

Lawyers and Judges involved in the hearing of cases of child sexual abuse or sexual offences against children should undergo training to perform their functions in a manner least traumatic for child complainants and witnesses.

An accused person should not be permitted to cross-examine a child complainant in person. Instead, it should be done through an intermediary or lawyer.

The taking of statements of child complainants should be a joint operation between members of An Garda Síochána and specially trained assessment personnel.

SECTION 3: FURTHER CHILD PROTECTION ISSUES

3.1 Introduction

This section aims to cover other pertinent issues in the area of child protection which have arisen since the last report. The “Ryan Report” recommendations will be discussed, and proposals regarding the implementation of these recommendations will be made. A Committee on Child Welfare and Protection will be also proposed as will a national review of the child protection system.

3.2 The Ryan Report

3.2.1 Introduction

One of the most significant developments in the area of child protection in Ireland in 2009 was the publication of the report of the Commission to Inquire into Child Abuse, otherwise known as the Ryan Report,¹⁴² in May 2009. The Commission, which was established in 1999, was tasked with the function of investigating child abuse in institutions of the State between the 1930’s and the establishment of the Commission in 2002. Victims, witnesses and in some cases, admitted abusers, gave evidence in large numbers.

The Ryan Report describes a system in which children were treated like prisoners and slaves instead of human beings with rights and potential. Abuse was described as systematic in almost all institutions, with some religious officials encouraging beatings and humiliation of the children involved. Government inspectors failed to stop the abuse of children as there were too few inspections and complaints were insufficiently investigated. The report also concludes that “the officials were aware that abuse occurred in the Schools and they knew the education was inadequate and the industrial training was outdated.”¹⁴³ Furthermore, the protection of the religious congregations and schools appears to have been a higher priority than protection of

¹⁴² Commission to Inquire into Child Abuse, *Committee Investigation Report*, (Commission to Inquire into Child Abuse, 2009) otherwise referred to as the “Ryan Report”, available at <http://www.rirb.ie/ryanreport.asp>.

¹⁴³ *Ibid.* See “Summary”.

the children in their care. The report provides a number of recommendations, many of which aim to prevent the abuse of children in the current system.

3.2.2 Ryan Report Recommendations

The first recommendation in relation to future prevention of child abuse is that child care policy should be child-centred and that the needs of the child should be the first priority. It is stated in s.3(1) of the Child Care Act, 1991 that “[i]t shall be a function of [the HSE] to promote the welfare of children...who are not receiving adequate care and protection.” However, in light of the recommendations of the Ryan Report, the language in this section could arguably be strengthened to reflect an obligation on the HSE to “ensure and uphold the rights and welfare of children”. As emphasised in the Ryan Report, the overall aim of child care should be to respect the rights and dignity of children and its top priority should be their safety and welfare. A change of focus in law and policy may be needed for changes in practice to occur. Engagement with the various arguments for and against an amendment to the Constitution to include an explicit recognition of the rights of children is beyond the scope of this report, however it must be considered that such an amendment may have the practical effect of promoting a rights-based approach in child protection.

It is clear that the main purpose of the institutions included in the report, i.e. caring for and educating children, was forgotten by the State. For this reason, the report recommends that the aims and objectives of the national child care policy should be clearly articulated and regularly reviewed in the future to prevent organisational interests becoming the main priority. The aims of the national child care policy could be subject to regular review by an independent group established specifically for this purpose. Related to policy review is the recommendation that a methodology for the evaluation of service provision should be devised. There is a pressing need to evaluate the extent to which services meet the aims and objectives of the national child care policy to ensure that the evolving needs of children remain the focus of service providers. Evaluation of services should be included in child care and child protection policies. All residential institutions and the Health Service Executive (hereinafter referred to as the “HSE”) should be subject to regular evaluation to assess outcomes in child care and protection. Data should be gathered on an ongoing basis and independent research experts should then collate and evaluate that data. Ireland can

learn from the research of Fink and McCloskey¹⁴⁴ who document 13 US child protection program evaluations published between 1978 to 1988. Fink and McCloskey emphasise the need for uniform definitions of child maltreatment and of what constitutes an “at risk” child or family; the need for fully measuring the impact of programs on the incidence of child abuse and neglect; and the need to collect data on some of the indicators that are targeted for special attention in prevention programs. This research and evaluation could be carried out in Ireland through the establishment of a National Child Protection Clearinghouse, as has been founded in Australia. The Clearinghouse has been part of the Australian Institute of Family Studies since 1995 and is funded by the Australian Government Department of Families, Community Services and Indigenous Affairs. The Institute provides a number of services to the child and family welfare sector in Australia. These services include the collection of information relevant to child protection, child abuse prevention, out-of-home care, the distribution of material to policy makers and practitioners and the completion of research.

Failure to prevent the abuses outlined in the Ryan Report was due primarily to the lack of implementation of the regulatory framework which was in place. For this reason, the report emphasises the importance of enforcing rules and regulations, reporting breaches and applying sanctions. Individual carers, superiors and the Department of Education all failed in this regard. To prevent this from occurring in the future, it is recommended that managers and those inspecting services must develop a culture of implementation of rules and standards. Managers need to be adequately trained on how best to do this.

The Ryan Report emphasised that independent inspections of institutions are essential. The Social Services Inspectorate (SSI) of the HSE, established in 1999 and overseen by the Health Information and Quality Authority, is an independent body which aims to promote the development of quality standards within the area of social services. SSI inspectors are authorised to enter any premises maintained by the HSE under s.69 of the Child Care Act, 1991. The Inspectorate has authority to examine premises and the treatment of children there and examine such records and interview

¹⁴⁴ Fink, A. and McCloskey, L. 1990, “Moving Child Abuse and Neglect Prevention Programs Forward: Improving Program Evaluations”, *Child Abuse and Neglect*, Vol. 14, pp.187–206.

such members of staff as it sees fit. However, there are significant failings in this system. For example, there is no provision for inspectors to examine services for children with an intellectual disability. Approximately 400 children with an intellectual disability are in full-time residential care and 500 children avail of such services on a part-time basis.¹⁴⁵ The Department of Health and Children should immediately implement the Health Act 2007 to provide a legal basis for SSI inspection of residential centres for children with intellectual disabilities.

Furthermore, all of the residential services which are provided to unaccompanied or separated children seeking asylum are provided by non-statutory, i.e. non-HSE, providers. The SSI currently does not have the requisite powers to inspect residential services operated by non-statutory service providers, despite the poor standard of provision highlighted as far back as 2005.¹⁴⁶ The HSE emphasises that the remit of the Health Information and Quality Authority will include inspections of non-statutory children's residential centres when the relevant sections of the Health Act 2007 are commenced.¹⁴⁷ However, the lack of inspection of such facilities constitutes a danger to the welfare of the children involved and immediate commencement of the relevant legislation is recommended.

The Ryan Report emphasises that it is crucial that children in care should be able to communicate concerns without fear. Although the SSI has drafted a brief document for service providers on practice guidelines for children's consultation,¹⁴⁸ it is not clear how the Inspectorate seeks children's views in its own inspections. There is evidence that children in care do not feel that their voices are sufficiently heard. Research of the Irish Association of Young People in Care indicates an, "...overwhelming sense of their not being involved in decisions about their lives."¹⁴⁹ It is recommended that service providers be given more comprehensive guidelines on

¹⁴⁵ Inclusion Ireland Press Release, *Inclusion Ireland calls for immediate inspection and standards in services for children with a disability*, May 2009.

¹⁴⁶ See Carl O'Brien, 'Migrant Group Aware of Child Victims', *The Irish Times*, 22 November, 2005.

¹⁴⁷ See, for example, letter from Hugh Kane, Assistant National Director, Primary, Community and Continuing Care to Mr. Denis Naughten, TD, 15 May, 2009, available at http://www.slainte.ie/eng/Access_to_Information_PQs/PQ/2009_PQ_Responses/February_2009/Feb_17/Denis_Naughten

[_PQ_5731-09_HIQA_social_services_reports_on_hostels_for_unaccompanied_migrant_children](http://www.slainte.ie/eng/Access_to_Information_PQs/PQ/2009_PQ_Responses/February_2009/Feb_17/Denis_Naughten_PQ_5731-09_HIQA_social_services_reports_on_hostels_for_unaccompanied_migrant_children).

¹⁴⁸ Social Services Inspectorate Practice Guidelines on Children's Consultation. Available at http://www.hiqa.ie/media/pdfs/sc_guidance_consultation.

¹⁴⁹ See website of Irish Association of Young People in Care, at <http://www.iaypic.ie/ORG/ypviews.htm>.

obligations to consult children in care and that the SSI outline in its annual report how and whether children are consulted during inspections.

The issue of the voice of the child in care proceedings should also be considered in terms of the implementation of the recommendations of the Ryan Report. It is recommended by the author of this Report that a regulatory body for guardians *ad litem* be established in the Republic of Ireland. In the UK, the organisation Cafcass, which is independent of the courts, social services and education and health authorities, is tasked with this role. The mandate of Cafcass is, *inter alia*, to make provision for children to be represented in court proceedings.¹⁵⁰ If established in Ireland, such a body could potentially oversee the training and employment of guardians *ad litem*, as well as providing much needed clarity on their role and appointment.

In my 2007 Report, I recommended that the guardian *ad litem* system in Ireland be reformed.¹⁵¹ A greater degree of clarity and certainty concerning the appointment, role and functions of the guardian *ad litem* was suggested. The appointment of a guardian *ad litem* is an appointment of significant importance, and it was recommended in my 2007 Report that those appointed as guardians *ad litem* hold the requisite professional qualifications. In May 2009, the Children Acts Advisory Board (hereinafter referred to as the “CAAB”) published guidelines on the appointment, role and qualifications of a guardian *ad litem*.¹⁵² The CAAB very helpfully set out a number of recommendations for reform in this area. In terms of the requisite criteria that must be satisfied for a person to be appointed a guardian *ad litem*, the guidelines categorise these as both experience and skills based. All applicants ought to be vetted by an Garda Síochána, must be fit to practice in the area, provide suitable references, hold a relevant third level qualification, have a knowledge of the courts system and have at least five years experience in the area of child welfare and protection. The guidelines also set out standards for the training of guardians *ad litem* and the manner in which they are to conduct themselves throughout the process from the preliminary

¹⁵⁰ http://www.cafcass.gov.uk/about_cafcass.aspx. Northern Ireland also has an equivalent body, NIGALA.

¹⁵¹ See Section 5.4 of the Report of the Special Rapporteur on Child Protection (November, 2007).

¹⁵² Children Acts Advisory Board, *Giving a Voice to Children’s Wishes, Feelings and Interests: Guidance on the role, criteria for appointment, qualifications and training of guardians ad litem appointed for children in proceedings under the Child Care Act 1991*, May 2009.

inquiry stage to post case care. These guidelines are to be welcomed as is the Child Care (Amendment) Bill 2009 which, when enacted, will provide an improved statutory footing for the guardian ad *litem*. However, to be truly effective the CAAB guidelines must be enacted on a statutory basis.

3.2.3 The Response of the Government to the Ryan Report

The Government pledged to respond in a comprehensive manner to the recommendations of the Ryan Report; and invited input from civil society. Many NGOs responded to this call, including the Children's Rights Alliance whose submission details a wide-ranging set of actions which it believes are necessary to fully implement the recommendations of the Ryan Report.¹⁵³

In July 2009, the Office of the Minister for Children and Youth Affairs published a response to the Ryan Report in the form of an "Implementation Plan".¹⁵⁴ The Government categorically stated that it "accepted all the recommendations of the Commission and is committed to their implementation".¹⁵⁵ The need to carry out independent inspections in respect of all services provided to children is acknowledged, as is the need to actually provide children with the opportunity to voice concerns or fears they may have. We have progressed as a society from a position of children being seen but not heard, to being heard: now it is time to listen. The effective provision of child welfare and protection services necessitates for the various agencies to work together. The placing of the child at the centre of all actions does form part of the Government's Implementation Plan. However, rhetoric seldom leads to progress. In recent times there has been an avalanche of reports commissioned on various issues arising in society. It is now time for action. The promises of greater accountability, more effective governance, and the provision of resources into child welfare and protection all need to be fulfilled. There has been an absence of a satisfactory degree of clarity and certainty in the context of child welfare and protection over the years. It is now evident that the only solution to this is to put into effect best practice through legislation. Suggested reforms need to become

¹⁵³ Children's Rights Alliance, *Learning from the Past: Responding to the Recommendations of the Commission to Inquire into Child Abuse Report*, June 2009.

¹⁵⁴ Office of the Minister for Children and Youth Affairs, *Report of the Commission to Inquire into Child Abuse, 2009: Implementation Plan*, July 2009.

¹⁵⁵ *Ibid.*, at p.1.

binding so as to have any effect at all. It is recommended that those aspects of the Implementation Plan directly relating to the protection of child welfare be set out on a statutory basis.

3.2.4 Recommendations

The rights and welfare of children as the main priority for the child care system should be enshrined in law and policy.

A National Child Protection Clearinghouse should be established.

Child care services should be subject to regular evaluation to assess outcomes in child care and protection. Data should be gathered on an ongoing basis and independent research experts should then collate and evaluate that data.

Managers need to be adequately trained on how best to develop and maintain a culture of implementation of rules and standards.

All care facilities should receive independent and thorough inspections. The Department of Health and Children should prepare immediately the necessary legislation to provide a legal basis for inspection of residential centres for children with intellectual disabilities and there should be immediate commencement of the relevant legislation to enable inspections of facilities for unaccompanied children seeking asylum.

It is recommended that service providers be given more comprehensive guidelines on obligations to consult children in care and that the Social Services Inspectorate outline in its annual reports how and whether children are consulted during inspections.

It is recommended that the guidelines for the appointment, role and qualifications of guardians ad litem published by the Children Acts Advisory Board be enacted on a statutory basis. In addition, a regulatory body for guardians ad litem should also be established.

3.3 Committee on Child Welfare and Protection

3.3.1 Introduction

Where the child protection system fails and children suffer serious harm, inquiries are necessary to highlight the failures involved, to learn lessons and to prevent such system failures from occurring in the future. There is a need for a standardised approach to inquiries into failings in the child protection system. The state is obliged under Art. 6 of the ECHR to ensure such inquiries are transparent and independent. Inquiries should also be placed on a statutory basis. If investigations are not statutory, they do not have the power to compel individuals to attend or co-operate. Furthermore, such investigations do not possess powers applicable to a court of law. There are a number of recent cases which highlight the need for inquiries that are transparent, independent and have a statutory footing.

Arguably an independent committee which would oversee such inquiries into failings in the child protection system should be established. Notably, a Serious Incident Management Team has been set up within the HSE for the purpose of developing and implementing policies and procedures to facilitate appropriate responses to all serious incidents. While this is to be welcomed, it is advisable that a Committee on Child Welfare and Protection be established on an ongoing, independent basis which would deal with all inquiries relating to child protection issues.

3.3.2 ECHR Considerations

Regard has to be had for the ECHR when inquiries are conducted in Ireland. Inquiries are required to be independent and transparent under Art. 6 of the ECHR,¹⁵⁶ which states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” The ECtHR has extended this principle to investigations and inquiries. Investigations and inquiries must be “effective” under the Convention. For example in the case of *Bitiyeva and X v Russia*,¹⁵⁷ the Court found that there had been a violation of the Convention when

¹⁵⁶ See *Findlay v U.K.* (1997) 24 E.H.R.R. 221 and *McGonnell v U.K.* (2000) 30 E.H.R.R. 289 for the determination of the Court that tribunals must be impartial and independent.

¹⁵⁷ Applications nos. 57953/00 and 37392/03, judgment of 21 June, 2007.

State investigations into the killing of the applicant's family had not been effective. The Court has held that, for an investigation to be effective, it is necessary that those carrying out the investigation and those responsible for it must be independent from those implicated in the events.¹⁵⁸

The public character of proceedings is a key factor in terms of the right to a fair trial under the ECHR. Article 6 of the Convention also holds that judgment shall be pronounced publicly. It is permissible to restrict the public nature of a judgment (and by extension an inquiry):

“... 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, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

A lack of a statutory basis for an inquiry may also be in breach of the ECHR if it diminishes the effectiveness of the investigation. In the case of *Paul and Audrey Edwards v UK*,¹⁵⁹ the ECtHR found that the lack of compulsion of witnesses diminished the effectiveness of the inquiry as an investigative mechanism. The Court continued that this detracted from the capacity of the inquiry to establish the relevant facts. It was found that this lack of a statutory basis for the inquiry, coupled with the private character of the proceedings, constituted a violation of the ECHR.¹⁶⁰

It is vital that in the future, inquiries into child protection matters and apparent failings in the child protection system are fully independent and statutory so as to ensure their effectiveness as inquiries. Such inquiries must also be public, unless there are reasons in the interests of morals, public order or national security, or other special circumstances which preclude this. The establishment of a Committee on Child Welfare and Protection to oversee such inquiries would go a long way towards ensuring this. Such a Committee should be based within the Office of the Minister for Children and Youth Affairs to both avail of and enhance the capacities of that office

¹⁵⁸ See, for example, *Güleç v. Turkey*, application no. 21593/93, judgment of 27 July, 1998, *Reports* 1998-IV, p.1733, §§ 81-82, and *Oğur v. Turkey* [GC] (2001) 31 E.H.R.R. 40.

¹⁵⁹ These cases involved alleged unlawful killing by State agents. (2002) 35 E.H.R.R. 487.

¹⁶⁰ The Court found that there had been a violation of the procedural obligation of Art. 2 of the Convention, the right to life, in those respects.

to investigate complaints relating to fundamental failings of the child welfare and protection system.

3.3.3 Recommendations

Suspected fundamental failings of the child care system should be responded to with independent, statutory inquiries. Such inquiries should also be public unless there are circumstances which preclude this.

A Committee on Child Welfare and Protection should be established to oversee inquiries into serious failings of the child protection system. Such a Committee should be based within the Office of the Minister for Children and Youth Affairs.

3.4 National Review of Child Protection Systems

It is a matter of concern that children can go unprotected in Ireland even when social services have regular contact with those children. It is also of concern that the *Children First* Guidelines are inconsistently applied¹⁶¹ and that users of the child protection system report it to be slow to respond when help is sought.¹⁶² Recent cases which resulted in deaths of children at the hands of parents further indicate overt failings in the child protection system in Ireland. Yet, no independent national review of the current child protection system in Ireland has been carried out to date. A significant lack of data means that there is little evidence to suggest how prevalent these failings in the Irish child protection system are. Buckley emphasises that this means that, at present, an accurate national picture of child protection practice is unavailable.¹⁶³ This affects the ability of the system to evaluate current practices and plan for future work accordingly. A number of other jurisdictions have engaged in such a review, and others are in the process of doing so. The Ryan Report highlighted the fact that lessons in relation to failings in the child protection system should be learned and the system of protecting children should be amended accordingly. The

¹⁶¹ Office of the Minister for Children and Youth Affairs, *National Review of Compliance with Children First: National Guidelines for the Protection and Welfare of Children* (Dublin: OMCYA, 2008).

¹⁶² Buckley, H., Whelan, S., Carr, N., and Murphy C., *Service Users' Perceptions of the Child Protection System*, (Dublin: Office of the Minister for Children and Youth Affairs, 2008).

¹⁶³ Helen Buckley, "Reforming the child protection system: why we need to be careful what we wish for" (2009) 12(2) *I.J.F.L.* 27.

Ryan Report states that there must be “acknowledgement of the fact that the system failed the children, not just that children were abused because occasional individual lapses occurred.”¹⁶⁴ Failures of systems, policy and management need to be examined. It is clear that Ireland would be engaging in best international practice if it were to commence such a review of its own child protection system.

There is evidence from other jurisdictions to suggest that major benefits can derive from reviews of child protection systems. The Scottish Executive’s audit and review, *“It’s Everyone’s Job to make sure I’m alright”*, was published in 2002.¹⁶⁵ Following a report into the death of a child, Kennedy McFarlane, the (then) Minister for Education, Jack McConnell, ordered a review of child protection across Scotland. The review aimed to promote the reduction of abuse and neglect of children and to improve the services for children who experience abuse or neglect. International practice, child protection data, as well as consultations with stakeholders (families, social workers etc.) were analysed to highlight weaknesses in the system and indicate how the needs of children were being met or unmet. The review also highlighted the quality of partnerships, case management practices, and staff support and management.

The Scottish review provided vital insight into the child protection system. It was found that although there were many instances where children were being protected well, there were many failings in the system. It was concluded in the review that 21% of children were not getting the protection they needed and a further 33% were only partially protected. The review contained a number of recommendations, including the proposal that National Standards were needed in relation to child protection. It was also established that many local authorities in Scotland are underfunded by the Executive in their allocation of funds for children’s services. A national shortage of qualified social workers was also identified. It was requested that local authorities and the Scottish Executive immediately address these issues. In some areas of Scotland, child protection co-ordinators have been appointed to assist in implementing the

¹⁶⁴ See Commission to Inquire into Child Abuse, Committee Investigation Report, (Commission to Inquire into Child Abuse, 2009), at “Summary”.

¹⁶⁵ Scottish Executive, *“It’s Everyone’s Job to Make Sure I’m Alright”: Report of the Child Protection Audit and Review*, 2002.

recommendations and to mobilise workers in relevant agencies to take these recommendations forward.

Another example of a review process is the *Report on the Child Protection Services in Tasmania* which was published in 2006.¹⁶⁶ This report was commissioned by the Minister for Health and Human Services and conducted jointly by the Deputy Secretary (Human Services) and the Commissioner for Children. The terms of reference of the Tasmanian review were similar to that of the Scottish review. International practice, child protection data as well as consultations with stakeholders were used to indicate potential for improvements to child protection in Tasmania. The report highlighted a system that was overwhelmed and struggling to cope. It also indicated that the failures existed at a systemic level and that the shortcomings were due to multiple factors. The report resulted in changes within the system, for example more extensive induction programmes for staff, upgrading of IT systems, as well as the initiation of a pilot project which aims to divert families from the statutory child protection system. However, more fundamental structural and cultural changes were also recommended, such as an evidence based framework for professional practice and amendments to the *Children, Young Persons and their Families Act* of Tasmania to improve the efficiency of the system.

Similar initiatives in other jurisdictions indicate that reform of the child protection system is increasingly becoming a priority in many other States. In Northern Ireland, a cross-departmental safeguarding policy statement has been drafted that integrates existing measures on protecting children with new actions and policies. The document examines the child protection system in detail and the final chapter outlines how the policy statement should be taken forward. In the UK, the death of Baby P has also prompted a national child protection review. Although Ireland has a policy document entitled *Children First*, this document merely provides national guidelines to strengthen the approach to protection of children. It does not constitute an overarching independent examination of the child protection system. The Tasmanian and Scottish examples indicate the usefulness of such a review. Such an examination could

¹⁶⁶ Tasmanian Department of Health and Human Services and the Commissioner for Children Tasmania, *Report on Children Protection Services in Tasmania*, October 2006.

identify shortcomings in the Irish system, in the same manner as the reviews outlined above, as well as ways in which such shortcomings could be addressed.

3.4.1 Recommendations

An independent national review of the current child protection system should be carried out. The review should involve examination of child protection data, international practice, and consultations with stakeholders to identify the primary child protection concerns and areas in need of reform.

SECTION 4: RECENT CASE LAW

4.1 Introduction

This section seeks to analyse reported judgments in cases concerning the welfare and protection of children since the publication of the previous report in October 2008. Due to the personal and sensitive nature of these cases they are heard *in camera* which means in private. This causes difficulties for those who seek to analyse and study this area of law. There are relatively few reported cases issued each year in the field of family law, and even less concerning children. Those judgments that are made available come from the High Court and indeed Supreme Court. However, the court of first instance when it comes to the welfare of children is the District Court from which we do not have the benefit of published written judgments. The following is a commentary on the few judgments that have been published since October 2008.

4.2 The Voice of the Child

The participation of children in court proceedings concerning them has always been a topic of great interest. There are many elements to the debate ranging from the possibility of joining children as parties to proceedings, providing legal representation to children and the guardian *ad litem* system. The unifying feature of all these elements is the desire to provide children with a voice in court proceedings. The Irish courts have recognised the constitutional right of a child to have his/her wishes taken into account in proceedings concerning him/her, having regard to his/her age and understanding.¹⁶⁷ In practical terms there has always been much debate as to what age a child ought to be before his/her wishes are taken into account. In December 2008, Finlay Geoghegan J. delivered judgment on a preliminary matter in a child abduction case dealing with this point. In *N. v N. (hearing a child)*,¹⁶⁸ the child was six years of age. In granting the relief sought and providing the child with an opportunity to express his views Finlay Geoghegan J. enunciated the following test:

“I have therefore concluded that the primary consideration of the Court in determining whether or not a child should be given an opportunity to be heard

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

¹⁶⁸ [2008] I.E.H.C. 382 (unreported, Finlay Geoghegan J., 3 December, 2008).

is whether the child on the evidence appears *prima facie* to be of an age or level of maturity at which he is capable of forming his own views.” The judicial recognition of children of the age of 6 years being capable of forming views on matters concerning them is a very important development. It illustrates an awareness of the importance of involving children in proceedings which will determine the manner in which their lives will be managed.

Whilst it is important to afford children this opportunity when matters are before the court, true protection for the welfare of children mandates that the opportunity be provided well in advance of any possible court proceedings. The abuse of children has been shrouded in secrecy for far too long in this State. As a people we are only now coming to terms with the levels of abuse perpetrated on children over the years. A cause of this was the age old saying “children should be seen and not heard”. Such a mentality can no longer be tolerated in the field of child protection. Children have a right to be heard. Not only should they be heard, but they should be listened to. Early indications of child abuse can be found in the changed behaviour of a child. An adequate response needs to be provided in that situation, and the first step in any such response is to talk to and listen to the child.

4.3 The Disclosure of Information

Teachers, and other professionals who interact daily with children, may suspect that a child is being abused at home. This places such a person in a difficult position. If they report their suspicions to the relevant authorities then an investigative procedure is put in train which may ultimately jeopardise the relationship of trust and confidence between the person, e.g. teacher, and child. If, however, they fail to report their concerns then the consequences may be grave. This issue formed the substantive backdrop to the case of *HSE v Information Commissioner*.¹⁶⁹ In that case an anonymous phone call was made to the HSE that a child was being abused at home. The HSE investigated the matter and in the course of the investigation four teachers were interviewed. Ultimately, the HSE found that there was no cause for concern and closed the inquiry. The parent of the child then sought to establish the identity of the anonymous caller with a view to instigating legal proceedings. She sought access to her personal records held by the HSE. The HSE provided partial disclosure. The

¹⁶⁹ [2008] I.E.H.C. 298 (unreported, High Court, McMahon J., 1 October, 2008).

parent appealed to the Information Commissioner who directed further disclosure, but declined to direct disclosure of certain information.

The HSE appealed this decision. In dismissing the appeal, McMahon J. referred to the *Children First* Guidelines and the recognition therein of members of the public being entitled to access documentation held by the HSE, or indeed to have decisions made by public bodies reviewed. The court held that having regard to this and other factors the HSE and the teachers involved must have been aware that the information they shared could be disclosed to the parent in satisfaction of his/her constitutional rights.

This case illustrates the need to place the *Children First* Guidelines on a statutory footing so as to ensure that all concerned persons are fully aware as to their duties and entitlements. Moreover, it demonstrates the need to consider the nature of reporting in this jurisdiction.¹⁷⁰

4.4 Criminal Law (Sexual Offences) Act 2006

As mentioned at Section 2.4 above, a challenge to the constitutionality and compatibility of the Criminal Law (Sexual Offences) Act 2006 with the ECHR has been brought in the High Court. In the Summer of 2006 a boy was charged under s.3 of the 2006 Act. At the time he was 15 years of age and the girl was 14 years of age. The girl was not charged. The DPP prosecuted the matter and it was set down for trial for the 28th April, 2009. So as to prevent the hearing of the trial until such time as his challenge to the 2006 Act could be heard Mr. D. sought an injunction.¹⁷¹

Whilst the offence of the defilement of a child pursuant to s.3 of the 2006 Act is gender neutral, s.5 specifically exempts a female from prosecution under the Act. Thus, the Act operates in such a manner so that if there is consensual sexual activity between two underage persons only the male can be found guilty and the female cannot. It is on that basis that Mr. D. claimed the 2006 Act to be discriminatory. In its defence, the State argued that it is permitted to draw a distinction between male and female persons in this area. However, the second limb of its defence is quite

¹⁷⁰ See Section 1 above.

¹⁷¹ *D.(a minor) v Ireland* [2009] I.E.H.C. 206 (unreported, High Court, Clarke J., 21 April, 2009).

persuasive. The State argued that s.3 of the Act is not of itself discriminatory as it applies to all underage persons. The alleged discriminatory element is to be found in s.5 alone, thus the only relief available to Mr. D., were he to succeed, is to strike down s.5. This will not prevent him from being prosecuted however. Rather it opens the door for the female to be prosecuted also. Therefore, even if successful Mr. D. will not prevent his prosecution. Clarke J. held that there was a fair question to be tried and granted a stay on the hearing of the criminal trial on the condition that an early hearing date be sought and obtained for the determination of Mr. D.'s challenge to the 2006 Act.