

***Rights-based Child Law:
The case for reform***

***A report by
the Law Society's Law Reform Committee***

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INTRODUCTION AND EXECUTIVE SUMMARY

INTRODUCTION

The Law Reform Committee of the Law Society of Ireland was established in November 1997 in order to identify and focus upon specific areas of the law in need of update and reform. The central objectives of the Committee are threefold. Firstly, the Committee aims to contribute towards improving the quality, fairness and effectiveness of Irish legislation in a number of selected areas. Secondly, the Committee seeks to represent the views of the Society's members in relation to a number of legislative initiatives and to enhance the Society's contribution to the development of Irish law. Thirdly, and more generally, the Committee aims to build relationships between the Law Society and others involved in the review of law and policy, including senior policy-makers and the voluntary sector.

To date, the Law Reform Committee has published reports on Domestic Violence (May 1999), Mental Health (July 1999), Adoption (April 2000), Nullity of Marriage (October 2001), Charity Law (July 2002) and Discriminatory Planning Conditions (March 2005) and continues to monitor developments in these areas and make contributions where appropriate. Work on other areas is ongoing. It was with the above objectives in mind that the Committee added to this list a report concerning aspects of child law.

1. SUMMARY - CHILDREN'S INTERNATIONAL AND CONSTITUTIONAL RIGHTS

The Irish Constitution

The position of children under the Constitution has been the subject of comment and debate because the protections afforded do not always achieve the best interests of the child. In cases of long-term care, fostering, adoption and health, the rights of children are subject to some degree to the rights of their parents or families, and preference is given to realising their rights in the framework of their (marital) families. The absence of specific rights for children as children, other than to education, dilutes their protections in certain circumstances.

The Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child identifies around 40 substantive rights. Some relate to the child as a member of a family, and some relate to the child as an autonomous being. There are potential conflicts in reconciling the rights identified. The Convention is not directly enforceable, and many of the rights are couched in aspirational language, and require significant commitment and investment by States to make them realisable. This makes the Convention a source of guidance, rather than a source of hard law.

The European Convention on Human Rights

The European Convention on Human Rights was not drafted with the rights of children specifically in mind, and it does not state the welfare principle, or recognise any rights specifically belonging to children. However the welfare principle has been recognised by the European Court in the context of disputes between child and parent, parent and parent, and parent and State. Although there is scope for conflict between that principle and Article 8, which provides for family and private life, the European Court has developed caselaw which tends to give priority to the children's interests. The balance between children's rights and those of their parents is still not settled, and because of this lack of clarity, some argue, courts in Member States may countenance parents attempting to pursue their own interests to the detriment of their children's.

Constitutional amendment

The absence of clearly defined children's rights under the Constitution and other instruments, combined with the policy of the courts in making declarations on the State's obligations, but refusing to enforce them with mandatory orders, means that there can, on occasion, be children who are entitled to a service or remedy but who have no way of enforcing it. In this context, we believe that constitutional reform is necessary to give children individual rights. We therefore recommend that the welfare principle and a list of children's rights, similar to those listed in Chapter 2, Section 28 of the Constitution of South Africa, be inserted in the Irish Constitution.

2. SUMMARY - THE LEGAL CAPACITY OF CHILDREN AND THEIR REPRESENTATION

Legal capacity

The UN Convention on the Rights of the Child achieved consensus on childhood lasting up to the age of 18, subject to the domestic laws of the signatories. However, children mature gradually, and benefit from growing responsibility and freedom as they approach majority. In order that their varying capacities and vulnerabilities be properly taken into account in any dealings with them under the law, greater understanding of children's development must inform legislation and its interpretation. Stages of ability and skill have been identified which broadly correspond to the ages of under 12, 12 to 13, 14 to 15 and 16 to 17. However, this information should not be used to ignore the particular abilities of an individual child, but to assist in understanding a child's likely stage of development. The consultation of children recognises their importance and personal autonomy, and can promote their decision-making capacities without saddling them with the final responsibility for decisions they should not have to have the responsibility of making.

While the capacity of children in civil legal matters is very restricted, they have full capacity in the eyes of the criminal law once they are over the age of criminal responsibility. This anomaly is balanced to some degree by the special treatment afforded to children in the criminal justice system.

In most cases, childhood ends at 18 years. However, in a range of sexual offences, 17 years is the critical age. The international law of conflict seeks to protect children and combatants under 15 years. In some education and employment law, 16 years is a watershed, and this age is also the age at which the law on abduction of children no longer applies, and at which young people can consent to medical or dental treatment. At the other end of the spectrum, a person up to 23 years may be a dependent member of the family, and payment of maintenance by a parent on his or her behalf may be ordered. Under succession law, a person's child may be of any age and still have rights arising from being a child.

The welfare principle requires the welfare of the child to be the paramount consideration. However, conflicts of interest can arise between siblings, under-age parents and their babies, and families. The role of the family in the Constitution has resulted in some decisions overriding the perceived best interests of the child in the interests of the family. In other cases, giving the welfare of a child primacy without taking into account the reasonable and legitimate, and sometimes vital, interests of their close relations has been challenged as not necessarily being a proportionate response, pointing to growing consensus on a more nuanced approach. Principles to reconcile these interests, to achieve the best all-round outcomes, may be the best approach.

Representation

Children need representation even more than most adults, and their parents may have conflicts of interest between their own interests and those of their children, or for other reasons may not be best placed to advocate on their behalf. Representation by a guardian *ad litem* and by a solicitor are the two most commonly recognised forms of representation for children. In addition, children's interests may be represented by social reports and expert evidence. However, the traditional arms-length approach of the courts in private law matters concerning children is being rethought in the United Kingdom. There a suite of proposals is being tested which involves a more hands-on approach by the welfare authorities, supervised by the courts. Tighter case management and diversion of CAFCASS staff from report-writing to active problem-solving are two of the new initiatives.

Guardians *ad litem* have a role prescribed under legislation, but there is little guidance on the circumstances in which they should be appointed. There is an implication that representation by a guardian and a solicitor should be alternatives, which is a misunderstanding of their respective roles, and should be corrected. There is little legislative guidance on guardians' qualifications, their functions and role, and recommendations are made in this regard. In particular, guardians have an important function in relation to the welfare, as opposed to the wishes, of the child.

Lawyers who represent children must consider them as clients and owe them the same obligations. In particular, they are not qualified to judge or represent the child's interests as opposed to wishes.

Legal representation can arise in various circumstances: if the child is accused in criminal proceedings, or is a witness, in civil proceedings as a witness, and in civil proceedings in public law (child care) cases and private law (family law) cases. Considerable adjustments to normal rules are made in criminal law cases to enable evidence to be given by children by hearsay, television link and recorded interviews, and the use of these methods is also permitted in civil cases, public and private law, in limited circumstances.

Guardians *ad litem* may be appointed in a range of child care cases, but their appointment is not routine, due to a variety of reasons. Evidence in public law child care cases gathered by means of social reports is very dependent on the quality of the report, and the delays inherent in such a system can be damaging to children.

Guardians *ad litem* may be involved in private law cases, but there is resistance to this on a number of grounds. Legislative provision for the separate representation of children in private law cases exists on the statute book, but has not been brought into effect. The consequences for children of being informed and consulted in decision-making which affects their lives is usually beneficial, not only at the time, but in the later life of the family. Aside from direct representation, evidence gathered by means of social report is important in practice, but has the shortcomings already mentioned.

In England and Wales a new approach is being attempted to improve the outcomes in family separation cases. It seeks to focus and educate parents on the paramount concern post-separation, that is, the welfare of the children. Children's interests are to be protected by better information and advice for parents. Support is offered by the provision of model parenting plans, school programmes on parental separation, and ready access to legal, practical and emotional advice. The focus of legal representatives is to be resolution rather than conflict, and in court proceedings, conciliation must take place before any hearings take place. Judges' management of cases is to be tighter, and court orders relating to access are to be energetically enforced. CAF/CASS personnel are to switch their resources from the preparation of reports to problem-solving and making agreements work, attending in person if necessary to ensure that agreements are kept. Through minimising court hearings, and the consequent reduction in formal representation of children in court proceedings, it may be that this system could in fact give better results for children. The introduction of family courts in this jurisdiction, with specialised judges and support services, could provide the necessary support framework for proposals such as these. Even now, with increased support from the Health Service Executive and the Probation and Welfare Service, steps could be taken to improve the management of family law cases and the position of the children involved.

Developments in relation to the representation of children as a result of the European Convention on Human Rights Act 2003 and EU legislation mean that greater attention will have to be given to ensuring children's representation on a more systematic basis. Ireland is not alone in this position. The

unequal position of migrant children in different EU jurisdictions under the Brussels II Regulation should also be addressed.

3. SUMMARY - CHILDREN AND CRIME

Youth crime prevention

The Children Act 2001 is a major piece of legislation, the need for which was evident for many years during which the Children Act 1908 continued to be used to deal with juvenile crime. In parallel with the preparation of the Children Act, other initiatives in the form of preventive programmes were taking shape, based on the recognised risk factors for offending by young people. Preventive programmes of four kinds receive state and voluntary support: family-based interventions, school-based programmes, individual and group initiatives, and community interventions. While welcome and successful to a considerable degree, there are problems with fragmentation, over-dependence on the commitment and talents of dedicated individuals and inadequate cohesion.

It is the experience of many solicitors and others working in the field that the insufficiency of services for at-risk young people results in their being criminalized. The failures and neglect of the families and agencies come to a head in the courts. The law relating to children and crime operates in a context which is hugely influenced by social factors. The juvenile justice system commonly comes into play at a relatively late stage in a child's development, when opportunities for more effective intervention have been missed. However, the numbers of children who are regularly in trouble with the law is relatively small, and improvements in the treatment of these children both in the legal system and afterwards, in detention or under the care of the probation service, are very achievable.

The Children Act 2001

Much of the Children Act 2001 is now in force, although it is not expected to be fully implemented before 2008. Most of it deals with juvenile justice, and the delay in full implementation is because of resource and organisational implications. The report makes recommendations in relation to advocacy for juvenile suspects, the role of the Ombudsman for Children and access for children to the complaints procedure for the Garda Síochána. The Family Welfare Conference may work very well in some circumstances, but certain changes are proposed to give more discretion on whether such conferences should be convened, to avoid wasting time and resources unnecessarily, and to ensure that sufficient resources are available to enable their decisions to be implemented.

The Garda Liaison Programme has been put on a statutory footing as the Diversion Programme, and in Part 4 of the Children Act powers are given to enable Garda conferences to be convened. Recommendations are made in relation to the chairing of Garda conferences, the legal position of children who are refused admission to the diversion programme, but who may have admitted a crime, and the problem for the legal representatives of young people in reconciling their duty to give legal, as

opposed to ethical, advice to young defendants with their concern for the longer term interests of the child.

Part 5 of the Children Act increases the age of criminal responsibility from 7 to 12 years. Recent research on cases coming before the Children's Court reveals that very few children under 14 years are charged and come before the court. This Part should therefore be brought into effect as quickly as possible, and the existing services in the spheres of health and education should be upgraded to deal with younger children outside the criminal justice system.

Ensuring the correct treatment of child suspects in Garda Stations requires special training for those Gardaí charged with the responsibility for detained children, and improvement in the conditions under which children may be held, to include ensuring that children are never held with adults. The issue of suitable qualifications for independent adults who agree to attend the interviewing of children in the absence of their parents is also considered.

Part 8 of the Children Act 2001 deals with proceedings in court. A common cause for concern is the lack of a legal provision to require the Health Service Executive to appear in court when the accused child is in its care, when it is the child's *de facto* guardian, or at the request of the defendant, his family or legal representative. We recommend that this situation should be remedied. We also recommend that pilot programmes for closer co-operation between those working in juvenile justice should be developed. The problem of inadequate accommodation for detained children, so that they continue to be held with adults, should also be addressed.

Part 9 of the Children Act 2001 deals with the powers of courts in relation to child offenders. We recommend the abolition of the power to impose fines on young offenders. We also recommend the repeal of sections 111 to 114 of the Act, which enable parents to be made answerable for the misconduct of their children through the use of parental supervision orders, orders to pay compensation and orders to exercise control, on the grounds that they do not work in practice and can have results which are detrimental to the child's welfare.

Children Detention Schools are enabled to take in children who are convicted of offences, and also children without a criminal record. We recommend that this be changed to exclude children without criminal records, in accordance with international standards and the ethos of the Act.

Current proposals to introduce anti-social behaviour orders and make them applicable to young people is contrary to the ethos of the Children Act 2001 and threatens to criminalise behaviour which is a breach of civil, not criminal, law. Such a development would be regrettable, in that the child-centred approach of the Children Act and the use of prison as a last resort would be undermined.

Treatment of convicted children

In relation to what happens after a child is convicted, there are many recognised deficiencies in the services available at that stage. The lack of “joined-up” services in many instances results in failures of coordination between the different agencies, and reduced effectiveness so that, despite the significant investment in detention schools, the probation service and other agencies, there are many individual youngsters who benefit from no meaningful intervention. While legal reforms have a role to play, reform of the juvenile justice system can only be effective in a wider context.

4. SUMMARY - CHILDREN NOT IN THE CARE OF THEIR PARENTS: CHILD REFUGEES AND ASYLUM SEEKERS, UNACCOMPANIED MINORS AND TRAFFICKED CHILDREN

Important research into the situation of unaccompanied child asylum seekers and the legal framework within which they fall was published in 2003 by the Refugee Council of Ireland. Trafficking in unaccompanied minors in Ireland was the subject of a study published by the IOM in 2004. Both reports contained recommendations to improve the reception, care and protection of such children, and we support their recommendations. Insofar as this report overlaps with the findings and recommendations already published, this only serves to highlight the need for reform.

International legal framework

The status of applicants for refugee status is regulated by a body of international law to which Ireland is a party. Some instruments specifically cover the position of unaccompanied minors, and practice manuals have been developed by international bodies to set out guidelines for the treatment of refugee children, including those who are separated from their families. They include the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (the UNHCR Handbook), the Resolutions of the Executive Committee of the High Commissioner’s Programme (EXCOM Resolutions), the Policy on Refugee Children (1993), Refugee Children: Guidelines on Protection and Care (1994), and the Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (1997). The Separated Children in Europe Programme (STEP) has developed the Statement of Good Practice (last updated 2004). The UN Convention on the Rights of the Child forms the framework for these documents. Ratified by Ireland in 1992, the Convention is not directly applicable in Irish law, but the State has obligations at an international level to ensure that its provisions are being implemented. This body of law constitutes best international practice, and while not having the force of law, it has to a varying degree received judicial recognition. It is also acknowledged by the State bodies having responsibility for dealing with unaccompanied minors. However, the current statutory framework does not lend support to the standards set out in those instruments.

Legislative framework

The Refugee Act 1996, as amended by the Immigration Acts 1999 and 2003, brings the provisions of the Geneva Convention of 1967 into effect. There is very little reference to minors, accompanied or unaccompanied, but from the reading of section 8, it appears that a minor may apply for asylum from within the State or at its frontiers. Section 8(5) makes a narrow provision for separated children, described as “children not in the custody of any person”. This is a narrower definition than the definition of a “separated child”, defined in the UNHCR Guidelines 1997 as a child who is “separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so”. The wider definition gives greater protection to the child where a conflict of interest arises between the child and the accompanying person.

The refugee determination process

Initial applications for recognition of refugee status are made to the Office of the Refugee Applications Commissioner (ORAC) and appeals lie to the Refugee Appeal Tribunal (RAT). These offices also make decisions on transfer of applicants under the Dublin II Regulation, which provides for applicants to be returned to the EU country where they first made an application. Applicants are assisted by the Refugee Legal Service at no cost, and positive developments in all organisations in relation to the treatment of unaccompanied minors have been noted. However, some areas of concern remain:

- accelerated procedures,
- orders designating countries as safe countries of origin,
- the Minister’s power to give directions on the prioritisation of applications, including applications from unaccompanied minors, and
- the application of the Dublin II Regulation, which incorporates the safe third country principle.

As these procedures apply equally to unaccompanied minors, they are contrary to the Statement of Good Practice and the UNHCR Guidelines.

The Dublin Convention and Dublin II Regulation

The Dublin Convention established the pooling by Member States of their responsibilities to asylum seekers, and the principle that a decision by one Member State absolved others from any duty to consider another application by the same person. The Regulation improves the position of family reunification in relation to minors (Article 6), but does not make the child’s best interests a matter for consideration in the event of no family reunification. These agreements have been criticised because of the way in which Member States attempt to redistribute asylum seekers without harmonising the underlying definition of who qualifies for protection, and the procedures by which decision-making takes place, including appeal rights.

The application of the Dublin Convention and Dublin II Regulation give rise to problems in relation to unaccompanied minors. The best interests principle is not required to be applied to such minors, even though not all EU countries are equal in the ways they treat such children. We recommend that the

application of this principle be required as a matter of policy and law. Other recommendations are made in relation to the information which must be given to unaccompanied minors under the Regulation, and in particular in relation to the State's discretion to deal with an asylum application, even though it is not required to do so by the Regulation.

Burden of proof

The burden of proof placed on unaccompanied minors in relation applicants coming from countries designated as safe countries of origin, or where an application for asylum has been made in such a country, does not take into account child-specific considerations. They include the general compliance in the country at issue with the UN Convention on the Rights of the Child, and the child-friendliness of the procedures involved in an asylum application. In this way, the legislation fails to meet international standards.

Assessment credibility

Similar considerations apply in relation to the requirements for assessment of credibility. The criteria set out in section 11B of the Refugee Act 1996 are hardly relevant to the situation in which asylum-seeking minors find themselves. They are usually the objects of actions by adults who, for a variety of reasons, send the children off as unaccompanied minors. We recommend amendments to the Refugee Act 1996 to exempt sections 11A, B and C from application to unaccompanied minors.

Family Unity

The principle of family unity means that the children of an asylum seeker derive their refugee status from their parent. The Refugee Act does not provide for this, and yet decisions concerning parents are applied to children. It is possible for children to make separate applications, and this fact is not highlighted in an information leaflet issued by the Office of the Refugee Applications Commissioner. There is uncertainty about children's derived refugee status in the event of death, separation or divorce involving the refugee parent. We recommend that the principle of family unity be explicitly stated to be part of Irish law, and that the status of a spouse or minor who derives status from a refugee should be clarified. Special procedures should also be put in place to facilitate individual applications for refugee status by accompanied minors, which are necessary in cases where there may be a conflict of interest between the minor and the accompanying person.

Unaccompanied minors

The statutory provision for unaccompanied minors set out in section 8 of the Refugee Act 1996 is minimalist, and leaves it to the discretion of the Health Service Executive to decide what steps to take under the Child Care Act 1991, and whether or not to make an application for asylum on the minor's behalf. Such children may be taken into care, or may be treated merely as homeless, which leaves open the question as to whether they are always treated as Irish children in their position would be. Children arriving alone with no relatives in Ireland, those with relatives in Ireland, and those accompanied by a person who may not be a relative, are all referred to the local area of the Health Service Executive,

which assesses the position and decides where and with whom the child should live. This guards against possible exploitation and abuse in the event the child is trafficked. If it is decided that the child should make an asylum application, he or she is registered with the Refugee Legal Service, and receives the support of a social worker throughout the process.

Unaccompanied children who are reunited with persons who are not parents or their legal guardians do not benefit from follow-up supervision by the local branch of the Health Service Executive. They no longer come under the definition of “unaccompanied minor”, and the Health Service Executive, with limited resources, does not continue to monitor their welfare. There are reasons to think that sometimes there may be a conflict of interest between such children and the persons who are caring for them, not least in relation to the question of whether or not they should make independent applications for refugee status. The solution to the risk of the trafficking and exploitation of such children may be the requirement of a DNA test to establish any relationship. We also recommend regulations to ensure that such children continue to benefit from Health Service Executive supervision. It would be helpful also if a unified definition of such children were to be adopted, based on the wider definition of “separated child” used in the Statement of Good Practice of the Separated Children in Europe Programme. We recommend that separated children defined in this way should be made the legal responsibility of the Health Service Executive, while recognising that this may have resource implications.

Age assessment

Age assessment is a difficult task, which has importance because the age of an asylum seeker determines whether he or she is treated as a minor (if under 18), or an adult. The number of unaccompanied minors has reduced to 124 in 2004 from a peak of 841 in 2003, of whom 729 were accepted as minors. The decision on age is made by a senior staff member of the Office of the Refugee Applications Commissioner (ORAC), who has received training from UNHCR. The critical issue is the person’s maturity and vulnerability, rather than stature. However, the officer has no professional expertise in child development or specialist knowledge of the child’s background and culture, and there is no appeal provided. The Health Service Executive generally accepts ORAC’s determination.

An asylum seeker claiming to be a child, but not assessed as such, is unable to receive legal aid from the Refugee Legal Service because of the wording of the legislation. The legislation, however, provides for discretion to waive the requirement that a person represented must be of full age, or have a guardian *ad litem*. This discretion is not used by the Legal Aid Board. The Service assists such applicants with legal advice and assistance in drafting an appeal, but does not represent the applicant. An impasse arises whereby such applicants are effectively denied representation contrary to human rights and international standards. We recommend the development of an objective age assessment procedure with guidelines, and provision for appeal or review. The exclusion of this area from the remit of the Ombudsman and Ombudsman for Children makes the need for an appeal procedure more necessary. The international standards recognise that age assessment cannot be an exact science, and

stipulate a wide margin of error. We recommend that legal representation should be available to a young person refused recognition as a minor, and if necessary a guardian *ad litem* should be appointed.

Publication of guidelines and decisions

Neither policy guidelines nor decisions at application or appeal level are published, probably as a defensive measure to prevent abuse of such information by non-genuine applicants. A High Court decision on the matter, allowing access by applicants to relevant tribunal decisions under the Immigration Act 2003 and the Constitution, is under appeal. Internal guidelines on unaccompanied minors have been developed by ORAC and the Refugee Appeals Tribunal, based on international standards. However, their application cannot be assessed in the absence of their publication. The arguments for publication include the promotion of transparency and accountability in the administration of the system, the development of legal concepts and the consistency of approach among decision makers and the assistance afforded to other jurisdictions in developing their practice. Decisions the subject of judicial review are reported, but they are not representative and they do not contribute greatly to the clarification, understanding and development of the law arising from decisions to grant asylum. We recommend the publication of guidelines and decisions, particularly in the cases of unaccompanied minors who are owed special safeguards including legal protection.

Role of the Health Service Executive

The Executive's general duties include promoting the welfare of children who are not receiving adequate care and protection, taking children into care where this is perceived to be necessary for the child's care and protection, and endeavouring to reunite children with their parents where this is in the children's interests. The Executive can act where a child appears to be homeless. The provisions of the Child Care Act 1991 give the Executive a range of powers to deal with unaccompanied minors, but the constraints on resources and staffing levels means that many such young people are not receiving adequate levels of guardianship and care, and may be less well cared for than Irish children in the childcare system. Some improvements are reported and with the decreasing number of unaccompanied minors coming into the jurisdiction, the situation is not static. We recommend that in line with the Statement of Good Practice, provision should be made for the Health Service Executive or other organisation to take on the role of guardian as envisaged in those guidelines.

Complementary or subsidiary protection

Unaccompanied minors may need protection and care, and may be fleeing from appalling conditions, but may not come within the definition of refugee. In the absence of refugee status, such a child has no legal status in Ireland, and has no entitlement to remain. In other states, a system of "complementary protection" has been developed which gives legal status to persons who do not qualify as refugees, but who nevertheless need some form of protection owing to a well-founded fear, for example, of torture, inhuman or degrading treatment, severe violation of their human rights, a threat to their lives, safety or freedom as a result of armed conflict or systematic human rights violations. An EU Council Directive adopted in April 2004 proposes to harmonise the definition of refugee and introduces "subsidiary"

protection status, on the basis of a risk of serious harm. Serious harm includes the death penalty, torture or inhuman or degrading treatment or punishment, and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. The Directive is due to be incorporated in domestic law by October 2006. We endorse the Irish Refugee Council recommendation that a formal system for granting complementary protection should be adopted for granting protection in a unified investigative process. The same rights should be granted to a person with complementary protection status as are afforded to a person who has been determined to be a refugee. However, it is important that the introduction of complementary protection should not undermine the granting of refugee status.

In addition to complementary protection, we recommend that a status of temporary permission to remain in the country should be made available to children, to give them legal status while their best interests are assessed. An application for temporary leave to remain should be possible in its own right, and not as a defence to a threat of deportation. A non-exhaustive list of Leave to Remain grounds should be set out in legislation, and reasons should be given for refusals. The procedure should not be limited to an application in writing, but should include an interview, with legal representation, and input from the applicant's guardian.

The UNHCR Guidelines and the Separated Children in Europe Programme Statement of Good Practice make provision for the views of children's parents to be taken into account in assessing a child's application for refugee status. A strong case exists for the State to actively seek the views of parents where this is possible, and this is reinforced by the UN Convention on the Rights of the Child, Articles 5 and 22. We recommend that a system for the systematic tracing of the families of unaccompanied minors be instituted to enable consultation with the families in cases of minors' applications for refugee status, and otherwise.

Aged-out minors

Aged-out minors are minors who reach the age of 18 during the asylum determination process. Contrary to the recommendation in the Statement of Good Practice, once applicants reach the age of 18 they are treated as adults, and no longer receive support from a guardian or social worker while their cases are being processed. The Refugee Legal Service normally retains aged-out minors within its unit for unaccompanied minors. The question of deportation of aged-out minors also arises, where they are particularly vulnerable. We recommend that there should be transitional provision made for aged-out minors, similar to the aftercare provision in section 45 of the Childcare Act 1991.

Education

While applications on asylum are being determined, asylum seeking children (accompanied and unaccompanied) only have a right to fulltime education while they remain under the age of 18, nor are they entitled to take advantage of government adult education programmes. If there is a negative determination of refugee status in relation to a minor, it seems that whether he or she can continue with

his or her education depends on the school in question. We endorse the recommendation of the Irish Refugee Council that asylum seekers should be entitled to the same rights to adult education and training as refugees and Irish citizens have now.

Essentially, what is being proposed is that a child-centred approach is taken to the issue of unaccompanied minors.

5. SUMMARY - CHILDREN NOT IN THE CARE OF THEIR PARENTS: CHILDREN'S RIGHT TO IDENTITY

While there is no legislative requirement that identifying information on birth mothers of adopted children be withheld, this is the practice. Many birth mothers were given an assurance of lifelong anonymity. The Adoption Board and the High Court may order disclosure of information held on the Adopted Child Register, subject to this being in the best interests of the child. The Supreme Court decision in *IOT v B* held that a child's right to know his or her mother was an unenumerated constitutional right which flows from the natural and special relationship between a mother and her child, but that the mother's right to privacy was also a constitutional right and could take precedence over the child's right. The case concerned two informal adoptions and the rights of non-marital children to equal succession rights arising from the Status of Children Act 1987. As the adoptions did not come within the terms of the Adoption legislation, the best interests of the child could not be argued within section 8 of the Adoption 1976, and their constitutional right was the basis of their application. If section 8 had applied, it is not clear how far a countervailing constitutional right to privacy on the part of the mothers could have been argued.

The child's right to identity in international law

Articles 7 and 8 of the UN Convention on the Rights of the Child 1989 recognises a child's rights to registration on birth, to a name, nationality and as far as possible, to know and be cared for by his or her parents. States Parties to the Convention also undertake to respect and vindicate children's rights to preserve their identities including nationality, name and family relations.

Children without birth certificates are rare in Ireland, but when this arises in relation to children offered for adoption abroad, it should trigger questions about the legitimacy of the persons involved in offering the child for adoption. The reference to family relations is considered to cover both birth and adoptive relations. The wording of Article 8(2) was intended to cover the theft of children from their "disappeared" parents during the Junta regime in Argentina in the 1970s. Deprivation of elements of a child's identity which is legal may be by closed adoption, anonymity of the donor of genetic material, and the lack of sufficient efforts to trace the parents of an abandoned child for whom no birth certificate exists.

The child's right to identity and donated genetic material

The general consensus that a child should be informed of his or her adoption is not as prevalent in relation to children who are the product of donated genetic material. In the UK, the Fertilisation and Human Embryology Act 1990 provides that the birth certificate of a child born through donated genetic material should name the parents undergoing fertility treatment and not the biological donor. Anyone born after the 1990 Act came into effect can apply, on reaching 18, to discover if he or she was conceived through donated genetic material, and is entitled to limited information on physical characteristics of the donor, and also to information on whether a prospective spouse is a close relation.

The ECHR – *Rose v Secretary of State for Health*

The European Convention on Human Rights was given direct application in domestic law by the Human Rights Act 1998 in the UK, and the European Convention on Human Rights Act 2003 in Ireland. In *Rose v Secretary of State for Health*, the applicants, who were conceived through the donation of genetic material, argued that their rights under Articles 8 and 14 were being infringed. They argued that the State had a positive obligation to collect and ensure that certain information was available for children as a result of artificial insemination, including the information preserved in adoption cases. Secondly, they argued that the State should establish a contact register for willing donors and willing offspring. The court concluded that Article 8 did apply to the applicants' position. Referring to two previous decisions of the European Court of Human Rights, (*Gaskin v UK* and *Mikulic v Croatia*) the judge concluded, inter alia, that respect for private and family life can involve positive obligations on the State as well as protecting the individual against arbitrary interference by a public authority, and that this respect requires that everyone should be able to establish details of their identity as individuals, including their origins and the opportunity to understand them. It also embraces their physical and social identity and psychological integrity. The right comprises to a certain degree the right to establish and develop relationships with other human beings, and the absence of an existing relationship other than an unidentified biological connection does not prevent Article 8 from applying.

Ireland

There is no legislation on these questions in Ireland. The Government-appointed Commission on Assisted Human Reproduction published its report in May 2005 and made some recommendations which are relevant to children conceived with the use of donated genetic material or as a result of surrogacy. It recommended the recognition of children's right to know the identity of donors on reaching 18, and the surrogate mother, although it does not envisage a reciprocal right for the donors. In order to make these recommendations possible to realise, procedures to ensure the traceability of donated genetic material will be required. The parents involved will need to be open with their children and donors will have to agree to openness when donating. The medical ethics guidelines under which assisted reproduction currently takes place in Ireland do not specifically state children's right to discover the identity of their genetic parents, nor that relevant records must be maintained to enable this to happen. However, the Assisted Reproduction Sub-Committee of the Executive Council

of the Institute of Obstetricians and Gynaecologists' report, included in the report of the Commission on Assisted Reproduction, asserts these rights.

Since April 2005 in the UK any donors of genetic material must consent to the disclosure of their identities to any offspring when reaching the age of 18 years. However, as long as other jurisdictions permit anonymity, evading these rules remains possible. It is also unclear how children should be informed that they are the result of assisted reproduction techniques, and many parents conceal this from their children. They may be even more inclined to do so now that tracing biological parents will be possible. Where donors are concerned, they may be reluctant to donate without anonymity.

Research tends to indicate that disclosure to children of their origins will lead to fewer problems and better outcomes. The results of a UK Department of Health consultation indicated growing acceptance of children's rights to know their identities. However, it is likely that many parents do not tell children of their origins, and the right of a young person to check the position on reaching 18 does not help those who have no suspicion of that heritage. Further work must be done to arrive at policies to guide what, if any, information is to be given to children conceived using donated material, and how it is to be done.

The Irish Medical Council amended its Guide to Ethical Conduct and Behaviour in 2004 to permit the donation of surplus embryos conceived during in vitro fertilisation techniques to infertile couples. In this way, an embryo can be effectively adopted, but no legislative requirements have been put in place to protect the identities of the children born in this way. A duty of care to such children may also arise, although there are great difficulties in the way of making judgments on who are suitable parents.

Unregulated donation

Donor gametes (sperm or ova) and children are available for adoption on the internet, without regulatory supervision. While impossible to regulate outside Ireland, it should be possible to regulate the donation of genetic material within the country, requiring Irish organisations to respect the future rights of any children conceived as a result of their services.

Unregulated adoption

Legislation to implement the Hague Convention on Inter-country Adoption is in preparation, following a Law Reform Commission report on the matter. The abuses arising in unregulated adoption through the internet and commercial adoption agencies are well documented. Such abuses can include the suppression of the identities of the children involved, and it is important that Ireland should do what it can to foster international standards for the children's protection.

Unregistered fathers

The Civil Registration Act 2004 introduced new requirements for the registration of children, which involve more information in relation to the parents including each parent's PPSN. There are reports

that this is leading to some fathers refusing to register as parents because of fears that they may be required to contribute to their children's support in the future. This situation may lead to a small class of children without registered fathers.

We recommend that the right of a child to his or her identity should be given statutory recognition and protection in legislation regulating adoption and donation of genetic material. This right should encompass the child's right of access to identifying information on his or her biological parents. In the case of children who are the product of donated genetic material, research and consultation should take place on the best method to enable them to acquire knowledge of this fact.

The State and organisations working in this field have a responsibility to foster greater understanding of the issues of identity for children among the public at large, and to uphold high standards in this regard in their work involving other countries. They also have a role in relation to the development and application of internationally accepted rules and standards on inter-country adoptions and the control of donated genetic material. The Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption, 1993 should be implemented in Irish law without further delay.

Natural fathers should be encouraged to register as the parents of their non-marital children and the possible disincentive to registration arising from the new requirements of the Civil Registration Act 2004 should be monitored.

6. SUMMARY - MINORS' CONSENT TO MEDICAL TREATMENT

Medical treatment

The difference between medical "examination" and "treatment" is not clear in the legislation and is important especially where proxy consent may be given on behalf of children. We recommend that this be clarified, and that "examination" be limited to non-invasive examination.

Consent

There are no formal guidelines on how doctors should weigh up the interests of a child patient, the wishes of parents and their own medical opinions. We recommend that in accordance with Article 12 on the Convention on the Rights of the Child, as a general principle, doctors should be required by law to give children an opportunity to express their views and have them given due weight in accordance with their age and maturity.

Consent by proxy for the young child

There is uncertainty in Irish law on whether the consent of both parents, or one parent only, is needed when a valid proxy consent to the treatment of a child is required, and this should be clarified in legislation. We recommend that while the consent of one parent is sufficient, the consent of both

parents should be required where this is reasonably practicable. Where one parent withholds consent, there should be a means of making an informal emergency application to the High Court. If the parents are not married, the father's consent should not be essential unless he is appointed as a guardian of the child. Parents may not make decisions for their children which are contrary to their welfare, and are expected to make decisions in the best interests of their children.

Medical procedures to which a parent cannot consent

Female genital mutilation and circumcision

There are certain medical procedures to which parents cannot consent, because they are contrary to the interests of the child. There is no express legislation prohibiting female genital mutilation, and we recommend that this be remedied.

Male circumcision for social, cultural and religious reasons is more contentious. Its effects are much less damaging than female genital mutilation. However, it is nonetheless an unnecessary, potentially dangerous and irreversible operation and there is a strong case to argue that parents do not have the power, in law, to consent on behalf of their infant sons. The UN Convention on the Rights of the Child and the European Convention on Human Rights also tend to support this position. From a rights-based child law perspective, most members of the Committee believe that the circumcision of boys violates their right to bodily integrity and that it is not capable, in law, of proxy parental consent. However, there are strong practical reasons for not enforcing an outright prohibition. It would risk driving the practice underground, the constitutional right to travel means the operation can be done abroad, and it is likely that prohibition would be divisive and alienating to the sections of society which have traditionally practiced this custom. We recommend that, as a minimum, infant male circumcision should be unlawful unless carried out by appropriately trained personnel, to protect the interests of the child. This, however, leaves open the possibility of future liability, on the part of parents and the State, for the violation of the affected children's bodily integrity.

Sterilisation of mentally handicapped children

The sterilisation of a mentally handicapped child may have longer term social advantages for the child in some cases, but may not be necessary for a child's health, may be done for the advantage of family or carers, and may not necessarily be what the child might decide on reaching majority. We recommend that court approval should be required for the sterilisation of a mentally handicapped child, and that the circumstances in which sterilisation can be sanctioned should be defined in legislation. This protection should also be extended to mentally handicapped adults.

Organ and tissue donation

Organ and tissue donation by a child also raises questions about the parents' capacity to consent by proxy on behalf of the child. The beneficiary is usually a sibling or close relative of the child, and the only benefit accruing to a child donor is the psychological benefit of helping to save a life, and of not losing a family member. The Council of Europe's Convention on Human Rights and Biomedicine sets

out exceptions which may be made to the general rule that only people with capacity to consent may donate an organ or tissue, and provides other safeguards. There is an absence of protection of minors under the law at present, and guidance for parents and doctors would be useful. Because of parents' potentially conflicting interests, a court may be best placed to ensure the protection of a potential donor child's best interests, with the child donor represented before it by a guardian *ad litem*. The disadvantage of such a requirement is the potential delay in decision-making. Whether or not by ratifying the Convention on Human Rights and Biomedicine, the position of child donors should be clarified.

The duty of a parent to consent to certain medical procedures

This duty has been considered in the Supreme Court case *North Western Health Board v HW and CW*. The case concerned the PKU test for newborns, which the court accepted would be in the interests of the child. However, because of the constitutional position of the family, the parents' decision to refuse the test was upheld. The Court held that only in extreme situations, where there was an immediate and fundamental threat to the life of the child, would State intervention be justified. Such circumstances have since arisen in relation to children refused consent to blood transfusions on religious grounds. Court orders permitting the transfusions were obtained. There does not appear to be protection under the law afforded to children who are not in immediate risk of death. We recommend that the State should have the capacity to intervene to protect the best medical interests of a child in the event of a long-term threat of a deteriorating nature, which could be prevented by early intervention. Proportionate intervention should be permitted where the effects of not intervening are severe, and best medical practice suggests that intervention is necessary for the future health of the child.

The mature minor

The law recognises the increasing maturity of children and their growing capacity for autonomous decisions. However, the absolutist nature of the Constitution gives rise to some ambiguity between the rights of the mature child and those of the family. The Non-Fatal Offences Against the Person Act 1997, section 23 gives autonomy to 16-year-olds to consent to surgical, medical or dental treatment, without the need for parental consent. Whether minors of 16 and 17 years have total autonomy as regards medical treatment, or their parents still hold some level of concurrent control, is uncertain. Under similar legislation in England and Wales, the courts have held that the right to consent to or refuse medical treatment is not absolute, in that minors aged between 16 and 18 can be compelled to submit to medical treatment in certain circumstances, and secondly, that minors *under* the age of 16 have the right to consent to, and thus refuse, medical treatment in certain circumstances.

There is a potential conflict in Irish law between a child's right to privacy and bodily integrity on the one hand, and Articles 41 and 42 of the Constitution on the other. While doctors should take into account the child's maturity in treating a child, they may also be under a constitutional duty to inform the child's parents that they are treating the child.

This raises practical problems in relation to sensitive treatments for drug addiction and contraception, where young people may be deterred from seeking necessary medical advice because of the fear that their parents will be informed. In England and Wales, pragmatism has won and a young person's right to confidentiality will be respected, subject to the safeguards set out in the *Gillick* case. Under this test, the young person must understand the doctor's advice; she cannot be persuaded to inform her parents of the matter; it is likely that her physical or mental health will suffer should she not receive the treatment; and her best interests require her to receive the treatment without her parents' consent.

Under section 2(10) of the Criminal Justice (Forensic Evidence) Act 1980, in cases where a body sample is sought from young persons aged 14 to 17, consent must be obtained from the parents or guardians of a minor, as well as from the minor. From the age of 17, the minor alone must consent, and under 14, the parent alone must consent on behalf of the child.

The present uncertainty in relation to mature minors' capacity to consent to and refuse medical treatment should be clarified in legislation. Legislation should set out guidance on the minor's age and other factors which may be considered to determine the capacity of minors of under 16 years to consent to, and refuse, medical treatment. The test developed in the *Gillick* case is a useful starting point. If a minor does not have capacity in accordance with the proposed legislative guidance, the consent of parents or guardians should be required.

Minors aged 16 and 17 should be presumed to have full capacity. If they refuse treatment, and have capacity to do so in accordance with the proposed legislative guidance, a court should still be able to intervene to order treatment which is necessary to preserve life and is in their best interests, on the principle that minors should be protected against making choices which irreversibly limit their future choices, and in accordance with the State's obligation to protect the right to life under Article 2 of the European Convention on Human Rights. In the event of such a court application, the minor should be represented by a guardian *ad litem*.

The Child Care Act 1991

Under the provisions of this Act, decisions on the healthcare of children in its care may be made by the Health Service Executive subject to different conditions, depending on what type of care order is in force. While the legislation would appear to allow parental wishes and indeed children's wishes to be disregarded, this is contrary to best practice as set out in the National Standards for Children in Residential Centres, 2001. The National Standards recognised that young people and their families should be consulted about decisions which affect their lives and future, and that parents are to be kept informed about events in their child's life, and are to have every opportunity to make a positive input to the care of their child, and are to be invited to participate in events such as medical and dental appointments.

Children who are wards of court

There is no reported case on wardship and the medical treatment of a minor. It can be presumed that the President of the High Court, in exercising the jurisdiction of wardship, has a duty to ensure that the child is receiving adequate medical treatment, and has the capacity to grant orders to that effect. Any guardian appointed under the wardship rules can be presumed to have considerable discretion to approve routine and minor treatment for the child. In practice, children in need of care are not made wards of court, but are dealt with in the child care system. The Law Reform Commission recently recommended the abolition of the wardship jurisdiction and its replacement with a new Public Guardianship system. In any adaptation of the Law Reform Commission's proposals for children, we recommend that account should be taken of the constitutional position of children.

The Mental Health Act 2001

Involuntary admission, by its very definition, means the admission of a patient to a psychiatric institution without his or her consent, and by the very fact that a child under 16 cannot "consent" to medical treatment as such, it would appear that any child admitted to a psychiatric institution should be regarded as an involuntary patient. However, in the Mental Health Act 2001, the consent of a parent is treated as the consent of the child. This means that a young person can be treated as a voluntary patient, even though his admission is in fact contrary to his wishes.

The definition of "child" in section 2 of the Mental Health Act 2001 refers to a person under 18 years of age (other than a person who is or has been married). This is inconsistent with section 23 of the Non-Fatal Offences Against the Person Act 1997, which provides that minors of 16 years have competence to consent to and refuse medical treatment, as though they were of full age. This conflict should be resolved, and we recommend that the Mental Health Act 2001 should be amended to be consistent with section 23 of the Non-Fatal Offences Against the Person Act 1997 so that children of 16 and 17 years are presumed to have capacity to consent to, or refuse, medical treatment as if they were of full age.

We recommend that the consent of the parents or guardians of a child under 16 years should be sufficient proxy consent for the admission of that child to a psychiatric hospital or the child's treatment there, where a doctor is satisfied that the child does not have capacity, in view of his or her age, maturity and understanding, to consent to or refuse medical treatment, that the child is suffering from a mental disorder warranting voluntary admission, that such admission is in the child's best interests, that the child will be admitted to a hospital with appropriate facilities for the care and treatment of children with mental illness and that no appropriate alternative method of treatment is available at the time. We recommend that such a child's admission be subject to automatic review by a Mental Health Tribunal.

In the event that the child is judged to have sufficient capacity in view of his or her age, maturity and understanding to consent to or refuse medical treatment, the child should be entitled to agree to

voluntary admission or be admitted in accordance with the procedures under the Mental Health Act 2001 as though the child were an adult.

In relation to all persons under 18 years of age, we recommend that a court should not direct involuntary admission unless it is satisfied that the child is incompetent to make a decision about the need for hospitalisation, the child be admitted to a hospital with appropriate facilities for the care and treatment of children with mental illness, the hospital proposed to admit the child will provide treatment which is appropriate for the child's condition, and that an individualised treatment plan has been written and presented to the court by the admitting hospital.

In order for the Health Service Executive to be able to detain a child for the purpose of mental treatment, it must make an application to the District Court under section 25 of the Mental Health Act 2001. In order to make the application, the child must first be examined by a consultant psychiatrist. If the parents of the child refuse their consent to the examination, or if they cannot be found, the Health Service Executive may apply without the prior examination of the psychiatrist. However, there is no legislative provision for the situation which arises if the child refuses to be examined by a psychiatrist. In that event, we recommend that other evidence be brought before the court to enable it to decide that the child may be suffering from a mental disorder, and that the child should be admitted and detained for assessment.

When an order under section 25 has been made, section 61 of the Mental Health Act deals with the medical and psychiatric treatment of children. The wording of the section is ambiguous and we recommend that it be amended and clarified. Specifically, clarification is sought as to whether the approval of one or two consultant psychiatrists is needed under the section. We recommend that both the approval of the treating consultant psychiatrist and another consultant psychiatrist be required. We also recommend deletion of references to "consent" in section 61.

7. CHILDREN'S SUCCESSION RIGHTS

Rules of succession

Children's succession rights are limited by the rights of a parent's surviving spouse, so that children will inherit any shares due to them after their surviving parent or stepparent has been provided for. The entitlements for family members prescribed by the Succession Act 1965 reflect the moral and legal obligations owed to spouse and children during life. If a parent dies intestate, with a spouse and children, the spouse is entitled to two thirds and the children to one third of the deceased's estate. If a parent dies intestate without a spouse but with children, the children take in equal shares. If a child has predeceased the parent, his or her children are entitled to take his or her share. Non-marital and adopted children have the same rights, but children to whom the deceased was *in loco parentis* do not.

The surviving spouse may appropriate the dwelling house as part of her share, along with household chattels. If her share is not enough to cover the value of the house, any infant child's share for whom she is trustee may also be appropriated. In this way the family home is preserved for the child as well as the spouse. Generally, there is no provision for judicial discretion to provide a greater share for a particularly vulnerable member of the family, such as a disabled child. This has the merits of certainty and equality.

If a parent dies testate, the surviving spouse has a minimum entitlement but the children do not. If there are children, the surviving spouse is entitled to one third. If there are no children, she is entitled to one half. The surviving spouse may elect to take under a bequest or under her legal right share. In practice, the family home is commonly held under a joint tenancy, so that it does not form part of the deceased's estate. A surviving spouse may inherit the family home, usually the main family asset, as the surviving joint tenant, and then also inherit the bulk of what is left under the will or intestacy.

Reconciling the protection of children's property rights with the orderly administration of estates poses a challenge because of children's legal incapacity to act for themselves. In most cases, a child will have an adult who can secure, represent and protect his interests. In the absence of such an adult, a parent can provide protection for children by appointing a trustworthy executor. In the absence of an executor, an administrator will be appointed, whose correct behaviour is guaranteed by a bond. However, this does not guarantee the behaviour of any trustees appointed. The personal representative is responsible to a minor beneficiary until he or she appoints trustees under section 57 of the Succession Act 1965. Trustees owe extensive duties to beneficiaries under trust law: to act in good faith and in a responsible and reasonable manner, to secure and safeguard trust property, to invest it, account for it and provide information to the beneficiaries, distribute it and pay for a minor's maintenance and advancement as appropriate. If a trustee fails in his or her duty, the beneficiary's remedy lies in a right of action for breach of trust, but this may be meaningless if the beneficiary does not know of his entitlement, if there are strong family objections to seeking a remedy or if assets belonging to a minor have been wasted and there is nothing to be gained by legal action. A better solution to the vulnerability of minors' rights would be periodic accountability of the trustees to an independent body which could intervene to protect the minor's property if it were perceived to be at risk. In the context of a general review of trust law, the Law Reform Commission recommended a general requirement for at least two trustees or a corporate trustee body, where there is a child beneficiary.

England and Wales, Scotland

The position in England and Wales is similar to that in Ireland. In Scotland, the Children (Scotland) Act 1995 provides for cases where a person is holding property to which a child is entitled, and but for this legislation, the holder of the property would be required to pay it over to the child's parent or guardian. In such cases, the holder of the property must (if the value is over £20,000) or may (if the value is over £5,000) seek directions from the Accountant of Court. This is not the case if the parent or

guardian has been appointed as a trustee, and in such cases, the person holding the property is required to transfer it to the trustee parent or guardian. The Accountant of Court may apply for the appointment of a judicial factor (who may be a parent or guardian) to administer the property, he may direct the property to be transferred to him, or he may direct its transfer to the parent or guardian, subject to any conditions he considers appropriate, including that no capital expenditure may be incurred without his approval, and that the securities and bank books be submitted for annual inspection. Other provisions detail the duty owed by persons administering a child's property, and the constraints on such persons are less than those on trustees. The courts have wide powers relating to parental responsibility and the welfare of children, including the protection of their property. The courts may make orders protecting children's property on an application or on their own volition. The views of the children concerned may be expressed and taken into account. The Scottish system has the potential to give greater protection to children's property than the protection afforded under trust law alone.

South Africa

The position of minors' interests in South Africa is set out in the Administration of Estates Act 1965, although the system set out there may be superseded and dispensed with by a will. The essence of the system is security of minors' property by bonds or sureties and detailed accountability to the local Master of the High Court or the court itself, reinforced in some instances by the criminal law. The South African system goes much further to protect minors' property rights than the system in this jurisdiction.

Minor Wards of Court

Under Rule 65 of the Rules of the Superior Courts, there is no obligation on a guardian or trustee of a minor to account annually to the Registrar of Wards of Court. This is in contrast with the duties of a Committee of an adult ward and is anomalous. Rule 65 provides for the appointment of a guardian, whose powers and duties are set out in section 10 of the Guardianship of Infants Act 1964. The guardian's responsibilities extend to the person and estate of the child, unless otherwise provided. In relation to property, the guardian is entitled to possession and control of the child's property and must manage it and receive all profits until the child comes of age. A guardian is not required to account for the property to any third party, but is regarded as the ward's trustee. He may seek court directions on any question affecting the child's welfare. If the child's property is simply transferred to court, the appointment of a guardian is not necessary for property purposes, although it may be needed for other reasons. A guardian is required to provide security in the form of insurance bonds or personal sureties (which however are proving increasingly difficult to get). The President of the High Court can authorise the guardian to deal with the ward's property by way of sale, mortgage and lease and has other wide powers in relation to the ward. The cost of making a child a ward of court is currently around €5,000. Fees will also be incurred by the ward's estate including legal fees, court fees and stamp duty, and a small percentage of the clear annual income. The guardian is usually not paid for work done personally but reasonable professional assistance will normally be paid for. The current modest cost of court supervision is likely to increase as a result of a review of fee structures, but still

may represent good value for supervision and security. We believe that the protection of minors' property rights does require accountability by trustees to an official body, such as the Office of the Registrar of the Wards of Court. Further, the replacement proposed by the Law Reform Commission of the current wards of court system by a guardianship system could be adapted to serve the interests and special needs of minors without much adjustment.

40 years after the Succession Act 1965

Reviewing the changes which have taken place in society since the enactment of the Succession Act in 1965, we argue that the most important difference today is the greater expectation on the part of the public that matters should be regulated to protect the vulnerable. No official information on the numbers of minors inheriting property are available, but there is anecdotal evidence that child successors are not well protected, and are often ignorant of their inheritances or entitlements. The absence of trustee supervision makes negligence and abuse more likely. Papers relating to a parent's estate may be lost. While the Inland Revenue Affidavit will be available from the Probate Office, the final accounts will not be and may not be traceable through the personal representative or his solicitor. The actual number of minors annually inheriting property valued at over €50,000 (say) is likely to be small. There is no reason that minors should not be afforded the same protection as adult wards, where the cost of such added protection is proportionate to the interest to be protected. The option of such supervision should be open to people concerned about the futures of their children. By making personal representatives and trustees more accountable, it may discourage people from taking on these roles. However, trust law already requires the keeping of accounts and imposes other duties, and if compliance is required, some persons will rise to it, and in other cases professional assistance may have to be sought.

Pending any future reforms of the wards of court system in general, we recommend that a system of accountability for personal representatives and trustees of minors' inheritances be instituted in a like manner to the wards of court system for adult wards. Such a system should provide for supervision of the management of property of minors with a value over a threshold amount, which amount would take into account the relative costs and benefits of supervision.

In the context of the debate on reform of the wards of court system and the proposals for added protections for vulnerable elderly people, we recommend that a system of accountability by trustees for the protection of minors' estates be also considered, where the value of the interest would make the cost of such a system worthwhile. If abuses are suspected, any person should be able to alert the supervising authority, which should be empowered to investigate, make orders and impose sanctions. An additional objective of such a system should be to make transparent the details of the administration and disbursement of estates involving property inherited by minors.

Much can be done by individuals and their solicitors to ensure proper arrangements to protect children's rights, including care in the appointment of trustworthy trustees and careful disposition of

property which is usually sufficient. The above recommendations relate to those cases where such careful precautions have not been taken.

Provision for children on application to court under section 117

Section 117 of the Succession Act 1965 gives a child of any age who has been un- or under-provided for the option of applying to court for provision out of his or her parent's estate. Any award under this section may not affect the right of the deceased's spouse, and if the surviving spouse is the child's natural parent, the child has no claim against the surviving parent's share of the estate or any devise or bequest. An application under section 117 must be made within 6 months, which is a rigid time limit and may not be extended by a court. There is no obligation on the personal representative to notify a child or the child's guardian, and the potential injustice suggests that some flexibility should be introduced. It would also be desirable to provide for an independent assessment in relation to whether a section 117 application should be made or not, in the case of minor children and children of any age suffering from an intellectual disability. In the event that an award is made under section 117, it may be necessary for the court to adjust other dispositions to achieve a fair result between other beneficiaries. While in practice the courts have assumed this power, it is desirable that explicit authority be provided.

In certain exceptional cases, non-natural children (dependent foster children, stepchildren and grandchildren) may have a compelling claim on provision by a deceased surrogate parent. To enable the courts to exercise their discretion in such cases, it would be desirable that section 117 would be extended to include them. This does not mean that they would be entitled to any provision, merely that they would have standing to apply in appropriate circumstances.

If stepchildren are to be given this standing, the question arises as to whether the marriage giving rise to the stepparent-child relationship should still be subsisting at the time of the deceased stepparent's death, in order to give rise to the standing to make a claim. In order that a stepchild should not have to compete with a stepparent at the time of his or her parent's death, the better choice is to allow the relationship to survive the death of a parent or divorce of a stepparent, and leave discretion to the court. In the event that family property is left away from a child to a stepparent, who then leaves it away from the child of the family, legal standing for a stepchild to seek proper provision out of the stepparent's inflated estate would be possible.

Assisted conception

The position of children born as a result of assisted conception, including the surrogacy or the donation of genetic material, is not yet legislated for in Irish law. Other jurisdictions have clarified the assumptions to be made when such children are born. For example, in Australia a number of jurisdictions have legislated that the biological donor of sperm is not to acquire the status of father, but that the consenting partner of the mother or surrogate mother (recipient of a donated ovum) is to be regarded as the father.

Until the position is legislated for, there will be uncertainty about the status of any resulting children, including their succession rights.

Appropriation of a dwelling and the adult child with learning disability

The family home may be appropriated by the surviving spouse and if her share is not sufficient, the spouse may also appropriate the share of a minor child for whom she is a trustee. Section 56(10) of the Succession Act 1965 also gives discretion to a court to appropriate the house and chattels to the surviving spouse (and minor children, if any), even if she does not have enough money to pay other shares out of the estate. This option however is not available to a surviving spouse with an intellectually disabled adult child. It would be useful to extend section 56 to secure the home of an intellectually disabled adult child in appropriate circumstances.

Intestate succession – the absence of discretionary provision

Discretionary provision under section 117 only applies in cases where the deceased has made a will. This can result in situations where vulnerable children suffering from disability or other handicaps may be left badly provided for, in comparison with their siblings. The present position has the merit of equality and certainty, and thereby avoids the litigation which section 117 has occasioned. However, it would be desirable that transfers between beneficiaries of an inheritance would be facilitated in the interests of family solidarity, to provide for family members who may need extra provision, without the present, often prohibitive, cost of stamp duty and capital acquisitions tax. The revenue cost and benefit implications of family arrangements consequent on an inheritance and within two years thereof should be examined with a view to introducing this relief.

Rights-based Child Law: The case for reform

*Members of the Law Reform Committee for
at least one of the years 2003-04 and 2004-05*

John Costello, Chair 2003-04
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SUMMARY OF RECOMMENDATIONS

1. CHILDREN'S INTERNATIONAL AND CONSTITUTIONAL RIGHTS

1

We recommend that a provision similar to Chapter 2, Section 28 of the South African Constitution be inserted into the Irish Constitution. It provides:

“Every child has a right

- a. to a name and a nationality from birth;*
- b. to family care or parental care, or to appropriate alternative care when removed from the family environment;*
- c. to basic nutrition, shelter, basic health care services and social services;*
- d. to be protected from maltreatment, neglect, abuse or degradation;*
- e. to be protected from exploitative labour practices;*
- f. not to be required or permitted to perform work or provide services that:
 - i. are inappropriate for a person of that child's age; or*
 - ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;**
- g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 (freedom and security of the person) and 35 (arrested, detained and accused persons), the child may be detained only for the shortest appropriate period of time, and has the right to be
 - i. kept separately from detained persons over the age of 18 years; and*
 - ii. treated in a manner, and kept in conditions, that take account of the child's age;**
- h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and*
- i. not to be used directly in armed conflict, and to be protected in times of armed conflict.*

*A child's best interests are of paramount importance in every matter concerning the child”.
(p. 61)*

2. THE LEGAL CAPACITY OF CHILDREN AND THEIR REPRESENTATION

2

Should children's rights always be given precedence over the rights of others? To do so can be to give them disproportionate weight, and a better approach may be to weigh the interests of the children against those of other persons in the family unit, giving precedence to the children's interests when they cannot be reconciled with the parents', but also making allowance for the relative importance of the different interests to be considered. We recommend that this interpretation of the welfare principle be promoted where appropriate. (p. 71)

3

We recommend that section 26(4) of the Child Care Act 1991 be amended to remove the requirement that representation by a guardian ad litem should be excluded on the joining of a child as a party to a case concerning care and supervision orders under Part IV of the Act. (p. 74)

4

We recommend the following steps to clarify and give guidance to the delivery of services by guardians ad litem:

- *Legislation should be enacted to enable regulations to be made to set standards for guardians ad litem. The regulations should deal with matters such as supervision, training, monitoring and accountability.*
- *Guardians ad litem should be recognised as independent officers of the court, whose primary role should be the representation of the child's best interests.*
- *Legislation should be put in place to facilitate the role of guardians ad litem, for example in relation to having access to the child to be represented, to family and other persons concerned, and to medical, school and other records which may have relevance.*
- *Provision should be made to allow the guardian ad litem to be involved in the formulation of any settlement by the parties. It can be as important that the voice of the child be heard in such negotiations, as it is in the hearing itself.*
- *The anomalies between public and private law in relation to representation by a solicitor as well as involvement of a guardian ad litem should be eliminated, so that it is possible in public law proceedings for a guardian ad litem to seek legal representation in the right circumstances.*
- *In both public and private law cases where representation for a child is considered necessary and in the best interests of the child, state funding should be made available for such representation where the means of the parents are insufficient. (p. 77)*

5

We recommend that legislative guidelines and rules of professional conduct be developed for the legal representation of children. (p. 83)

6

We recommend that solicitors do not exceed their area of professional competence or indeed their professional indemnity insurance policies, and seek to involve guardians ad litem where they consider that representation is required for a child's best interests. (p. 83)

7

We recommend that a mentor service be made available to young persons accused of crimes in the absence of other suitable support, such as their parents, to assist and guide them during the criminal process. (p. 85)

8

We recommend that as a matter of practice, only solicitors with expertise in child law matters and a commitment to this area of practice be appointed to represent children in public law child care proceedings. We further recommend that the Family Law Committee of the Law Society study the question of development of a child law panel and make recommendations in this regard. (p. 97)

9

We recommend that the experiences of the implementation of the different proposals of the England and Wales green paper “Parental Separation: Children’s Needs and Parents’ Responsibilities, July 2004” be studied. We further recommend that ways of implementing these proposals in an Irish context be developed, in the light of the experience in our neighbouring jurisdiction. We recommend that similar changes to the way in which parental separation is currently dealt with by the courts should be explored and put in place, as appropriate and as resources can be found. (p. 99)

10

We recommend that the vulnerable position of the migrant child arising out of the divergent child-consultation procedures between Member States should be addressed in advance of the 7-year review of the revised Brussels II Regulation required under Article 65. (p. 103)

3. CHILDREN AND CRIME

11

We recommend that the Health Service Executive be notified by the Education Welfare Board of cases where a non-attendance notice under section 25 of the Education (Welfare) Act 2000 is served, and consult with the Executive about assistance for the children and parents. (p. 113)

12

We recommend that the Education (Welfare) Act 2000 be amended to enable the National Education Welfare Board to apply to the Circuit Court for an order that a child undergo an assessment. (p. 113)

13

We recommend that a system of advocacy for children in the juvenile justice system be developed, tested and implemented throughout the State, and that age-appropriate information be made available to children in the juvenile justice system in relation to their rights on arrest, interrogation, charging and detention. (p. 118)

14

We recommend that the Ombudsman for Children Act 2002 be amended to remove the limitation on the Ombudsman’s remit of investigations into places of custody for children. Such access would require an amendment to Schedule 1, part 2 of the Ombudsman for Children Act 2002. (p. 118)

15

We recommend that special procedures be put in place under Part 4 of the Garda Síochána Act 2005 to ensure access by under-18-year-olds to the Ombudsman complaints procedure, and age-appropriate procedures for the hearing of such complaints. (p. 118)

16

We recommend that section 7 of the Children Act 2001 and section 23A of the Childcare Act 1991, as inserted by Part 3 of the Children Act 2001, be amended to permit the Health Service Executive to seek a waiver of the requirement for a family welfare conference by application to the District Court, if in its opinion it would be unlikely to result in any change to the child's circumstances or be of assistance to the child. (p. 120)

17

We recommend that in the event that the Health Service Executive does not convene a family welfare conference on its own initiative or at the request of the family of the child concerned, it should be open to the family to apply to the District Court for an order convening such a conference and requiring the attendance of a representative of the Health Service Executive and other named parties. We recommend that the Court should continue to supervise such cases to ensure that the decisions of the conference are followed through. (p. 120)

18

We recommend that additional, designated funding be made available to support and enable implementation of family welfare conference action plans. (p. 120)

19

We recommend that the judicial practice of joining children to care proceedings to enable the imposition of care conditions enforceable by the contempt of court procedure be discontinued. We also recommend that the Child Care Act 1991 be amended to prevent the use of this procedure for this purpose. (p. 123)

20

We recommend that section 31(4)(b) of the Children Act 2001 be amended to provide that the facilitator of a conference should be a neutral, suitably qualified person who is not a member of the Garda Síochána. (p. 125)

21

We recommend that in the event that a child indicates willingness to admit responsibility to a crime, but because of the gravity of the offence, is refused admission to the diversion programme, immunity under section 48 of the Children Act 2001 should be extended to evidence of such admission or implied admission. (p. 126)

22

We recommend that a code of practice be developed and agreed among legal representatives of children in consultation with others to cover situations in which legal advice may conflict with moral guidance, in order to resolve the conflict between the right to non self-incrimination and the benefits of genuine confession and acceptance of responsibility. (p. 126)

23

We recommend that Part 5 of the Children Act be brought into effect without further delay, as a result of which the age of criminal responsibility will be raised from 7 to 12 years, with a rebuttable presumption that a child between 12 and 14 years is incapable of committing a crime. (p. 126)

24

We recommend that members of the Garda Síochána who undertake the role of member in charge should be required to have received special training in the treatment of child suspects, and that the definition of member in charge in section 3 of the Children Act 2001 be amended accordingly. (p. 127)

25

We recommend that the conditions and procedures for the holding of children in Garda stations be reviewed in the light of the principles expressed in the National Children's Strategy and our international obligations. We further recommend that steps be implemented as part of this review to ensure that sufficient facilities suitable for children are provided to ensure children are not held in custody with adults. (p. 128)

26

We recommend that qualifications and criteria be drawn up under section 70, in relation to persons nominated by the member in charge of a Garda station for attendance at the interview of a child, to reflect the need for training and independence. We further recommend that panels of suitable persons willing to act be assembled and maintained for each area and that appropriate training be provided. (p. 129)

27

We recommend that section 67 of the Children Act 2001 be amended to extend the age of fingerprinting from 17 to 18 years. (p. 130)

28

We recommend that special training be afforded to judges hearing juvenile crime cases, to reflect the ethos of the Children Act 2001 and the realignment of juvenile justice with remedial rather than punitive priorities. (p. 131)

29

We recommend training of other persons dealing with young persons involved in the criminal justice system, such as members of An Garda Síochána, solicitors, probation officers, and members of the Courts Service and Prison Service. (p. 131)

30

We recommend that a working group of stakeholders should formulate proposals to achieve respect for the rights of the children appearing before the court, and a more effective and user-friendly court system. (p.1316)

31

We recommend that the Children Act 2001 be amended to extend the anonymity afforded to children appearing before the Children Court to other courts. (p. 132)

32

We recommend that the Children Act 2001 be amended to require the Health Service Executive to send a representative to a court hearing at the request of the defendant, his family or legal representative. (p. 132)

33

We recommend that the service providers working with children at risk or already in the juvenile justice system should initiate programmes to strengthen co-operation and coordination. (p. 133)

34

We recommend that the principle of separation of minors from adult prisoners be respected and that separate accommodation be provided expeditiously to enable this to happen. (p. 134)

35

We recommend that the exclusion of the Health Service Executive from the definition of “guardian” in section 3 of the Children Act be deleted. (p. 135)

36

We question the morality and effectiveness of imposing fines on juveniles, and recommend that the power to do so should be repealed. (p. 136)

37

We recommend that sections 111 to 114 of the Children Act 2001 be repealed. (p. 137)

38

We recommend as a matter of best practice that section 161(5) of the Children Act 2001 be amended to exclude the use of facilities for the detention of children found guilty of offences by children not so found. (p. 139)

39

We recommend that the creation and maintenance of a database holding key information on at-risk children by the Health Service Executive should be considered, subject to appropriate safeguards. (p. 143)

40

We recommend that consultation with young people having experience of the juvenile justice system, persons working with them both in NGOs and government agencies, advocates of young people and academics familiar with research and developments elsewhere should be undertaken in any review of the juvenile justice system. (p. 144)

**4. CHILDREN NOT IN THE CARE OF THEIR PARENTS:
CHILD REFUGEES AND ASYLUM SEEKERS, UNACCOMPANIED MINORS
AND TRAFFICKED CHILDREN**

41

We support the recommendations of the Irish Refugee Council as set out in their report on Separated Children Seeking Asylum in Ireland, August 2003. (p. 149)

42

We support the recommendations of Dr. Pauline Conroy as set out in her report on Trafficking in Unaccompanied Minors in Ireland, International Organisation for Migration, June 2004. (p. 149)

43

We recommend that the Refugee Act (Section 22) Order 2003, regulation 7(3) be amended to exclude its application to children under the age of 18 years consistently with regulation 7(8)(a), and to lay down a procedure to ensure that such children are given the correct information. (p. 154)

44

We recommend that the information required to be provided to applicants under Article 3.4 of the Council Regulation 343/2003 (the Dublin II Regulation) should include information on the State's discretion not to transfer applicants under Article 3.2 and that the implementing regulations should be amended to require the provision of this information. The fact that this discretion must be exercised at

application stage and cannot be exercised at appeal stage by the Refugee Appeals Tribunal should also be highlighted. (p. 154)

45

We recommend that in the case of separated children, the best interests test should always be applied before returning separated child asylum applicants to the places of first application for asylum. We recommend that this approach should be legislated for or adopted as a matter of policy. (p. 154)

46

We recommend that sections 11A, B and C of the Refugee Act 1996 be amended to exempt their application to applicants for refugee status who are unaccompanied minors. (p. 156)

47

We recommend that the Refugee Act 1996 should be amended to make it clear that the principle of family unity is part of Irish law and set out clearly the status accorded to the spouse or minor who derives status through the application of the principle of family unity. (p. 157)

48

We recommend that procedures be put in place to facilitate individual applications for refugee status by accompanied minors. (p. 157)

49

We recommend that in making an assessment for the purpose of placing a child in the care of a relative or accompanying adult, the Health Service Executive should carry out a DNA test to safeguard against the trafficking and exploitation of children, where appropriate. (p. 159)

50

We recommend that regulations be made under section 41 of the Child Care Act 1991 in order to ensure that the protection needs of children who are placed with an adult or relative who is not their parent or legal guardian are adequately provided for, and to provide adequate supervision and monitoring given the risks to which they may be exposed. (p. 159)

51

We recommend that a uniform definition of “unaccompanied minor” and “separated child” be adopted in legislation to reflect the broader international definition. We recommend that the Child Care Act 1991 be amended to make it clear that separated children as defined in accordance with Separated Children in Europe Programme guidelines are the legal responsibility of the Health Service Executive. (p. 160)

52

We recommend that an objective age assessment procedure with appropriate guidelines and with formal provision for appeal or review be put in place. (p. 163)

53

We recommend that guidelines for use in determining refugee applications and representative decisions of the ORAC and the RAT should be published, with particular priority given to guidelines and decisions regarding unaccompanied minors. (p. 165)

54

We recommend that in line with the Statement of Good Practice, provision should be made for the Health Service Executive or other organisation to take on the role of guardian as envisaged in those guidelines. The responsibilities of the guardian should be to:

- *ensure that all decisions taken are in the child's best interests,*
- *ensure that a separated child has suitable care, accommodation, education, language support and health care provision,*
- *ensure a child has a suitable legal representation to deal with her or his immigration status or asylum claim,*
- *consult with and advise the child,*
- *contribute to a durable solution in the child's best interests,*
- *provide a link between the child and various organisations who may provide services to the child,*
- *advocate on the child's behalf where necessary,*
- *explore the possibility of family tracing and reunification with the child,*
- *help the child keep in touch with his or her family. (p. 167)*

55

We endorse the Irish Refugee Council recommendation that a formal system for granting complementary protection should be adopted for granting protection in a unified investigative process, that is, a system which empowers national determining authorities to process claims for refugee status and complementary protection simultaneously. The same rights should be granted to a person with complementary protection status as are afforded to a person who has been determined to be a refugee. (p. 169)

56

Apart from complementary/subsidiary protection, there may also be grounds for granting children the right to remain either temporarily or on a more long-term basis. As the law currently stands, until an application for asylum is made, the child has no legal status in the country. We recommend that provision should therefore be made for the granting of a temporary permission to remain in these cases with provision for periodic review. This takes a child out of legal limbo while the relevant authorities

assess what is in the best interests of the child. An application for temporary leave to remain should be able to be made in its own right and not as a defence to the threat of deportation. Rather than the exhaustive list as currently set out in section 3 of the Immigration Act 1999, a non-exhaustive list of Leave to Remain grounds should be set out in legislation, with the Minister obliged to give reasons for refusing the application. The actual procedure for making the application, which is currently by way of written application, should make provision for an interview, with the child having appropriate legal representation and the input of an appropriate guardian. (p. 169)

57

We recommend that a system for the systematic tracing of the families of unaccompanied minors be instituted to enable consultation with the families in cases of minors' applications for refugee status, and otherwise. (p. 171)

58

We recommend that there should be transitional provision made for aged-out minors, similar to the aftercare provision in section 45 of Child Care Act 1991. Under that section the Health Service Executive may provide aftercare assistance to a child who leaves the care of the Executive up to the age of 21 years. (p. 172)

59

We endorse the recommendation of the Irish Refugee Council that asylum seekers should be entitled to the same rights to adult education and training as refugees and Irish citizens have now. (p. 172)

60

With regard to minors who receive negative determinations of their asylum applications, we recommend that they should have the right to continue in education until such time as durable solutions to their situations are found. (p. 172)

**5. CHILDREN NOT IN THE CARE OF THEIR PARENTS:
CHILDREN'S RIGHT TO IDENTITY**

61

We recommend that the right of a child to his or her identity should be given statutory recognition and protection in legislation regulating adoption and donation of genetic material. This right should encompass the child's right of access to identifying information on his or her biological parents. In the case of children who are the product of donated genetic material, research and consultation should take place on the best method to enable them to acquire knowledge of this fact. (p. 184)

62

The State and organisations working in this field have a responsibility to foster greater understanding of the issues of identity for children among the public at large, and to uphold high standards in this regard in their work involving other countries. They also have a role in relation to the development and application of internationally accepted rules and standards on inter-country adoptions and the control of donated genetic material. The Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption, 1993 should be implemented in Irish law without further delay. (p. 185)

63

Natural fathers should be encouraged to register as the parents of their non-marital children and the possible disincentive to registration arising from the new requirements of the Civil Registration Act 2004 should be monitored. (p. 185)

6. MINORS' CONSENT TO MEDICAL TREATMENT

64

We recommend that the distinction between “examination” and “treatment” be clarified in legislation, on the basis that “examination” be defined as non-invasive, and that invasive exploratory acts for the purpose of diagnosis should come within the definition of “treatment”. (p. 186)

65

In accordance with Article 12 of the UN Convention on the Rights of the Child, a child has a general right to express his or her views in matters affecting him or her, and to have them given due weight in accordance with his or her age and maturity. We recommend, as a general principle, that doctors be required by law to give children an opportunity to express their views and have them given due weight, in accordance with their age and maturity. (p. 187)

66

We recommend that legislation should clearly set out the circumstances in which the joint consent of parents is required to treat a child. The general position should be that while the consent of one parent is sufficient, consent of both parents should be required where reasonably practicable. In cases of emergency, or where the condition of the child is life-threatening, the consent of one parent will suffice. (p. 189)

67

Where one parent withholds consent, there should be means of making an informal emergency application to the High Court for a decision under section 11 of the Guardianship of Infants Act 1964. (p. 189)

68

If the parents of a child are not married, the father should be treated in the same way as a marital father if he has been appointed as a guardian under section 2 or section 6A of the Guardianship of Infants Act 1964. If the non-marital father has not obtained a guardianship order, his consent should not be strictly necessary. (p. 189)

69

We recommend that Female Genital Mutilation be prohibited in legislation. (p. 190)

70

We recommend that, as a minimum, infant male circumcision should be unlawful unless carried out by appropriately trained personnel, to protect the interests of the child. (p. 193)

71

We recommend that legislation be enacted to provide that no sterilisation procedure be performed on a minor without court approval, unless medically necessitated. Such legislation should define clearly the circumstances in which a sterilisation can be sanctioned. We further recommend that such legislation be extended to the protection of mentally disabled adults. (p. 193)

72

We recommend that consideration should be given to ratifying the Convention on Human Rights and Biomedicine and incorporating it into Irish law through legislation. In any event, the position of child donors should be clarified and protected in domestic law, either in conjunction with, or in the absence of, the Convention. (p. 195)

73

We recommend that the State should have the capacity to intervene to protect the best medical interests of the child in the event of a long-term threat of a deteriorating nature, which could be prevented by early intervention. Proportionate intervention should be permitted where the effects of not intervening are severe, and best medical practice suggests that intervention is necessary for the future health of the child. (p. 199)

74

We recommend the general principle that minors aged 16 and 17 should have the capacity to consent to, and refuse, medical treatment. (p. 203)

75

We recommend that legislation should set out guidance on the minor's age and other factors which may be considered to determine the capacity of minors of under 16 years to consent to, and refuse,

medical treatment. The test developed in the Gillick case is a useful starting point. Under this test, the young person must understand the doctor's advice; she cannot be persuaded to inform her parents of the matter; it is likely that her physical or mental health will suffer should she not receive the treatment; and her best interests require her to receive the treatment without her parents' consent. If a minor does not have capacity in accordance with the proposed legislative guidance, the consent of parents or guardians should be required. (p. 203)

76

If minors do not consent to, or refuse, medical treatment which is deemed to be in their best medical interests, consideration should be given to the factors other than age which may be considered to determine their capacity. If they have capacity, a court should still be able to intervene to order treatment which is necessary to preserve life and is in their best interests, on the principle that minors should be protected against making choices which irreversibly limit their future choices, and in accordance with the State's obligation to protect the right to life under Article 2 of the European Convention on Human Rights. In the event of such a court application, the minor should be represented by a guardian ad litem. (p. 203)

77

In any adaptation of the proposals recommended by the Law Reform Commission in relation to the proposed Public Guardianship system, we recommend that account should be taken of the constitutional position of children. (p. 208)

78

We recommend that the Mental Health Act 2001 should be amended to be consistent with section 23 of the Non Fatal Offences Against the Person Act 1997 so that children of 16 and 17 years are presumed to have capacity to consent to, or refuse, medical psychiatric treatment as if they were of full age. In relation to voluntary admission, children of 16 and 17 years should be treated as adults. (p. 208)

79

We recommend that the consent of the parents or guardians of a child under 16 years should be sufficient proxy consent for the admission of that child to a psychiatric hospital or the child's treatment there, where a doctor is satisfied that the child does not have capacity, in view of his or her age, maturity and understanding, to consent to or refuse medical treatment, that the child is suffering from a mental disorder warranting voluntary admission, that such admission is in the child's best interests, that the child will be admitted to a hospital with appropriate facilities for the care and treatment of children with mental illness and that no more appropriate alternative method of treatment is available at the time. We recommend that such a child's admission be subject to automatic review by a Mental Health Tribunal. (p. 209)

80

In the event that the child is judged to have sufficient capacity in view of his or her age, maturity and understanding to consent to or refuse medical treatment, the child should be entitled to agree to voluntary admission or be admitted in accordance with the procedures under the Mental Health Act 2001 as though the child were an adult. (p. 209)

81

In relation to all persons under 18 years of age, we recommend that a court should not direct involuntary admission unless it is satisfied that the child is incompetent to make a decision about the need for hospitalisation, the child will be admitted to a hospital with appropriate facilities for the care and treatment of children with mental illness, the hospital proposed to admit the child will provide treatment which is appropriate for the child's condition, and that an individualised treatment plan has been written and presented to the court by the admitting hospital. (p. 209)

82

There is no legislative provision for the situation which arises if the child refuses to be examined by a psychiatrist under section 25 of the Mental Health Act 2001. In that event, we recommend that legislative provision be made for other evidence to be brought before the court to enable it to decide that the child may be suffering from a mental disorder, and to enable it to make an order that the child should be detained for assessment. (p. 210)

83

We recommend that section 61 of the Mental Health Act be amended and clarified. We recommend that both the approval of the treating consultant psychiatrist and another consultant psychiatrist be required. We also recommend deletion of references to "consent" in section 61. (p. 212)

7. CHILDREN'S SUCCESSION RIGHTS

84

Pending any future reforms of the wards of court system in general, we recommend that a system of accountability for personal representatives and trustees of minors' inheritances be instituted in a like manner to the wards of court system for adult wards. Such a system should provide for supervision of the management of property of minors with a value over a threshold amount, which amount would take into account the relative costs and benefits of supervision. (p. 227)

85

In the context of the debate on reform of the wards of court system and the proposals for added protections for vulnerable elderly people, we recommend that a system of accountability by trustees for the protection of minors' estates be also considered, where the value of the interest would make the

cost of such a system worthwhile. If abuses are suspected, any person should be able to alert the supervising authority, which should be empowered to investigate, make orders and impose sanctions. An additional objective of such a system should be to make transparent the details of the administration and disbursement of estates involving property inherited by minors. (p. 228)

86

We recommend that section 117(6) be amended to provide for a limitation period of twelve months from the first taking out of representation of the deceased's estate, and that on an application to the court, it should have discretion to extend the limitation period in the interests of justice up to a maximum period of three years from the first taking out of representation. A personal representative should not be prevented from making a distribution of the estate by the existence of this discretion once the standard limitation period has expired, and no liability should attach to a personal representative who distributes an estate after the standard limitation period but before any other application is made. However, once an application is made, the existing rule that an estate may not be distributed until the court has adjudicated on the application should be preserved. Any assets already distributed should be traceable in the hands of their recipients if so ordered by the court. (p. 230)

87

We propose a Child Provision Assessment Procedure for the event that a minor child or adult child with a learning disability of the deceased is not provided for in a testamentary disposition, or where the parent has failed in his or her moral duty to make proper provision for that child, and where the surviving natural parent is not the surviving spouse of the deceased parent (because of remarriage). We propose that the personal representative should be placed under a statutory obligation to apply to the Registrar of the Wards of Court within three months of being appointed, to have an assessment carried out by his office, to review the facts of the case as applying to the child and make a reasoned recommendation on whether or not a section 117 application should be made. We envisage that the same officer could act in the case of more than one child in relation to the same estate. On completion of the written recommendation within a limited time, the Registrar would apply on notice to the personal representative to the Circuit Court, for consideration of the report by the Wards of Court officer and a decision by the Court on whether or not a section 117 application should be made. The expenses of this procedure, which should be kept at a modest level, should be born by the estate. (p. 232)

88

Guidelines should be drawn up to assist the Wards of Court officer to arrive at his or her conclusions. Such guidelines (to be periodically reviewed) would list matters to be considered by the officer such as the value of the estate and the child's potential share thereof, any offer of settlement of the child's interest, the cost/benefit of any arrangements including the section 117 application itself, other safeguards to secure the child's future (e.g. the setting up of a trust), the requirements of other beneficiaries of the estate and other resources already available to the child. (p. 232)

89

In making their assessments, officers should be afforded access to all relevant information by the personal representative. Officers should have standing to apply to the Circuit Court for an order to require disclosure of information, if necessary. (p. 232)

90

Where the Circuit Court directs that a section 117 application should be made, such application should be made within six months from that direction. In making a decision to order a section 117 application, the Circuit Court would be required to appoint a Guardian ad Litem to act for the child. The Wards of Court Office should be consulted on whether an official would be in a position to act as Guardian ad Litem of the child in suitable cases. If circumstances require the Guardian ad Litem to be a professional, he or she should be paid by the estate. The Guardian ad Litem would be empowered to agree a settlement on behalf of the child, subject to Court approval. (p. 232)

91

We recommend that section 117 be amended to grant an express power to the courts to make additional orders to adjust the distribution of the estate, where the making of the section 117 order has distorted the relative values of the shares of the estate provided for by the testator. (p. 233)

92

We recommend that qualifying foster children, dependent stepchildren and other dependent children should have the right to apply to the court for discretionary provision on the basis of a failure of the deceased's moral duty. (p. 235)

93

We recommend that in cases where a deceased stepparent has been in loco parentis to a child, that child, whether still a dependent minor or otherwise, should be granted the standing to make an application under section 117 of the Succession Act. (p. 235)

94

We recommend that the relationship between stepparent and child should survive the dissolution by death or divorce of the marriage creating it, for the purposes of a stepchild's entitlement to make a section 117 application. (p. 236)

95

We recommend that the options under section 56 of a surviving spouse to require appropriation, or apply for appropriation without supplementary payment, of the share of a minor child (for which she is trustee) towards the spouse's dwelling should be extended to the share of an adult child with a learning disability in circumstances which will secure a home for that child. (p. 238)

We recommend that the revenue cost and benefit implications of family arrangements consequent on an inheritance and within two years thereof be investigated and considered. (p. 239)

CHAPTER 1

CHILDREN'S CONSTITUTIONAL AND INTERNATIONAL RIGHTS

1. THE CONSTITUTION

The principal source of fundamental rights in Irish family law has been the Constitution. Articles 41 and 42 of the Constitution have had a major impact on the manner in which family legislation has been enacted and family law judgments delivered in Ireland. Article 41 of the Irish Constitution of 1937 relates to the family and “recognises the family as the natural and primary unit group of society” and also guarantees “to protect the family in its constitution and authority”.

The rights guaranteed by Article 41 are recognised as belonging not to individual members of the family but rather to the family unit as a whole. An individual on behalf of the family may invoke them but, as Costello J. notes in *Murray v Ireland*,¹ they “belong to the institution in itself as distinct from the personal rights which each individual member might enjoy by virtue of membership of the family”.

Article 41 lacks child focus. It fails to recognise the child as a person with individual rights. This derives from the principle of parental autonomy created by Article 41 of the Constitution. This Article establishes a level of privacy within family life, which the State can enter only in the exceptional circumstances detailed in Article 42.5 of the Constitution. Article 42 provides as follows:

“(1) The State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for religious and moral, intellectual, physical and social education of their children . . .

(5) In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State, as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.”

This article clearly provides that only in exceptional cases, where parents, for physical or moral reasons, fail in their duty towards their children, can the State as guardian of the common good attempt to supply the place of the parents.

The Irish Constitution is unique in that the family unit in Ireland takes precedence over and above that of the individual members of the family. In fact, the individual rights of the members of the family are

¹ [1985] I.L.R.M. 542 at 547.

both directed and determined by the family as an entity in itself. Thus, membership of the constitutional family subordinates the rights of the individual members in Ireland. This is specifically true in relation to the rights of children and Supreme Court judgments on the issue support this interpretation.

When examining Article 42 of the Constitution, it is true to say that this in fact has more to do with the family than it does with the substantive right to education and is an accompaniment and subordinate to Article 41. It deals with education in a broader sense than scholastic education. In referring to education, it alludes to the upbringing of the child, which it holds not only to be a right but a duty of parents. This article reinforces the decision-making autonomy of the family. This can be observed by examining the structure of Article 42, which assigns a strong sense of priority to parental autonomy.

Article 42.4 imposes an obligation on the State to provide free primary education. The corollary of this obligation is that children have a right to receive education provided for by the State. This is the only identifiable right specified in the Constitution for the benefit exclusively and specifically for children.² The right in question is subject to the parents being the “primary and natural educator” of the child.

Similarly, Article 42.5 obliges the State to intervene to supplant the duty owed by a parent to a child where there has been a parental failure in this regard. The duty owed by the State is said to be subject to the “natural and imprescriptible rights of the child”. Nowhere are these rights specified in the Constitution, though there has been judicial explanation of what these rights may amount to which generally may be said to fall with the notion of “the right to welfare protection”.³

Looking at Articles 41 and 42 of the Constitution together, it is clear that they render the rights of married parents in relation to their children “inalienable”. Article 41 of the Constitution alludes to the inalienable and imprescriptible rights of the family and Article 42 refers to the rights and duties of married parents. Only if the circumstances allow the constitutional restriction on inalienability, contained in Article 42.5 of the Constitution, is there then scope for the legal overruling of the rights of married parents. The threshold for State intervention is set at a very high level. As a result children can be placed at risk.

The statutory position

In spite of the precedence afforded to the welfare and best interests of the child in section 3 of the Guardianship of Infants Act 1964, the Constitution prevails. Section 3 of the Guardianship of Infants Act 1964 makes it clear that, in considering an application relating to the guardianship, custody or upbringing of a child, the Court must have regard to the welfare of the child. This, the section states, is “the first and paramount consideration”. The Supreme Court, however, has determined that the welfare of a child must, unless there are exceptional circumstances or other overriding factors, be considered to

² See *Sinnott v. Minister for Education* [2001] 2 IR 545

³ See O’Higgins CJ in *G v. An Bord Uchtála* [1980] IR 32.

be best served by its remaining as part of its marital family. The court considered in a number of cases that this was dictated by the constitutional preference for the marital family exhibited in Article 41.3 of the Constitution and the requirement therein that it be protected from attack.⁴ There is, therefore, an uneasy tension between, on one hand, the provisions of Articles 41 and 42 of the Constitution and, on the other, the welfare principle outlined in section 3 of the Guardianship of Infants Act 1964.

The apparent contradiction between Articles 41 and 42 of the Constitution and the principle of the welfare of the child in section 3 of the Guardianship of Infants Act 1964 has been reconciled, by the judiciary, by holding that the welfare of the child is to be found within the confines of the Constitution.⁵ This is a negative definition of welfare insofar as it impacts on the child. The focus is not on actively promoting the welfare interests of the child, but merely on ensuring that these interests are not seriously impaired. This approach derives from the wording of Articles 41 and 42 of the Constitution. It could therefore be argued that the current constitutional position in Ireland embodies a “seen but not heard” approach to the concept of “children’s rights”.

Case law on children’s constitutional rights

In *Re JH*⁶ the Court identified the following rights possessed by children born to a marital family: the right to belong to unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law, to protection by the State of the family unit and to education. The Court noted that the securing of these constitutional rights could be achieved either through Article 42.5 or Article 40.3. In relation to the right possessed by children under Article 42.5 the Court in *In Re Article 26 and the Adoption (Adoption Bill (No. 2))*⁷ noted that the securing of this right was subject to the inalienable and imprescriptible rights of the child. Nowhere, however, are the concepts of “inalienable and imprescriptible rights” defined or outlined. *Re Article 26 and the Adoption (Adoption Bill (No. 2))* can be said to imply that a child has a right to be adopted by a family in circumstances where the natural parents have failed in their duty towards the child.

In *G. v An Bord Uchtála*⁸ the Court identified the following rights possessed by all children: the right to bodily integrity, to be reared with due regard to religious, moral, intellectual, physical and social welfare, to be fed, to be educated, to work and to realise full personality and dignity. The above rights are possessed by all children irrespective of the marital relationship existing between the parents. These rights, expressed to be of a constitutional nature, have been queried recently by Murphy J. in *TD v. Minister for Education*⁹ who rejected that the Court in *G.* had declared such rights to exist. Murphy J. noted that no precedent was provided as supporting the conclusion that such rights existed for the

⁴ See, for example, *Re JH (An Infant)* [1985] I.R. 375 and *North Western Health Board v H.W. and C.W.* [2001] 3 I.R. 635.

⁵ *North Western Health Board v HW. and CW.* [2001] 3 I.R. 622. See, however, *Southern Health Board v C.H.* [1996] 1 IR. 231, where O’Flaherty J. observed, in a case concerning the admissibility of a video-taped interview containing allegations of parental abuse, that: “it is easy to comprehend that the child’s welfare must always be of far graver concern to the court. We must, as judges, always harken to the constitutional command which mandates, as prime consideration, the interests of the child in any legal proceedings”.

⁶ [1985] IR 375

⁷ [1989] IR 656

⁸ [1980] IR 32 at 44

⁹ [2001] 4 IR 259

benefit of children, particularly in light of the fact that the case itself concerned not the rights of children but the right of an unmarried mother in relation to the care and custody of her child. The case could not be seen to have decided anything other than this issue. Murphy J. did acknowledge the rights identified could be described as “natural” but this did not make them of a constitutional nature. He noted that such rights should exist but that legislation was the appropriate instrument in which to prescribe the nature and extent of such rights. Furthermore, Murphy J. noted there were two dissenting opinions in *G*, which made the decision an unstable basis for such constitutional rights. Keane C.J. expressly reserved his opinion but did indicate he doubted such rights to exist. The other members of the Court decided the appeal on the basis that the right alleged was presumed to exist. *TD* was decided on the assumption that the child possessed the constitutional right he was alleging, namely to be placed and maintained in an appropriate facility to provide for his welfare. The main issue before the court was whether the High Court possessed the jurisdiction to injunct a Government Minister to provide a suitable place for the child. The Supreme Court held that the High Court had transgressed the separation of powers doctrine and lifted the injunction. This left the applicants in *TD* with a declaration that they possessed a right to have their welfare provided for but no mandatory obligation on the State to vindicate that right, although the State was honour bound to do so.¹⁰

This position, coupled with the *NWHB v. HW & CW*¹¹ decision, leaves children in a constitutional limbo in rights terms. *NWHB v. HW & CW* did identify that a child possesses the constitutional right to bodily integrity and has a right to consent to medical procedures. By whom that right is to be exercised, however, was the central issue in the case. The Court examined the complex interaction between the rights of the child as an individual and as a member of the family with the rights of the family and in particular the decision-making authority of the parents where the State intended to rely upon Article 42.5 as default parent to vindicate the child’s constitutional rights.¹² The Court found in favour of the parents and refused the health board an injunction directing the parents to consent to a PKU test for the child. The constitutional balance here was tipped in favour of the parents owing to the weight provided by Article 41. The parents were considered the appropriate individuals to make a decision regarding the child’s rights and in particular his welfare. The Court acknowledged the right of the child and found that vindication of that right was best decided by the parents. Any rights that do exist are presumed to be provided and catered for by the family. In the event of parental failure, the State is constitutionally obliged to provide for children.

In some cases, the State had failed to make appropriate provision for children as evidenced by the *TD* case. Injunctive relief to provide practical necessities for children was not forthcoming because of the separation of powers doctrine. A simple declaration by the court is considered sufficient to vindicate the right (to the extent that it exists in the first place) of the child. The gap between the law and the practical provision for the right in question was evidenced further by the *DG v. Ireland* decision in

¹⁰ And did so by establishing a number of High Support Units including Creag Aran, Crannóg Nua, Ballydowd, Castleblayney, Gleann Ailinn and Coovagh House, Limerick.

¹¹ [2001] 3 IR 622.

¹² The Court implicitly accepted that there existed a right to life and to health protection possessed by the child in question.

which the State was found to be in breach of Article 5 of the European Convention on Human Rights. The essential problem in *DG* was the then lack of appropriate facilities in which DG could be placed to provide the particular care he required. Any amendment of the Constitution to give rights specifically to children would still not result in court orders for the provision of services enforceable against the State because of the separation of powers doctrine. However, it would remove the current uncertainty about children's rights and thereby, it is hoped, avoid the necessity in many cases of children having to seek to vindicate their rights. The absence of essential facilities and services for children could not be utilised to justify a failure to act on a child's behalf or indeed resort to services and facilities outside the jurisdiction.¹³

Express and clear rights for a child would provide greater certainty in this area. A clear and certain right can be enforced and vindicated in many circumstances. The alternative is to maintain the *status quo* and allow the courts approach fundamental issues concerning children on an *ad hoc* basis.

2. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The United Nations Convention on the Rights of the Child (CRC) was ratified by Ireland on 21st September 1992, and entered into force on 21st October 1992. The CRC contains 54 articles identifying some 40 substantive rights which should be possessed by children. The rights can be broken down into the following categories:

- civil
- political
- economic
- social

As L LeBlanc suggested, the CRC rights can also be classified as survival, membership, protection and empowerment rights.

Survival rights

Survival rights by their very nature are of primary importance. Fortin indicates that these include more than just those necessary for basic survival.¹⁴ Thus ensuring the right to life¹⁵ and prohibiting the death penalty for criminal acts¹⁶ are insufficient in their own right to meet the requirements of the Convention. Article 6(2) requires that appropriate resources exist for children to develop their full potential. Hence an array of socio-economic rights exist to enable children attain their potential. Article 27 in particular envisages development of children's physical, mental, spiritual, moral and social development. This provision mirrors the definition of the term "welfare" in section 2 of the

¹³ *Western Health Board v. KM* [2002] 2 IR 493 and *East Coast Area Health Board v. MM*, unrep. H Ct., February 2002, Finnegan P.

¹⁴ See Fortin, *Children's Rights and Developing Law*, (Lexis Nexis UK 2003), p. 38. Also G. Shannon, *Child Law*, (Roundhall Thompson 2005) pp 1-9.

¹⁵ Art. 6.

¹⁶ Art. 37 (a)-(d).

Guardianship of Infants Act 1964. The important point of distinction is that the Convention expresses these elements as rights of a child whereas the 1964 Act directs that these are matters for a court to consider in any proceedings concerning the custody, guardianship, upbringing or property of a child. Similarly Article 42.1 of the Constitution provides for an inalienable parental right to educate a child and identifies similar aspects to education which a parent may provide. Other rights falling within the ambit of survival rights include the right to social security benefits¹⁷ and the highest attainable standard of health, treatment of illnesses and rehabilitation of health.¹⁸

Membership rights

Membership rights concern the rearing of a child within a family unit and as a member of the wider community. Also within this category are the right to equality and freedom from discrimination on a wide variety of grounds.¹⁹ Identity rights such as a name and nationality,²⁰ the preservation of identity²¹ and minority group protection are provided for.²² Positive obligations are imposed to ensure that children with disabilities can participate within the community as fully as possible.²³

Representation of Children

Article 12 of the UNCRC 1989 provides for the separate representation of children:

- (1) State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 9 of the UNCRC provides for participation by children in separation and divorce processes:

- (1) State parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case as such as one involving abuse or neglect of the child by the parents, or one where parents are living separately and a decision must be made as to the child's place of residence.

Taking cognisance of the foregoing rights, and in particular Article 12, it is clear that the UNCRC 1989 is soundly based on a defensible concept of children's rights. The law in Ireland, however, falls far short of such a concept.

A child's membership of the family unit is stressed in a number of articles of the Convention which acknowledges that for most children a family unit is the optimum means to provide for a happy and stable childhood and upbringing. In particular the important and primary role of parents is

¹⁷ Art. 26.

¹⁸ Art. 24(1).

¹⁹ Art. 2(1) stipulates as grounds: race, colour, sex, language, religion, political or other opinion, national ethnic or social origin, property disability, birth or other status.

²⁰ Art. 7

²¹ Art. 8

²² Art. 30 provides that a group's culture, religion and language be protected.

²³ Art. 23(1)-(4)

acknowledged by Article 5²⁴ and specifically in Article 18. The principle of rearing within the family unit is provided for in Articles 9 and 10 whereby children should not be separated from their parents and states should promote family reunification. Article 20 reflects Article 42.5 of the Constitution where the State is obliged to provide substitute parenting in the event of parental failure.²⁵

Protection rights

A broad spectrum of protection rights are listed in the CRC. The rights seek to protect children from abuse, exploitation and ill-treatment. Thus sexual exploitation and prostitution are prohibited.²⁶ Children are to be protected from economic exploitation and employment that affects education and health.²⁷ Within the family context, children are to be protected from all abuse²⁸ whilst in parental care.

Empowerment rights

The final category concerns empowerment rights. Primarily, children enjoy the same dignity and worth as adults.²⁹ Children need to possess certain liberty rights to develop as individuals and participate as fully as possible as members of society. The most noteworthy of these rights is contained in Article 12(2) which confers a procedural right to be heard in judicial or administrative proceedings which concern the child. In addition Article 13 provides for the right to freedom of expression which in turn requires that a child have access to information and material from a variety of sources.³⁰

On the whole, the rights set out in the CRC vary in importance and significance and some are purely aspirational in nature. Some of the rights are not self-executing and require substantial state investment and commitment to give them effect. The inconsistency between rights, as well as the ineffectual and vague nature of some of the rights, render the rights difficult to incorporate into domestic law in a meaningful fashion. Indeed, the main problem identified with the CRC is the internal conflict between the rights possessed by children which amount to individual autonomy enjoyed by the child and the role of the family and in particular the authority enjoyed by parents in relation to children. The possible tensions between the rights of parents and the rights of children have the potential to diminish in effect the rights of children which could be subservient to those of parents in the event of a conflict.

There is a twofold problem with enforcement of the CRC. The first is that the language used to describe the various rights is vague, making it difficult to incorporate the rights in a substantive legal fashion. In addition certain rights require state commitment and investment to be realised. A second more fundamental problem is the fact there is no enforcement mechanism. There is no recourse to a court or tribunal to give effect or vindicate the rights set out in the Convention. The only watchdog is

²⁴ Art. 5 provides *inter alia* that States “respect the responsibilities, rights and duties of parents to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention.”

²⁵ Art. 21 provides for the regulation of adoption.

²⁶ Art. 34.

²⁷ Art. 32.

²⁸ Art. 19 specifies physical, emotional and sexual abuse, ill-treatment and neglect.

²⁹ Second paragraph of the Preamble.

³⁰ Art. 17.

the Committee on the Rights of the Child which monitors the progress of the implementation of the CRC. A further difficulty arises as most states only ratify the CRC, as opposed to incorporating or implanting its provisions.

3. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The incorporation of the European Convention on Human Rights and Fundamental Freedoms (ECHR) in Irish law occurred on 31 December 2003 with the coming into effect of the European Convention on Human Rights Act 2003. The ECHR is an influential and substantial body of legal rights with appropriate mechanisms of enforcement for infringement. There is considerable jurisprudence from the European Court of Human Rights on the interpretation of the Convention articles.

The Convention protects all persons, including children, but when originally drafted the Convention was intended to protect adult rights of a civil and political nature rather than specifically to protect children. The Convention focus is narrow in protecting the individual's autonomy and privacy from State interference. Apart from education, most of the rights protected relate to adult activity in the civil and political spheres.

There have been very few cases brought attempting to establish the Convention rights for the benefit of children and the response from the Court has been cautious and conservative.³¹

The fact that adults or parents bring claims on behalf of children may colour and shadow a child-orientated approach to the application of the Convention. Article 8 (respect for family life) is the article most relied upon to found an application brought on behalf of a child. The language of Article 8 is adult-orientated as it envisages the regulation of family life by adults rather than children. Similarly Article 2 of the First Protocol, (right to education), which at first reading appears child-orientated, is conditioned by the requirement that there be respect for "the rights of parents to ensure such education and teaching are in conformity with their own religious and philosophical convictions." Any conflict between a parental and children's right must consider both parties' rights.³² This is most obvious in cases involving welfare agencies that remove children from their familial surroundings. The European Court of Human Rights has consistently stressed that disrupting family life by taking a child into State care must be an act of last resort and only then to be of a temporary nature.³³ Recent cases show that

³¹ *Handyside v. United Kingdom* (1976) 1 EHRR 737.

³² In *Elsholz v Germany* [2000] 2 FLR 119 the ECtHR impliedly criticised the domestic court for assuming that because a denial of access to the claimant father appeared to be in the best interests of the child, it justified the claimant's loss of family life. Thus, relying purely on the best interests of the child may not be sufficient if the rights of others are not taken into the equation and balanced, and consideration given to whether infringement of parents' rights is proportionate to the child's immediate needs. The older case of *Neilsen v Denmark* (1988) 11 EHRR 175 would probably not be followed today.

³³ *Johansen v. Norway* (1996) 23 EHRR 33, *EP v. Italy* (2001) 31 EHRR 31 and *L v. Finland* (2001) 31 EHRR 50.

the European Court is willing to carefully scrutinise all stages of care proceedings to ensure that a child is not unnecessarily removed from the care of his or her parents.³⁴

The text of the ECHR does not contain the concept of the welfare principle, an omission that would undermine the Convention provisions in attempting to establish children's rights. The welfare principle has, however, been recognised by the European Court as a mechanism to resolve disputes between child and parent, parent and parent, and parent and State.³⁵ Concerns have been voiced on the supremacy of the Article 8 rights vested in parents to the extent that this article could overpower a welfare argument where a conflict arises between parent and child (a not dissimilar conflict to that between the welfare principle on the one hand and the rights of parents in Articles 41 and 42 of the Constitution on the other). A second voiced concern relates to the absence of an independent right for children within the articles of the Convention.³⁶

Despite the above position, there have been some positive developments in the establishment of children's rights over the years. Physical punishment³⁷ has been declared a violation of Article 3, as has parental neglect and state failure to intervene to protect the well-being of children.³⁸ There have been considerable developments in the juvenile criminal justice area in protecting the rights of children facing criminal prosecutions.³⁹

Most significantly the Court has stressed that in certain areas, member states are positively obliged to take measures to protect the rights of children.⁴⁰ This is particularly relevant where children are neglected or abused by parents and the state is positively obliged to ensure against such treatment.⁴¹ Furthermore the Convention is said to have "horizontal effect", that is between private individuals, whereby the state ensures that one individual's rights are not affected by another individual owing to the absence of laws relating to the right in question.⁴² In addition, the ECHR has ensured that fair procedures⁴³ and speedy determination of issues regarding children, and in particular young children,⁴⁴ are required.

In one particular area, the Court's interpretation of the Convention has resulted in a more extensive substantive rights-based position for children by comparison with domestic law. Article 8 protects the right to private and family life. In relation to the respect for family life, the European Court of Human Rights has specifically acknowledged the right of a child to a parental relationship with both married

³⁴ See *K and T v. Finland* (2001) EHRR 484.

³⁵ *Hokkanen v. Finland* (1994) 19 EHRR 139.

³⁶ See Fortin, *Children's Rights and Developing Law*, (Lexis Nexis UK 2003), p.59.

³⁷ *A v. United Kingdom* [1998] 2 FLR 959.

³⁸ *Z v. United Kingdom* [2001] 2 FLR 612.

³⁹ *Hussain v. United Kingdom* (1996) 22 EHRR 1 and *V and T v. United Kingdom* (2000) 30 EHRR 121.

⁴⁰ *Osman v. United Kingdom* [1999] 1 FLR 193.

⁴¹ *Z v. United Kingdom*. [2001] 2 FLR 612.

⁴² *A v. United Kingdom* [1998] 2 FLR 959.

⁴³ *W (and R, O, B and H) v. United Kingdom* (1987) 10 EHRR 29.

⁴⁴ *H v. United Kingdom* (1987) 10 EHRR 95.

and unmarried parents⁴⁵ as evidenced by the Irish case of *Keegan v. Ireland*⁴⁶ as well as other *de facto* members of the family.⁴⁷ Recognition of such fundamental rights has in turn led to a right to fair and speedy procedures⁴⁸ and to information concerning children whilst maintained in state care.⁴⁹ The right to respect for the sexual life of children has also been acknowledged.⁵⁰

Notwithstanding the above positive developments, critics still argue that the ECHR approach in not treating children as individuals possessed with individual rights merely enables the courts in the signatory jurisdictions to do likewise in not acknowledging children as possessing rights independent of their parents. It has indeed been argued that this approach poses a risk of parents attempting to pursue their own rights to the detriment of their children.⁵¹

4. CONSTITUTIONAL AMENDMENT

Recent judgments of the Irish Courts signpost a shift to conservatism by the Supreme Court both legally and in terms of social policy.⁵² That said, the judgments could also indicate a desire on the part of the Supreme Court to respect the principle of the doctrine of the separation of powers. Whatever interpretation one affords to the recent approach of the Supreme Court regarding children's rights, there is a gap in the current legislative framework where children's rights are concerned. The Supreme Court has, as previously outlined, recognised that the Constitution protects children's rights. That said, if the State fails to protect the rights of individual children, and the Supreme Court refuses to step in as guardians of the Constitution (save in exceptional circumstances), to uphold such rights, on whom does this duty now fall?

Constitutional reform is necessary to recognise and protect the child as a legal person with individual rights. One of the significant conclusions of the 1996 Constitution Review Group was that Article 41 of the Constitution be amended.⁵³ In particular, it recommended the inclusion of the "judicially construed un-enumerated rights of children in a coherent manner, particularly those rights which are not guaranteed elsewhere and are peculiar to children".

In the Kilkenny Incest Investigation Report, the investigation team, chaired by Catherine McGuinness SC,⁵⁴ proposed that Article 41 of the Constitution be amended to include a Charter of Children's Rights.

⁴⁵ *Marckx v. Belgium* (1979) 2 EHRR 330 and *X, Y, and Z v. United Kingdom* (1997) 2 CLF 892 (relationship with a transsexual parent).

⁴⁶ (1994) 18 EHRR 342.

⁴⁷ *Marckx v. Belgium* (1979) 2 EHRR 330 (grandparent) and *Boyle v. United Kingdom* (1994) 19 EHRR 179 (uncle).

⁴⁸ *W (and R, O, B and H) v. United Kingdom* (1987) 10 EHRR 29.

⁴⁹ *Gaskin v. United Kingdom* (1989) 12 EHRR 36.

⁵⁰ *Sutherland v. United Kingdom* (1997) 24 EHRR CD 22.

⁵¹ See Fortin, *Children's Rights and Developing Law*, (Lexis Nexis UK 2003), p. 63.

⁵² See, however, the recent judgment of Finlay-Geoghegan J. in *F.N. and E.B. v C.O., H.O. and E.K.* [2004] 4 IR 377 which gives an interesting analysis of the relationship between the Constitution and the Guardianship of Infants Act 1964, s. 3.

⁵³ Constitution Review Group, Report of the Constitution Review Group (Stationary Office, 1996).

⁵⁴ Now Mrs. Justice Catherine McGuinness of the Supreme Court

It stated:

“While we accept that the courts have on many occasions stressed that children are possessed of constitutional rights, we are somewhat concerned that the “natural and imprescriptible rights of the child” are specifically referred to in only one sub-article (article 42.5) and then only in the context of the State supplying the place of parents who have failed in their duty. We feel that the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents than to the rights of children. We believe that the Constitution should contain a specific and overt declaration of the rights of born children. We therefore recommend that consideration be given by the government to the amendment of Articles 41 and 42 of the Constitution so as to include a statement of the constitutional rights of children. We do not ourselves feel confident to put forward a particular wording and we suggest that study might be made of international documents such as the *United Nations Convention on the Rights of the Child*”.

The Commission on the Family agreed with the Constitutional Review Group and recommended recognition for children as individuals within the family.

In 1998, the United Nations Committee on the Rights of the Child, in its Concluding Observations, emphasised that the recommendations of the Report of the Constitution Review Group would reinforce “the status of the child as a full subject of rights”. The Committee held that the implementation of the recommendations of the Report of the Constitution Review Group be accelerated which, it stated, would reinforce “the status of the child as a full subject of rights”. In light of this, the Committee therefore recommended:

“...that consideration be given by the Government to the amendment of Articles 41 and 42 of the Constitution so as to include a statement of the constitutional rights of children”.

We therefore recommend that a provision similar to Chapter 2, Section 28 of the South African Constitution be inserted into the Irish Constitution. It provides:

“Every child has a right

- a. to a name and a nationality from birth;**
- b. to family care or parental care, or to appropriate alternative care when removed from the family environment;**
- c. to basic nutrition, shelter, basic health care services and social services;**
- d. to be protected from maltreatment, neglect, abuse or degradation;**
- e. to be protected from exploitative labour practices;**
- f. not to be required or permitted to perform work or provide services that:**
 - i. are inappropriate for a person of that child’s age; or**
 - ii. place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;**
- g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 (freedom and security of the person) and 35 (arrested, detained and accused persons), the child may be detained only for the shortest appropriate period of time, and has the right to be**
 - i. kept separately from detained persons over the age of 18 years; and**
 - ii. treated in a manner, and kept in conditions, that take account of the child’s age;**
- h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and**
- i. not to be used directly in armed conflict, and to be protected in times of armed conflict.**

A child's best interests are of paramount importance in every matter concerning the child".

The All Party Oireachtas Committee Report on the Family

The All-Party Oireachtas Committee on the Constitution (the committee) published its report on '*The Family*' on January 24, 2006.

The committee has recommended that a new clause should be inserted in Article 41 of the Constitution dealing with the rights of children as follows:

"All Children, irrespective of birth, gender, race or religion, are equal before the law. In all cases where the welfare of the child so requires, regard shall be had to the best interests of that child."

The recommendation on children is worthy of closer scrutiny. It provides that children, as between each other, are equal before the law. This merely reinforces the constitutional requirement of equality contained in Article 40.1^o of the Constitution: 'All citizens shall, as human persons, be held equal before the law.' The first sentence of the proposed amendment does not therefore seem to improve the position of children under the Constitution.

The second sentence provides that regard should be had to the child's best interests, where the welfare of the child so requires. It does not require that the child's best interests must be paramount, nor does it elaborate on what weight should be given to the best interests of the child. It appears also that the child's welfare must be under consideration before the best interests rule will apply. Therefore, the recommendation does not give children rights which may be applied in a general and systemic manner. Moreover, the proposal does not address fundamental issues identified in the Convention on the Rights of the Child.

A decade after the Kilkenny Investigation and the Report of the Constitution Review Group and eight years after the recommendations of the Committee on the Rights of the Child, the foregoing recommendation of the committee is weak, ambiguous and indecisive. Despite protestations to the contrary, the proposal falls far short of our international obligations, including the requirements of the CRC. The recommendation also departs from the approach adopted by the Constitution Review Group, that the Constitution should be amended to include an express guarantee of certain rights for children and an express requirement that in all actions concerning children, the best interests of the child must be the paramount consideration.

In summary, the committee's recommendation on children is a clear departure from the recommendations of various expert groups. It fails to meet a commitment given by the State to the recognition of children's rights through the signing and ratification of various international instruments. More importantly, the recommendation will not cause a re-evaluation of Irish society's view of children, which emerges from the Kilkenny Incest and Ferns inquiries as an important requirement.

CHAPTER 2

THE LEGAL CAPACITY OF CHILDREN AND THEIR REPRESENTATION

1. THE LEGAL CAPACITY OF CHILDREN – GENERAL PRINCIPLES

Between being babies and achieving full adult status at the age of 18, children or minors develop steadily and increase their knowledge, skills and capacities for understanding, reasoning and making decisions affecting their lives. This chapter looks at how the law deals with the developing capacity of minors and gives it recognition in a range of circumstances. The law affecting minors as such is often discretionary, which is to be expected because of the very different rates of development in individual children. The law seeks to achieve a balance between paternalism and protection for younger children, and the maximum latitude for older children which is compatible with their survival and well-being. Young people are generally tolerant of their restricted legal capacity in the knowledge that they will soon grow out of it, but there can be occasions when it is acutely felt. Examples range from relatively trivial matters in relation to what people they will mix with, bed time, hair length and ear piercing to more serious matters involving confidential medical advice on contraception, what decisions affecting their futures they should be free to make (such as leaving education), and what medical treatment they should or should not be required to undergo.

The UN Convention on the Rights of the Child 1990¹ has been widely adopted throughout the world.² It states that for the purposes of the Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. This statement of the age of 18 is a useful standard, which will in time help to achieve more uniformity internationally in the laws applying to young people. Articles 12 (the child's views), 13 (freedom of expression) and 14 (freedom of thought, conscience and religion) imply that the development of autonomy and independent decision-making should be part of the upbringing of a child. It has strongly inspired the National Children's Strategy,³ which recognises the benefits of protection and autonomy and the need for children's views to be consulted. How the tension between protection and autonomy is resolved is one of the main challenges of the law affecting children.

¹ Ratified by Ireland in 1992.

² Everywhere except the US, East Timor and Somalia.

³ November 2000.

Development of autonomy during adolescence

Adolescents need practice at making decisions so that they will be prepared to take full responsibility for themselves when they reach adulthood. It is appropriate that the law should support this developmental requirement and encourage parents to give their children the necessary latitude. For parents and lawmakers alike, it is helpful to be aware of the capacity for decision-making of children at different stages of development.

There can be considerable variation in the individual development of children, so any case involving an individual child should be decided on the basis of the actual capacity of the child concerned. However, there is useful information available from research⁴ which sheds light on children's developmental stages and the related cognitive abilities and skills. The following is a brief outline:

- Children under 12 are more focused on the immediate, while children over that age have increasingly sophisticated abilities to distinguish between the actual and possible, to test hypotheses and plan for the future, to be introspective and use relative rather than absolute concepts. The majority of pre-adolescent children appear not to have the cognitive abilities and judgmental skills to make major decisions which could affect the course of their lives.
- Research into political thought and reasoning has shown that approaches to problems vary in important and subtle ways from 12-year-olds to 14-15-year-olds, and again from them to 16-year-olds. Typical 12-13-year-olds tend to believe that a problem has only one solution and acts or solutions must be right or wrong. By 14-15, there is a considerable growth in competence and they are able to be more critical and pragmatic. Many teenagers in fact feel that 15 is an age at which they should be allowed to start making important decisions for themselves.
- Children develop a clearer sense of their personal identities during their teenage years and start understanding themselves and their own personalities as they get older.
- By their mid teens, adolescents are capable of quite sophisticated decision-making, which however does not mean that their judgment is well informed or mature. In fact, the rebellion and questioning characteristic of this age, coupled with lack of knowledge and experience, can lead to behaviour which is dangerous to the young people themselves and to society. Sometimes it appears to be the result of peer pressure, and in other cases it may be based on a sense of invulnerability, or belief in their ability to control the consequences. Risk-taking in relation to health, drink and drugs appears to be an important developmental stage on the way to adulthood.

Legislation relating to children may make reference to "the age, understanding and wishes of the child and the circumstances of the case". In any individual case, the understanding of the child will be assessed informally and with only estimated information on the child's cognitive or judgmental abilities. Giving due weight to the child's views will depend on the skill and judgment of the

⁴ Usefully summarized in Fortin, *Children's Rights and the Developing Law*, (Lexis Nexis UK 2003), p. 72.

professionals concerned, and particularly the skill and judgment of the judge. Age limits set by legislation may be a useful guideline, but when deciding what choices it is reasonable to ask a child to make, it is important to take into account the child's relative youth. As well as having rights to have their views considered, children also have a right to be protected against being asked to make decisions before they have the cognitive ability and judgmental skill to do so. In particular, if their decisions are likely to restrict their options in the future, it is often appropriate that they should be overborne (for example, a decision not to go to school). Consultation, however, is another matter in that it promotes young people's decision-making capacities without saddling them with the final responsibility.

Capacity of children in the legal process

Children may be parties to proceedings under the criminal law, provided they are over the age of criminal responsibility. Legal representation and the help of a guardian *ad litem* may assist them in coping with this role. The anomaly is that while children are considered too young to act for themselves in relation to many civil matters, they may still be considered old enough to be answerable for their actions when they break the law. This anomaly is balanced to some degree by the special treatment afforded to children in the criminal justice system.

In very limited circumstances, children may have capacity to act in their own right in civil court proceedings. Section 25 of the Child Care Act 1991 enables a court to join a child to whom the proceedings relate as a party, "where it is satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so". This does not mean a child can initiate proceedings in his or her own name, but enables him or her to take part in proceedings initiated by another if they concern him or her, and are taken under Parts IV (care proceedings) or VI (children in the care of the Health Service Executive) of the Child Care Act 1991.

The legislative provision for the representation of children in civil proceedings concerning access and custody has not yet been brought into effect.⁵ The voice of the child in such cases is not being formally heard as a matter of course, despite Article 12 of the Convention on the Rights of the Child:

Article 12

(1) State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

⁵ S. 28 of the Guardianship of Infants Act 1964 as amended by the Children Act 1997, s. 11.

2. CHILDREN DEFINED BY AGE IN LEGISLATION

Majority at 18

For most purposes, the dividing line between minority and majority is the age of 18 years, reduced from 21 years by the Age of Majority Act 1985. The reduction of the age of majority by three years eliminated many problems. In particular, the law applying to minors' contracts, which mainly arose for consideration in relation to young people aged between 18 and 21 years, is no longer so relevant. In relation to the criminal law,⁶ child care,⁷ adoption,⁸ guardianship, custody of and access to a child,⁹ child protection,¹⁰ obtaining of legal aid in relation to a child's welfare,¹¹ domestic violence,¹² maintenance,¹³ taxation,¹⁴ social welfare,¹⁵ refugee law¹⁶ and the constitutional right to education,¹⁷ 18 years is the age at which the status of childhood changes into adulthood. There are however some exceptions to this general rule.

Sexual offences perpetrated on under-17-year-olds

In relation to sexual offences, a crucial age for consent is commonly 17 years. A 17-year-old may lawfully consent to sexual intercourse¹⁸ and 17 is also the age for consent to homosexual intercourse.¹⁹ A distinction is made in the penalties to which an offender is liable between offences committed in relation to under-15-year-olds, and those between 15 and 17. The same applies to the offence of gross indecency between males. Consent cannot be a defence to a charge of indecent assault of a girl under the age of 15,²⁰ or to a charge of buggery and gross indecency between males under the age of 17.

The Sexual Offences (Jurisdiction) Act 1996 makes offences committed outside the State involving children under 17 indictable in the State, provided that the act is an offence both under the law of the country where it was committed and under Irish sexual offences law. Ancillary offences are also created by the Act: transporting a person for the purposes of enabling such offences to be committed, and publishing information likely to promote such offences.

The Child Trafficking and Pornography Act 1998 similarly applies to child victims under the age of 17. Offences created by the Act include child trafficking and taking a child for sexual exploitation, allowing a child to be used for pornography, producing and distributing child pornography and

⁶ Children Act 2001, s. 3.

⁷ Child Care Act 1991, s. 2.

⁸ Adoption Act 1988, s. 6.

⁹ Guardianship of Infants Act 1964, s. 2 as amended by the Children Act 1997, s. 4.

¹⁰ Protection of Children (Hague Convention) Act 2000, s. 1 and Art. 2 of the Convention.

¹¹ Civil Legal Aid Act 1995, s. 28.

¹² Domestic Violence Act 1996, s. 1.

¹³ Family Law Act 1995, s. 2 and Family Law (Divorce) Act 1996, s. 2.

¹⁴ Taxes Consolidation Act 1997, s. 7.

¹⁵ Social Welfare (Consolidation) Act 1993, s. 2(3).

¹⁶ Refugee Act 1996, s. 8 as amended by the Immigration Act 1999, s. 11.

¹⁷ *Sinnott v Minister for Education* [2001] 2 IR 545.

¹⁸ Criminal Law Amendment Act 1935, ss. 1 and 2 make it a criminal offence to have sexual intercourse with girls aged under 15, and between 15 and 17 years.

¹⁹ Criminal Law (Sexual Offences) Act 1993, s. 3, as amended by the First Schedule to the Criminal Law Act 1997. Consent is no defence under 17.

²⁰ Criminal Law Amendment Act 1935, s. 14 and *AG (Shaughnessy) v Ryan* [1960] IR 181.

possessing child pornography.²¹ The Act does not create an offence of trafficking for purposes of labour exploitation.

The Children Act 2001 provides in section 248 for offences of allowing a child to reside or be in a brothel, or of causing or soliciting anyone to assault, seduce or engage in prostitution or commit sexual offences on a child. In this instance, a child is defined as a person under 17 years of age.

3. OTHER DEFINITIONS OF CHILD

The Education (Welfare) Act 2000 applies to schoolchildren, and child is defined as a person over six and either under 16, or not having completed three years of secondary education, whichever is later, and not over 18 in any event.²² Section 31 of the same Act redefines child for the purposes of the Protection of Young Persons (Employment) Act 1996 as a person who has not reached the age of 16 years, and a young person as a person who has reached the age of 16 years, but has not reached the age of 18 years. Recognising the increasing autonomy of young persons of 16 years and older, the Hague Convention on Child Abduction²³ applies only to children up to the age of 16 years,²⁴ and a person of 16 years may consent to surgical, medical or dental treatment.²⁵

Interestingly, a “dependent member of the family” may include, for the purposes of maintenance payments,²⁶ any child of the family up to 23 years of age if he or she is engaged in fulltime education, or any child of the family without age limit who has a mental or physical disability to such extent that it is not reasonably possible for the child to maintain him- or herself fully. However, there is an anomaly in that a child or young adult has no right to sue for maintenance on his or her own behalf. In succession law, a child of a deceased person may have rights at any age, either on intestacy, or by reason of the deceased’s moral duty on an application for a discretionary award under section 117 of the Succession Act 1965. At the other end of the scale, civil liability exists for wrongs done to an unborn child, provided that it is subsequently born alive.²⁷ In England and Wales, decisions have been taken to protect unborn children at risk from their mothers’ behaviour.²⁸ However, the status of parenthood does not arise until birth, so that a prospective father has no legal standing to prevent the mother from undergoing an abortion.²⁹ In times of war, keeping adolescents out of a conflict may be unrealistic. The Geneva Conventions (Amendment) Act 1998 incorporates additional protocols to the

²¹ Ss. 3, 4, 5 and 6.

²² S. 2.

²³ Incorporated into law by the Child Abduction and Enforcement of Custody Orders Act 1991.

²⁴ Art. 4 of the 1st Schedule.

²⁵ Non Fatal Offences Against the Person Act 1997, s. 23, and in the Health Act 1947, s. 2 defines an adult as a person who is 16 years of age or older.

²⁶ Family Law Act 1995, ss. 2 and 8 and Family Law (Divorce) Act 1996, ss. 2 and 13.

²⁷ Civil Liability Act 1961, s. 58.

²⁸ *D (A Minor) v Berkshire County Council* [1987] 1 All ER 33, *A Metropolitan Borough Council v DB* [1997] 1 FLR 767.

²⁹ *Paton v United Kingdom* (1980) 3 EHRR 408, see also *C v S* [1987] 1 All ER 1230. Art. 40 (3) 3^o of the Constitution gives limited protection (as far as is practicable) to the life of the unborn, without preventing travel to another state or the availability of information on services legally available in another state (e.g. abortion services).

conventions already incorporated into Irish law. The first protocol relating to victims of international armed conflict includes in Article 77:

“The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces”.

The second protocol relating to victims of non-international armed conflict provides in similar terms.³⁰

4. CHILDREN AS PARENTS

The rights, duties, responsibilities and interests of parents in relation to their children apply equally to parents who are still children themselves.³¹ The welfare of a child cannot be sacrificed to the welfare of a parent who is still a minor, where the child’s welfare is under consideration.³² The rule is that it is the welfare of the child who is the subject of the court’s consideration which is paramount. For example, if a baby is the subject of care proceedings and his mother is a child herself, it is the baby’s welfare which will be considered ahead of his mother’s.³³ That welfare may of course be interdependent with the parent’s welfare, and must be considered in the context of all the circumstances.³⁴

The issue of the competing claims of children has arisen in relation to siblings, where it seems invidious and unfair to give preference to the welfare of the child before the court ahead of the welfare of brothers or sisters who happen not to be before the court. Perhaps the better course is for the court to have regard to the welfare of all the children who are likely to be affected by the decision. The interdependence of a mother and child will make it more likely that the welfare of an under-age mother will overlap with the welfare of her child, but this is not so for many under-age fathers. A recent study has highlighted the exclusion suffered by many young fathers and argued that this undermines the strength of the future family and the future welfare of the children.³⁵

The notion of parents’ rights has evolved from the earlier notion of a minor child being under the absolute authority of his or her father, to a much greater emphasis on such rights arising in the context

³⁰ Article 4.

3. Children shall be provided with the care and aid they require, and in particular:

(a) . . .

(b) . . .

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

³¹ See generally Bainham, *Children – The Modern Law* (2nd ed. 1998), pp 38 and 94-104

³² S. 3 of the Guardianship of Infants Act 1964, in relation to custody, guardianship, upbringing and administration of a child’s property. The welfare of the child must be regarded as the first and paramount consideration.

³³ *F v Lees City Council* [1994] 2 FLR 60, Birmingham City Council v H (no. 3) [1994] 1 FLR 224.

³⁴ See generally, Shatter, *Family Law* (4th ed. 1997) pp. 545 and 578.

³⁵ Ferguson and Hogan, *Strengthening Families Through Fathers*, 2004, Family Support Agency. See also comment in the Irish Times: in an article by Garrett Sheehan, “Prison Reform could make State a safer place”, 24 January 2005: “At a conference in Dublin last year, the recently-retired Chief Justice Ronan Keane expressed the view that one of the major causes of crime was absent fathers. This is undoubtedly true, one could go further and say that the absence of proper fathering is probably at the root of most criminal behaviour.” See also an article by Tom O’Dowd, “Benefits of being a dad”, Irish Times 25 January 2005.

of the parents' duty to care for and make decisions for the child. Parents' rights and responsibilities are seen as interdependent: parents have rights because they have responsibilities, and have responsibilities because they have rights. This is not to exclude parents' independent interests, aside from their responsibilities to their children, such as, for example, their interest in knowing and having the company of their children.³⁶ Once their children's essential needs are provided for (care, food, shelter, clothing), parents have a wide discretion as to the type and quality of upbringing the children will have, including their education and healthcare.³⁷ They are limited by the requirements of the law, in relation to education and healthcare, for example, and the need to avoid neglect, cruelty and abuse. The State clearly has an interest in the welfare of children, but a parent has a wide margin of discretion once a child's basic needs are secured, before the State will intervene to challenge parental control.

Both parents and children have rights and interests, and the law must seek to achieve a balance between them. As mentioned above, the welfare principle, which states that the welfare of the child is the first and paramount consideration in any decision affecting the child, may on occasion disregard the interests of parents and indeed other children of the family. The balance to be struck between Articles 41 and 42 of the Constitution, as they apply to the family based on marriage, and the welfare principle in section 3 of the Guardianship of Infants Act 1964 is uncertain, following a number of diverging decisions. Some have relied on the constitutional provisions to favour the inalienable rights of the family (in effect, the wishes of the parents) over the welfare of the child while others have upheld the primacy of the child's interests, as being in accordance with constitutional principles.³⁸

The resolution of the uncertainty arising from these decisions is likely to be assisted by the caselaw of the European Court of Justice, given persuasive authority in this jurisdiction by the European Convention on Human Rights Act 2003. The caselaw of the European Court of Human Rights requires the rights of both children and parents to be considered, fairly balanced and the resulting decision to be proportionate to its legitimate aim, while recognising that the rights of the child will often outweigh those of the parent.³⁹ It has been suggested that the welfare principle should itself be reformulated as a principle "giving priority to children's rights over those of parents (or others) in cases where they cannot be reconciled".⁴⁰

It is most likely that any minor who is a parent will be unmarried, and in that event, the uncertainty arising from the constitutional provisions relating to the family, based on marriage, will not be relevant.

³⁶ Recognised by the European Court of Human Rights in *Hokkanen v Finland* (1995) 19 EHRR 134 and *Elsholz v Germany* [2000] 2 FLR 119.

³⁷ For example, in relation to the PKU test: *North Western Health Board v HW and CW* [2001] 3 IR 622.

³⁸ *PW v AW & Ors*, Ellis J., H Ct. unrep, April 1980; *KC & AC v An Bord Uchtala* [1985] 5 ILRM 302; [1986] 6 ILRM 65, also reported as re *JH (An Infant)* [1985] IR 375, 390 and *North Western Health Board v HW and CW* [2001] 3 IR 622. See Shatter, *Family Law* (4th ed. 1997), p. 578 and the discussion in Ch. 1 of this report.

³⁹ The leading case is *Johansen v Norway* (1996) 23 EHRR 33 (para. 78) in which the court stressed the crucial importance attached, in the balancing exercise, "to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular . . . the parent cannot be entitled under article 8 to have such measures taken as would harm the child's health and development".

⁴⁰ J Eekelaar, "The Wardship Jurisdiction, Children's Welfare and Parents' Rights" (1991) 107 LQR 368 at p. 389.

The welfare principle alone will be relevant, and will apply to ensure that the child's interest, not the parent's, is given priority.

Should children's rights always be given precedence over the rights of others? To do so can be to give them disproportionate weight, and a better approach may be to weigh the interests of the children against those of other persons in the family unit, giving precedence to the children's interests when they cannot be reconciled with the parents', but also making allowance for the relative importance of the different interests to be considered. We recommend that this interpretation of the welfare principle be promoted where appropriate.

5. REPRESENTATION FOR CHILDREN

Parents are not necessarily the best representatives of their children's interests. In some cases there may be a clear conflict of interest, for example where there are child protection issues. In other cases, parents have been known to compromise the interests of children for the sake of parental agreement, among other reasons.

If parents are not to be representatives of their children, who should be? Could children not represent themselves? Children have been found to show "increasing knowledge of legal terminology and of concepts associated with the court process with increasing age", but they are unhappy about giving evidence in court. They are concerned about

- speaking in front of people,
- cross-examination by lawyers,
- making a mistake and/or not being heard,
- retaliation by the accused, and
- unfamiliarity with or inexperience of the trial process.⁴¹

Judges too have reservations about children appearing in court or meeting with judges in family separation cases. In some cases they have interviewed children in chambers,⁴² and in others have declined to do so.⁴³ The Law Reform Commission has stated that "A legal qualification does not necessarily imply suitability for interviewing children",⁴⁴ and this view is shared by many lawyers.⁴⁵ Courts are daunting for most people, and children with their lesser experience and understanding are likely to be affected even more by the stress of speaking in such a place. Further, children may not

⁴¹ Maunsell, Smith & Stevenson, "What happens in court? The development of understanding of the legal system in a sample of Irish children and adults", *Irish Journal of Psychology*, 2000, 215.

⁴² *Cullen v Cullen* [1975] IR 54; *NO'D v MO'D* 16 Nov 1977, unrep. HCt.; *MK v PK* noted in [1984] ILRM 311; *NAD v TD* [1985] ILRM 153; *MOS v MOS* April 1972, unrep. HCt.

⁴³ *JC v OC* 10 July 1980, unrep. HCt.; *FM v JM* Nov 1983, unrep. HCt. See generally Shatter, *Family Law*, (4th ed. 1997), p. 565

⁴⁴ Law Reform Commission, *Report on Family Courts*, LRC 52-1996 at section 10.25.

⁴⁵ Murch & Keehan, *The Voice of the Child in Private Family Law Proceedings*, Cardiff Law School, Nov 2002, pp. 51 and 82.

want their wishes to be made public and may be left in a vulnerable position, if this happens, in relation to a parent or sibling. Thus it appears that children should not be expected to be their own advocates.

6. TYPES OF REPRESENTATION

Apart from family members and social workers who may informally represent the interests of a child, the two formal forms of representation recognised in our law are advocacy representation by a guardian *ad litem*, and legal representation by a solicitor (who may employ counsel). Usually trained in social work or child development, a guardian *ad litem* must not only represent the child's wishes, but also investigate the child's circumstances and take a view as to the child's best interests, and advise the court accordingly. In contrast, a solicitor must explain his appointment, his duties and the procedure of the case to his client, taking into account the client's age and understanding. A solicitor is not required to judge the best interests of a child client, and must follow his client's instructions. In theory the lines of demarcation are clear.

In practice, it is quite common for a child to have no representation to assist in giving him a voice in proceedings which will affect him very directly, such as care proceedings or custody and access arrangements. If he has legal representation, he is likely to better understand the legal choices open to the court, and to be able to express his wishes in relation to them. However, solicitors recognise the limited nature of the representation they can offer in cases where the wishes of the child client do not coincide with the child's best interests. Among non-lawyers there is a common perception that one kind of representation for a child is as good as another, equating legal representation with representation by a guardian *ad litem*. This perception is reinforced by a statutory provision which dispenses with a guardian *ad litem* in the event that a child is joined as a party to proceedings.⁴⁶

Ultimately, the objective of representation for children is to ensure that their interests are understood and taken into account in legal decisions which affect them. The representative role of a guardian *ad litem* can be of additional assistance to a court in assisting it to understand and take into account a child's best interest in arriving at its decision. Other expertise also may be called upon by the court, through social reports and expert evidence. It is important that the limited nature of legal representation be understood, and that it be supplemented where appropriate by the more sophisticated representation offered by guardians *ad litem* and evidence from other sources.

The most interesting recent proposals for law reform to improve the position of children in family law disputes have come from England and Wales. In a green paper published in July 2004, a new approach to the problems for children arising from contentious parental separations was proposed.⁴⁷ It was

⁴⁶ S. 26 (4) of the Child Care Act 1991.

⁴⁷ Green Paper, *Parental Separation: Children's Needs and Parents' Responsibilities*, (July 2004, DCA, DfES and DTI). A sequel, entitled *Parental Separation: Children's Needs and Parents' Responsibilities, Next Steps* was published in January 2005.

widely welcomed by many lawyers dealing with custody disputes, intractable access and other problems arising in situations where parents are unable to make allowances for their children's interests. While the recommendations do not relate to direct representation for children, they indirectly aim to achieve greater focus on children's interests and better results in family law cases. Most notable among the recommendations are the proposed shift by CAFCASS⁴⁸ personnel from the writing of reports on children's welfare to active problem-solving and supporting agreements, and tight case management by the courts. The proposals are discussed below.

7. GUARDIANS AD LITEM

A guardian *ad litem* is, effectively, an independent representative appointed by the court to represent the child's personal and legal interests in legal proceedings.⁴⁹

The guardian *ad litem* in public law proceedings

The role of the guardian *ad litem* first came to the fore in public law care proceedings. Section 26 of the Child Care Act 1991 allows the court to appoint a guardian *ad litem* in respect of a child involved in proceedings under Part IV (care and supervision orders), and Part VI (children in the care of the Health Service Executive) of that Act. Section 25 of the 1991 Act allows the child to be added as a party to the proceedings, but where this does not occur, section 26(1) allows a guardian *ad litem* to be appointed to act on the child's behalf. This is subject to the important caveat, that the court be satisfied that such appointment is both necessary in the interest of the child and consistent with the requirements of justice. As with all child law proceedings, section 24 of the 1991 Act ranks the child's welfare as the first and paramount consideration in such cases although the court is also required to have due regard to the rights and duties of parents. It further notes that the court should, in so far as practicable, have regard to the wishes of the child. Therefore the child's wishes are something the court will consider in deciding to appoint a guardian *ad litem*, unless it decides that it is necessary in the interests of the child and in the interests of justice to appoint a guardian *ad litem*, under section 26(1).⁵⁰ The practicability of so doing will, as always, depend on the child's age and understanding.⁵¹

Beyond that, few other guidelines are laid down to aid the court in deciding whether it is appropriate to appoint a guardian *ad litem*. Section 26(4) stipulates that should the court see fit to add a child as a party to the proceedings under section 25, any prior appointment of a guardian *ad litem* in respect of

⁴⁸ Children and Family Court Advisory and Support Service.

⁴⁹ See generally The Guardian ad Litem Group, *Giving children a voice*, Law Society May 2001 and the Capita *Review of the Guardian ad litem service*, the National Children's Office, March 2004. See also G. Shannon, *Child Law*, (Roundhall Thompson 2005), ch. 8.

⁵⁰ Not yet in force

⁵¹ Frank Martin (*The Politics of Children's Rights*, Cork University Press, 2000, p. 52) argues that the obligation to take into account the wishes of the child, having regard to the age and understanding of the child, implies a child's right to be present at part or all of the hearing of the proceedings if the child so requests. This right is significantly modified by the courts discretion in acceding to such requests only where it appears to the court to be in the child's best interests to be present. He argues that representation of children in private law proceedings as well as in public law proceedings should be a "presumptive norm" (p. 55).

the same child shall be deemed to have ceased. It therefore seems that section 25 (allowing a child to be a part to a case) and section 26 (allowing the appointment of a guardian *ad litem*) are mutually exclusive. This is so even where a child is added as a party only for certain purposes specified by the court.

In contrast, in England and Wales guardians commonly work “in tandem” with specialist children’s solicitors to provide separate representation for children in public law proceedings under the Children Act 1989.⁵²

The importance of an independent person who is there for the child alone cannot be overstressed. Staff of the Health Services Executive can be influenced by the pressures of their employment into considering the case of the child from the organisation’s point of view, that is, what would best fit in with the organisation and available services. Further, some children are so emotionally mixed up that a solicitor can need guidance on the child’s capacity to give instructions. An independent guardian may be needed to advise on this. It is important also that the guardian be appointed in good time and have sufficient resources to do his or her job, to give the child equality of arms and the benefit of proper procedure under Article 6 of the European Convention on Human Rights, if applicable (for example, if the child is to be deprived of his or her liberty).

There appears to be no good reason why the joining of a child party to a case, and consequent appointment of a solicitor, should require the discontinuance of representation by a guardian *ad litem*. **We recommend that section 26(4) of the Child Care Act 1991 be amended to remove the requirement that representation by a guardian *ad litem* should be excluded on the joining of a child as a party to a case concerning care and supervision orders under Part IV of the Act.**

Qualifications

The Child Care Act 1991 lays down no criteria governing the type of person who may be appointed as a guardian *ad litem*. Neither does it provides means by which such criteria may be laid down, for example, by regulation. In strict theory at least, the court could appoint anybody. Nonetheless, it may be said with some conviction that the guardian *ad litem* should be a social worker, or some other child care professional with expertise in dealing with children. This view is supported in part by the fact that the Act stipulates that the Health Service Executive should pay any costs incurred by a person acting in the capacity of guardian *ad litem*. It can be assumed that a responsible Executive would not be expected to pay someone without qualifications or expertise to perform such a task, although, as noted above, there is nothing preventing the court from appointing such a person. It is suggested, furthermore, that the guardian *ad litem* should be familiar with the workings of the courts in cases involving children. This is all the more important, considering that the Act seems not to permit the appointment of a lawyer to represent the guardian *ad litem* at the hearing. Presumably, the guardian *ad*

⁵² Fortin, *Children’s Rights and the Developing Law*, (Lexis Nexis UK 2003), p. 233. See also Murch & Keehan, *The Voice of the Child in Private Family Law Proceedings*, Cardiff Law School, Nov 2002.

litem should not be an employee of the Health Service Executive which is itself a party to such a case. The conflict of interest arising should of necessity preclude such an appointment.

Functions and duties of the guardian *ad litem*

The Act is equally vague regarding the functions and role of the guardian *ad litem*. It does not specify any role or duty beyond that necessarily implied by the term guardian *ad litem* - presumably, that the person appointed would be charged with advocating a legal solution that is in the best interests of the child. Nor is there any provision in the Act allowing regulations to fill this gap.

Notable also is the lack of any obvious provision allowing access to the child. While it may be implied by the appointment, it would be desirable to make such access an automatic consequence of appointment.

One point at least is necessarily implicit, and that is that the guardian *ad litem* is to act independently of the parents and Health Service Executive with a view to promoting the welfare and wishes of the child. Beyond that, the guardian *ad litem* is probably best advised to take direction from the presiding judge. The guardian *ad litem* should first and foremost appraise the situation of the child. For these purposes the guardian should be granted permission to have access to the child with a view to ascertaining his or her needs, wishes and concerns. Adequate access to records (such as Health Service Executive, social workers' and school reports) should also be afforded. Presumably the guardian *ad litem* should also have liberty to make such inquiries so as to enable him or her to determine the best interests of the child concerned. In practice, the guardian *ad litem* can perform a very valuable role outside the court in achieving agreement between the parties in relation to the child's interests.

The guardian *ad litem* in private law proceedings

Provision is also made in Irish law for the appointment by the court of a guardian *ad litem* to act on behalf of any child in private law proceedings involving:

- the custody of, or access to, a child; or
- an application for guardianship by a natural father.⁵³

The circumstances in which a guardian *ad litem* may be appointed in such proceedings are, however, very clearly more limited than those contemplated in public law cases. The court must be satisfied that "special circumstances" exist necessitating the appointment of the guardian *ad litem*, a formula that obviously precludes such appointment in all but the most pressing of cases. It appears that the guardian *ad litem* is considered not to be as crucial to the best interests of the child in private law cases as in public law cases. Alternatively, this more restrictive perspective may reflect a concern to avoid undue state intervention in private law proceedings, an approach that, in fairness, is not borne out by the

⁵³ Section 28 of the Guardianship of Infants Act 1964 to be inserted by section 11 of the Children Act 1997. This section is one of only two sections of the Children Act 1997 not yet in force.

provisions of section 47 of the Family Law Act 1995.⁵⁴ The more likely reason may be a fear that the appointment of a guardian may in many circumstances

“create as many problems – costs, delay, an increase in the adversarial nature of the proceedings – as it solves. In many cases separate representation of the child is not really necessary as the welfare of the child can be ascertained through expert or other evidence”.⁵⁵

It should be added that the options available to children in family separation situations are usually quite limited by what their parents can make available. The advantage of separate representation in such cases can be the emphasis it puts on the interests of the children, helping the parents to be aware of them.

In deciding whether to appoint a guardian *ad litem* several criteria may be considered.⁵⁶ These include:

- (a) the age and understanding of the child in question;
- (b) the findings of any social report;⁵⁷
- (c) the welfare of the child;
- (d) the wishes of the child;
- (e) the submissions of any other parties.

By contrast with the Child Care Act 1991, there is some guidance on the criteria upon which the guardian *ad litem* should be chosen, section 28(3) of the 1964 Act providing that the author of a section 47 report in respect of the child may be selected as its guardian *ad litem*. Another notable difference is that the private law guardian *ad litem* may be legally represented should the court consider it necessary in the best interests of the child.⁵⁸ This is all the more surprising considering the comparatively more serious consequences that tend to accompany an order made under the Child Care Act 1991. It may reflect the fact that public money is usually involved in public law cases, but not in private law cases, where the parents will normally be expected to pay the extra cost.

Other than that, the two regimes appear to be largely similar. The most notable similarity lies in the lack of any detail in both Acts regarding the functions and duties of the guardian *ad litem*. Again, much of the detail can only be worked out on an *ad hoc*, common sense basis. In practice, standards developed for guardians *ad litem* in the UK are used as a guide to best practice.

The Irish government launched the National Children’s Strategy in December 2000.⁵⁹ This document represented a significant commitment by the Irish government to realise the rights identified in the

⁵⁴ This section empowers the Circuit or High Court, as the case may be, to order a social report relating to any party to the proceedings, at the request of a party or of its own motion. See further below.

⁵⁵ Working Group on a Courts Commission, *Conclusion*, (Government Publications, November 1998) p. 69.

⁵⁶ S. 28 of the Guardianship of Infants Act 1964 as amended by section 11 of the Children Act 1997.

⁵⁷ Under s. 47 of the Family Law Act 1995.

⁵⁸ See s. 28(4).

⁵⁹ *The National Children’s Strategy: Our Children-Their Lives* (Dublin Stationery Office: Department of Health and Children, 2000).

1989 UN Convention on the Rights of the Child.⁶⁰ The first national goal identified in the strategy document at page 11, and elaborated upon in chapter 3, focuses on giving children a voice:

“National Goal: Children will have a voice in matters which affect them and their views will be given due weight in accordance with their age and maturity.”

The strategy sets out what giving children a voice means,⁶¹ and in judicial proceedings the involvement of children needs to be “mediated” rather than direct.⁶² There is then reference to the

“Guardian *ad Litem* service (which) provides for the appointment of a legal guardian to represent the interests of the child and to act as an independent voice in care proceedings.”

This and the statement that “the Guardian *ad Litem* Service was established under section 26 of the Child Care Act 1991”⁶³ is misleading. It ignores the fact that there is no “service” and that section 26 provides for the appointment of a guardian *ad litem* at the discretion of the court.

It is clear that the goal of giving children a voice has yet to be realised in either Irish public or private law proceedings. The guardian *ad litem* review alluded to at page 34 of the National Children’s Strategy has been completed, and a report was issued recommending, *inter alia*, “a single, national system for guardians *ad litem*, centrally regulated and funded, with effective mechanisms for monitoring, accountability and adherence to best practice standards”.⁶⁴ While the report is welcomed, more emphasis seems to have been placed on the costing of options than on the right of the child to be heard.

We recommend the following steps to clarify and give guidance to the delivery of services by guardians *ad litem*:

- **Legislation should be enacted to enable regulations to be made to set standards for guardians *ad litem*. The regulations should deal with matters such as supervision, training, monitoring and accountability.**
- **Guardians *ad litem* should be recognised as independent officers of the court, whose primary role should be the representation of the child’s best interests.**
- **Legislation should be put in place to facilitate the role of guardians *ad litem*, for example in relation to having access to the child to be represented, to family and other persons concerned, and to medical, school and other records which may have relevance.**
- **Provision should be made to allow the guardian *ad litem* to be involved in the formulation of any settlement by the parties. It can be as important that the voice of the child be heard in such negotiations, as it is in the hearing itself.**

⁶⁰ See also the European Convention on the Exercise of Children’s Rights, which was signed by Ireland on 25 January 1996, entered into force on 7 January 2000 but has not yet been ratified. It was conceived to redress the deficiency of procedures in the Convention on the Rights of the Child, and emphasises procedural rights for children, their participation in judicial proceedings affecting them through information and assistance from an appropriate person or representative. See further Jane Fortin, *Children’s Rights and the Developing Law*, (Lexis Nexis UK 2003), p. 199 et seq.

⁶¹ P. 30.

⁶² P. 31.

⁶³ P. 34.

⁶⁴ *Review of the Guardian Ad Litem Service* (Capita, 2 March 2004) at p. 84.

- **The anomalies between public and private law in relation to representation by a solicitor as well as involvement of a guardian *ad litem* should be eliminated, so that it is possible in public law proceedings for a guardian *ad litem* to seek legal representation in the right circumstances.**
- **In both public and private law cases where representation for a child is considered necessary and in the best interests of the child, state funding should be made available for such representation where the means of the parents are insufficient.**

8. REPRESENTATION OF CHILDREN BY LAWYERS

The role of the guardian *ad litem* requires a child welfare professional in order to deal with both “welfare” and “wishes”. The lawyer who represents the child directly has a task which is quite different to the guardian *ad litem*. The lawyer is obliged to follow the instructions of his or her client, even against what the lawyer may perceive to be his or her client’s better interests. Lawyers are not generally trained in child psychology and are never professionally qualified to tell the court what is in the best interests of their underage clients. The lawyer has a duty to advise the child client that the courts’ paramount consideration will be the welfare of the child.

The lawyer/client relationship is a professional and objective one. The commitment is a personal one, rather than one which can be delegated.⁶⁵ Lawyers owe a professional duty as officers of the court not to mislead the court. In general, however, the duty of the lawyer is to investigate and collate evidence, call and cross-examine witnesses and ensure the client’s instructions are presented to the court in the most persuasive manner.⁶⁶ The personal views of the lawyer as to what is best can only be used as a guide to the client on the likely approach to be taken by the court. As succinctly stated by Treyvaud J. in the Australian case of *Waghorne v. Dempster*:⁶⁷

“Advocacy ... demands that the advocate conduct his client’s case objectively and without necessarily holding, and certainly not expressing, any personal opinion or view as to the case or any aspect of it. To permit otherwise would be to fly in the face of the Australian and English understanding of the role of an advocate.”

It is important for the lawyer to ascertain whether the child client is capable of giving instructions. In other words, the lawyer must be satisfied that the client fully understands the nature of the proceedings and the ramifications of what he or she is asking the lawyer to do on his or her behalf. If the child is

⁶⁵ The Solicitors Family Law Association in England and Wales in its *Guide to Good Practice* provides that the solicitor should not normally delegate the preparation, supervision, conduct or presentation of the case, but should deal with it personally. In each case the solicitor must consider whether it is in the best interests of the child to instruct another advocate and then advise on whom should be instructed.

⁶⁶ Peggy Ray, see paper delivered at First World Congress on Family Law and Children's Rights, 4th to 9th July 1993, Sydney Convention Centre.

⁶⁷ (1979) 5 F.L.R. 503.

severely emotionally disturbed he or she may not be capable of giving instructions.⁶⁸ If there are already child mental health professionals involved the lawyer may consult them. However, if there are none, the lawyer is faced with a difficult dilemma. The direction of the court can be sought in such circumstances.

It is important to explain to the young client the nature of the proceedings in question (child care, wardship or custody/access) in simple and straightforward terms.⁶⁹ The client should be made aware of the fact that the court will make decisions about his or her future and that, by law, it must consider his or her views and wishes.⁷⁰

The child has the same right to be kept informed about the progress of the proceedings as an adult client. He or she must have sufficient information to be able to make informed decisions for him- or herself. Normally a client is entitled to see relevant documentary evidence that the lawyer holds. In the case of a child client, however, this does not always follow and the direction of the court may be obtained where the child client wishes to access a confidential report which may be inappropriate for the child client to see or have a copy of.⁷¹ Social reports are generally given to the court in the first instance, as they are reports for the benefit of the court.

In practice it can arise that solicitors are expected to assume the role of guardians *ad litem*, and there can be a lack of clarity about what the role of the solicitor representing a young client should be. This is implied, in care proceedings, by section 26(4) of the Childcare Act 1991, which provides that if the court decides to add a child as a party to the proceedings under section 25, any prior appointment of a guardian *ad litem* in respect of the same child shall be deemed to have ceased. The intention is probably to ensure that one child cannot have both legal and guardian representation, probably for cost reasons. However, the result may be to deprive the child of an advocate who is qualified to assess his or her best interests, and for whom a lawyer who can only give legal representation will be an inadequate substitute.

United Kingdom

In the UK the matter is catered for by Rules of Court which provide that as soon as practicable after the commencement of public law proceedings, the court shall appoint a children's guardian, whose function is to "give such advice to the child as is appropriate having regard to his understanding" and to instruct the solicitor representing the child.⁷² The role of the guardian is to assess the child's situation

⁶⁸ See *Re H. (A Minor) (Care Proceedings: Child's Wishes)* [1993] 1 F.L.R. 440 where Thorpe J. pointed out that a child had to have sufficient understanding and must be rational. This may not be so where the child is severely emotionally disturbed. If there is any doubt on this matter, expert opinion must be obtained.

⁶⁹ The Lord Chancellors Department Leaflet No. 2, available at www.offsol.demon.co.uk/leaf2tfr.htm, can be very usefully adapted for this purpose.

⁷⁰ See s. 24 of the Child Care Act 1991 and s. 25 of the Guardianship of Infants Act 1964.

⁷¹ See *Re C (Expert Evidence: disclosure practice)* [1995] 1 F.L.R. 204; *Re M (Minors) (Care Proceedings: child's wishes)* [1994] 1 F.L.R. 794; *Re T and E (Proceedings: conflicting interests)* [1995] 1 F.L.R. 581.

⁷² Family Proceedings Rules 1991, r 4.11(2)(a) and (b); Family Proceedings Courts (Children Act 1989) Rules 1991, r 11(2)(a) and (b). See also *Re H (A Minor) (Care Proceedings: Child's Wishes)* [1993] 1 FLR 440 and *Re M (Minors) (Care Proceedings: Children's Wishes)* [1994] 1 FLR 749 and Bennett and Dunford "The Child as Client - "sacking" the Guardian" [1993] Family

and develop a recommendation on what is he or she considers to be in the child's best interests, which may go against the child's wishes. The guardian works "in tandem" with the child's solicitor in commissioning reports and preparing the assessment. If the child is old enough to instruct a solicitor directly, and disagrees with the guardian, the child should be allowed to do so, and the guardian should instruct a separate solicitor. If there is a disagreement about the child's capacity to directly instruct a solicitor, it should be settled by the court. This system of representation for children in public law proceedings is regarded as working well.⁷³

In private law proceedings, although a child's future could be just as much disputed, there is no automatic right to representation. In Scotland, parents are obliged to consult children, depending on their age and maturity, about major decisions within their parental responsibility,⁷⁴ and although this is impossible to enforce, it has useful moral authority. There is no such provision in England and Wales. The Children Act 1989 directs the courts to have regard to children's ascertainable wishes and feelings in relation to disputes concerning the children's upbringing,⁷⁵ but there is no obligation on other practitioners to do so. In negotiations between parents' representatives, mediation and in-court conciliation there is no obligation to have children's views represented. The history of child representation in private law proceedings in the UK, both prior to the establishment of the Children and Family Court Advisory Support Service (CAFCASS) in 2001 and since, has many lessons teach us in this jurisdiction.⁷⁶ In contrast to the system in place for public law cases, the position in relation to private law proceedings continues to be confused and less than satisfactory. It was summarised by Jane Fortin in 2003 as follows:

"Despite the reorganisation [and establishment of CAFCASS], it still varies enormously how, if at all, the court discovers information about the children involved in private disputes. The "ladder" of these children's involvement appears to have at least four rungs. On the ladder's bottom rung, children have no means of providing the court with any indication of their wishes regarding their parents' dispute. On the next rung up, an account of their view will be included in the Child and Family Reporter's report to the court (but such a report need not be called for) [and often is not because of the anticipated delay]. On the third rung up, children are provided with party status and separate representation (but the court may not consider this to be appropriate). On the top rung, children litigate on their own behalf, possibly even having initiated the proceedings themselves. . . . The fact that the Children Act 1989 discriminated against children involved in private law proceedings has been a constant source of criticism. Unlike those who are the subject of public law proceedings, the legislation contains no presumption that these children will be separately represented."⁷⁷

The demarcation of roles between children's guardians and legal representatives generally remains clear. In some cases, however, children on the third rung of the ladder (above) may get only a legal representative, usually an officer from the legal branch of CAFCASS, who must attempt to fill the dual

Law 354; Guidelines on Acting for Children in Private Law Proceedings under the Children Act 1989, The Law Society of England and Wales, July 1992.

⁷³ Fortin, *Children's Rights and the Developing Law*, (Lexis Nexis UK 2003), p. 240.

⁷⁴ Children (Scotland) Act 1995, s. 6(1). Children of 12 years and over are legally presumed to be of sufficient age and maturity to have formed a view on major decisions.

⁷⁵ S. 1(3)(a)

⁷⁶ Fortin, *Children's Rights and the Developing Law*, (Lexis Nexis UK 2003), p. 210 et seq.

⁷⁷ *Ibid.*, p. 212.

role of lawyer and guardian.⁷⁸ Court rules now oblige Court and Family Reporters to advise the court in each case “whether it is in the best interests of the child to be made a party to the proceedings.”⁷⁹ The courts have discretion to appoint guardians, but do not do so generally, although they are increasingly open to the idea of separate representation for children.⁸⁰

Australia

In Australia there are Guidelines for the Child’s Representative which set out a clear statement of the Court’s expectations of the Child’s Representatives and makes specific reference to the UN Convention on the Rights of the Child, 1989.⁸¹ These oblige the representative to act impartially and in a manner which is unfettered by considerations other than the best interests of the child. They are charged to act independently of the Court and the parties to the proceedings but in a collaborative manner with other parties to fulfil that aim. Those guidelines are very specific as to the information to be explained to the child, the limitations of the role, and what happens when they must act contrary to the wishes of the child. The guidelines indicate the role is that of a “skilful, competent and impartial best interests advocate”.

United States

In the US the American Bar Association reset the professional standards for lawyers representing children in August 2003.⁸² The standards do away with the term “guardian *ad litem*.” Instead, they create two distinct definitions of roles for a lawyer representing children in custody cases. A lawyer can be either a “Child’s Attorney” or a “Best Interests Attorney.” Although there are certain duties common to both attorney roles in the Standards, the duties unique to each are also clearly set out.

The “Child’s Attorney” is defined as: “A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.” The “Best Interests Attorney” is defined as: “A lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.”

The distinction between these two lawyer roles is at the heart of the Standards. The Best Interests Attorney investigates and advocates the best interests of the child as a lawyer in the case, regardless of what the child says he or she wants. The Child’s Attorney, however, represents the child as a client in the same way as an adult would be represented, and is guided by the child’s wishes.

It is for the Court to appoint a Child’s Attorney, a Best Interests Attorney, or both in a given case. However, the same lawyer cannot serve both roles. Neither kind of lawyer can be called as a witness.

⁷⁸ p. 221

⁷⁹ See FPC (CA 1989) R 1991, r 11B(5) and (6) and FPR 1991, r 4.11B(5) and (6).

⁸⁰ Fortin, *Children’s Rights and the Developing Law*, (Lexis Nexis UK 2003), p. 223

⁸¹ Available at www.familycourt.gov.au

⁸² American Bar Association Section of Family Law, Standards of Practice for Lawyers Representing Children in Custody Cases, www.abanet.org/child/childrep.html

Rights-based Child Law: The case for reform

The Child's Attorney role contemplates a confidential relationship and carries with it the attorney-client privilege. The Child's Attorney, as the child's advocate, must abide by the client's decisions about the objectives of the representation regarding all issues on which the child is competent to direct the lawyer. The following are included in the duties delineated by the Standards for the Child's Attorney:

- meet with the child upon appointment, before court hearings, when apprised of emergencies or significant events affecting the child, and at other times as needed;
- explain to the child, in a developmentally appropriate manner, what is expected to happen before, during, and after each hearing;
- advise the child and provide guidance, communicating in a way that maximizes the child's ability to direct the representation;
- discuss each substantive order and its consequences with the child.

The Child's Attorney is bound by state ethics rules in all matters. If the Child's Attorney believes that the child's instructions will result in harm to him or her, the attorney can seek court-appointment of a Best Interests Attorney for the child. If a Child's Attorney is appointed to represent siblings, the lawyer should be vigilant to determine whether the siblings' instructions or priorities are in conflict and in the case of a conflict, the Attorney may not act. In such cases, the Standards require the Child's Attorney to withdraw or decline representation.

The lawyer for the child has dual fiduciary duties:

- to ensure that the client is given enough information to make an informed decision, and
- not to overbear the will of the child client. This may require the Child's Attorney to consult with the child's therapist or other experts to assist the lawyer in understanding the child's priorities, perspectives, and individual needs.

The Standards provide guidance for the Child's Attorney in circumstances where the child is unable to express a position, as with a pre-verbal child. In such situations, the Child's Attorney should represent the child's legal interests or request the appointment of a Best Interests Attorney. The Standards draw a distinction between the child's "legal interests" and "best interests." "Legal interests" are interests of the child that are specifically recognized in law and that can be protected by a court. They may include a child's right to support and public financial benefits; rights to parenting time; due process or other procedural rights; or the child's right to appropriate educational, medical, or mental health services.

While Best Interests Attorneys are also bound by state ethics rules in matters not dictated by the absence of the traditional attorney-client relationship because they need not always follow the child's instructions, their role includes specific investigative duties. These include:

- reviewing court files of the child and family members, including case records of social services agencies or other service providers;
- reviewing mental health records, medical records, drug and alcohol-related records, school records, law enforcement records and others related to the case;

- communicating with lawyers for the parties, the Child's Attorney, if there is one, and with non-lawyer representatives or court-appointed special advocates;
- contacting and meeting with the parties, with permission of their lawyers;
- interviewing individuals significantly involved with the child, including case workers, caretakers, neighbours, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;
- reviewing any relevant evidence personally rather than relying on other parties' or counsel's designations or characterizations of it; and
- staying apprised of other court proceedings affecting the child, the parties and other household members. Competent investigative techniques include regular meetings with the children and all parties.

The Best Interests Attorney serves as both fact gatherer and finder of fact, to the extent that the lawyer's role requires obtaining and weighing evidence, reaching factual conclusions and applying best interests criteria contained in state statutes and case law to them. The Standards require the representation of the child's best interests to be based on objective criteria and not on the lawyer's personal philosophies, values, or experiences.

Ireland

The role of a solicitor in Ireland in relation to representation of children requires definition under legislation, and rules of professional conduct should be clear on the matter also.⁸³ **We recommend that legislative guidelines and rules of professional conduct be developed for the legal representation of children.**

Normally a client has access to and may read all the documents filed in the proceedings including medical and other reports and pleadings. However it may not be in the child's best interests to read or know about some of the material in question. This is a matter which should be specifically dealt with by the Guide to Professional Conduct but meantime should be dealt with by application under section 47 of the 1991 Act using the case of *Re M (Minors)* (Disclosure of Evidence) as guidance on the issues involved.⁸⁴

We recommend that solicitors do not exceed their area of professional competence or indeed their professional indemnity insurance policies, and seek to involve guardians *ad litem* where they consider that representation is required for a child's best interests.

⁸³ A Guide to Professional Conduct of Solicitors in Ireland, Law Society, 2002.

⁸⁴ *Re M (Minors)* [1993] Fam 142, [1993] 1 FLR 191 and see generally D. Burrows, "Evidence in Family Proceedings", Family Law (1999) pp. 213-220.

9. LEGISLATIVE PROVISION FOR GIVING THE CHILD A VOICE

The issue of representation for children arises in four types of legal proceedings:

- criminal, where the child is charged with an offence;
- criminal, where the child is a witness;
- civil, public law proceedings involving care proceedings, where the future living arrangements or supervision of the child will be decided;
- civil, private law proceedings involving family disputes, where the future living arrangements of the child will be decided.

Criminal proceedings, child accused

It is anomalous that a child is required to be a party to criminal proceedings where he or she is accused of breaking the law, but cannot usually be a party to a civil case in his or her own right. In most civil law cases he or she must sue or be sued through a next friend, usually a parent.

The constitutional right to legal representation has generally arisen in the context of free legal aid.⁸⁵ In general, an accused is entitled to legal representation in any criminal proceedings if he or she is in a position to pay privately for it. If the accused does not have the resources for this, a number of decisions by the Supreme Court have established a constitutional right to legal aid in cases where the charges are serious or the consequences of conviction are likely to be serious and the interests of justice require that he or she be represented. There is a duty on trial judges to inform accused persons of their right to legal aid, so that they can, if they wish, apply for it under the Criminal Justice (Legal Aid) 1962. Juveniles generally do not have the means to pay for their own representation, and because of their age and inexperience are at a disadvantage in understanding procedures and conducting a defence. In most cases where accused juveniles apply for legal aid, it is therefore awarded. There is no appeal against a refusal to grant legal aid.

The accused juvenile is entitled to the same safeguards and process as any other accused. The Children Act 2001 contains some provisions which are designed to assist a child going through the court process. Section 75 provides for consultation with parents or other adults by the child on opting for a summary trial. Section 77 provides for suspension of a trial and reference to the Health Service Executive for a family welfare conference, with the possibility of an emergency care order, which may result in personal support for the accused, if he or she is willing to accept it.

Section 78 enables court proceedings to be suspended pending the convening of a family welfare conference, "if a child accepts responsibility for his or her criminal behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her."

⁸⁵ See generally Walsh, *Criminal Procedure*, (Thomson Round Hall 2002) p. 557 et seq.

Section 91 provides for the attendance of the parents or guardian of an accused child at court proceedings or a family conference, and empowers the court to issue a warrant for the arrest of the missing parent or guardian in the event of non-attendance, and treat this as contempt of court. If the whereabouts of the parents or guardian are unknown or they fail to attend, “the child may be accompanied during the proceedings by an adult relative or other adult.” Section 94 provides for the presence in court of the parents or guardian of the accused child, or other accompanying adult.

There is no provision, however, for an advocate to assist a child facing criminal charges, if a parent or other adult is unavailable, inadequate or not wanted. In practice, some young people are charged and sentenced without the help and support of a responsible and experienced adult, who could act as an advocate for their interests. This situation arises even for minors in the care of the Health Services Executive, who are not always accompanied to court by a social worker concerned with their care. In many cases, Health Service personnel, probation officers or voluntary workers step in to assist an accused juvenile, and can make an appreciable difference. Legal advisors have a role limited to the provision of legal advice, and no specialist knowledge or status to assist children in other, more personal ways. Neither do they have professional indemnity insurance for this role, but they nevertheless can find themselves assisting children facing criminal charges in the absence of other supports.

We recommend that a mentor service be made available to young persons accused of crimes in the absence of other suitable support, such as their parents, to assist and guide them during the criminal process. Ideally, such a mentor service should not necessarily be limited to the duration of criminal proceedings, but continue thereafter as part of a programme of social support.

Criminal proceedings, child as witness

A court can be an intimidating place even for a worldly adult. For a child it must be especially so. A key concern must be to avoid the process causing additional trauma for the children involved. Several commentators have referred to the stress involved in testifying in open court as a “re-victimisation” or secondary victimisation. A child already scarred by the subject matter of the proceedings may be further traumatised by the process of testifying in court in relation to such matters.

In addition to preventing trauma, there is also a further concern of a more judicial nature. The court will also be concerned to ensure that a child giving evidence will be able to give as full, accurate and coherent an account of his or her experiences as possible. A belief that this is not always possible, added to the fear of further traumatising the child, often results in the courts failing to hear the evidence of children. The prevailing wisdom, it seems, has been that the benefit of hearing the child's evidence is generally outweighed by the danger of the child incurring “secondary trauma”, as a result of being exposed to the formal questioning of lawyers. This concern can arise equally in criminal and civil cases.

The testimony of a child is obviously of particular importance in the context of cases involving child sexual abuse. Because of the nature of the offence, and the secluded context in which it usually occurs, there may be no other evidence to corroborate that of the child. Thus, the need to facilitate child witnesses becomes especially important.

The former (and widely held) view that the testimony of children is not fully to be trusted has nowadays dissipated somewhat. Clinical professionals in particular now widely accept that children do not fabricate abuse allegations and should generally be believed when making such allegations.

Problems still remain, however, in the context of the giving of evidence before a court, especially where matters of a sexual nature are concerned. Children often face having to give evidence about confusing and embarrassing events in open court. The distress is often exacerbated by the presence of the accused during the giving of such testimony.

Placed in such an environment, it is no wonder that children often fail to be able to give a full and coherent account of their experiences. The credibility of even the most honest child can be weakened by a skilful cross-examination. Aggressive questioning and the use of intimidating or embarrassing language can engender confusion and highlight childish inconsistencies that further undermine the coherence and credibility of a child's testimony. Often (and particularly in the context of child sexual abuse cases) a child lacks the vocabulary necessary specifically to describe a particular experience.

Evidence given by television link

The concern to prevent trauma and to ensure that a child's evidence is as coherent as possible has motivated certain evidential reforms. One is the possibility of a child giving evidence by means of a live television link. This allows the evidence of a child to be broadcast live in court but from a separate room.

This method of giving evidence was pioneered in the field of criminal trials. The Criminal Evidence Act 1992 was the first statutory provision in this jurisdiction to allow for the giving of evidence from a room separate from the court.⁸⁶ This evidence is in turn broadcast live into the court. There were, of course, owing to the departure from standard courtroom proceedings, major concerns regarding the constitutionality of such provisions, the key fear being that this facility might undermine the accused's right to "face his accuser". The constitutionality of these provisions has, nonetheless, been affirmed first in the High Court in *White v. Ireland*,⁸⁷ and later upheld in the Supreme Court decision of *Donnelly v. Ireland*.⁸⁸ The Supreme Court made it clear however that sufficient other safeguards must be put in place to ensure that this method of presenting evidence does not prejudice the accused. It noted in particular that the use of the video link in this case did not prejudice the accused's rights because the

⁸⁶ Criminal Evidence Act 1992, s. 13

⁸⁷ [1995] 2 I.R. 268

⁸⁸ [1998] 1 I.R. 321

child had given evidence under oath. This begs the question whether the video link procedure may be used where a child has not sworn an oath. In Ireland, after all, provision is made, most notably for younger children, who do not understand the nature of such an oath, to forego the oath.⁸⁹ It is uncertain if this would preclude the giving of video linked testimony.

The main practical concern surrounding this innovation is one of resources. Few Irish courts have adequate facilities for a television link.⁹⁰

Anatomically correct dolls

In many cases, especially those involving alleged sexual abuse, a child may lack the language necessary to describe his or her experiences. An innovative solution to the problem of the child's limited vocabulary is the use of anatomically correct dolls. These enable a child to convey to the court, by gesture rather than words, the nature of his or her experiences. For instance, a child allegedly the victim of sexual abuse can point to the places where he or she has been touched, thus obviating the need to mention what to the child may be unknown or embarrassing words.⁹¹

Civil proceedings, public law

The Child Care Act 1991, section 30 permits the court to hear cases concerning the welfare of children in their absence, unless it is necessary to have the presence of the child for the proper disposal of the case. While a child may apply to be present at a hearing, the court may exclude the child if, having regard to his or her age and the nature of the proceedings, it feels that it would not be in the child's interest to allow him or her to be present.

The exclusion of children from the process may, however, be to the detriment of the child's right to have his or her interests duly considered by the court. To this end several innovative methods have been formulated to enable a child's voice to be heard in the judicial process, in some cases without requiring the child to be physically present in court.

Guardian ad litem

As already mentioned above, sections 25 and 26 of the Child Care Act 1991 provide for the appointment of a guardian *ad litem* to represent the interests of a child who is the subject of child care proceedings. Costs are commonly ordered to be paid by the Health Service Executive under section 25 (5). Guardians *ad litem* may be appointed in the following child care applications:

- interim care proceedings (section 17) and care proceedings (section 18)
- proceedings for a special care order (section 23B)
- proceedings to vary or discharge a care or supervision order (section 22)

⁸⁹ Children Act 1997, s. 28

⁹⁰ S. 13 of the Criminal Evidence Act 1992 has been brought into effect for the Central Criminal Court and the Dublin Circuit Criminal Court (SI 38/93), the Dublin Metropolitan District of the District Court (SI 288/93) and the Cork Circuit Criminal Court (SI 221/05).

⁹¹ Research in this area was reviewed by Judy S DeLoache in Scientific American, August 2005. She concluded that the use of dolls when interviewing children under the age of five is not always reliable, because of their developing sense of symbolism.

- applications by someone with parental responsibility for access (section 37)
- removal from placement (section 46)
- application for directions (section 47)

The Capita Report⁹² estimated that around 200 care cases potentially involve guardians *ad litem*, based on 2000 figures of children entering care. Other public law cases potentially involving guardians *ad litem*, such as judicial reviews, are estimated at an additional 77 per annum. It also estimated that guardians *ad litem* were not appointed in around 60% of cases where they were potentially needed, for a variety of reasons including lack of familiarity with their role, lack of available, recognised guardians or a perceived lack of familiarity or availability.⁹³

In the event of a guardian *ad litem* service becoming more structured and recognised, more court appointments of guardians *ad litem* can be expected.

Hearsay

The rule against hearsay is described succinctly in *Cross and Tapper on Evidence* as follows:

“[A] statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated”.⁹⁴

If enforced to its full extent, it is obvious that such a rule would cause great hardship in the context of child law proceedings. It may prevent evidence being given by a person who has interviewed a child of the content of that interview. Thus, short of presenting the child as a witness, such evidence could not be admitted. In both public law and private law family proceedings, however, the rule has been eroded considerably.

In the context of childcare cases the inclusion of hearsay evidence is permitted, albeit at the discretion of the court. The Supreme Court affirmed this proposition in *Southern Health Board v. C.H.*,⁹⁵ a case involving the admissibility of a video-recorded interview with a child.

Section 23 of the Children Act 1997, furthermore, permits the inclusion of hearsay evidence of any fact in all proceedings relating to the welfare of a child, in public law (child care) or private law (family) cases. The legislation also applies in cases relating to any person who has a mental disability to such an extent that independent living is not feasible. However, in all cases to which section 23 relates, several conditions apply as listed below:

- the court must be satisfied that the child in question is either unable to give evidence by reason of age or that the giving of oral evidence (in person or by television link) would not be in the interests of the child's welfare;⁹⁶

⁹² Capita Consulting Ireland and the Nuffield Institute for Health, *Review of the Guardian ad Litem Service*, the National Children's Office, 2 March 2004.

⁹³ At p. 53.

⁹⁴ Tapper, *Cross and Tapper on Evidence* (9th ed., Butterworths, 1999), at p. 6.

⁹⁵ [1996] 1 I.R. 219.

- evidence of a fact will only be admitted if direct oral evidence of such fact would also have been admissible;⁹⁷
- such statement cannot be admitted if, in the opinion of the court, its inclusion would be to the detriment of the interests of justice, in particular if its inclusion would result in unfairness to any of the parties to the proceedings;⁹⁸
- prior to hearsay evidence being admitted, all interested parties to the proceedings must be given notice of the proposal to submit such evidence. This should be accompanied by such particulars of, or relating to, the evidence as are considered reasonable and practicable in all the circumstances to allow the parties to deal with any matter arising from its being hearsay.⁹⁹ This condition does not apply where the parties, by agreement, consent that it should not apply;¹⁰⁰
- section 23 does not apply to proceedings started before the commencement of Part III of the 1997 Act, that is January 1, 1999.

When hearsay evidence is admitted by virtue of section 23, the court must also turn its attention to section 24 of the Children Act 1997. This relates to the weight to be given to such evidence. The court is generally required to have regard to all circumstances from which any inference can be drawn as to its accuracy or otherwise, but in particular must consider the following:

- (a) Was the original statement made at the time of, or as soon as possible after, the event to which it relates? Obviously the closer to the event, the greater the likelihood of accuracy.
- (b) Does the evidence involve multiple instances of hearsay?¹⁰¹
- (c) Does any person involved have any vested interest in concealing or misrepresenting the matter or matters? Take, for instance, the case of a person accused of abusing a child, informally questioning that child relating to the matter. It may be the case that the court would consider inadmissible evidence of the child's answers.
- (d) To what extent, if any, was the original statement an edited account? To what extent, if any, was such statement made in collaboration with another for a particular purpose? Obviously an edited account will be of lesser weight, particularly where the person relating it has a vested interest in the case.
- (e) Were the circumstances in which the evidence was gathered, such as to suggest an attempt to prevent the proper consideration of its weight?

Section 25 of the Children Act 1997 allows evidence regarding the credibility of the child to be admitted, notwithstanding the fact that the child is not, strictly speaking, a witness.

⁹⁶ S. 23(1).

⁹⁷ S. 23(1).

⁹⁸ S. 23(2).

⁹⁹ S. 23(3).

¹⁰⁰ S. 23(4).

¹⁰¹ For example, evidence of more than one statement made outside the confines of the court.

Evidence by television link in civil cases

The Children Act 1997, building on the advances made in the criminal sphere, extended the facility to allow children to give evidence by television link in civil proceedings concerning the welfare of a child.¹⁰² While such evidence will be broadcast live, there is also a further requirement that it be video-recorded (presumably for the further perusal of the judge and, where necessary, of any appellate court).

A standard procedure associated with court proceedings is that of identification in open court. Where a person is mentioned, particularly in connection with an allegation of wrongdoing, a court may require the person mentioned to be identified by the speaker in open court. This would of course undermine the efficacy of section 21 of the 1997 Act and to this end it is possible for a child to avoid this requirement.¹⁰³ If the child gives evidence by television link, as contemplated by section 21, that he knew a person before the commencement of the proceedings, it will not be necessary for the child to identify such person in open court. This obviates the trauma often associated with court proceedings where alleged wrongdoers and their victims are thrown together in open court.

A further safeguard for the child is contained in section 22 of the 1997 Act. This allows evidence, given by means of a television link, to be conveyed through an intermediary. This may be done 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.¹⁰⁴ The benefit of this approach is that it enables questions to be put to the child in language that he or she understands. Indeed the Act requires as much.¹⁰⁵ The court must also be satisfied that the intermediary is competent to perform such a task.¹⁰⁶ It may not be sufficient that the intermediary be experienced as a social worker *per se*. In *Eastern Health Board v. M.K. and M.K.*,¹⁰⁷ Keane C.J. cited with approval the following extract from the judgment of Ward L.J. in the Court of Appeal in *Re N (a Minor)*:¹⁰⁸

“For the court to rely on opinion evidence - even to admit it - the qualifications of the witness must extend beyond experience gained as a social worker and require clinical experience as or akin to a child psychologist or a child psychiatrist”.

A key fear may be that the interposition of an intermediary will blunt the opportunity for robust cross-examination of witnesses. All parties are still, of course, entitled to put questions to the child but only indirectly. The Supreme Court considered the use of the television link and intermediary in child law proceedings in *Eastern Health Board v. M.K. and M.K.*¹⁰⁹ While critical of the handling of the particular interview,¹¹⁰ the court seemed in principle to approve of this innovation. Two of the judges, in particular, noted that it was possible for all concerned to see the child during the interview (and, as it

¹⁰² S. 21

¹⁰³ S. 21(5).

¹⁰⁴ S. 22(1).

¹⁰⁵ S. 22(2).

¹⁰⁶ S. 22(3).

¹⁰⁷ Unreported, Supreme Court, January 29, 1999.

¹⁰⁸ [1997] 1 WLR 153. See also judgment of O’Flaherty J in *Southern Health Board v. C.H.* [1996] 2 I.L.R.M. 142, wherein he referred to the fact that the District Judge regarded a senior social worker with the health board as an expert, on the basis that he was “a man who had considerable expertise ... dealing with sexual abuse cases involving the very young”.

¹⁰⁹ Unreported, Supreme Court, January 29, 1999.

¹¹⁰ See also the judgment of Butler-Sloss L.J. in *Re D (Minors)* [1998] 2 FLR 10.

was recorded, to review the proceedings thereafter), thus placing all concerned in a better position when judging its credibility. In light of the decision in *Donnelly v. Ireland*,¹¹¹ it is indeed unlikely that the new provisions in the Children Act 1997 will face constitutional difficulties. That said, caution is still required. The latter case underlines the particular need to ensure that such procedures as are followed do not prejudice the right of all concerned to natural justice, in particular to challenge the veracity of evidence delivered by television link.

Evidence gathered by means of social report, child care cases

Section 27 of the Child Care Act 1991 provides for the District Court or the Circuit Court, on appeal, to order the making of a report on any matter relating to the welfare of a child to which the proceedings relate.

In deciding whether to request a report, the court must pay heed to the wishes of the parties involved, although it is not required to abide by those wishes. It is the court alone that must make the final decision. A copy of the final report must, however, be presented to the parties or (where legally represented) their legal representatives. In the course of the proceedings, the court is entitled to utilise the report as evidence in the proceedings and for these purposes, the author of the report may be called as a witness by any of the parties to the proceedings or by the court itself. The court has discretion to allocate the cost of preparing such a report and of appearing in court to the party or parties to the case.

There is no formal requirement in this section to consult the child affected or include the child's feelings and wishes in the report, but this would normally be done as a matter of good practice.¹¹²

The main problem with these reports is the time they take to prepare and the delay which this occasions for the conclusion of the case. Children have a different sense of time to adults, which passes more slowly for them. They inevitably suffer in situations of uncertainty, as of course adults do also. To minimise the delay, the obvious solution is for the Health Service Executive to provide sufficient resources to conduct the necessary investigations as quickly as possible. A related issue is the value of these reports, which depend greatly on the calibre and experience of the persons making them, and the time and trouble taken. While of assistance to the court, they are not necessarily as effective as direct representation of the child.

Civil proceedings, private law

Guardian ad litem

As already mentioned, there is provision in Irish law for the appointment of a guardian *ad litem* by the court to act on behalf of a child in custody and access applications, and applications for guardianship

¹¹¹ [1998] 1 I.R. 321.

¹¹² The Home Office in the UK published National Standards in 1994 for the preparation of court welfare reports, which required children concerned to be seen at least once by Court Welfare Officers carrying out a reporting function, unless there were exceptional circumstances.

by the natural father.¹¹³ Problems arise from the lack of recognised guardians *ad litem*, lack of funding for their role in private law cases, and some resistance on the part of lawyers and parents. This may be because the addition of another professional is seen as a complicating factor, or because they feel that they are able to ensure the protection of the children's interests without assistance. There is also disagreement about the issue of whether children *should* participate in decisions affecting them. The paternalistic view is that parents are best placed to judge their children's best interests, and wish to protect the children from having to be involved in decision making – in fact, often an appropriate view where younger children are concerned. The problem with this view is that children can too easily feel excluded and uninformed. The children's rights approach stresses the benefits to children in feeling informed, consulted and involved, not ignorant, anxious and lacking any control over what happens to them and the family.

In addition to the children's rights approach, Murch and Keehan identify two other reasons for the input of children. The first is children's roles as social actors, in which their activity after separation is important in restructuring relationships and redefining the family. Listening to their experience in their own terms is important in facilitating this, and the dangers of ignoring it is evidenced by the many incidents of child abuse in which children's statements were not taken seriously but subsequently came to light. The second reason for consultation of children is based on a mental health approach. It seeks to evaluate the appropriateness of legal and other procedures in the light of what is known about the effect on children of stressful life events. Murch and Keehan conclude that there is a wide range of views among all concerned.¹¹⁴ There is however growing recognition that in many cases children are already too deeply involved in family disputes to be protected against direct involvement in the related litigation.¹¹⁵ In such circumstances, it can be very important for the child to feel heard. Lord Justice Wall has acknowledged:

“the need for the boys on the facts of this particular case to emerge from the proceedings (whatever the result) with the knowledge that their position had been independently represented and their perspective fully advanced to the judge.”¹¹⁶

Hearsay

Hearsay evidence is permitted in all proceedings relating to the welfare of a child, including family law proceedings. The conditions set out above by sections 23 and 24 of the Children Act 1997 apply equally to family law cases.

Evidence gathered by means of social report, family cases

Section 20 of the Child Care Act 1991 enables the court to order an investigation to be carried out by the Health Service Executive with a view to determining whether a care or a supervision order is appropriate in relation to a child who is the subject of proceedings concerning custody and access under:

¹¹³ S. 28 of the Guardianship of Infants Act 1964, inserted by s. 11 of the Children Act 1997, not yet in force.

¹¹⁴ Murch & Keehan, *The Voice of the Child in Private Family Law Proceedings*, Cardiff Law School 2002, p. 125.

¹¹⁵ Fortin, *Children's Rights and the Developing Law*, (Lexis Nexis UK 2003), pp. 215 *et seq.*

¹¹⁶ *Mabon v Mabon & Others* [2005] EWCA Civ 634, para. 44, CA.

- section 7, 8, 11, 11B or Part III of the Guardianship of Infants Act 1964;
- section 3(3) of the Judicial Separation and Family Law Reform Act 1989;
- section 6(b) or 10(f) of the Family Law Act 1995; or
- section 5(2), 11(b) or 41 of the Family Law (Divorce) Act 1996.

Despite the fact that these are essentially private law proceedings, the court may make a care or supervision order. The court may order such investigation of its own motion or following the request of any party to the proceedings.

Following such an order, proceedings will be adjourned pending the publication of the results of the investigation. In the interim, the court may make such orders regarding the child(ren)'s care and custody as to it seem proper, including a supervision order. In undertaking the investigation, the Health Service Executive will consider, in particular, whether it should apply for a care order or supervision order in respect of a child, provide services or assistance for the benefit of a child or his or her family, or take any other appropriate action in relation to the child. Once completed, a report must be delivered in writing to the court. If the Executive, having completed its investigation, decides not to proceed to obtain a care or supervision order, it must inform the court of its reasons for so deciding and of any service or assistance that it has provided or intends for the child or for his or her family. It is also required to appraise the court of any action that it has taken, or intends to take in respect of the child. It is possible, in addition, for the court to call the person making the report to give evidence before it.

A danger with evidence gathered by means of a social report is that such a report may, and sometimes does, tend to approach the circumstances of the family from the perspective of the adults as they relate to their children rather than focusing on the children's interests in and of themselves. Care is needed to ensure that the ultimate purpose of the proceedings - to secure the welfare of the children - is not obscured or diluted. There is no statutory requirement that the person making the report ascertain the feelings and wishes of the child, although this is considered to be a matter of good practice.

Section 47 reports

Despite the strictures of the adversarial approach, it has been the frequent practice of the courts to request social reports in respect of children who are the subject of proceedings, public law and private, for a number of years. These allow evidence relating to the child's welfare to be collected without necessarily requiring the child to appear in court. This task was originally performed by the Probation and Welfare Service on an informal basis. Since 1996, such reports have generally been made by social workers, the Probation and Welfare Service maintaining that it lacked the resources to continue doing so adequately.¹¹⁷ The court's jurisdiction to order reports has been put on a formal statutory footing by section 47 of the Family Law Act 1995.

¹¹⁷ A pilot project from July 2003 to July 2004 in the Circuit Court resulted in the Probation and Welfare Service once again undertaking these reports. Due to lack of awareness, there was not a great deal of uptake of this service. There was no equivalent resumption of the service in the District Court.

Section 47 of the 1995 Act empowers the Circuit Court or High Court, as the case may be, to order a social report relating to any party to proceedings or any other person to whom they relate, which obviously includes the children of the parties. Such reports may be requested on an application by a party to the proceedings or the court on its own motion, without necessarily being requested to do so by a party. Section 47 may be invoked in respect of proceedings in a wide range of contexts as listed below:

- Guardianship of Infants Act 1964;
- Family Law (Maintenance of Spouses and Children) Act 1976;
- Family Home Protection Act 1976;
- Domestic Violence Act 1996;
- Status of Children Act 1987;
- Judicial Separation and Family Law Reform Act 1989;
- Child Abduction and Enforcement of Custody Orders Act 1991;
- an application for a decree of nullity; and
- under the Family Law Act 1995 itself.

By virtue of section 42 of the Family Law (Divorce) Act 1996, the social report facility also applies to proceedings taken under that Act. Section 26 of the Guardianship of Infants Act 1964,¹¹⁸ furthermore, once in force, will allow such a report to be procured in proceedings before the District Court taken under the 1964 Act.¹¹⁹

Section 47 allows the court to appoint as author of the social report either a Probation and Welfare Officer, or a suitably qualified person nominated by the Health Service Executive, or any other person named in the order.¹²⁰ In practice, as stated previously, the report is generally compiled by a qualified social worker. As with section 20 reports (above), there is no statutory requirement to report on the feelings and wishes of the child concerned, but this is considered to be a matter of good practice.

Problems with social reports

Delay once again is the main drawback of this procedure.¹²¹ Even in cases where the report is paid for privately, delays can be caused by the unavailability of a suitably qualified person to do the investigation and report quickly.

Delay in matters of custody and access frequently gives the advantage to the *status quo*, even though it may not be in the best interests of children in the longer term. Where living and access arrangements become habitual, judges, children and even parents see the disadvantages of disruption. This can mean that what was a fluid situation at the termination of a marriage or relationship becomes entrenched

¹¹⁸ As inserted by s. 11 of the Children Act 1997.

¹¹⁹ This section is one of the two sections of the Children Act 1997 not yet in force.

¹²⁰ S. 47(1).

¹²¹ See G. Shannon, *Child Law*, (Roundhall Thompson 2005), paras.8-18 to 8-20.

because of the delays inherent in any court system. A better idea may be the more informal approach outlined in the England and Wales green paper, in which prompt, professional assistance in arriving at an agreement is provided, in preference to the preparation of reports.

In some cases parents will not agree on the arrangements to be made as a result of parental separation, despite professional assistance of the kind outlined in the green paper. In such cases, social reports will be necessary to assist a judge in coming to a decision. In all other cases, another system with less delay would be desirable.

At present, when parents separate, the procedure is well known and followed for lack of an alternative:

- If the parents cannot agree, the children by default will remain with one parent, and the second parent will typically be excluded, lose his or her home, and will either seek custody or access.
- If agreement cannot be reached, the parents involve solicitors.
- They may agree to mediation.
- If mediation does not work or is not tried, legal proceedings are initiated and a social report applied for.
- The judge may have to decide the issues between the parents, and sometimes, between a parent and the children.

There is no other equally available procedure, but one could be put in place. This is what the England and Wales green paper is proposing, described below.

Expert and medical opinions

In child custody and access disputes there is a tendency to try to influence judicial decision making by seeking an expert medical report in cases where no one is suggesting that the parents or the child have a mental health issue. Dr Paul S. Appelbaum concedes that in many of these cases doctors give their own value-laden opinions rather than opinions based on a factual or empirical basis:

“We do not have any data comparing children raised by their parents living an alternative lifestyle in San Francisco to those raised by traditional grandparents in Iowa. And, we have relatively little outcome data that addresses simple custody dispute questions like the relative success of children growing up in joint custody arrangements vs. single parent custody arrangements. We do not know what it is like for those kids to be moving back and forth between their parents’ homes on a monthly, weekly, or daily basis. It is extraordinarily difficult to answer these questions on anything other than an anecdotal or value-laden basis as opposed to a genuinely empirical basis. When mental health professionals respond to what they often correctly perceive as the imperative of offering some concrete recommendations in these very difficult cases, they tend to respond on the basis of theories that are essentially unproved”.¹²²

The need for competent impartial input by an expert witness in this area is not in question. The decision however remains one for the judge in the case to make. Unfortunately there is at present nothing in the law which prevents each parent from seeking a report thereby ensuring a “battle of the

¹²² Appelbaum, “The Medicalization of Judicial Decision Making”, keynote address presented at the Judicial Training Conference on Mental Health Testimony in the Courtroom, March 1998, available at www.mass.gov/mhlac/applebaum.htm.

experts” at trial. Inevitably such reports do little to shorten the litigation. Dr. Kenneth Byrne points out that

“Litigating for the custody of one’s child is an extremely stressful experience. It often creates psychopathology in one or both parents. The longer the litigation is drawn out, the more likely this is to be the case. Secondly, whilst litigation is going on the children involved must endure a considerable degree of stress and anxiety. The longer the case and the more court appearances that are involved, the greater the potential for psychological damage to the children.”¹²³

Parents involved in such litigation are not noted for their objectivity and sometimes the children become totally alienated from one of the parents. There has been considerable controversy and debate around the concept of “Parental Alienation Syndrome”¹²⁴ and it can be argued that by giving a child embroiled in such a situation a voice it is more likely that the child will be used to further the aims of the more powerful parent. However the appointment of a guardian *ad litem* and solicitor for the child could in fact assist the court and the child in overcoming the problems associated with this complex problem.¹²⁵

Are welfare reports the equivalent of direct representation for children?

There can be problems with welfare reports. Those preparing them may not have time to interview the children properly or fully investigate the family background. Children can be ambivalent about the degree to which they can trust the process, and how much they can confide in the person undertaking the report. Most importantly, a welfare report does not represent a child’s feelings and wishes, but focuses on the overall situation. Much depends on the calibre and training of the person undertaking the report. In important ways, reports are not the equal of direct representation.

Child law panels

The UK system of solicitors specialising in child law and being admitted to a panel which recognizes their expertise has no equivalent in this jurisdiction. Judges who wish to appoint a representative for a child have total discretion on who to appoint, and this can have most unsatisfactory consequences. Staff of the Health Service Executive can suggest the appointment of solicitors with whom they have worked, or a solicitor with little experience and understanding of the complexities of such cases can be nominated. In relation to decisions which can affect the future course of a child’s life, this is not a satisfactory provision of legal representation.

If there were to be such a panel, how could it be administered? At a minimum, membership of such a panel would need to ensure that the solicitor has the appropriate interest and experience. Attendance at related child law CPD¹²⁶ courses could be evidence of this. It could be self certified, in that the solicitor holds himself out to have this expertise, and therefore owes a commensurately high standard of care.

¹²³ Kenneth Byrne, “Mental Health Professionals in Child Custody Disputes: Advocates or Impartial Examiners?”, *Australian Family Lawyer*, v. 6(3), 1991, p. 8

¹²⁴ Dr. Richard Gardiner, “Recent Developments in Child Custody Litigation”, *The Academy Forum*, vol. 29

¹²⁵ Kenneth Waldron and David Joanis, “Understanding and collaboratively treating parental alienation syndrome”, *American Journal of Family Law*, vol. 10.121-133, (1996) available at www.fact.on.ca/Info/pas/waldron.htm

¹²⁶ Continuing Professional Education

Alternatively, it could be administered by an association of such solicitors, such as the Family Lawyers Association, or by the Law Society. The legislation governing solicitors¹²⁷ restricts the description of solicitors by themselves as specialists, but membership of professional associations is permitted on letter paper and advertising. In order for the Law Society to accredit child law panellists, it would have to make regulations establishing a means of satisfying the Society that the applicant has specialist knowledge.

We recommend that as a matter of practice, only solicitors with expertise in child law matters and a commitment to this area of practice be appointed to represent children in public law child care proceedings. We further recommend that the Family Law Committee of the Law Society study the question of development of a child law panel and make recommendations in this regard.

10. THE ENGLAND AND WALES GREEN PAPER ON PARENTAL SEPARATION

Frustrated by the general lack of enforcement of court orders in intractable access cases and the estimated 10% of custody and access disputes going to court for resolution and taking up a vastly disproportionate amount of time and resources, to little good effect, the Department of Constitutional Affairs published a Green Paper in July 2004 which made radical proposals. Responses to the consultation and an agenda for action followed in January 2005.¹²⁸

The Paper is entitled *Parental Separation: Children's Needs and Parents' Responsibilities* and is squarely focused on the paramount concern in post-separation arrangements, which is the welfare of the children. It is interesting in that it does not seek to give children direct representation by a solicitor or guardian *ad litem*, neither does it particularly seek to involve children in conciliation and mediation processes, though it contemplates this happening when appropriate. The main emphasis is the representation of the child's interests through a mixture of initiatives, summarised below:

- improving the availability of better information and advice to separating parents on how to deal with the consequence of their separation on their children;
- developing model parenting plans;
- covering aspects of parental separation in school programmes;
- improving access to legal advice and practical/emotional advice on handling disputes, by phone and the internet;
- restructuring legal aid so that solicitors promote resolution rather than conflict, and giving incentives for early dispute resolution, mediation and support for collaborative law;
- instituting an in-court conciliation system, focused on problem solving;

¹²⁷ Solicitors Act 1954, section 71 as amended by Solicitors (Amendment) Act 2002, s. 4.

¹²⁸ Green Paper, *Parental Separation: Children's Needs and Parents' Responsibilities*, (July 2004, DCA, DfES and DTI). A sequel, entitled *Parental Separation: Children's Needs and Parents' Responsibilities, Next Steps* was published in January 2005.

- introducing tight case management for family cases, promoting judicial continuity and earlier court dates;
- taking initiatives to achieve better enforcement of court orders and agreements, including follow-up by CAFCASS personnel to ensure they are being respected, and the provision of more resources for contact centres for the most difficult cases;
- redirecting the emphasis of CAFCASS from writing reports toward active problem-solving and helping to make agreements work.

One proposal is notable for the hands-on, interventionist approach involved. The Family Resolutions Pilot Project¹²⁹ started in September 2004, and is intended to raise parents' awareness of children's needs following separation and assist them in agreeing parenting arrangements. As described in the green paper, it involves a three-step process.

First, parents are sent an information pack, which includes guidance on how the court operates and how it views contact cases: that is, the court's expectation that the children should have a meaningful ongoing relationship with both parents. Second, the parents are directed to attend, separately, two facilitated group sessions to discuss how difficult separation and disputes about contact can be for the children and how disputes might be lessened. Third, the final stage involves one or more planning sessions for both parents, facilitated by a CAFCASS court advisor, and involving the children as appropriate. Any agreement reached may be made a court order by consent, or if there are outstanding issues of disagreement, a CAFCASS report may need to be prepared for the court identifying what has been agreed, and what still requires court resolution.

The green paper represents a rethinking of the dispute resolution process for cases involving children whose parents are separated or separating. Recognising that children's interests are often overlooked in the disputes between their parents, it seeks to re-engineer the process to keep the focus on those interests.

The direct representation of children can doubtless be helpful. The proposals in the green paper however seek to go further, and promote the children's interests more actively, with more out-of-court intervention. It remains to be seen where the flaws in this approach appear in practice, but the concept is more ambitious and radical than merely giving a voice to children in the court system. Ensuring children have representation of their views and interests does not necessarily result in a good outcome for them. This is because of the difficulties with enforcement of court orders, the inflexible nature of court orders over time, the financial and emotional cost of court applications, and particularly the lack of ongoing professional support and encouragement for new arrangements affecting the children after separation.

¹²⁹ P. 25

Some of the reforms have already been introduced and others are being implemented as resources and transition times permit. In the responses to the green paper, there was general support for the proposals but concerns about the provision of the resources needed to make them effective. If such initiatives were to be introduced in this jurisdiction, we believe that most practitioners and parents would be strongly in favour of them. However, as in England and Wales, their proper resourcing would be an important element in their ultimate success.

A strong case has been made by the Working Group on a Courts Commission and the Law Reform Commission for the establishment of specialised family courts.¹³⁰ Such courts would have specialist judges and support services. If such a system as outlined in the green paper were to be introduced, a system of family courts as envisaged would provide the necessary support framework for proposals such as those above. Even in the non-specialist courts as they operate at present, increased support, for example from social workers, the Health Service Executive or the Probation and Welfare Service, would enable similar initiatives to be instituted. As the green paper makes clear, it will require training and preparation, and a detailed implementation plan. However, given sufficient resources, it appears to offer the best ideas at present on how children's interests can be represented in situations of parental separation.

We recommend that the experiences of the implementation of the different proposals of the England and Wales green paper “*Parental Separation: Children’s Needs and Parents’ Responsibilities, July 2004*” be studied. We further recommend that ways of implementing these proposals in an Irish context be developed, in the light of the experience in our neighbouring jurisdiction. We recommend that similar changes to the way in which parental separation is currently dealt with by the courts should be explored and put in place, as appropriate and as resources can be found.

11. THE OFFICE OF THE MINISTER FOR CHILDREN

The National Children's Office, now the Office of the Minister for Children has been proactive in the implementation of the goals identified in the National Children's Strategy. It is proving effective in educating Irish society and government on the need not only to recognise and respect children's rights, but also to be held accountable on that commitment. The Office has been a significant development and has promoted child-related thinking through “joined-up government”. Its potential contribution to a culture change in the way children's interests are regarded and dealt with is very important.

¹³⁰ Working Group on a Courts Commission, 6th Report, *Conclusion*, November 1998 and *Report on Family Courts*, (LRC 52-1996), March 1996. There is a widely held view that courts as we know them fail to support children and that far from being part of the solution, the court becomes part of the problem, aggravating an already volatile and acrimonious family dynamic. This undoubtedly occurs, and any reform of our courts must seek to avoid this.

12. THE OMBUDSMAN FOR CHILDREN

The Ombudsman for Children's Office was established in April 2004 under the Ombudsman for Children Act, 2002. The Ombudsman for Children is independent of Government and other civil society actors and is accountable to the Oireachtas.

The first Ombudsman for Children, Emily Logan, was appointed by Her Excellency, President Mary McAleese following an open recruitment procedure in which children and young people were fully involved.

The role of the Ombudsman for Children is to promote and safeguard the rights and welfare of children and young people. The functions of the Ombudsman for Children are: to conduct investigations of complaints regarding actions by public bodies, schools and voluntary hospitals; to promote children's rights, including through participation and communication activities, and to provide research and policy advice to Government and other bodies.

The Ombudsman for Children can investigate complaints from children or young people or from adults on their behalf. She also has a statutory mandate to highlight issues relating to the rights and welfare of children that are of concern to children. In order to facilitate this representational role, the Ombudsman for Children Act, 2002 provides that the Ombudsman shall establish structures to consult regularly with groups of children. The Ombudsman for Children's statutory representational role extends to the provision of advice to the Government on any matter relating to the rights and welfare of children.

13. REPRESENTATION FOR CHILDREN UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

As a result of the European Convention on Human Rights Act 2003,¹³¹ the Convention may be relied upon in Irish courts. Section 2 of the 2003 Act requires the Irish courts to interpret Irish law in a manner compatible with the State's obligations under the ECHR, "in so far as is possible". All courts are now obliged to interpret and apply any statutory provision or rule of law in accordance with the ECHR and take judicial notice of the decisions of the institutions of the ECHR. Where this is not possible and where no other legal remedy is adequate and available, the superior courts may make declarations of incompatibility in relation to legislation and awards of damages (and other remedies) against "organs of the State" who behave in a manner contrary to the State's obligations under the ECHR. Issues likely to be informed by European Court of Human Rights (ECtHR) jurisprudence include the representation and voice of children in proceedings.

¹³¹ Which came into force on 31 December 2003

The right of the child to initiate legal proceedings

The child's right to initiate proceedings is implied in the right of access to a court under Article 6, ECHR. In *Golder v UK*,¹³² the ECtHR explicitly refers to the right of the child to bring proceedings, although in the later case of *Ashingdane v UK*,¹³³ the ECtHR held that the right of access to court could be restricted.

The right to participate in legal proceedings

Articles 6 and 8 of the Convention afford certain procedural safeguards applicable in court proceedings in a contracting state. The right of the individual to participate in legal proceedings is one of those procedural safeguards, a conclusion underlined by the ECtHR in *T & V v UK*.¹³⁴ Both cases concerned whether two 11-year-old boys who were tried for murder in an adult court had received a fair trial within the meaning of Article 6. The cases turned on whether the boys had participated effectively in their own criminal trial and the court held in the circumstances that they had not. The provision of separate and impartial representation to children was, in these cases, deemed to be essential to the conduct of certain criminal proceedings involving children. Considering the far-reaching nature of many public law proceedings involving children, a similar approach is likely in relation to applications by the Health Service Executive for orders for care or supervision of a child and perhaps even in civil proceedings generally.

As previously stated, at best the child's right in Ireland to representation in court applications affecting him or her is discretionary. The net result of such discretion is a chaotic system of representation for children with significant variations as to the operation of the provision of representation throughout the State.

Some recent trends

Recent ECtHR case law points to the fact that courts determining custody and access issues should hear children of sufficient age and maturity. Where this is not possible, a reasonable explanation of a decision not to hear a child of sufficient age and maturity should be provided by the national court.

In *Sommerfeld v Germany*,¹³⁵ the ECtHR criticised the German national court for not obtaining a psychological report to assess the apparently entrenched views of a 13-year-old child not to see her father. The Chamber's decision was overturned by the Grand Chamber, which held that the national court could rely on the directly expressed wishes of a 13-year-old.¹³⁶ That said, the 2003 ECtHR

¹³² ECtHR, 21 February 1975, series A Vol. 18, para. 39.

¹³³ ECtHR, 28 May 1985, series A Vol. 93.

¹³⁴ (1999) 30 EHRR 121.

¹³⁵ [2003] 38 EHRR 35, [2002] 1 FLR 119.

¹³⁶ [2003] 2 FCR 619.

decision of *Palau-Martinez v France*¹³⁷ highlights the need for expert evidence in the making of decisions on custody and access matters.

In *Elsholz v Germany*¹³⁸ and *Sahin v Germany*¹³⁹ the European Court of Human Rights considered the question of children being heard in access proceedings. In *Elsholz*, the child was 7 years of age, and in *Sahin*, 5 years. In *Elsholz*, the child was interviewed twice by the district court, but no psychological evidence was sought. In *Sahin*, overruling a contrary decision in the Chamber, the Grand Chamber held that the Regional Court had not overstepped the margin of appreciation in relying on the expert's statements "about the risks inherent in questioning a child".¹⁴⁰ Notwithstanding the fact that hearing a child between four and five years old did not amount to a violation of Article 8, the Grand Chamber held that the hearing of a child in court depends "on the specific circumstances of each case, having due regard to the age and maturity of the child concerned".¹⁴¹ In neither case did the court address the question of the children's representation.

14. REPRESENTATION FOR CHILDREN UNDER EU LAW

The status of the child in the revised Brussels II Regulation is significantly enhanced.¹⁴² To this end, the hearing of the child plays an important role in the application of the revised Regulation. This is a welcome departure from the current mere affirmation of the "best interests" principle. In particular, Article 11(2) requires the child to be heard in child abduction proceedings unless it is inappropriate because of his age and maturity. Article 41(2)(1) further establishes the child's status in access proceedings:

"The judge of origin shall issue the certificate . . . only if:
(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity".

Brussels II confines parental responsibility to the children of both spouses in connection with a divorce, legal separation and marriage annulment. The revised Regulation¹⁴³ covers both biological and adopted children of the couple, as well as stepchildren and non-marital children. It applies to all civil matters relating to the "attribution, exercise, delegation, restriction or termination of parental responsibility".¹⁴⁴ Article 2 defines "parental responsibility" to mean "all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect". It also provides that the term is to include "rights of custody and rights of access".

¹³⁷ [2004] 2 FLR 810.

¹³⁸ [2000] 2 FLR 486.

¹³⁹ (2002) 1 FLR 119.

¹⁴⁰ [2003] 2 FLR 671.

¹⁴¹ Judgment of 8 July 2003, para. 73.

¹⁴² See G. Shannon, *Child Law*, (Roundhall Thompson 2005), paras.12-59 et seq.

¹⁴³ Which came into effect on 1 March 2005.

¹⁴⁴ See Article 1(1)(6) of Council Regulation 2201/2003.

While, according to recital 19, it is left to the Member States' discretion to provide a framework for representing the interests and wishes of the child, this discretion must be exercised in a manner compatible with the provisions of the United Nations Convention on the Rights of the Child.¹⁴⁵ Research commissioned by the European Forum for Child Welfare in 2001, which took the form of a comparative analysis of the implementation of Article 12 of the UN Convention on the Rights of the Child in six European Union countries,¹⁴⁶ identified significant shortcomings and divergent age-based restrictions in giving effect to the right of the child to be heard in family law proceedings. The research findings highlight the absence of an automatic right for the child to be heard in private law proceedings in Ireland, which is compounded by the fact that section 28 of the Guardianship of Infants Act 1964, as introduced by section 11 of the Children Act 1997, has not yet come into force.¹⁴⁷ In public law cases, while section 26 of the Child Care Act 1991 allows for the appointment of a guardian *ad litem*, the practical reality, as previously stated, is that the absence of a legal infrastructure for the operation of the public law guardian *ad litem* has led to a reluctance to engage children in decisions regarding their own futures.

While the revised Brussels II Regulation establishes the general right of the child to be heard in family proceedings, child-consultation procedures remain an issue of national law. This will result in the nature and extent of the child's right to be heard being dependent on the Member State in which he or she is habitually resident. **We recommend that the vulnerable position of the migrant child arising out of the divergent child-consultation procedures between Member States should be addressed in advance of the 7-year review of the revised Regulation required under Article 65.** This should ensure greater uniformity between Member States and have a significant impact on honouring not only the terms but also the spirit of Article 12 of the 1989 UN Convention on the Rights of the Child.

¹⁴⁵ Article 12 provides that the child who is capable of forming his or her own views has the right to be heard in all matters affecting the child.

¹⁴⁶ Austria, Greece, Netherlands, Ireland, Italy and the United Kingdom.

¹⁴⁷ Guardians *ad litem* are occasionally appointed using the court's inherent jurisdiction.

CHAPTER 3

CHILDREN AND CRIME

1. INTRODUCTION

The sense of frustration often felt by practitioners in dealing with children in the criminal justice system has two aspects. The first immediate one relates to the shortage of constructive options open to children who are convicted of a crime and who look likely to re-offend without serious intervention and help. This situation is discussed below in the context of the Children Act 2001. The second arises from the sense that these children have been badly served, and that more effort should have been made to intervene in their lives at the right time before they got into a pattern of anti-social behaviour and criminal offending. In fact, over the past few years there has been a considerable increase in activity at government, agency and local level to tackle the many factors which contribute to children getting into trouble with the law. It would be unhelpful to ignore this in the context of an evaluation of the legal process as it applies to those children who are failed by society, and slip through the various nets summarised below. Nevertheless, the fragmented nature of much intervention and the disjointed way in which children are helped when they start to show signs of difficulty means that too many children do slip through the nets. The children's courts end up dealing with the consequences of the failures of other agencies and a flawed system.¹

Background to the Children Act 2001

After a long period of stagnation when the dominant legislation relating to juvenile crime continued to be the Children Act of 1908, the Children Act 2001 was enacted and is now partly in force. It introduced some significant innovations:

- The age of criminal responsibility is raised from 7 to 12 years, and may be raised further to 14 years. This provision is not yet in force, nor is it intended to bring it into force until the legislation is amended and the age of criminal responsibility is reset at 10 years.²
- The Garda Juvenile Liaison scheme is put on a statutory basis as the Garda Diversion Scheme.
- Structures for the Garda Diversion scheme are established.
- Family group conferences are introduced.
- Principles for the administration of juvenile justice are set out.

¹ High rates of previous offending were found in a sample of 50 children studied in Sinéad McPhillips, *Dublin Children Court, A Pilot Research Project*, Irish Association for the Study of Delinquency, July 2005, p. 32. See generally G. Shannon, *Child Law*, (Roundhall Thompson 2005), ch. 11.

² Statement by the Minister for Justice, Equality and Law Reform in July 2005.

- Alternatives to detention are available to the courts in the form of a variety of community service and supervision orders.

Disquiet about the juvenile criminal justice system had existed for many years, and different aspects were officially documented in the Kennedy Report (1970),³ the Henchy Report (1974),⁴ the Report of the Task Force on Child Care Services (1980)⁵ and the Whitaker Report (1985),⁶ all of which made proposals for radical reforms. In 1992, Ireland ratified the UN Convention on the Rights of the Child. The same year, a highly critical review of the juvenile justice system instigated by the Government was published,⁷ which reflected a change in thinking on juvenile crime and the traditional solutions. It was widely welcomed and initiated “a unique period of debate and discussion”.⁸ This new climate resulted in the appointment of a junior Minister for Children and the establishment of a new inter-departmental ministry drawn from the Departments of Health, Education and Justice. A National Children’s Strategy was published,⁹ the National Children’s Office was set up to coordinate services and matters concerning children between different government departments, and a statutory Ombudsman for Children was appointed in December 2003. The focus on children and the commitment to inter-agency co-operation is promising for the future.

At the same time as these reforms were being put in place, more effort and resources were being put into preventative programmes than ever before. A National Anti-Poverty Strategy was published in 1996, which set out an agreed agenda for the tackling of anti-social behaviour at its roots. A range of initiatives are attempting to keep as many children as possible out of trouble and away from contact with the courts. The risk factors leading to a child becoming a young offender are well recognised:¹⁰

- family members and peers who offend
- poor parental supervision, and harsh or erratic discipline
- lack of attachment to family and school
- truancy and exclusion from school
- aggressive and hyperactive behaviour in early childhood
- drug and alcohol use
- poverty and membership of a disadvantaged community
- being a boy – boys are more than twice as likely to offend as girls¹¹

³ Government of Ireland, *Reformatory and industrial schools systems: Report of the Committee on Reformatory and Industrial Schools* chaired by District Judge Eileen Kennedy, 1970, Dublin Stationery Office.

⁴ *First Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons: Assessment Services for the Courts in Respect of Juveniles*, 1974, Dublin Stationery Office.

⁵ Government of Ireland, *Task Force on Child Care Services: Final Report to the Minister for Health*, 1980, Dublin Stationery Office.

⁶ Government of Ireland, *Report of the Committee of Inquiry into the Penal System* chaired by Dr. TK Whitaker, 1985, Dublin Stationery Office.

⁷ Government of Ireland, *First report of the Select Committee on Crime: Juvenile Crime: Its Causes and Remedies*, 1992, Stationery Office.

⁸ Marian Quinn, “Youth Crime Prevention” at p. 678 in O’Mahony, *Criminal Justice in Ireland*, IPA 2002. See also O’Mahony, “A Brief Overview of Juvenile Justice in Ireland”, paper delivered to the Conference on Youth, Children and Crime in Sterling, Scotland, April 1998.

⁹ The National Children’s Strategy *Our Children – Their Lives*, 2000.

¹⁰ And found to be present in a sample of 50 children studied in Sinéad McPhillips, *Dublin Children Court, A Pilot Research Project*, Irish Association for the Study of Delinquency, July 2005.

¹¹ Marian Quinn, “Youth Crime Prevention” at p. 680 in O’Mahony, *Criminal Justice in Ireland*, IPA 2002.

Typically, a young offender will have more than one of these risk factors in his background, and an intervention which has a good effect on one factor will often beneficially influence another factor also. For example, increased family support from parents who may have benefited from parenting support and training may also result in better and more punctual attendance in school, with breakfast eaten and a packed lunch. The importance of an inter-agency, holistic approach to the various aspects of a child's existence is underlined by the range of factors which can act to undermine him.¹²

Members of the Health Service Executive, social workers, probation officers, schools and teachers, education services, voluntary organisations, school attendance officers, Gardaí, lawyers and judges may all be involved with a child engaged in anti-social behaviour, and his family. Better inter-agency coordination and follow-through is identified by many practitioners as being critical to achieving results. Insufficient inter-agency coordination is commonly seen as being the big problem. But if resources are already stretched and services fully utilised, it is understandable that coordinating them becomes more difficult. For example, if a young person needs an educational assessment, and there are waiting lists for the assessment service and any extra services recommended as a result of the assessment, it is going to involve a lot of phone calls and effort on the part of a coordinator to achieve a result. However, if the necessary services are more readily available, making appointments and fitting the young person in can happen more smoothly and more can be accomplished. Therefore it is likely that better resourcing will be needed to achieve improvements in coordination in many cases.

Another critical factor may be the need for one person to take responsibility for championing such a child. With many agencies and professionals being involved, the commitment of one person to coordinate services, advocate and take responsibility for a child who is at risk can make a crucial difference to achieving a positive result.

2. YOUTH CRIME PREVENTION INITIATIVES

A general criticism has been made that youth work generally, and youth crime prevention specifically, are frequently not integrated, established programmes with proper funding and commitment, quality assurance and systematic evaluation of effectiveness.¹³ This is not surprising, given the relative novelty of much that is being attempted. However, the *ad hoc* and under-resourced nature of many of the initiatives described below can undermine their effectiveness. Another perceived problem is the lack of trained professional youth workers. Much of the credit for the success of the many effective interventions must go to the individual practitioners and members of voluntary organisations who organise and deliver them.

¹² See also O'Mahony, "Juvenile Delinquency and Emotional and Behavioural Difficulties in Education", available from the author Dr. Paul O'Mahony, TCD.

¹³ O'Mahony, *Criminal Justice in Ireland*, IPA 2002 at p. 683.

The wide range of preventive measures recently being undertaken in the State is described by Marian Quinn in her chapter on “Youth Crime Prevention” in *Criminal Justice in Ireland*.¹⁴ What follows is a brief summary. She divides the measures into four categories:

- interventions which aim to support families and enable positive parenting,
- those which are school-based, or which seek to encourage children to stay in school,
- those aimed at specially targeted individuals and groups of young people, and
- community-wide interventions.

Family-based interventions

These include:

- General measures identified by the Government to promote family cohesion, outlined in the 1999 National Development Plan 2000–2006.
- The Early Start programme, which provides one year’s pre-school intervention for three-year-olds from areas of social disadvantage. Some similar interventions specifically target traveller children.
- Parent training courses run throughout Ireland, although there is a challenge in reaching parents with literacy problems who would stand to benefit, and fathers who tend to leave parenting to the mothers.
- The Springboard pilot projects, based in disadvantaged communities and funded by the Department of Health and Children. These fifteen projects are targeted at children between 7 and 13 and aim to provide supports and services, and support the families’ abilities to respond adequately to the children’s needs.
- Family Group conferences, given a statutory basis in the Children Act 2001 (see below), aimed at engaging with children at risk as well as dealing with the effects of a crime through the Garda Diversion programme or the Probation and Welfare Service. The risk with these conferences is that the decisions agreed are not always carried through and require ongoing supervision.

School-based programmes

The importance of keeping children engaged in school is widely accepted and recognised. However, schools must maintain discipline for the sake of students and staff alike, and traditionally have recourse to suspension for disruptive and unacceptable behaviour. It can be very difficult to find the right balance between positive intervention to encourage children to attend, and disciplining disruptive behaviour, and each school must try to do so in its own way in the absence of national guidelines. Some schools are better than others in seeking the co-operation of different agencies to assist. Teachers do not receive training in relation to the key service providers, nor in relation to inclusive approaches and effective methodologies which aim to enable school attendance in marginal cases.

¹⁴ Edited by Paul O’Mahony, IPA 2002. See also Julie Bowe, *Literature and System Review*, Irish Association for the Study of Delinquency (July 2005) which contains a comprehensive list of agencies, institutions, voluntary groups and official bodies engaged in diversion and youth support initiatives. It also contains a listing of literature on the subject of juvenile crime in the previous five years.

Successful attendance at school is primarily in the hands of the child and his or her family. The under-resourcing of the school attendance service has been the subject of much comment, and it is to be hoped that as Education Welfare Officers are more widely appointed, the basic issue of regular school attendance will be more systematically dealt with.

The following initiatives seek to support schools and pupils:

- 40 areas across the country have been designated as areas of disadvantage by the Department of Education and Science, and thereby qualify for additional funding and programmes in both primary and secondary schools. Improved teacher-pupil ratios, additional support teachers, community liaison teachers, classes and activities including parents, pre-school activities and homework clubs are among the features of this initiative.
- The 8–15 Early School Leaver Initiative applies in certain areas, based on the extent of early school leaving. Teachers without class responsibilities to give support and extra tuition to individual students are available, and activities are organised including after-school activities groups, sports, homework clubs, outdoor pursuits, summer projects and counselling.
- The Stay in School Retention Initiative applies in certain secondary schools and seeks to develop links with the community and relevant agencies.
- The introduction of the Transition Year is widely seen as positive, as are the vocational qualifications such as the Leaving Certificate Applied and the Junior Certificate School Programme. The Transition Year gives opportunities for personal development programmes.

Individual and group initiatives

In the initiatives outlined below, there is a growing role for cognitive-behavioural training which has been shown to achieve excellent results in the development of emotional intelligence and in fostering the ability to make better choices, to think something through before acting and to develop alternative ways of solving problems. It is important in the youth service programmes, the Garda Special Projects, Youthreach and Copping On, among others.

There are five well-established youth organisations which receive regular government funding: National Youth Federation, National Youth Council, Catholic Youth Council, Foróige and City of Dublin Youth Services Board. In addition to funding mainstream activities such as youth clubs and Scouts, four of them fund projects based in under-privileged communities, employing professional youth workers to organise a range of activities for at-risk youngsters. They include

- intensive group work programmes,
- arts and activity based programmes,
- training of local volunteers, and
- referral of young people to specialised services such as counselling, bereavement counselling and for drug related issues.

Community based *Garda Special Projects* (GSPs) are funded by the Department of Justice and are targeted at young people at risk or already believed to be involved in criminal activity. They are managed by local voluntary committees with the support of the Gardaí and the Youth Service. Each is individual but all have much in common, generally working with youngsters between 10 and 16, referred from the Garda Diversion Programme or the Probation and Welfare Office, but sometimes also from schools, parents, youth workers and even the youngsters themselves. They generally involve small groups doing group work programmes, such as *Copping On* (see below) and arts and sports activities.

Youthreach is a national programme for 15- to 18-year-olds who have left school and have no formal qualifications. It does not work as a route back to mainstream schooling, and is potentially stigmatising for participants, always a problem with such programmes. The participants receive a nominal training allowance, and there are over 150 centres throughout the country. The programme focuses on three areas: personal development, skills training and preparation for work. Work experience is an important part of the whole, which works towards positioning the participants for employment or further education or training.¹⁵ Increasingly, formal qualifications are being integrated into its programme, which is excellent for those able to achieve them, but has the potential to threaten the original needs-based approach.

Youthreach however is subject to serious criticisms: that it is used as a dumping ground for difficult children, and that because the staff are on temporary contracts, there is little longterm continuity and standards suffer accordingly. The lack of objective standards (such as national examinations) increases the risk of having low standards, and it is to be hoped that internal standards will evolve and be maintained. A serious drawback is that once a child leaves mainstream schooling and joins Youthreach, there is no way back to mainstream schooling. One solution to this would be to run these programmes on the campuses of mainstream schools, and encourage rejoining. However, there is no prospect of this at present.

Copping On is a national crime prevention initiative, based on a group work programme which aims to improve the participants' cognitive skills, encourage debate, challenge attitudes to crime and inform on the criminal justice system. Involving representatives from many agencies and services, it is an important element of the crime prevention strategy in youth service programmes, in schools, prisons, drug programmes, and work done by the Probate and Welfare Service.

The *Garda Juvenile Diversion Scheme* is the single most important diversionary strategy for at risk young people who are beginning to get into trouble with the law. Since its establishment in 1963, it claims that 87.6% of the total number of young people involved in the scheme (122,304) reached 18

¹⁵ O'Mahony, *Criminal Justice in Ireland*, IPA 2002 at p. 696.

without being prosecuted for a criminal offence.¹⁶ In order to come within the scheme, a young person must be under 18 years of age, admit the offence, and not have been cautioned before (although this is discretionary). The young person will be cautioned with the parents' consent and sometimes also the consent of the victim of the young person's crime. Three types of caution can be given: formal, informal and restorative. The restorative caution involves the young person making amends to the person victimised by the crime. The Children Act 2001 provides for family conferences to be convened by the Gardaí as part of this process, to make further arrangements to assist in the avoidance of further criminal activity. If no further lawbreaking takes place, the caution is removed from the young person's record at 18 years. A total of 20,647 referrals were made to the National Juvenile Office in 2002, involving 17,493 juveniles.¹⁷ 10,240 juvenile offenders were included in the Juvenile Diversion Programme in the same year. 6,531 cases were pending or involved no further action. Around 22% of young offenders were unable to avail of the scheme, either because the crimes they were charged with were too serious (3%), or because they were judged unsuitable for the scheme (19%). In 2002, those excluded from the scheme for these reasons amounted to 3,902. Only the Director of the Diversion Programme may direct a prosecution and exclusion from the scheme.

Community interventions

Good communities have a role to play in removing temptation and opportunity, and providing an atmosphere of good morale for the young people growing up in them. Housing and estate design are important in giving enough space and outlets for activities (playgrounds, playing fields, community centres) and avoiding opportunities for intimidation and worse, for example dark passages, empty houses, many entrances and exits to facilitate escape, and bushes which can be used for cover. Community involvement in schemes such as Neighbourhood Watch and the development of neighbourly relationships can also be very helpful. It is important to strike a balance between the interests of the young people of an area, and those who feel vulnerable and afraid. The risk is that excessive activity can border on vigilantism and can polarise a community.

Prevention better than cure

The above is only a brief overview of the efforts being made to improve communities and services so that fewer children will succumb to the many pressures of their lives and drift into a life of criminal offending. On the basis that prevention is always better than cure, we recognise the critical role that these initiatives have to play in the mainstream of our society. With continuing and increasing commitment to preventive actions, we would hope that the number of children coming into the criminal justice system can be steadily reduced.¹⁸ It is likely, however, that those children most at risk and marginalized often do not benefit from community initiatives. They become marginalized there also, and do best with one-to-one support and specialised services.

¹⁶ An Garda Síochána Annual Report 2002, p. 106.

¹⁷ An Garda Síochána Annual Report 2002.

¹⁸ By at least 12%. "Typically the effects on delinquency in successful interventions have been in the order of a 12% reduction, with considerable variation between studies and individuals." Rutter, Giller & Hagell, *Anti-social behaviour by young people*, Cambridge University Press, 1998, p. 383.

The diversity and fragmentation of prevention efforts is a current problem. There is no official central source of information on the wide range of initiatives undertaken throughout the country. However, in July 2005 the Irish Association for the Study of Delinquency published a study by Julie Bowe entitled *Literature and System Review* which contains a comprehensive list of agencies, institutions, voluntary groups and official bodies engaged in diversion and youth support initiatives. It also contains a listing of literature on the subject of juvenile crime for the previous five years. The Special Residential Services Board has commissioned a survey of preventative initiatives, work on which is in progress. Regular updating and publication of such information sources could provide a valuable resource. Greater cohesion and availability of information should result in the possibility of learning from other experience and initiatives, and the better focus of efforts.

Money spent on family conferences before crimes are committed is likely to give better value than after-crime conferences. It is the experience of legal practitioners that intervention to help out-of-control, homeless or at-risk children is often postponed until they become criminalized by the commission of an offence. Then they are channelled into the juvenile justice system, with all the stigma and alienation which this implies. This appears to happen because adequate intervention services are not sufficiently available. When a child in care is at clear risk of breaking the criminal law, social workers involved with that child cannot always intervene effectively. This is because the childcare system is structured to provide a range of services which may not include an appropriate intervention in that case. The drive to create High Support Units over the past few years has afforded solutions for some difficult and violent children, but admission criteria can exclude others who also need protection for and against themselves.¹⁹ For example, a 13-year-old boy manifesting assertive and inappropriate sexual behaviour is clearly setting himself up for trouble, whether by inviting sexual abuse, or himself sexually abusing another vulnerable child. In the absence of a suitable programme or facility, he will inevitably be criminalised sooner or later. This will not be the fault of his social worker, but of the shortcomings of the care system which is not structured to give him the necessary protection. Other examples arise from difficulties of access to psychiatric care and failure to treat for addiction problems.

Providing services for every contingency is clearly very difficult and expensive, and in the context of limited resources the temptation to allow such cases to drift until a criminal charge and trial brings them to a head is obvious. However, a child in care remains the charge of the Health Service Executive even when convicted and any special arrangements to deal with his problem remain the Executive's financial responsibility. Waiting until a child is criminalised merely puts off the day when a solution has to be found, with the obvious danger to the child and his victims in the meantime, and the added burden of a criminal record for the child. It is a complex problem which needs to be confronted, and it is likely that additional services need to be developed. "Special arrangements" have been put in place by the Health Service Executive when existing services are not suitable, and can be appropriate in some

¹⁹ See SIS, *Definition and Usage of High Support in Ireland*, report to the Special Residential Services Board, April 2003.

cases as a short term solution, for the care of siblings together, or as a break from an existing placement. However, they should be justifiable in terms of the child's long term interest.

3. THE EDUCATION (WELFARE) ACT 2000

Article 42 of the Constitution gives parents and the State a pivotal role in education. The right of children to receive a special minimum education is guaranteed by the Constitution and the law. Research has consistently shown a link between early school-leaving, crime, anti-social behaviour, social deprivation and underachievement generally.²⁰ International research points to fact that the educational attainment of children in care is significantly lower than of those children outside the care system.²¹ The Education (Welfare) Act 2000 aims to provide a national system which will ensure that children of school-going age attend school, or if they fail to do so, that they will otherwise receive at least a minimum standard of education. Dympna Glendenning argues that it therefore imposes a statutory duty on schools to adopt a more pro-active approach to the problem of truancy and non-attendance in school. To achieve this duty schools are to be assisted by The National Educational Welfare Board. The Education (Welfare) Act puts in place a solid management reporting structure for the effective operation of the Act. Schools and Boards of Management have specific duties, Education Welfare Officers and Liaison Officers help them in achieving those duties and the Board has its own duties. Parents have a duty to ensure that their children go to a recognised school. Exceptions exist where the child is registered with the Board for education provided outside the recognised system under section 14, or where the child is being educated outside the State or is taking part in a programme of education, training, instruction or work experience prescribed by the Minister under section 14(19), or the child is receiving a certain minimum education in accordance with subsection 27(2), or where another sufficient cause exists for the child's non-attendance.

The parents have an express duty to notify the school principal of the reason for the child's absence. However children attending special schools or institutions do not fall within the ambit of the Education (Welfare) Act 2000. Where a child is not attending school the Board can serve a notice under section 25 on the parents of the child. If the parents ignore that notice and the child is still not sent to school, the parents are guilty of an offence and liable on summary conviction to a fine or imprisonment for a period not exceeding one month or to both such fine and imprisonment. Prior to serving a notice the Board must make all reasonable efforts to consult with the parents of the child concerned and the principal of the recognised school in question.

²⁰ See D. Glendenning B.L "School Attendance, The Common Good and the Education (Welfare) Act 2000", Bar Review May 2001 p. 381; The School Attendance/Truancy Report, Dept. of Education, 1994; D. Stokes, *Youthreach: An Overview-Development and Future Trends* (Dept. of Education, 1995); Dr Paul O'Mahony, "Punishing Poverty and Personal Adversity", in Professor Ivanna Bacik and Dr. Michael O'Connell (eds) *Crime and Poverty in Ireland*, Round Hall, Sweet and Maxwell, 1998 and *Report of the Working Group on Foster Care*, (Department of Health and Children) May 2001 at p. 39.

²¹ Berridge D, *Foster Care, a Research Review*, HMSO London p. 30 quoted in *Report of the Working Group on Foster Care* (Department of Health and Children) May 2001 at p. 40.

There is no link at this stage with the local branch of the Health Service Executive. This linkage only occurs where the parents have been convicted of an offence or if the prosecution for such an offence have shown that they have taken all reasonable steps to have the child attend school. The potential advantage of early intervention by the Health Service Executive suggests that earlier notification of a child at risk of not receiving schooling would be helpful. **We recommend that the Health Service Executive be notified by the Education Welfare Board of cases where a non-attendance notice under section 25 of the Education (Welfare) Act 2000 is served, and consult with the Executive about assistance for the children and parents.**

Section 10(f) of the Act provides that the Board may advise and assist children and the parents of children who exhibit problems relating to attendance at, and behaviour in, school. Furthermore, the Board may, under section 10(4), with the consent of the parent of the child concerned, arrange for a child to be assessed as to his or her intellectual, emotional and physical development by such person as may be determined. Where the parent refuses his or her consent the Board may apply to the Circuit Court for an order compelling the assessment of the child. The Circuit Court, if satisfied that the child's behaviour, his or her lack of educational progress or the regularity with which he or she is absent from school without reasonable excuse is significant, may order the assessment to be conducted in the face of opposition by the parents.

The Act does not address the unwillingness of the child to submit to such an assessment. This may arise even where the parents are anxious for the child to undergo the assessment. Where this is the case the Board would not appear to have any ability to apply to court for an order that the assessment be carried out. This should therefore be addressed by amending legislation, which will have moral authority although it will not be capable of enforcement. If the child refuses to undergo assessment, the legislation should provide that the Circuit Court will have to make a decision informed by that refusal. **We recommend that the Education (Welfare) Act 2000 be amended to enable the National Education Welfare Board to apply to the Circuit Court for an order that a child undergo an assessment.**

Where the child ultimately refuses to undergo the assessment it would seem that the only thing the Board can do is consult with the Health Service Executive in terms of its general enabling provisions of Section 10(8). It can, of course, prosecute the parents for the failure of the child to attend school and then notify the Health Service Executive pursuant to section 24(8).

The genesis of problematic behaviour leading to truancy can arise due to family breakdown, problems within the school system, bullying or because of unidentified special needs, learning disability, emotional disturbance or mental disorders. The Education Act 1998 and Education (Welfare) Act 2000 clearly acknowledge that the problem is not capable of a purely "stick" approach. The legislation puts in place a sophisticated system of checks and balances involving the school, the parents, the Board and its officers to coax school attendance rather than force it. The Ombudsman for Children Act 2002 also

places schools within the ambit of the Ombudsman for Children and this may prove to be the missing link from the perspective of the child in the school system.

At present, there are insufficient numbers of education welfare officers to ensure school attendance in all areas. As of July 2004, 73 officers were employed to cover the approximately 4,000 schools nationwide, and a further 10 were sanctioned in November 2004. According to a report commissioned by the National Education Welfare Board, 360 staff are needed to provide a complete, nationwide service as envisaged under the Education Welfare Act 2000. The Board prioritises areas of most need. In May 2005, it reported taking on 17,000 cases in its first full year of operation, and answering 7,000 calls. It found serious problems in school attendance, and that over 80,000 children missed 20 plus days of school in the previous year.

The work of the Education Welfare Board has great potential to keep and support children in school and avoid them falling behind, becoming alienated and drifting into trouble with the law or becoming clients of the care system. Children who have fallen behind in their education and lost the daily discipline of school are gravely disadvantaged and difficult to help, and at higher risk of offending or being taken into care. Preventing this from arising is generally agreed to be a crucial objective.

A number of children are subject to so many personal and societal disadvantages that, despite everything, they are not diverted from crime and end up in the juvenile justice system. This system by its nature represents “after the event” crisis intervention, and in many cases must mop up the damage left by the failings and omissions of other agencies. The need for well-thought-out and coordinated services for children at all levels including the juvenile justice system is widely accepted and recognised, but far from realisation at this time. Rough estimates put the regular clients of the Children’s Court in Dublin at under 100, perhaps between 60 and 70, which is not an impossibly large number. Instituting an effective, coordinated system to deal with juvenile justice is an achievable goal.

4. THE CHILDREN ACT 2001

The Children Act 2001,²² together with the Children Act 1941²³ and the Children’s (Amendment) Act 1957,²⁴ deals with the treatment of unruly children, those children with special needs and those found to be in breach of the criminal law. The 2001 Act contains 271 sections, designed primarily to overhaul the Children Act 1908. It was signed by the President on July 8, 2001. However, a few important parts of the Act are not yet in force.

²² No. 24 of 2001.

²³ No. 12 of 1941.

²⁴ No. 28 of 1957.

Rights-based Child Law: The case for reform

The following is an overview of the main provisions of the Children Act 2001 which have been commenced:

Part 1 Preliminary ²⁵	<i>All except some of Schedule 2 (s. 5)</i>
<i>Dept. of Justice, Equality and Law Reform</i>	
Part 2 Family Welfare Conferences ²⁶	<i>All except ss. 7(1)(a), 10(2) and 13(2)</i>
<i>Dept. of Health and Children</i>	
Part 3 Amendment of Act of 1991 ²⁷	<i>All except s. 23D</i>
<i>Dept. of Health and Children</i>	
Part 4 Diversion Programme ²⁸	<i>All</i>
<i>Dept. of Justice, Equality and Law Reform</i>	
Part 5 Criminal Responsibility	<i>None</i>
<i>Dept. of Justice, Equality and Law Reform</i>	
Part 6 Treatment of Child Suspects in Garda Stations ²⁹	<i>All except ss. 59 and 61(1)(b)</i>
<i>Dept. of Justice, Equality and Law Reform</i>	
Part 7 Children Court ³⁰	<i>All</i>
<i>Dept. of Justice, Equality and Law Reform</i>	
Part 8 Proceedings in Court ³¹	<i>ss. 78 – 87 and s s.89 – 94</i>
<i>Dept. of Justice, Equality and Law Reform</i>	
Part 9 Powers of Courts re Child Offenders ³²	<i>ss. 108-110; 113-114; 133-136</i>
<i>Dept. of Justice, Equality and Law Reform</i>	
Part 10 Children Detention Schools	<i>None</i>
<i>Dept. of Education and Science</i>	
Part 11 Special Residential Services Board ³³	<i>All</i>
<i>Dept. of Health and Children</i>	
Part 12 Protection of Children ³⁴	<i>All</i>
<i>Dept. of Justice, Equality and Law Reform</i>	
Part 13 Miscellaneous ³⁵	<i>All except ss. 259, 262, 263 and 265</i>
<i>Dept. of Justice, Equality and Law Reform</i>	

The Office of the Minister for Children has the lead role in relation to co-ordinating the implementation of the Children Act, 2001.³⁶ The Act is not now expected to be fully in force until 2008.

²⁵ Children Act 2001 (Commencement) Order 2002 (SI 151/02), Children Act 2001 (Commencement) Order 2004 (SI 468/04).

²⁶ Children Act 2001 (Commencement) (No. 2) Order 2004, SI 548/04.

²⁷ Children Act 2001 (Commencement) (No. 2) Order 2004, SI 548/04.

²⁸ Children Act 2001 (Commencement) Order 2002, SI 151/02.

²⁹ Children Act 2001 (Commencement) Order 2002, SI 151/02.

³⁰ Children Act 2001 (Commencement) Order 2002, SI 151/02.

³¹ Children Act 2001 (Commencement) Order 2002, SI 151/02, Children Act 2001 (Commencement) Order 2004, SI 468/04.

³² Children Act 2001 (Commencement) Order 2002, SI 151/02.

³³ Children Act 2001 (Part 11) (Commencement) Order, 2003, SI 527/03.

³⁴ Children Act 2001 (Commencement) Order 2002, SI 151/02.

³⁵ Children Act 2001 (Commencement) Order 2002, SI 151/02, Children Act 2001 (Commencement) Order 2004, SI 468/04.

Regulations for the conduct of Family Welfare Conferences under Part 2 and for Child Care (Special Care) under Part 3 are effective from 24th September 2004.³⁷

The Children Act 2001 repeals the Children Act, 1908, which Act established a children's court and set out provisions for the disposal of children and young persons after conviction. It is primarily concerned with matters of juvenile justice, with the exception of Part 3, which amends the Child Care Act 1991. The 2001 Act has 13 parts. It is the culmination of three decades of debate and recommendations³⁸ and attempts to put in place a modern statutory framework for dealing with juvenile justice. The Act adopts neither a welfare nor a justice model of youth justice. Rather, it reflects a rights-based approach, imported in large measure from international imperatives. It provides for family welfare conferences and other new provisions to deal with unruly children and children with special needs. A comprehensive strategy on restorative cautioning and conferencing is introduced. Broadly speaking, the 2001 Act supports the philosophy that children in conflict with the law must be treated as children first. It is based on the premise that detention should be used only as a last resort and should only be considered after a range of community-based measures (detailed in Part 9 of the Act) have been exhausted.

At present, the Act is not working satisfactorily because while many of the traditional crime and punishment provisions have been brought into effect, they are not yet balanced by the other, more constructive procedures and powers designed to intervene in cases where children break the law, and the necessary support services to make such interventions useful and effective. Many of the parts of the 2001 Act not yet implemented will require additional training, manpower and resources. The following parts of the Act remain to be implemented:

- Part 5 – Criminal responsibility and the treatment of underage offenders by the Gardaí: no date has been set for implementation. This part will have major implications for the Department of Health and Children, as young offenders dealt with heretofore by the Gardaí will become the responsibilities of the Health Service Executive.
- Part 8 (part) – section 88, remand in custody
- Part 9 (part) – Powers of courts in relation to child offenders: principles to guide exercise of criminal jurisdiction over children, probation officer reports, parental supervision orders, the establishment of day centres, attendance at day centres, various probation orders (training or activities programme, intensive supervision and residential supervision orders), other orders (suitable person (care and supervision) and mentor (family support)), detention orders in Children Detention Schools or centres, the establishment of Children Detention Schools and

³⁶ For an interesting insight into the work of the National Children's Office, now the Office of the Minister for Children, and the situation of children generally see Ireland's Second Report to the UN Committee on the Rights of the Child July 2005, available at www.nco.ie. See generally G. Shannon, *Child Law*, (Roundhall Thompson 2005) paras. 8-63 to 8-65.

³⁷ Children (Family Welfare Conference) Regulations 2004 (SI 549/04) and Child Care (Special Care) Regulations 2004 (SI 550/04).

³⁸ See the Kennedy Report (1970), the Henchy Report (1974), the Task Force on Child Care Services (1980), the Whitaker Report (1985) and the Report of the Dáil Select Committee on Crime (1992).

regulations for them, and punishment of certain indictable offences committed by younger children. No date has been set for implementation.

- Part 10 – Children Detention Schools: due to be implemented once separate detention facilities for 16- to 17-year-old boys and girls are established.
- Part 13 (part) – Miscellaneous: provisions dealing with probation officers, delegation, and temporary accommodation in Garda stations or elsewhere. No date set for implementation.

The order of implementation of the different parts of the Act can be criticised on the basis that earlier intervention is more useful than later, and therefore that Part 2 of the Act dealing with family welfare conferences prior to conviction should have been brought into effect as a priority,³⁹ and certainly before Part 8,⁴⁰ which deals with post conviction family conferences, convened and managed by probation officers. While practical realities in the order of implementation are acknowledged, the other reality is that crucial parts of the Children Act remain unimplemented four years after enactment, and further delays are anticipated, up to 2008.

The Act undoubtedly signposts a movement towards a more progressive juvenile justice system, and there is wide discretion allowed to Gardaí, judges, social workers, probation officers and others to work within the socio-economic context in which deviant behaviour often occurs. The central role of the family is to be welcomed. The concept of the family conference is imported from New Zealand, which jurisdiction views the family as the solution to the problems of the child in conflict with the law. But parts of the Children Act 2001 arguably see the family as the primary cause of the problems encountered by troublesome children. In particular, sections 111 to 114 of the 2001 Act permit failed parenting to be sanctioned, although these provisions are very rarely used, if ever. A similar approach is not adopted when the State is fulfilling a parenting role. In fact, the State as a parent has had a disturbing history. While the Children Act 2001 sends a clear message to parents regarding care, so far the State has been effectively immune from prosecution. However, this position may change as children seek to have their human rights vindicated under the Constitution and the European Convention on Human Rights.⁴¹

The Act contains no provision for support and advocacy for young people, other than legal representation. Children who find themselves in the juvenile justice system must rely on parents and other adults to explain to them all the implications of their position, which may be problematic if the available adults are not equal to the task. There is no provision for age-appropriate information on legal rights. Ursula Kilkelly, in her study on the Children's Court, argues that

“ . . . serious consideration should also be given to putting in place formal, independent support structures for young people, in the form of a court-based advocacy service. The role of such an advocate would be to prepare the young person for court, advise him/her where to stand, how to address the judge, and how to communicate with his/her solicitor during the proceedings. The

³⁹ Brought into effect on 23rd September 2004, SI 548/04.

⁴⁰ Mostly brought into effect on 29 July 2004, SI 468/04.

⁴¹ For example, see report in the Irish Times, 14 May 2004, p. 4 “At risk boy takes case to High Court: Son of alcoholic parents says his statutory and constitutional rights have been breached”.

advocate, which in other jurisdictions takes the form of a social worker, could offer independent support to all young people who attend court and act as a court-based liaison officer between the young person and his/her family, the Probation and Welfare Service, the court and other agencies.”⁴²

We recommend that a system of advocacy for children in the juvenile justice system be developed, tested and implemented throughout the State, and that age appropriate information be made available to children in the juvenile justice system in relation to their rights on arrest, interrogation, charging and detention.

In relation to complaint mechanisms, the Ombudsman for Children Act 2002 excludes the application of that Act to children in detention, who are among the potentially most vulnerable.⁴³ **We recommend that the Ombudsman for Children Act 2002 be amended to remove the exclusion from the Ombudsman’s remit of investigations into places of custody for children.**⁴⁴ The Garda Síochána Act 2005 makes provision for the investigation of complaints against members of An Garda Síochána by persons including children, but it is not clear what special arrangements will be put in place to make this procedure accessible to young people and effective where they are concerned. **We recommend that special procedures be put in place under Part 4 of the Garda Síochána Act 2005 to ensure access by under-18-year-olds to the Ombudsman complaints procedure, and age appropriate procedures for the hearing of such complaints.** Ursula Kilkelly makes a similar recommendation in her study on the Children’s Court.⁴⁵

The Children Act 2001 Part 1 - Preliminary

The word “child” has been defined in section 3(1) of the 2001 Act, in line with the definition of a child under the Child Care Act 1991⁴⁶ to mean “a person under the age of 18 years”.

The Children Act 2001 Part 2 - Family Welfare Conferences

Family group conferencing

Part 2 of the Children Act 2001 establishes for the first time on a statutory basis provisions for early intervention at an inter-agency level for children at risk by the holding of a family welfare conference. The concept of a family welfare conference has been imported from the family group conference, which term originally came from New Zealand where it forms an integral part of the youth justice system there. The Health Service Executive is empowered under the Act to establish family welfare conferences in appropriate cases in respect of children at risk who have not committed offences and children before the court for their criminal behaviour but who the court considers may need care and protection. Family welfare conferences provide a useful framework within which a child, his family

⁴² Dr. Ursula Kilkelly, *The Children’s Court*, May 2005, p. 31.

⁴³ S. 11(1)(e)(iii).

⁴⁴ See G. Shannon, *Child Law*, (Roundhall Thompson 2005), para 8-58.

⁴⁵ Dr. Ursula Kilkelly, *The Children’s Court*, May 2005, p. 86: “An effective, independent Garda complaints mechanism must be established with age appropriate procedures which are accessible to young people. Details of such procedures should be brought to the attention of all young people on arrest.”

⁴⁶ No. 17 of 1991.

and the appropriate agencies can find solutions to the problems that have led to the child being at risk. It empowers families to come to their own solutions in co-operation with the relevant professionals. The emphasis is on consensus and partnership, in line with the approach adopted in New Zealand. One of the most significant and progressive elements of the family welfare conference is that children will be present at the conference. Two core principles underlying the family welfare conference are that the child's interests are paramount and that insofar as is possible, the child is best looked after within his own family.

Types of conferencing

Three types of conferencing are provided for under the Children Act 2001.⁴⁷ The first is the family welfare conference, which is provided for in Part 2 of the Act and is to be convened by the Health Service Executive. It deals with young people who are not offenders but whose behaviour presents a serious risk either to themselves or others. Where it appears to the Health Service Executive that a child is in need of special care and protection, a family welfare conference must be convened under Part 2 of the 2001 Act, before the Executive can apply for a special care order under Part 3.

The second type of conference is the Garda conference, as the Garda juvenile liaison scheme is now to be known.⁴⁸ The provisions relating to Garda conferences are in force since 1 May, 2002.

The third type of conference is a family conference, which is convened under Part 8 of the Act by the Probation and Welfare Service where a child is charged with an offence and the Court considers that a family conference is desirable. It is a valuable link between the child care/welfare system and the criminal law. The provisions relating to the family conference came into force on 29 July 2004.⁴⁹

Family welfare conference

A family welfare conference is convened under section 7 of the 2001 Act by a co-ordinator appointed by the Health Service Executive. Regulations to govern the conduct of conferences are contained in SI no. 549 of 2004 and came into effect on 24 September 2004. The co-ordinator acts as chairperson of the conference. Section 7 also identifies the circumstances in which a conference may be convened. It can be triggered in two ways, on the direction of the court where it considers that a child before it on a criminal charge may be in need of special care or protection, or where it appears to the Health Service Executive that a child may require special care or protection. Before such an order can be applied for, the Health Service Executive must convene a family welfare conference. The intention is to ensure that children are only taken into special care as a last resort.

However, in practice the convening of a family welfare conference will take two or three months, and the outcome may often be a foregone conclusion given the circumstances of the family already known

⁴⁷ See further G. Shannon, *Child Law*, (Roundhall Thompson 2005), para. 11-06 et seq.

⁴⁸ See Pt 4 of the Act.

⁴⁹ SI 468/04.

the Health Service Executive officers. The requirement can therefore result in considerable loss and waste of time. **We recommend that section 7 of the Children Act 2001 and section 23A of the Childcare Act 1991, as inserted by Part 3 of the Children Act 2001, be amended to permit the Health Service Executive to seek a waiver of the requirement for a family welfare conference by application to the District Court, if in its opinion it would be unlikely to result in any change to the child's circumstances or be of assistance to the child.**

While the Health Service Executive is empowered to convene a family welfare conference, it is not obliged to do so, and can avoid doing so even though the family may request it. The Executive must however inform the parents in writing of the reasons for its decision. There is no time frame stipulated in the legislation for the organisation of a conference, or in relation to the implementation of its decisions. Omission to convene a family welfare conference arises in cases where the necessary services are not properly resourced: the Health Service Executive routinely has trouble in allocating social workers to some children in its care, or known to be at risk.

We recommend that in the event that the Health Service Executive does not convene a family welfare conference on its own initiative or at the request of the family of the child concerned, it should be open to the family to apply to the District Court for an order convening such a conference and requiring the attendance of a representative of the Health Service Executive and other named parties. We recommend that the Court should continue to supervise such cases to ensure that the decisions of the conference are followed through.

The basic purpose of the family welfare conference is to produce a plan for the future care, protection and development of the child. This will involve the family taking responsibility for the child and coming up with proposals for the plan with the assistance of the professionals attending the conference. Section 8 sets out the functions of the family welfare conference. It can decide whether a child is in need of special care and protection, which he is unlikely to receive unless a special care order is made. If it decides that the child is in need of a special care order, it shall recommend to the Health Service Executive that it seek such an order. If it does not so decide, it may make recommendations to the Executive on the care and protection requirements of the child, including the seeking of a supervision order or a care order under the Child Care Act 1991 or the provision of services and assistance to the child and his family. The family welfare conference is designed to ensure that children who require special care and protection will only be sent to a special care unit as a last resort.

A family welfare conference is likely to agree on a course of action which will involve special costs. For example, the action plan may involve drug treatment, psychological therapy, special training or equipment, and it will be essential that resources are made available to enable the Health Service Executive and other authorities such as the Probation and Welfare Service to implement the family welfare conference decisions. **We recommend that additional, designated funding be made available to support and enable implementation of family welfare conference action plans.**

Conferences will also need to include progress review procedures and follow up to action plans to be effective.

One of the fundamental principles of the family welfare conference is that agreement should be unanimous. Therefore, section 8(2) requires any recommendations made by a family welfare conference to be unanimous, unless the co-ordinator regards the objection of any participant as unreasonable. Where unanimity cannot be achieved, section 8(3) provides that the matter revert to the Health Service Executive for determination.

In convening a family welfare conference the co-ordinator should discuss with all the parties the persons he believes should be permitted to participate in this conference. The guiding test for participation is the welfare of the child. By virtue of section 9 of the 2001 Act, a variety of different people are entitled to attend a family welfare conference, including

- the child and his parents or guardians;
- any guardian *ad litem* appointed;⁵⁰
- other relatives as determined by the co-ordinator following consultation with the child and his parents or guardians; and
- an officer or officers of the Health Service Executive.⁵¹

Under section 9(1)(f), the co-ordinator can permit other persons to attend who, “in the opinion of the co-ordinator . . .” could make a positive contribution to the conference. This subsection could facilitate the presence of a solicitor at the family welfare conference. Section 9(2) of the 2001 Act should be noted. It provides:

“If, before or during a family welfare conference, the coordinator is of the opinion that the presence or continued presence of any person is not in the best interests of the conference or the child, the coordinator may exclude that person from participation or further participation in the conference.”

The foregoing is an important provision in that someone contributing negatively to a conference can be excluded from the conference.

Section 10 of the 2001 Act deals with the procedure at the family welfare conference and provides that each family welfare conference will generally set down its own procedures and timeframe. Section 11 requires the Health Service Executive to provide such administrative services as are necessary. Section 12 requires the co-ordinator to notify the recommendations of the conference to the participants and any other body or persons the co-ordinator deems appropriate. Section 13 sets out how the Health Service Executive is to give effect to the recommendations of a family welfare conference. It may apply for a special care order, a care order, a supervision order or provide appropriate services and assistance for the child and his family. Section 14(1) provides that no evidence shall be admissible in

⁵⁰ As noted elsewhere, GALs are often not available. See further G. Shannon, *Child Law*, (Roundhall Thompson 2005), ch. 8.

⁵¹ S. 9(1)(a) to (e).

court regarding any information, statement or admission disclosed in the course of the family welfare conference.

Section 14(2) renders admissible, of necessity, the recommendation or decision of a family welfare conference.

The family welfare conference, as a participative model of childcare, is very much to be welcomed. It also has a role to play prior to the commission of an offence, in cases of children at risk.

The Children Act 2001 Part 3 – Children in need of special care and protection

Part 3 amends the Child Care Act 1991, inserting a new part IVA. It gives a court power to make an order where it appears that a child requires special care and attention which he or she is unlikely to get, unless an order is made to detain the child in special residential care. The legislation stipulates a prior family conference, and that the detention should not normally be shorter than three months or longer than six. The court must be satisfied that “the behaviour of the child is such that it poses a real and substantial risk to his or her health, safety, development or welfare, and . . . the child requires special care or protection which he or she is unlikely to receive unless the court makes such an order”.

Before matters reach this degree of seriousness, but where children are “out of parental control” for one reason or another, or where their families cannot care for them, they come into the care system and care orders are made in respect of them. The question of the representation of this group of children generally arises because they are old enough not to comply with decisions taken for them by their carers or social workers. Court orders under the Child Care Act 1991 are required when normal parental or other authority no longer works and they run away.

Certain courts in the context of the Child Care Act, 1991 are making care orders which incorporate lists of conditions to be followed by the child who is the subject matter of the order, including curfews. The child is brought before the court for the review of the order made by the court and in particular the directions or conditions imposed by the court as to the behaviour of the child. Section 30(1) provides that it is not necessary for the child to be brought before the court or to be present for all or any of the hearing unless the court feels that it is necessary for the proper disposal of the case. These directions are made by the court under its inherent power to give directions under section 47 of the 1991 Act. By joining the child as a party to the proceedings and appointing a solicitor to represent him or her under section 25, the Act is being subverted to make these children subject to committal proceedings for breach of court order where the conditions are breached by the child. SI no. 124 of 1999 District Court (Attachment and Committal) Rules 1998 and SI no. 198 of 2000 District Court (Attachment and Committal) Rules 2000 are utilized to enforce compliance by the child with the conditions.

Although a creative use of the 1991 Act, it appears that this is an improper use of the Act which was designed for the care and protection of children. Such sanctions as may be imposed are vulnerable to

attack on both procedural and substantive grounds. Section 26 of the Act was not designed to force responsibility on the child who is the subject matter of the order. However the practice of forcing compliance by the child, with multiple attendances in court to take responsibility for breaches of the conditions imposed on the child under the care order, is not uncommon and is colluded with by staff of the Health Service Executive. Such ongoing formal hearings are not an efficient, let alone child-centred, way of dealing with these matters. This practice is entirely at odds with the system for dealing with such cases in the UK where there is now a protocol for judicial case management of care cases to ensure that they are dealt with justly, expeditiously, fairly and with the minimum of delay.⁵²

We recommend that the judicial practice of joining children to care proceedings to enable the imposition of care conditions enforceable by the contempt of court procedure be discontinued. We also recommend that the Child Care Act 1991 be amended to prevent the use of this procedure for this purpose. The answer must be found in tighter co-operation between the social services and the judiciary, in accordance with the Child Care Act 1991, and to this end the UK protocol mentioned above may give some assistance.

The Children Act 2001 Part 4 - Diversion Programme

Introduction

Part 4 of the Children Act 2001, sections 17 to 51, places the former Juvenile Liaison Scheme, introduced in Dublin in 1963, on a statutory footing and renames it the Diversion Programme. This part of the Act was commenced on 1 May, 2002.⁵³ It is supported by a new principle that children must admit responsibility for their acts before admission to the scheme and it therefore has an element of restorative justice. The primary purpose of the programme is “to divert from committing further offences any child who accepts responsibility for his or her criminal behaviour”.⁵⁴ Diversion may be achieved by way of administering a caution, formal or informal, to the child and, where appropriate, by placing the child under the supervision of a juvenile liaison officer and convening a conference which will provide a forum for the child, his parents and other family members, possibly other interested persons and, where appropriate, a victim to discuss the child’s offending and the reasons for it. The conference, to be known as the Garda conference, is convened by the Garda Síochána and involves the formulation of an action plan for the child in respect of whom it has been convened. The provision for an action plan is a key feature of restorative conferencing. It provides an opportunity to confront the child with the consequences of his offending in the presence of the victim and allows the child to apologise and make reparation to the victim.

⁵² See Practice Direction Care Cases: Judicial Continuity and Judicial Case Management, May 2003, Hershman D. QC, *Working with the Child Care Protocol*, Jordans 2004 and Toby Hales, “Public Law Children Act cases: is the Protocol for Judicial Case Management working?”, *The Lawyer*, August 2004.

⁵³ SI no.151 of 2002.

⁵⁴ S. 19(1).

Diversion Programme

Section 18 of the 2001 Act states that, unless the interests of society require otherwise, any child who has committed an offence and accepts responsibility for his criminal behaviour should be considered for admission to the diversion programme. The objective of the programme, contained in section 19, is to divert from committing further offences any child who accepts responsibility for his criminal behaviour. A statutory obligation is imposed on the Garda Síochána to operate a diversion programme. A director, defined in section 20 as “a member of the Garda Síochána not below the rank of Superintendent”, operates the programme, which is under the control and general supervision of the Commissioner of the Garda Síochána. Section 22 requires a report to be prepared by the member of the Garda Síochána dealing with the child. This report must then be sent to the director of the diversion programme with a recommendation as to any further action, including admission to the diversion programme, that should be taken. Section 23 provides that a child must admit responsibility for his criminal behaviour before being admitted to the scheme and must also consent to be cautioned. If a child is to be admitted to the diversion programme, a written notice is furnished to the parents or guardians of the child by the juvenile liaison officer, acting on the instructions of the director of the diversion programme, specifying the fact that the child is to be cautioned under the programme.

Section 25 provides for the administration of a caution, whether informal or formal. An informal caution is given where no previous caution has been administered or where any previous caution or cautions have also been informal. The formal or informal caution is either given in a Garda station or the child’s home or in exceptional circumstances at another place. It must take place in the presence of the parents or guardians. Section 26 facilitates restorative cautioning and provides that where a formal caution is being administered to a child offender who has been admitted to the diversion programme, the victim may be present. It is a mini-conference-type response in circumstances where a full conference is not warranted and where the child offender can be confronted with the consequences of his offending and be invited to apologise or make some form of reparation to the victim. Section 27 details the length of the supervisory periods associated with the different types of caution. A formal caution entails a 12-month period under the supervision of a juvenile liaison officer from the date of the administration of the caution. Where a child has received an informal caution he shall not be placed under the supervision of a juvenile liaison officer, save in exceptional circumstances and then for no longer than 6 months. Section 27(1)(d) provides that the supervision period may be varied by the director of the diversion programme. The level of supervision to be applied in the case of any child is to be determined by the juvenile liaison officer who must have regard to the matters set out in section 28(2) of the 2001 Act.

It is the experience of practitioners that the application of the Diversion Programme varies considerably. Almost 17,500 individual offenders were referred to the scheme in 2002. Approximately 22% (amounting to approximately 3,900 young people) were prosecuted initially or on the direction of the Director of the Diversion Programme, as being unsuitable for the scheme. Around 44% were cautioned formally (8%) or informally (36%), no further action was taken on 6% of cases,

and 31% remained pending.⁵⁵ Some children are merely cautioned, but others are allocated a juvenile liaison officer (JLO) who actively engages with the child and his family, and thereby increases his chances of avoiding the criminal justice system. JLOs made 3,154 visits to juvenile offenders who were under intensive supervision and a further 12,348 visits were made to those under regular supervision. A further 6,743 visits were made to school and clubs.⁵⁶

Garda conference

Section 29 provides that a conference may be held in respect of a child who has been formally cautioned and is being supervised by a juvenile liaison officer. It is the decision of the director of the diversion programme as to whether or not a conference is to be convened.⁵⁷ The Garda conference, as it is known, incorporates within its parameters modern restorative justice measures. It is an integral part of the diversion programme. Section 29(1) sets out the functions of the conference. It will be convened by the Garda Síochána. The conference venue will be determined by the facilitator. Attendance at the conference is governed by section 32 of the 2001 Act and will usually consist of the child, his parents or guardians and the facilitator, who will generally be the juvenile liaison officer.⁵⁸ Other persons permitted to attend the conference include the relatives of the child, a person nominated by the Health Service Executive for the area in which the child normally resides, a victim and any other person who may be of benefit to the conference. Section 35 provides that parties must be given sufficient notification of the conference while section 36 requires the facilitator to take all reasonable steps to ascertain the views of interested parties who may be unable or unwilling to attend the conference. The conference is to regulate its own procedure.⁵⁹

We believe that the restorative justice process is not assisted by a member of the Gardaí facilitating the conference. It would be better if the facilitator were a neutral person, with the role of a Garda representative being to represent the requirements of the criminal law. This is particularly so in cases where children have developed an active hatred or distrust of the Gardaí, which can make it very difficult for a guard to function neutrally and constructively. **We recommend that section 31(4)(b) of the Children Act 2001 be amended to provide that the facilitator of a conference should be a neutral, suitably qualified person who is not a member of the Garda Síochána.**

The conference will discuss why the child became involved in the criminal behaviour and will discuss how, through family support and community involvement, the child might be diverted from crime. It will also formulate an action plan for the child in respect of whom it has been convened.⁶⁰ The action plan may provide for the making of an apology, other reparation to the victim, a curfew or participation by the child in appropriate sporting and recreational activities. The primary focus of the Garda

⁵⁵ The 2002 Annual Report of An Garda Síochána (published 2004).

⁵⁶ *Ibid.*

⁵⁷ S. 31.

⁵⁸ S. 31(4).

⁵⁹ S. 37.

⁶⁰ S. 39.

conference is on issues of accountability rather than child welfare, though the action plan is to be welcomed in that it involves the child in the decision making process.

The facilitator is required to complete a report of the conference as soon as practicable after the conference has concluded and must submit it to the director of the diversion programme. The director may recommend that the period of supervision be varied as a result of the conference.⁶¹ Section 48 provides that any admission of responsibility made by a child for the purposes of the diversion programme is not to be admissible against the child in any civil or criminal proceedings. One matter of concern in relation to this section is what would happen if a child indicated willingness to admit responsibility, but, because of the gravity of the offence, was refused admission to the diversion programme. This contingency does not seem to be covered by the immunity provided in section 48,⁶² and this omission should be rectified in accordance with the ethos of the Act. **We recommend that in the event that a child indicates willingness to admit responsibility to a crime, but because of the gravity of the offence, is refused admission to the diversion programme, immunity under section 48 of the Children Act 2001 should be extended to evidence of such admission or implied admission.** Section 50 states that evidence obtained in the course of the Garda conference is not admissible in any court while section 51 makes it an offence to publish any report of the proceedings of the Garda conference.

The legal representative of a child suspected of a crime can be faced with a conflict between the demands of normal legal advice, and good moral guidance. If a solicitor were representing an adult, his advice might be to admit nothing and make no statement. But this can be harmful from a child psychology point of view, where it is in the better interest of the child's upbringing to encourage the child to tell the truth and accept responsibility for his transgressions. A solution for this dilemma needs to be worked out. **We recommend that a code of practice be developed and agreed among legal representatives of children in consultation with others to cover situations in which legal advice may conflict with moral guidance, in order to resolve the conflict between the right to non self-incrimination and the benefits of genuine confession and acceptance of responsibility.**

The Children Act 2001 Part 5 - Criminal Responsibility

When brought into effect, section 52 of the 2001 Act will raise the age of criminal responsibility from seven - the lowest age in Europe⁶³ - to twelve. This means that children under the age of 12 years will no longer have the legal capacity to commit offences. Section 53 provides that if a child under the age of 12 years is found by a member of the Garda Síochána to be engaged in an activity which, if the child was over 12 years, would constitute criminal activity, the member must take the child to his parents or, if the member has reasonable grounds for believing the child is not receiving adequate care or attention,

⁶¹ S. 41.

⁶² S. 48 is proposed to be amended by the Criminal Justice Bill 2004, s. 31, which proposes to allow evidence of a child's acceptance of responsibility, behaviour and participation in the diversion programme in the event that a court is sentencing a child after admission to the programme. This is a significant departure from the immunity enjoyed to date.

⁶³ Seven is also the age of criminal responsibility in Switzerland and Cyprus. See further G. Shannon, *Child Law*, (Roundhall Thompson 2005), para 11-52.

to the Health Service Executive. Any person who aids or abets a child in committing what would, but for his age, be criminal acts, can be charged under section 54 and tried as a principal offender. A target commencement date has yet to be set for Part 5 of the 2001 Act.

Recent analysis of the cases coming before the Children’s Court indicates that 14 years is the age at which children start to be charged in any significant numbers.⁶⁴ On that basis, Ursula Kilkelly argues that there should be no delay in bringing this section into effect, with which we concur. **We recommend that Part 5 of the Children Act be brought into effect without further delay, as a result of which the age of criminal responsibility will be raised from 7 to 12 years, with a rebuttable presumption that a child between 12 and 14 years is incapable of committing a crime.**

There is considerable research on the “window of opportunity” between 9 and 14 years during which children are old enough to be reasoned with, and still young enough to be influenced by parents and other authority figures.⁶⁵ After this age, the primary influences tend to be their peers, and success with diversion becomes more difficult to achieve. This places the role of the Garda Diversion Programme in a pivotal position for this age group.

The responsibility for offending children excluded from the criminal justice system by reason of their young age will fall to the child care and education services in the future, and it will be important that the Health Service Executive and other services be properly resourced and prepared for this additional responsibility.

The Children Act 2001 Part 6 - Treatment of Child Suspects in Garda Síochána Stations

Part 6 deals with the treatment of child suspects in Garda Síochána stations. It obliges the Gardaí to have due regard to the dignity of children and their vulnerability owing to their age and level of maturity. This part of the Act, with the exception of sections 59 and 61(1)(b), came into force on 1 May, 2002.

Section 56 provides that a detained child shall be kept separate from a detained adult, and shall not, unless there is no other place available, be kept in a cell. This section is disappointing in that there still exists the prospect of children who are detained in Garda custody being held with adults.

The member in charge of a Garda station is the person responsible under section 56 to ensure that the requirements of the section are observed. The definition of the term “member in charge” in section 3 does not include any requirement that he or she should be specially trained in the treatment of child suspects, but this should not prevent the Garda Síochána from training senior station staff in the treatment of child suspects as a matter of good practice. **We recommend that members of the Garda Síochána who undertake the role of member in charge should be required to have received**

⁶⁴ Dr. Ursula Kilkelly, *The Children’s Court*, May 2005, p. 17.

⁶⁵ For example, research summarised by Daniel Goleman, *Emotional Intelligence*, 1995, Pt. 4.

special training in the treatment of child suspects, and that the definition of member in charge in section 3 of the Children Act 2001 be amended accordingly.

The absence of special arrangements for children in Garda stations fails to reflect the dignity of the child and the need for proper childcare standards. In the experience of practitioners, conditions in Garda cells are frequently such that no child should be exposed to them. Better conditions for children are needed and a policy is required to achieve this. **We recommend that the conditions and procedures for the holding of children in Garda stations be reviewed in the light of the principles expressed in the National Children’s Strategy and our international obligations.⁶⁶ We further recommend that steps be implemented as part of this review to ensure that sufficient facilities suitable for children are provided to ensure children are not held in custody with adults.**

When a child is arrested, he must be informed, in language appropriate to his age and understanding, of the details of the alleged offence, that he is entitled to consult a solicitor and that his parent or guardian has been told of his arrest.⁶⁷ Section 58 states that if the parents cannot or will not attend, the child is to be told of his “entitlement to have an adult relative or other adult reasonably named by him or her given the information specified in [section 58(1)(a)] and requested to attend at the station without delay”. Section 59(1) provides that where the member in charge of the Garda station in which a child is detained has reasonable cause to believe that the child may be in need of care or protection, the member must inform the Health Service Executive and the Executive shall then be obliged to send a representative to the station “as soon as practicable”. This section is one of two sections of Part 6 of the 2001 Act not yet in force.

Section 61 sets out the details regarding the interviewing of children. The 2001 Act provides that a child may not be interviewed unless in the presence of his parent or guardian, subject to section 62(2) and (3). Significantly, section 61(4) permits the member in charge of the Garda station to remove an adult from where a child is being questioned or a written statement is being taken, where the member has reasonable grounds for believing that the conduct of the adult amounts to an obstruction of the course of justice. Section 61(7) defines parent or guardian for the purposes of section 61 as including the adult reasonably named by the child under section 58. In the absence of the parent or guardian, or the other adult reasonably named by the child, the member in charge can nominate another adult. Little guidance is provided as to what “reasonably named” means. This affords a wide discretion to the member in charge of the Garda station in deciding whether to allow the adult named by the child to attend the interview.

⁶⁶ For example, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), 1985, Rule 13.4 and 13.5:

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

13.5 While in custody, juveniles shall receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality.

⁶⁷ S. 57.

The power of the member in charge of the Garda station to nominate another adult, not being a Garda, is potentially unsafe in that the person nominated to attend a child's interview may not have sufficient independence from the Gardaí to ensure correct procedures and afford the child appropriate support. In one instance witnessed by a solicitor, a cleaning woman was asked to step into the interview room to be present. An interview may have crucial significance for the future of a child if it results in the admission of a serious crime, which can convict. It is therefore most important that, in the absence of a parent or guardian or other person connected with the child, the independence and training of the person attending is assured.⁶⁸ One solution may be to provide a guardian *ad litem* service in such cases. A guardian *ad litem* may also be useful in the rare cases when parents do not have their children's interests at heart, for example, because of a conflict of interest. It may be, for instance, that a parent is guilty of physical or sexual abuse, and does not want this to come to light. It may be difficult for a solicitor to take instructions from a minor, in the absence of a parent or guardian *ad litem*, and solicitors may have to fall back on general principles for guidance in this matter. This can arise particularly when a child is foreign and very vulnerable.

Section 70(b) and (c) of the 2001 Act enables the Minister for Justice, Equality and Law Reform to make regulations governing the role of any of the adults present at the interviewing of children in Garda stations. These regulations will provide useful guidance as to whether the adult present during the questioning of the child in a Garda station is there to ensure procedures are complied with, to ensure the child is properly treated or to offer support to the child. Section 70(1)(c) enables the Minister for Justice, Equality and Law Reform to make more general regulations concerning such other matters as may be necessary for the purposes of allowing the part of the 2001 Act dealing with the treatment of child suspects in Garda stations to have full effect.

We recommend that qualifications and criteria be drawn up under section 70, in relation to persons nominated by the member in charge of a Garda station for attendance at the interview of a child, to reflect the need for training and independence. We further recommend that panels of suitable persons willing to act be assembled and maintained for each area and that appropriate training be provided.

Section 62(1) provides that a parent or guardian must be given a copy of the charge sheet and is to be notified in writing, as soon as practicable, as to the date of the child's first appearance in court. Under section 63, a child who cannot contact a parent or guardian can name another adult, not being a member of the Garda Síochána.

Section 67 changes from 17 to 18 years the age at which a person is regarded as a child. This section brings section 5 of the Criminal Justice Act, 1984, which provides for access to a solicitor and

⁶⁸ An "independent visitor" is used for this purpose in the UK, who is usually a lay person. Peace Commissioners are called upon here from time to time, but none have been appointed recently and they are therefore decreasingly available, even if willing to attend.

notification of detention, in line with the Age of Majority Act 1985.⁶⁹ By virtue of section 2 of the 1985 Act a person reaches full age on attaining 18 years of age. There is an apparent drafting error in that the section omits to extend the increased age to fingerprinting. In practice, the Gardaí follow the spirit of the legislation and do not fingerprint under-18-year-olds. **We recommend that this inconsistency should be remedied and that section 67 of the Children Act 2001 be amended to extend the age of fingerprinting from 17 to 18 years.**

An “Out of Hours” service is run in Dublin by the Health Service Executive, Northern Region, to find accommodation for children at night – around 20 children use it each night. It involves the child going to a Garda station, which notifies a social worker, who enquires into the circumstances and whether in fact the child lacks a safe bed. The service is for emergencies only and is not available to children who just do not want to go home. The child is then collected, and put up in a hostel for the night. There are different hostels for inexperienced and more streetwise youngsters. The next day the child is accompanied to the office of a social worker in his area, and the matter is taken from there. Short of seeking a care order, it can be difficult to get children to co-operate.

While very welcome, there are some shortcomings in the Out of Hours service. The child has to go to a Garda station to avail of it, which is not suitable because it is likely to expose the child to scenes of drunkenness and other unedifying behaviour, and if the child has broken bail or is otherwise trying to avoid the Gardaí, it is ineffective. It is accepted that it can be very difficult to persuade some homeless children back into a disciplined environment from the freedom of the streets after only 7 days, so it is very important that there should be intervention promptly once a homeless or runaway child is identified. Inter-agency coordination has a role to play with homeless children, either before or after they become criminalized. In fact, many of the children availing of the service are repeat users.

According to information supplied by the Department of Health and Children, 342 young people used the Out of Hours Service in 2003. 79 individuals were returned home and 233 were given emergency accommodation. Only eight of the young people were involved in criminal proceedings.

The Children Act 2001 Part 7 - The Children Court

The former Juvenile Court has been abolished and, in its place, section 71 of the 2001 Act establishes a new Children Court. Section 71 also provides that the Children Court will now deal with persons under 18 years of age. All sections in Part 7 of the 2001 Act commenced on 1 May, 2002.

Section 72 is an enabling rather than mandatory provision. It enables the President of the District Court to require that judges (appointed after 15 December 1995) participate in any relevant course of training or education before sitting in the Children Court. It is widely accepted that special training in child, developmental and clinical psychology, anti-social behaviour by juveniles, addiction and related issues

⁶⁹ No. 2 of 1985.

should be available to judges dealing with juvenile crime cases (and other cases involving children).⁷⁰ Indeed, it can be argued that expecting them to work without such training is putting them in a very difficult position. The Judicial Studies Institute runs periodic conferences which touch upon these issues, but intensive training over a period of months is not available, unlike in other jurisdictions including the UK. There is clearly considerable scope for increasing the training and support to judges in tandem with the improvement of other aspects of the juvenile justice system. **We recommend that special training be afforded to judges hearing juvenile crime cases, to reflect the ethos of the Children Act 2001 and the realignment of juvenile justice with remedial rather than punitive priorities. We also see as necessary and recommend training of other persons dealing with young persons involved in the criminal justice system, such as members of An Garda Síochána, solicitors, probation officers, and members of the Courts Service and Prison Service.**

Serious shortcomings in the layout, facilities and procedures of the Children's Court in Smithfield, Dublin are reported by practitioners and other users of the court. Around 4,500 charge sheets are dealt with annually, and between 1,300 and 1,500 custodial defendants. The actual numbers of children involved are smaller, as some defendants have a number of charges, and a number of trials. Section 73 provides that as far as practicable, waiting times should be kept to a minimum and the time stated in a summons should be the time the case is likely to be heard. This legislative provision is not respected in practice. Problems arise with the listing of numerous cases at one time, the demoralising waiting periods, and the opportunities that the frequent waiting periods give for the exercise of undesirable influence by some children on others. An initiative to make it a condition of granting bail that bailed defendants should not frequent the vicinity of the Children Court in Smithfield except when required to appear before the court has been effective in preventing the congregation of at-risk or delinquent young people and formation of gangs. More cells have been effective in reducing the incidence of bullying, but it still takes place. More consultation rooms are needed, and greater consistency in the sitting judges would also be helpful. In the course of 2004, between 12 and 15 judges sat in the Children Court, allowing judge-shopping to take place, and resulting in the overcrowding of the lists of the those judges perceived to be more lenient. The frequent remand of cases adds to the problem. Doubtless, similar problems arise at other Children Court sittings around the country.

We recommend that a working group of stakeholders should formulate proposals to achieve respect for the rights of the children appearing before the court, and a more effective and user-friendly court system.

The Children Act 2001 Part 8 - Proceedings in Court

Part 8 details the rights of children before the court charged with criminal offences. It gives a central new role to the Children Court in implementing the restorative justice provisions in the 2001 Act. Part

⁷⁰ The Law Reform Commission Report on Family Courts (1996) and the 6th Report of the Working Group on a Courts Commission, 1998, Ch. V Family Law (Denham Report) discussed issues of judicial support and training, but stopped short of specific recommendations.

8 is generally to be welcomed in that it facilitates rehabilitation by vesting in the Children Court the power to adjourn a case and refer it to the Health Service Executive, thereby serving as a useful link between the child care system and the Children Court.

Sittings of the Children Court are held in private, with only court officers, parents or guardians of the child concerned, an adult relative of the child or other adult, other persons directly concerned, press representatives and other persons at the Court's discretion permitted to be present. Orders or decisions of the Court must be announced in public.⁷¹ This does not appear to be the position in relation to children being tried in higher courts, where there appears to be no protection of their anonymity.⁷² This is contrary to the ethos of the Children Act 2001 and **we recommend that the Children Act 2001 be amended to extend the anonymity afforded to children appearing before the Children Court to other courts.**

Section 77 of the Act allows the court to adjourn any criminal proceedings where it considers that a child's real problem is a need of care or protection. In such cases the Health Service Executive will be directed by the Children Court to convene a family welfare conference in respect of the child and report back to the court on what action, if any, it intends to take. For example, the Health Service Executive may apply for a care order, a supervision order or a special care order for the child. Following the outcome of the family welfare conference, the court will have the discretion as to whether it should dismiss the charge against the child.⁷³

There is nothing in the Act which requires the Health Service Executive to send a representative to attend the court at the request of the child defendant, his family or his legal representative. This can result in decisions having to be made in the absence of a critical factor in the whole equation. Some judges will direct attendance by an Executive representative, but others will not. In contrast, section 59 of the Children Act 2001 requires a Health Service Executive representative to attend in a Garda Station on notification from the Gardaí that the child may be in need of care and protection.⁷⁴ It is also likely that the absence of a representative of the Health Service Executive concerned with or having care of the child may be in breach of Article 40 of the Constitution (personal rights) and Article 6 of the European Convention on Human Rights, (the right to a fair trial). This is a most unsatisfactory position, and **we recommend that the Children Act 2001 be amended to require the Health Service Executive to send a representative to a court hearing at the request of the defendant, his family or legal representative.**

⁷¹ Ss. 3, 71(1) and 93(1) of the Children Act 2001, and District Court (Children) Rules, 2004, O. 37 r.6, SI no. 539 of 2004.

⁷² *Independent Newspapers v Judge Desmond Hogan*, High Court unreported, 14 January 2005, Dunne J.

⁷³ S. 77(3).

⁷⁴ Not yet in force.

Family conference

Section 78 provides for the introduction of a court-directed and -supervised family conference,⁷⁵ which is to be convened by the Probation and Welfare Service. The family conference is similar to the Garda conference in many respects and will generally arise where the Gardaí consider they have no option other than to prosecute. Section 78(1) states that where a child has accepted responsibility for his criminal behaviour and it appears to the court that an action plan for the child may be appropriate, the court will have the power to adjourn the case to convene a family conference as an alternative at that point to proceeding to a finding. This subsection gives the court discretion to achieve a balance between issues of accountability and the best interests of the child. The action plan formulated by the family conference will be supervised by the court and is enforceable. The court will, on the resumption of the case following completion of the action plan, have the discretion to decide whether or not to proceed to a finding. Section 83 is worthy of particular note as it makes provision for the Probation and Welfare Service to report back to the court and where it appears to the court that the child has failed to comply with an action plan, the court may resume the proceedings in respect of which the child is charged.

The success of the family conference will be greatly dependent on the good working relationships between all those involved, including the different service providers as among each other, and the family members involved also. The building of trust and good personal relationships between gardaí, social workers, probation officers, solicitors and others should be deliberately addressed. For example, the Courts Service could be asked to make one judge available at regular times to deal with a pilot number of cases on a consistent basis. A team of professionals and deputies involved should also be delegated to work consistently with the pilot cases, and effort put into building a good team relationship between the professionals involved, and achieving a coherent approach to agreed goals. Likeminded professionals could be invited to join the core group, and if it works well, other core teams could be established and built up. There is general agreement among those working with children who are criminalized or at risk of criminalization that the frequently very visible inefficiency and futility of the care and criminal system in which they become involved can only undermine their respect for law and society in general. For this reason alone it is important that good professional services, respectful of the child and others, are in place, and that the nonsense of the revolving door, judges' empty threats and failed ineffectual services are removed from the system. Closer co-operation between services could be initiated at a high level of the different organisations (Health Service Executive, Probation and Welfare Service, Gardaí) and interested members could be resourced to lead one or more initiatives. **We recommend that the service providers working with children at risk or already in the juvenile justice system should initiate programmes to strengthen co-operation and coordination.**

⁷⁵ These provisions were brought into effect on 29 July 2004 by SI no. 468 of 2004.

The Drugs Court model

It is too early to say to how well the court-ordered family conference will work under the management of the Probation and Welfare Service. In suitable cases, where the defendant child is willing but the family support may not be available, an alternative to the family welfare conference could be found in the model currently being piloted in the Drugs Court. In this model, the normal proceedings are suspended. The proceedings are non-adversarial, the judge is the chairman, and a team of support service providers participate in assisting the defendant's progress towards agreed goals. On achievement of the goals, the defendant "graduates" and the original charges are dropped. It would not be difficult to adapt this model to child offenders, and include in the support team a probation officer, a social worker, an education officer with remedial teaching experience and a nurse. In effect, it would be another version of the court-ordered family conference, but with the additional authority of a judge directly involved. The current availability of Court 56 beside the Children Court in Court 55 would enable such a pilot scheme to take place without impinging on the normal work of the Children Court.

Remand

The principle of separation of minors from adult prisoners is generally accepted, but much remains to be done to provide facilities for separation to be achieved.⁷⁶ The reason for separation between child and adult prisoners, whether convicted or on remand, is the very real risk of contamination of younger people's morale and mentality by older prisoners, who have often adopted crime and anti-social behaviour as a way of life. There is also the risk of bullying and abuse of younger people. The Beijing Rules provide for the separate detention of juveniles.⁷⁷ The European Convention on Human Rights limits detention in accordance with law to "the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority."⁷⁸ The jurisprudence of the European Court of Human Rights has interpreted these restrictions strictly.⁷⁹ The wording of the article and the jurisprudence implies a separation of children from adult prisoners. **We recommend that the principle of separation of minors from adult prisoners be respected and that separate accommodation be provided expeditiously to enable this to happen.**

Section 5 of the Bail Act 1997 has been amended by section 89 of the Children Act 2001. This section came into force on 1 May, 2002 (along with sections 90 to 94 of the Act). It provides that the payment of monies into court under the 1997 Act does not apply to persons under 18 years of age.

⁷⁶ In answer to a Parliamentary Question 16068/04 on 27 May 2004 the Minister for Justice, Equality and Law Reform stated that plans currently underway for the replacement of the Mountjoy complex will address the issue of separate detention facilities for 16- and 17-year-old girls.

⁷⁷ UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985, Rules 13.4 and 26.3.

⁷⁸ Art. 5(1)(d).

⁷⁹ For example in *DG v Ireland* (2002) 35 EHRR 1153, paras. 83–84, where it found that the detention of a minor in St. Patrick's for a total of approximately seven weeks (over three periods) did not satisfy Art. 5(1)(d) in circumstances where the first two periods of detention were not preliminary to any specific educational regime, and the third was preliminary to temporary accommodation and care facilities which proved to be unsuitable.

Parents' attendance in court

Section 91 concerns the attendance in court by the parents or guardians. It requires the parents or guardians to attend all stages of proceedings in court where a case is being heard against their child. Failure by the parents or guardians, without reasonable excuse, to attend such proceedings shall, subject to section 91(5), be treated as if it were contempt of court. Section 91(5) enables parents or guardians to be excused from attending court if the court is of the opinion that the interests of justice would not be served by such attendance. The court has the power where the parents or guardians fail to attend the proceedings to adjourn the proceedings and to issue a warrant commanding the parents or guardians to be produced before the court.

The definition of "guardian" in section 3 of the Children Act explicitly excludes the Health Service Executive. This means that if the child is in the care of the Health Service Executive, there is no legal obligation on the Executive to have a representative in attendance in court at any stage of the proceedings. Most Executive personnel would agree that good practice requires their attendance, particularly at important stages of proceedings. However, in practice it happens that a judge can be expected to dispose of a case involving a child in care in the absence of the most relevant element in that child's life, the Health Service Executive. Some judges will adjourn such a case and order a representative of the Executive to attend. However, this is an unsatisfactory situation which tends to waste the time of the court, the defendant, legal representatives and often other witnesses. The Health Service Executive may feel that they do not have the personnel to attend court on all occasions. Nevertheless, their discretion not to attend is unreasonable not only in relation to the child, but also in relation to the administration of justice, and **we recommend that the exclusion of the Health Service Executive from the definition of "guardian" in section 3 of the Children Act be deleted.**

The Children Act 2001 Part 9 - Powers of Courts in Relation to Child Offenders

Part 9 sets out the powers of a court on a finding of guilt of a child. Those powers must be exercised in accordance with the principles set out in section 96 of the 2001 Act relating to the exercise of criminal jurisdiction over children, one of which is the need to adopt and implement alternatives to formal criminal prosecution, wherever possible, in order to divert young offenders away from the criminal justice system. A range of imaginative community sanctions is available to a court, which include probation and training orders, orders for day care, orders for supervision and mentor orders. Of the ten community sanctions provided in the Children Act 2001, eight are new. Their purpose is to ensure an appropriate and suitable sanction for the young person accused of an offence. These sanctions give tangible effect to the principle in the 2001 Act that detention is to be an option of last resort, to be ordered only in respect of serious offences of violence or the repeated commission of other serious offences.

Part 9 introduces, *inter alia*, the parental supervision order, the parental compensation order, the imposition of a detention order and makes provision for the introduction of rules governing places of detention. It establishes the rights of children before the courts charged with criminal offences.

Significantly, section 96 provides that criminal proceedings cannot be used solely to provide any assistance or services needed to care for or protect a child. This section is therefore important in preventing the criminalisation of a young person where the primary problem is not offending, but a situation which can lead to it, for example homelessness.

On a finding of guilt, before a court decides how it will deal with the child, it will usually request a probation officer's report. The only situation where a report will not be requested is where the court is imposing a minor penalty such as a small fine or where it already has available to it an up-to-date report on the child. It should be noted that where the court is not in a position to impose detention in a children's detention school due to lack of space, it will, as an alternative, be empowered to impose an appropriate community sanction.

Sentencing

Section 96 of the Children Act 2001 sets out the matters a court should have regard to when dealing with a child offender at the sentencing stage. The various orders available to a court are detailed in section 98. They include a reprimand for the child, non-custodial orders or detention. On a finding of guilt, the court will have the power to request a victim impact report.

Fines, costs or compensation

Sections 108 to 110 of the 2001 Act give the courts the power to impose fines and order payment of costs and compensation. In particular, section 108 provides that fines, where appropriate, are not to exceed half the fine for an adult committing the same offence. **We question the morality and effectiveness of imposing fines on juveniles, and recommend that the power to do so should be repealed.** The vast majority of children coming before the court come from deprived backgrounds, there would appear to be no rehabilitative or restorative advantage to be achieved and there is currently no workable and effective sanction in the event that fines are not paid. In practice, charges are never re-entered to have a community sanction imposed because a fine was not paid. By leaving the option on the statute book, it will inevitably be used inappropriately, as happens at present.

Parental control mechanisms

The Children Act 2001 imposes responsibilities and obligations on parents to participate in their children's welfare. The court may, under section 111 of the 2001 Act, make a parental supervision order. This order gives the court the power to instruct parents to undergo treatment for substance or alcohol abuse and/or to attend a course in parenting skills (where such facilities are reasonably available). Failure to comply with a parental supervision order can be treated as contempt of court under section 112 of the 2001 Act.

Section 113 of the Children Act 2001 provides that parents can be ordered to pay compensation instead of their child. Before making a compensation order the court must be satisfied of the parents' ability to pay and that a wilful failure on the part of the parents to take care of or control their child contributed

to the child's offending. This provision, which enables the court to compel parents to pay compensation to the victim of an offence committed by their child, seeks to bring home to parents the fact that their responsibilities extend to the consequences of negative actions on the part of their child. Similarly, section 114 focuses on parental responsibilities and gives the courts the power to order the parent or guardian of a child offender to enter into a recognisance to exercise proper or adequate control over the child.

The inclusion of parental control mechanisms in the Children Act 2001 demonstrates a reluctance to acknowledge the social context that contributes to a child's delinquent behaviour, such as poverty, drug addiction or disadvantage. In practice, these provisions are very rarely used, if ever, and their value is highly questionable. In practitioners' experience, in virtually all cases of children in trouble with the law, seeking to control this situation by penalising their parents is unlikely to be effective, or to be fair to the child if it is. The risk is that the parents may impose harsh measures which will further damage or alienate the child. The parents of delinquent children usually lack material resources and parenting skills and should be supported and helped rather than punished for these deficits. These sections represent a coercive approach which is absent from ethos of the Act. **We recommend that sections 111 to 114 of the Children Act 2001 be repealed.**

Community sanctions

Section 115 of the Children Act 2001 provides community-based sanctions which greatly increase the non-custodial options available to the court and will assist in ensuring that custodial sentencing is treated as a measure of last resort. The 2001 Act provides for the following non-custodial options:

- a community service order for a child of 16 or 17 years of age,
- a day care centre order,
- a probation order,
- a probation (training or activities) order,
- a probation (intensive supervision) order,
- a probation (residential supervision) order,
- a suitable person (care and supervision) order,
- a mentor (family support) order,
- a restriction on movement order, and
- a dual order.

Sections 118 and 123 provide for day centre orders and have considerable potential, as have the suitable person (care and supervision) order and the mentor (family support) order, due to be commenced next. Sections 133 to 136 deal with restriction on movement orders on child offenders. These orders facilitate the imposition of curfews or barring orders from premises or their vicinities or a particular locality. The restriction on movement order came into force on 1 May, 2002. The other non-custodial orders are not yet in force.

There are question marks over the enforceability of the above-listed community sanctions, without considerable resources committed by the Government to assist in their enforcement. This goes particularly for the restriction on movement order, but ensuring compliance with other sanctions will be similarly demanding.

Detention

Section 143 of the Children Act 2001 provides that detention cannot be imposed unless the court is satisfied that detention is the only suitable manner of dealing with the child and, in the case of a child under 16 years of age, a place in a children detention school is available. Children detention schools are to replace industrial and reformatory schools. These are places of detention for convicted child offenders between 12 and 16 years of age. Places of detention are for child offenders between 16 and 18 years of age. The court must, pursuant to section 143(2), provide reasons for making a detention order in open court. Section 144 gives the court the power to defer the making of a detention order on the evidence of the parents and others, though no reference is made to the child. Provision is made in section 145 of the 2001 Act for the court, where it wishes to make a detention order but no place is available and it would not be appropriate to defer the making of the order, to impose the most appropriate community-based sanction. Section 153 allows the retention of Saint Patrick's Institution which is, in reality, part of Mountjoy prison.⁸⁰ This would appear to be contrary to the philosophy underpinning the Act, which outlaws the use of prisons for children. For example, section 156 provides that no sentence of imprisonment may be passed on a child. This section repeals the use of imprisonment on foot of certificates of unruliness issued under the Children Act 1908.⁸¹

The Children Act 2001 Part 10 - Children Detention Schools

Part 10 establishes children detention schools which come under the control of the Minister for Education and Science. It updates the system of juvenile detention, replacing the nineteenth century categorisations of detention centres into "industrial" and "reformatory" schools, and replacing them with "children detention schools", to be used by the courts where detention is considered the only suitable option for dealing with a child. Children's detention schools are therefore to be used by the courts where detention is considered to be the only suitable means of dealing with children aged between 12 and 16 years who have been found guilty of criminal offences. Part 10 emphasises the principal role of children detention schools in promoting the re-integration of the children referred to them back into society through the provision of appropriate educational and training programmes and appropriate facilities in which to deliver these programmes. It also provides for the certification of children detention schools as well as the number, age and the sex of children who may be detained in each children detention school at any time. Sections 185 to 189 set out an inspection system for children detention schools. In summary, Part 10 of the Children Act 2001 deals primarily with the management and objectives of the children detention schools. The commencement of Part 10 is

⁸⁰ This was a controversial decision. See the Whitaker Report (1985) at 9.18: "The Committee has no hesitation in recommending the closing of St. Patrick's Institution as soon as possible...The facilities and services which a humane and morally acceptable detention centre should provide for juveniles could not be provided even in a renovated St. Patrick's."

⁸¹ But is not yet in force.

awaiting the establishment of separate detention facilities for 16- and 17-year-old boys and girls. The only provision currently in force is section 159(1), which provides for the conversion of certified reformatory and industrial schools to children detention schools.

Two issues of concern should be noted in Part 10. Firstly, the directors of children detention schools are not in a position to refuse to admit children on the direction of the courts. Consequently, the pressure on accommodation may lead to overcrowding and the mixing of children with different needs, with the attendant implications in terms of cross-contamination. Alternatively, a child already making progress in the school could be displaced to make way for a court-ordered placement. This has the potential to be unfair to the child already in the school. It currently happens that directors of schools are required to take children whose needs should be met elsewhere (for example, in the community), and that detention schools are thereby used as a stopgap.

Secondly, the Children Act 2001 provides for the segregation of children detained on criminal charges and others. Only children detained on criminal charges can be detained in day care and other juvenile centres. Section 161(5) of the 2001 Act, however, states, “Any such place need not cater exclusively for children found guilty of offences”. A children detention school need not therefore provide exclusively for children who have committed criminal offences. This, in itself, is a breach of international standards which require the separation of child offenders and those children needing special care and attention. It is at variance with the ethos that underlies the Children Act 2001 which provides that children committed for criminal offences should only be detained in certain detention centres while those committed for other reasons should not. This is not to stigmatise convicted children, but to ensure that children in need of special care and attention receive appropriate care and attention. As a matter of best practice, the distinction should be observed. **We recommend as a matter of best practice that section 161(5) of the Children Act 2001 be amended to exclude the use of facilities for the detention of children found guilty of offences by children not so found.**

The Children Act 2001 Part 11 - Special Residential Services Board

Part 11 provides for the establishment, functions and membership of the Special Residential Services Board. The Board is designed to ensure the efficient, effective and co-ordinated delivery of services for children in respect of whom children detention orders or special care orders have been made. As previously stated, the advice of the Board must be sought before applying for a special care order. The Board is also to advise the Ministers for Health and Children and Education and Science on policy matters pertaining to the remand and detention of children. It is to be noted that the Board was already operating with a full membership on an administrative basis prior to the commencement of Part 11 of the 2001 Act on 7 November 2003. Part 3 of the 2001 Act was made dependent on the Special Residential Services Board being in place.

The Children Act 2001 Part 13 - Miscellaneous

Section 258 introduces a limited “clean slate” in respect of offences committed by children. It provides for the non-disclosure of findings of guilt in respect of most offences committed by children. In fact, it is one of the most important matters to be included in the Children Act 2001 and is consistent with the Act’s emphasis on rehabilitation. The conditions that must be satisfied are that

- the offence (not being one tried by the Central Criminal Court) was committed before the age of 18 years,
- at least three years have elapsed since the finding of guilt, and
- the person has not been dealt with for an offence in that three-year period.

This section was commenced on 1 May, 2002.

The Minister for Justice, Equality and Law Reform is enabled to make exceptions to the general application of this section. In the debate on the passage of the Act through the Dáil, this power was justified on the ground of prudence, with an example given that the question of past sexual offending might arise. To date, no ministerial orders have been made to limit the application of the section.

Section 263 makes provision for the temporary detention of a child in a Garda station or other place for a period not exceeding 24 hours. This section has not yet been commenced. Section 264 permits the Minister for Justice, Equality and Law Reform to conduct research into any matter connected with children who are considered at risk of committing offences, or who have committed offences or who appear before the courts charged with offences. This section was commenced on 1 May, 2002.

The Children Act 2001 - Conclusion

The provisions in the Children Act 2001 relating to family welfare conferences and the diversion programme (previously the juvenile liaison scheme) are positive steps forward. The latter introduces a system based on restorative justice. The benefits of restorative justice are well documented. It provides an opportunity to turn young offenders away from crime. Replacing the categorisations of reformatories and industrial schools with children detention schools, under the control of boards of management, and the establishment of a special residential services board to coordinate the provision of care for children in detention are all evidence of a more longterm approach to the problem of young offenders.

The Children Act 2001 has enormous potential, yet that potential will only be realised with adequate resources. In this regard, the delay in the implementation of the early intervention sections of the Act, and in particular part 2 of the 2001 Act, is to be regretted.⁸² Early intervention is critical to the success of the Children Act 2001 and means galvanising resources and proper care plans for families in crisis, while children are still of an age to be rescued from serious alienation.

⁸² Part 2 was commenced on 23 September 2004 by SI no. 548 of 2004.

The role of the Office of the Minister for Children will be crucial in ensuring that the Children Act 2001 is effectively implemented and that different agencies are properly resourced and work closely together. In the UK, Lord Lamming's 15-month investigation into Victoria Climbié's death, and his subsequent report published in February 2003, makes 108 recommendations. The inquiry's main recommendations centre on inter-agency co-operation and a lack of social work resources. It broadly mirrors the problems highlighted in the 1980's Cleveland inquiry chaired by Dame Elizabeth Butler Sloss and the other 70 public inquiries in England and Wales since 1945. It can be expected that here, too, the success of the Children Act 2001 will depend upon both inter-agency co-operation and adequate resources.

5. JUVENILE JUSTICE – ASPIRATION AND REALITY

The legal practitioners who represent children are only one group of professionals who are aware of the current shortcomings of the services available to deal with children once they have gone through the process of being charged and convicted. There is widespread awareness among health and childcare professionals and officials in the criminal justice system and government departments that the number, range and coherence of services available to troubled children or those engaged in anti-social behaviour are insufficient, and when available, are consequently often ineffective. This knowledge is shared by many of the families of such children, who may have sought help over months or years to keep their children out of trouble. The ethos of the National Children's Strategy represents a major and positive change of direction which is reflected in the Children Act 2001. However, the implementation of the objectives of the Strategy is still far from achieved and legal practitioners see evidence of this daily in the Children Court.

On conviction

There were 3,902 juvenile offenders referred for prosecution by the Garda National Juvenile Office in 2002.⁸³ Most prosecutions result in convictions, but it is the stated policy of the Children Act in section 143 that the court must be satisfied that detention is the only suitable way of dealing with the child. Most children are therefore not detained. Some are referred to the Probation and Welfare Service and the community sanctions and supervision orders in Part 9 of the Children Act may apply. Others may be given the benefit of the Probation Act and released without supervision.

Children Detention Schools

Around 250 children are detained and spend time in one or more of the 5 Children Detention Schools run by the Department of Education each year, which have a total of 111 places:⁸⁴

⁸³ An Garda Síochána Annual Report 2002.

⁸⁴ In an answer to a parliamentary question (15634/04) on 25 May 2004, the Minister for Education and Science gave the operational capacity of the 5 schools as 114, catering for 99 boys and 15 girls.

Rights-based Child Law: The case for reform

School	Remand places	Committal places
Trinity House	5	19
Oberstown Boys' Centre	8	12
Oberstown Girls' Centre	8	7
Finglas Children's Centre	4	8
St. Joseph's Clonmel	40 places in total, shared with the Health Service Executive. ⁸⁵	

In April 2004 the Special Residential Services Board started to perform its liaison role between the courts and children detention schools. The Board monitors availability of beds in the five schools daily, and advises the courts on availability of places, through officers attending children's courts in Dublin and around the country. They also advise on the suitability of places for the potential candidates, and can recommend against committal.⁸⁶ This is a welcome development and it is hoped will result in appropriate placing of young offenders.

16- and 17-year-olds

Boys of 16 and 17 are not sent to these schools, but may be remanded to adult prisons including Cloverhill, and committed to St. Patrick's Institution, which is a prison, and where there are fewer educational, therapeutic and recreational facilities. In 2002, 145 boys aged 15 and 16 spent time in prison,⁸⁷ and 1,538 young men aged 17 to 21. A total of 823 spent time in prison under sentence, which represents a welcome decrease of almost 33% on the previous year.⁸⁸ The Prison Visiting Committee Annual Report for 2003 made serious criticisms of St. Patrick's,⁸⁹ and the major disruption to the normal prison service since January 2004, arising from the rationalisations and closures of some prisons to save on overtime costs, is reported to have exacerbated the situation.⁹⁰ The failure to resolve the dispute between the Prison Officers Association and the management of the prisons, ongoing since 2003, was a major factor in the lack of progress in improving facilities and services in St. Patrick's and other prisons.

⁸⁵ The total number of children detained in 2003 was 252, distributed as follows:

	Remand	Committals	HCt. Orders	Totals
Trinity House	21	22	4	47
Oberstown Boys	34	4	2	40
Oberstown Girls	27	6	2	35
Finglas	94	10	5	109
St. Joseph's	0	18	3	21
Totals	176	60	16	252

⁸⁶ There are anecdotal reports of displacement of children in children detention schools to make way for court mandated committals, contrary to effective therapeutic practice and the interests of the displaced child. See for example a report in the Irish Times of 9 December 2004, "Judge refuses request not to send 15-year-old girl to detention centre."

⁸⁷ Still possible under s. 103(3) of the Children Act 1908 if the child is certified unruly or depraved.

⁸⁸ The Irish Prison Service Annual Report 2002.

⁸⁹ "Workshop and training facilities were inadequate. Drugs continue to be thrown over the wall into the prison yard. A substantial number of inmates did not have the most basic of literacy skills. The language skills of many inmates are so poor their ability to construct oral sentences was limited. Despite this the educational services at the prison are limited by the availability of teachers from Dublin VEC. One inmate died in custody in 2003." – Irish Times report, 6 May 2004.

⁹⁰ In July 2004 there were 201 inmates, where previously the average population was 185. On 10th December 2004, there were 193, but the number continues to go over 200 periodically.

Girls of 17 likewise have no specially designated accommodation, and are assigned to the Women's Prisons in Mountjoy or Limerick. In 2002, 10 girls aged 15 and 16 spent time in prison,⁹¹ as did 164 aged from 17 to 21. The number of girls under 21 who spent time in prison under sentence was 30, compared to 60 in 2001. A special facility for girls of 16 and 17 is planned for a future date as part of the building of a new prison complex to replace Mountjoy,⁹² but meanwhile girls of this age group are mixing with adult prisoners and have no special facilities to take account of their young age and related requirements, such as education.

Database of children at risk

Convicted children, whether detained or not detained, suffer from shortfalls in relevant services. One common problem which arises is the difficulty for legal representatives, probation officers, the Special Residential Services Board and others in obtaining comprehensive information on a child. There does not appear to be a central source of information on matters such as Garda contact and background information, health, educational assessments, progress reports and so on. It would be helpful to have a central source of available background information on all at-risk children who have come to the attention of the authorities, to be accessed subject to suitable safeguards. **We recommend that the creation and maintenance of a database holding key information on at-risk children by the Health Service Executive should be considered, subject to appropriate safeguards.**

Mental health and other services

Mental health services for children and adolescents are widely recognised as inadequate.⁹³ They have been expanding over the past few years, but are still well below international standards. Reports by the Irish College of Psychiatrists, Child & Adolescent Section⁹⁴ and Amnesty International⁹⁵ have identified serious shortcomings in the existing services and what would be needed to remedy them, and the human rights issues involved. For example, there are only 20 inpatient beds for the under 16-year-old population in the entire country.⁹⁶ The 16-18 years age group have no special service at all, and are treated as adults in the mainstream psychiatric services. There is no forensic service for children under 18, and adolescents who present with criminal behaviour are referred to the normal psychiatric services who do not have any specialist knowledge to offer. Overall, it is estimated that only 66% of the required out-patient service for child and adolescent psychiatric services are currently available, and

⁹¹ Still possible under s. 103 (3) of the Children Act 1908 if the child is certified unruly or depraved.

⁹² Reply by the Minister for Justice, Equality and Law Reform to parliamentary question 16068/04, 27 May 2004.

⁹³ See for example the annual report of the Chief Medical Officer, 2001: "Approaches to the promotion and development of sound mental health for children, and the identification and treatment of psychological and psychiatric disorders have been patchy, uncoordinated and under resourced."

⁹⁴ Submission to the Expert Group on Mental Health Services, December 2003 and The Irish College of Psychiatrists Occasional Paper OP60, *A Better Future Now, Position statement on psychiatric services for children and adolescents in Ireland*, August 2005.

⁹⁵ *Mental Illness, the Neglected Quarter – Children*, September 2003.

⁹⁶ Though the situation is evolving: according to an advertisement in the Irish Times on 27 July 2004, St. John of God Hospitaller Services was proposing to open an adolescent psychiatric unit in Stillorgan in Spring 2005. However, according to the Irish College of Psychiatrists Occasional Paper OP60, *A Better Future Now, Position statement on psychiatric services for children and adolescents in Ireland*, August 2005, the position had not changed. That report recommends 156 beds for under-16-year-olds, and an additional 80 beds for the 16-17 year age group.

these services are at varying stages of development.⁹⁷ Mental health issues play a large part in the anti-social behaviour of juveniles, and gaps in these services are to be particularly deplored both because of the human suffering entailed, and the price consequently paid by the children, their families, their wider communities and eventually the children's children.

Access to other services, such as educational and behavioural assessment, is also frequently reported as being inadequate. Children with learning disabilities and speech disabilities are prioritised by the mainstream services in accordance with the severity of the child's specific problem in that area, and not in relation to the severity of the child's position overall.

Children with drug or alcohol addiction are usually deemed unsuitable for admission to normal detention facilities, except for St. Patrick's Institution, which is not drug free. In St. Patrick's medical and psychiatric treatment is available to assist with coming off drugs, and access to methadone treatment is available. There is also a drug free section, Wing D, and prisoners may make voluntary application to be transferred there. Younger children who are not eligible for St. Patrick's or other detention centres can be released because there is nowhere to take them. There are residential addiction treatment facilities including the Aisling Project at Ballyragget, Co. Kilkenny and Matt Talbot House in West Cork, and the Probation and Welfare Service funds attendance of some addicted young people.⁹⁸

Probation

The Probation and Welfare Service is primarily responsible for working with convicted juvenile offenders who are not detained, and probation officers will clearly have an increasingly important role under Part 9 of the Children Act which details the community sanctions available as an alternative to detention, some of which are in force such as the restriction on movement order (section 133). Section 99 of the Children Act now requires a court to order a probation officer's report in most cases if a community sanction, detention or detention and supervision is being contemplated, to be prepared in 28 days.

As no annual report for the Probation and Welfare Service has been produced in recent years,⁹⁹ it is difficult to gauge the role currently played by the Service in the treatment and rehabilitation of juvenile offenders after conviction. It may well have decreased as a result of an 8% cut to the Service's funding in the December 2003 budget. The Service runs four probation hostels and training workshops for young offenders, and the potential of the Service in supporting young people by helping them to gain access to training and employment and any needed special services is clear. Supporting young people on courses and in employment is an important feature of the Service's work, as many do not have the

⁹⁷ The Irish College of Psychiatrists Occasional Paper OP60, *A Better Future Now, Position statement on psychiatric services for children and adolescents in Ireland*, August 2005, p. 59.

⁹⁸ However, no information is currently available on the long-term effectiveness of such facilities and their relative effectiveness compared with community based drug treatment programmes.

⁹⁹ Since 1999. The next report which will cover a number of years is expected in 2006.

emotional stamina, self-discipline or habits necessary to succeed. The number of young people actually assigned probation officers seems to be fewer than might be expected. An estimated 150 (northside) and 120 (southside) cases were assigned to two specialised Youth Justice Teams within the Probation and Welfare Service in Dublin in the 9 months from October 2003. Even allowing for other regions and the range of decisions open to the judiciary, this does not seem to be a large number in the context of the number of prosecutions of juvenile offenders (3,902 in 2002). However, an increasing role is planned for the Service under the Children Act, initially with the introduction of family conferencing under Part 8, to be followed by the new range of orders open to a court under Part 9. Thirty new probation staff were recruited and trained to facilitate the bringing into force on 29 July 2004 of sections 78 to 87 of the Children Act 2001 (court ordered family conferences).

The Probation and Welfare Service is also active in supporting and funding community-based initiatives which are focused on crime prevention and diversion, a total of 72 currently in the following categories:

- educational, vocational and placement – 27
- counsellor and offender reintegration – 14
- substance abuse treatment and aftercare – 18
- victim focused work with perpetrators – 5
- accommodation – 7
- prison visiting – 1

Cohesiveness of the juvenile justice system

The importance of coordination between the different government departments and agencies was recognised by the establishment of the National Children's Office, now the Office of the Minister for Children, which has a primary coordination role in the implementation of the Children Act 2001. The main department concerned is the Department of Justice, Equality and Law Reform, but the Department of Health and Children is involved in relation to family welfare conferences, special care orders (Parts 2 and 3) and the Special Residential Services Board (Part 11), and the Department of Education and Science is responsible for Children Detention Schools (Part 10).

The Probation and Welfare Service is the responsibility of the Department of Justice, Equality and Law Reform. Continuity in the care of a young person can be dropped as he or she moves from one area of responsibility to another. For example, a boy may be committed to a Children Detention School by a court, thus becoming the responsibility of the Department of Education and Science. The Children Act provides (section 156) that "No court shall pass a sentence of imprisonment on a child or commit a child to prison", but this section is not yet in force. Meanwhile section 102(3) of the 1908 Children Act applies, which makes an exception to sentence or committal to prison if the court certifies "that the young person is of so unruly a character that he cannot be detained in a place of detention . . . or that he is of so depraved a character that he is not a fit person to be so detained". If he is unmanageable in the school, the school may apply for an unruly or depraved order with the result that the boy is sent to

an adult prison, which is the responsibility of the Department of Justice, Equality and Law Reform. From there he may be released early at the discretion of the prison authorities, without any notification to the court which sentenced him, the original Children Detention School, or the Probation Service.¹⁰⁰

Other gaps readily identified in the juvenile justice system, which also exist in the childcare system, relate to psychiatric and psychological care, learning disabilities and addiction treatment, as outlined above. A breakdown in the provision of any service may result in failures of education and work placement, and further offending.

We recommend that consultation with young people having experience of the juvenile justice system, persons working with them both in NGOs and government agencies, advocates of young people and academics familiar with research and developments elsewhere should be undertaken in any review of the juvenile justice system. The commitment to consultation with young people was given in the National Children's Strategy (2000) which undertakes that "children will have a voice in matters that affect their lives and due regard will be given to their views, in accordance with their age and maturity", which echoes Article 12 of the Convention on the Rights of the Child. The experience of young people of the juvenile justice system is a valuable source of information and guidance in identifying necessary reforms and improvements.

Law reform in context

The criminal law is a very crude instrument for achieving the reform or rehabilitation of a young offender. Juvenile crime is primarily not a legal problem but a social one, and the importance of early and constructive intervention is beginning to get much needed official recognition and support. However, it is important that the law play its part along with other systems and agencies in such a way that it inspires respect and confidence in young people who come in contact with it. It is difficult to persuade disaffected young people that they must behave correctly if the agencies and structures dealing with them are visibly dysfunctional, and the State is not doing its part. Thus a reformed legislative structure will not achieve much on its own. To be effective, the entire context in which the law applies must also be consistent and functional. The implementation of the Children Act 2001 is a good starting point, as are the many initiatives to engage with children and give support to parents and schools. The challenge is to build on this to achieve a situation where vulnerable children are not failed.

¹⁰⁰ This scenario is based on a report in the Irish Times of 31 July 2004, p. 5 relating to the background of a juvenile convicted of rape: "A pattern of young criminals falling through society's cracks."

CHAPTER 4
CHILDREN NOT IN THE CARE OF THEIR PARENTS:
CHILD REFUGEES AND ASYLUM SEEKERS,
UNACCOMPANIED MINORS AND TRAFFICKED
CHILDREN

1. INTRODUCTION

According to the Office of the United Nations High Commissioner for Refugees (UNHCR) approximately half of the world's refugees or persons of concern to UNHCR are children. Children move across international boundaries for many and complex reasons which are not solely related to fleeing for refugee convention reasons; many may have protection needs not falling within the refugee definition.¹ Children may be displaced by war, escaping an abusive environment, or fleeing extreme poverty and lack of opportunity; in addition there is the growth in the phenomenon of children being trafficked for exploitation either in the sex trade or the unregulated economy. UNICEF reports that it is estimated by the United Nations that 1.2 million children are trafficked annually.²

From the late 1990s, Ireland experienced a significant increase in the numbers of persons (adults and children) arriving in the State and seeking asylum. In the last year there has been a downward trend in the numbers³ which may be explained by more rigorous immigration controls (emanating, mainly, from EU legislative initiatives); and also by the accession of the 10 new Member States on 1 May 2004. With regard to trafficking in children, there is some difficulty in accurately recording the extent of the number of trafficked children. In a report published by the Irish Refugee Council in 2003,⁴ it estimated that approximately 95% of separated children seeking asylum in Ireland were not identified by immigration officials at a port of entry but presented themselves to officials within the country. This means that there could be other children, perhaps victims of trafficking, arriving in the country and not coming to the attention of the authorities. In a study conducted by Dr. Pauline Conroy, *Trafficking in*

¹ Article 1(A)(2) of the 1951 UN Convention Relating to the Status of Refugees defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it."

² UNICEF, End Child Exploitation, "Stop the Traffic", July 2003.

³ From 841 applications by unaccompanied minors in 2003 (of which 729 were accepted as such), there were 124 such applications in 2004 (information taken from Smyth, "Refugee Status Determination of Separated Children: International Developments and the Irish Response, Part II", [2005] 2 IJFL 21 at p. 26, footnote 2.

⁴ *Separated Children Seeking Asylum in Ireland* by Dr. Angela Veale, Laila Palaudaries and Cabrini Gibbons, August 2003.

Unaccompanied Minors in Ireland, she found that approximately 10% of unaccompanied minors coming into Ireland are the subject of investigation in relation to criminal trafficking or smuggling by adults.⁵

How best to meet the needs of this particularly vulnerable group of children presents complex challenges for the State and for those who work and support children in the refugee and child law area. UNHCR, recognizing the vulnerability of such children, recommends to governments that, irrespective of their immigration status, they have special needs that must be met. First and foremost it has to be remembered that they are children, so that often their rights as children will supersede their rights as asylum seekers or refugees. In this part of the section dealing with “Children not in the care of their parents”, how our law caters for the needs of these children and the interaction between refugee law and child law will be considered.

2. EXISTING RESEARCH

At the outset, it is important to refer to the research that has already been conducted in Ireland on issues relating to unaccompanied minors and also on issues relating to trafficking in unaccompanied minors.⁶ Since 1999, the Irish Refugee Council has carried out considerable research into issues relating to separated children.⁷ Their most recent report, *Separated Children Seeking Asylum in Ireland*, examined how our law, policy and practice for dealing with unaccompanied minors conformed to the standards set out in the *Statement of Good Practice* of the Separated Children in Europe Programme.⁸ Issues considered in the report were as follows: the definition of ‘separated child’; age assessment; child trafficking; appointment of a guardian and interim care; health and psychological support; education, language and training; asylum or refugee determination process; criteria for making a child’s application; young people who become adults (‘aged-out’ minors) during the asylum process; durable or long-term solutions; family reunification in Ireland; family tracing, contact and reunification in the country of origin or a third country; settlement and social integration; inter-organisational co-operation. The key recommendations can be found in the Executive Summary of the Report. **We support the**

⁵ The Report was launched by IOM International Organisation for Migration on 24 June 2004 and was part of the third phase of a ten country European study coordinated by IOM and funded by the European Commission STOP programme as part of a collaboration between the European Union, UN agencies and the IOM to develop legislative and policy initiatives to counter trafficking and provide assistance to victims of trafficking.

⁶ See Smyth, “Refugee Status Determination of Separated Children: International Developments and the Irish Response”, [2005] 1 IJFL 15 and [2005] 2 IJFL 21 in addition to the two reports mentioned below.

⁷ A complete list of reports and information notes can be found on their website <http://www.irishrefugeecouncil.ie>

⁸ The Separated Children in Europe Programme is a joint initiative of the International Save the Children Alliance and the United Nations High Commissioner for Refugees. The programme is based on the complementary mandates and expertise of the two organisations; the International Save the Children Alliance is focused on the full realisation for children’s rights; UNHCR’s responsibility is to ensure protection of refugee children and those seeking asylum. A commitment to the full implementation of the United Nations Convention on the Rights of the Child (UNCRC) is fundamental to the work of the programme. The *Statement of Good Practice* is principally informed by the UNCRC and two documents: UNHCR’s Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum of February 1997 and the European Council on Refugees and Exiles (ECRE) Position on Refugee Children of November 1996. The SGP was updated in 2004 and can be found on the Programme’s website: <http://www.separated-children-europe-programme.org>

recommendations of the Irish Refugee Council as set out in their report on *Separated Children Seeking Asylum in Ireland*, August 2003.

In the report on *Trafficking in Unaccompanied Minors in Ireland* the legal framework in Ireland for dealing with prosecutions of perpetrators of trafficking in minors is examined; it describes the institutions and services for the protection of unaccompanied minors who are victims of trafficking and their reception into the care of public authorities and identified the policy responses being implemented in Ireland to combat trafficking in children and protect the victims. The Executive Summary highlights specific issues which need to be addressed, and, in section 4.5 of the main report, various recommendations and observations arising from the study are set out. **We support the recommendations of Dr. Pauline Conroy as set out in her report on *Trafficking in Unaccompanied Minors in Ireland*, International Organisation for Migration, June 2004.**

In the examination that follows the issues identified as requiring reform may overlap with findings and recommendations made in the aforementioned reports and, to the extent that they do, this only serves to highlight the need for reform.

3. INTERNATIONAL LEGAL FRAMEWORK

The primary source of refugee law at the international level is contained in the 1951 United Nations Convention relating to the Status of Refugees as amended by the 1967 New York Protocol (the Geneva Convention). The Geneva Convention itself contains no specific provisions dealing with the situation of unaccompanied minors. However at the time of the adoption of the Convention, Governments were recommended to take the necessary measures for the protection of the refugee's family, especially with a view to:

- ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country, and
- ensuring the protection of refugees who are minors, children and girls, with special reference to guardianship and adoption.⁹

The first recommendation recognizes the principle of family unity, which is further elaborated upon in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (the UNHCR *Handbook*).¹⁰ According to this principle, if the head of a family meets the criteria of the refugee definition, his or her dependants are normally granted refugee status.¹¹ This means that if a minor is accompanied by one (or both) of his/her parents, or another family member on whom he/she is

⁹ Excerpt from the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

¹⁰ Paras. 181-188 and 213 of the UNHCR *Handbook*.

¹¹ Para. 184.

dependent, who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity.¹² The principle of family unity does not however prevent persons who may be dependants from individually applying for asylum, as the principle operates in favour of dependants and not against them.¹³

With regard to the protection needs of unaccompanied minors, UNHCR has itself and, in conjunction with other agencies (as with the *Statement of Good Practice*), developed guidelines and policies setting out what may be regarded as best international practice in respect of issues relating to unaccompanied minors. These are set out in a variety of documents, such as *Resolutions of the Executive Committee of the High Commissioner's Programme* (EXCOM Resolutions);¹⁴ policy documents and guidelines, such as the 1993 *Policy on Refugee Children*, the 1994 *Refugee Children: Guidelines on Protection and Care*, the 1997 *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*; and the *UNHCR Handbook*.

In developing the policy guidelines and recommendations, UNHCR has been guided by and relied upon the general provisions of the 1989 United Nations Convention on the Rights of the Child (UNCRC) which is the cornerstone of the international regime for the protection of the child and lays down internationally accepted principles governing the rights of children. Among the provisions of the UNCRC which are especially pertinent to unaccompanied minors are:

- Article 2 (non- discrimination clause) whereby State Parties to the Convention are to respect and ensure the rights set out in the Convention to each child within their jurisdiction without discrimination of any kind;
- Article 3 which clearly sets out that in all actions concerning children "the best interests of the child shall be a primary consideration";
- Article 12 (participation of child) whereby children, capable of forming their own views, should be given the opportunity to express those views freely in all matters affecting the child, and those views should be given due weight in accordance with the age and maturity of the child; and
- Article 22 which affords to every child seeking refugee status a right to "protection and humanitarian assistance" in the enjoyment of the rights that are contained in treaties and declarations pertaining to refugees.

The UNCRC was ratified by Ireland on the 21 September 1992 and although it has not been incorporated into domestic law, the State has obligations at an international level to ensure that its

¹² Para. 213.

¹³ Para. 185.

¹⁴ Among the principles elaborated by EXCOM for the protection of refugee children are:

"All action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as the principle of family unity." (Conclusions No. 47 (XXXVIII) of 1987, para (d); No. 84 (XLVIII) of 1997, para (I); No. 88 (XLX) of 1999, para (c).

"Refugee children must be protected from threats to their life, liberty and security; from torture and cruel, inhuman or degrading treatment or punishment; from harmful traditional practices; and from sexual violence, exploitation, trafficking and abuse." (Conclusions No. 84 (XLVIII) of 1997; No. 85 (XLIX) of 1998).

provisions are being implemented.¹⁵ The importance of the Convention in this area of law was referred to by Ms. Justice Finlay-Geoghegan in the *Nwole* case (at the Leave application for Judicial Review) when she said that: “The provisions of the Refugee Act 1996 must be construed, and its operation applied by the authorities in accordance with the Convention on the Rights of the Child which has been ratified by Ireland.”¹⁶

The body of law described above as constituting best international practice, while not having the force of law, has, to a varying degree, received judicial recognition. Certainly, the UNHCR *Handbook* is universally regarded as an important interpretative tool to the Geneva Convention. In the UK, it has been held to be “good evidence of what has come to be international practice within Article 31(3)(b) of the Vienna Convention.”¹⁷ In this jurisdiction, in *Zgnat'ev v. Minister for Justice Equality and Law Reform* the UNHCR *Handbook* was relied upon as being a “legitimate aid” to the interpretation of the Convention.¹⁸ More recently, in *Nwole*, it was referred to as having been “judicially approved as a useful document for the purpose of interpreting and understanding the legislation in these cases.”¹⁹ With regard to UNHCR documents and policy guidelines setting out best practice for dealing with asylum applications of unaccompanied minors, these recently received positive judicial endorsement in the High Court at the Leave stage of an application for Judicial Review in the case of *Moradeyo Moronkeji a minor suing through her next friend, Adeola Olueye v Refugee Appeals Tribunal (Tribunal Member, Ben Garvey) and Minister for Justice, Equality and Law Reform*.²⁰ In that case, Peart J. referred extensively to the documents as he regarded them as setting out “best practice regarding the handling of unaccompanied minors, even one of 16 years of age.”

The judicial recognition given to this body of law is to be welcomed as is the acknowledgment given to the *Guidelines* by State bodies having responsibility for dealing with unaccompanied minors (the Irish Refugee Council report on *Separated Children Seeking Asylum in Ireland* records how and the extent to which the principles set out in the *Statement of Good Practice* are being conformed to in practice within the State). However, these guidelines do not have the force of law and our current statutory framework does not lend support to the standards set out in those guidelines. This means that where State bodies do try to follow best international practice there is no mechanism to ensure compliance with those standards, which is an obstacle to the promotion and protection of the rights of unaccompanied minors.

¹⁵ The Committee of the UNCRC oversees the implementation of the Convention. Under Article 44 of the UNCRC State Parties are required to submit reports setting out the measures they have taken which give effect to the rights recognised by the Convention.

¹⁶ *Angela Nwole, Lisa Nwole, Chichi Nwole, Uloma Nwole, Christle Nwole and Whitney Nwole v The Minister for Justice, Equality and Law Reform* [2003] IEHC 72, Finlay-Geoghegan J., 31 October 2003

¹⁷ Laws L.J. in *R v Secretary for the Home Department ex parte Adan, Subaskaran & Aitseuger* [1999] Imm 521.

¹⁸ [2001] IEHC 105, Finnegan J., 17th July, 2001.

¹⁹ 2002 No. 656 JR: Judgment of Mr. Justice Michael Peart, 26 May 2004.

²⁰ 2003 No. 477 JR: Judgment of Mr. Justice Michael Peart, 9 July 2004.

4. LEGISLATIVE FRAMEWORK: THE REFUGEE ACT 1996

The Refugee Act 1996 as amended brings the provisions of the Geneva Convention into effect in Irish domestic law. The main provisions of the Refugee Act did not come into operation until 20 November 2000. There is very little reference in the 1996 Act to minors, accompanied or unaccompanied. Section 2 contains the definition of a refugee. Section 8(1)(a) gives the legal entitlement to apply for asylum to “a person who arrives at the frontiers of the State...”; by virtue of section 8(1)(c) that same entitlement is given to “a person who at any time is in the State (whether lawfully or unlawfully . . .).” A “person” is not defined for the purposes of section 8(1) of the Act but from an examination of the wording of the Act it would seem that the persons envisaged in section 8(1) include minors.²¹

The Refugee Act 1996 makes a narrow provision for separated children, referring to children who are “not in the custody of any person”.²² This is narrower than the definition of “separated child”, which is defined in the UNHCR’s 1997 Guidelines as a child who is “separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so”. The problem with the narrow definition arises where there is a potential conflict of interest between the child and the accompanying person, which is discussed below.

5. THE REFUGEE DETERMINATION PROCESS

The Refugee Act 1996 (as amended by the Immigration Act 1999 and the Immigration Act 2003) sets out the procedure for applying for asylum and establishes the two bodies responsible for making a recommendation with regard to the grant or refusal of refugee status. The Office of the Refugee Applications Commissioner (ORAC) has as one of its functions the consideration of applications for refugee status at first instance. The Refugee Appeals Tribunal (RAT) hears substantive appeals from a negative finding of ORAC for refugee status and from decisions of ORAC to transfer under the Dublin Convention. Under section 17 of the 1996 Act, as amended, it is the Minister who declares someone to be a refugee.

With regard to the situation of unaccompanied minors within the asylum process, the *Statement of Good Practice* states the following:

Separated children, regardless of age, should never be denied access to the asylum process. Once admitted they should go through the normal procedures and be exempt from alternative procedures including those related to “safe third country” (admissibility), “manifestly

²¹ Section 9(A) (as inserted by section 11 of the Immigration Act 1999) makes provision for the taking of fingerprints which can be taken from an applicant above the age of 14. S. 9(8) of the Act sets out the circumstances in which an applicant for asylum may be detained, however that provision does not apply to a person under the age of 18 years (s. 9(12)(a)). S. 18(3)(b) further supports the contention that a minor can be an applicant for asylum as it makes provision for a minor who is not married and has been declared a refugee to apply to the Minister for Justice, Equality and Law Reform for permission for his or her parents to enter and reside in the State.

²² S. 8(5)

unfounded” (accelerated) and “safe country of origin” and from any suspension of consideration of their asylum claim due to coming from a “country of upheaval”.²³

The Irish Refugee Council noted the improvements made since their 1999 report by ORAC and RAT with regard to dealing with separated children. For example, both bodies have trained members of their staff, who are dedicated to dealing with separated children; ORAC, RAT and the Refugee Legal Service have had inter-agency training with regard to interviewing separated children, and ORAC and RAT have put in place procedural and evidentiary policies in relation to determining a child’s application for asylum.²⁴ These positive developments are welcomed, although there are areas for concern, which include

- the accelerated procedures set out in sections 11A and B of the Refugee Act 1996 (inserted by section 7 of the Immigration Act 2003);
- orders made pursuant to section 12(4) of the 1996 (as amended by the 2003 Act) designating countries as safe countries of origin;
- the power of the Minister to give a direction to the Refugee Applications Commissioner for the prioritisation of applications which includes those of unaccompanied minors, and
- the application of Council Regulation 343/2003/EC (Dublin II Regulation) which incorporates the safe third country principle.

These provisions apply equally to adult and minor applicants for asylum and, in their application to unaccompanied minors, are clearly contrary to the *Statement of Good Practice* and UNHCR Guidelines.

6. THE DUBLIN CONVENTION AND DUBLIN II REGULATION

The Dublin Convention²⁵ is based on two principles: first, that the Member States are entitled to pool their responsibility for asylum seekers; second, even though each Member State is separately a signatory to the Geneva Convention, a decision on an asylum application by one of them absolves all the others of any duty to consider an asylum application by the same individual. Regulation 343/2003/EC (known as Dublin II) builds on the existing Dublin Convention. It has an improved provision for family reunification - Article 6 of the Regulation makes it clear that for unaccompanied minors “ . . . the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application shall be where the minor has lodged his or her application for asylum.” In the latter case, there is no reference to the child’s best interests. The Dublin Convention and Dublin II have been severely criticised because of the way in which Member States attempt to redistribute asylum seekers without

²³ Para. 12 (a) *Statement of Good Practice*, 3rd ed., 2004.

²⁴ “The guidelines were drafted in consultation with the UNHCR and are subject to ongoing review as the experience of the asylum institutions increases over time”. Smith, “Refugee Status Determination of Separated Children: International Developments and the Irish Response”, Part 1 (2005) *IJFL*, 15 at p. 19.

²⁵ Official Journal C 254 , 19.08.1997.

harmonising the underlying definition of who qualifies for protection and the procedures by which decision making takes place, including appeal rights.²⁶ The Dublin II Regulation is directly applicable in Irish law and the Regulation specifies that Member States, all respecting the principle of non-refoulement, are considered to be safe countries for third country nationals. While children under 18 may not be arrested and detained, and placed on a ship or aircraft for the purposes of being transferred to another state under the Dublin II Regulation,²⁷ they may be required to leave the State and be served with a notice to this effect. If they refuse to go, they will be in breach of the Minister's order. Under the Refugee Act (Section 22) Order 2003,²⁸ regulation 7(3), they may be served with a notice stating that they may be detained, which is incorrect and taints the fairness of the procedure. **We recommend that the Refugee Act (Section 22) Order 2003, regulation 7(3) be amended to exclude its application to children under the age of 18 years consistently with regulation 7(8)(a), and to lay down a procedure to ensure that such children are given the correct information.** This is in any event required by Article 3.4 of the Dublin II Regulation, which provides:

“4. The asylum seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects.”

This obligation does not appear to be fully implemented by the requirements to inform set out in Articles 6 and 7 of the Refugee Act (Section 22) Order 2003.²⁹ Further, the information contained in the Information Leaflet for Applicants for Refugee Status in Ireland, chapter 4, does not deal with the special position of unaccompanied minors, nor does it mention the State's discretion to deal with an asylum application under Article 3.2. It merely states that “The Commissioner shall take into consideration all relevant matters known to him or her, including any representations made by you or on your behalf when deciding whether your application will be transferred”.³⁰ **We recommend that the information required to be provided to applicants under Article 3.4 of the Council Regulation 343/2003 (the Dublin II Regulation) should include information on the State's discretion not to transfer applicants under Article 3.2 and that the implementing regulations should be amended to require the provision of this information. The fact that this discretion must be exercised at application stage and cannot be exercised at appeal stage by the Refugee Appeals Tribunal should also be highlighted.**

Despite EU efforts at harmonisation, the reality is that child asylum applicants will be better protected in some countries than in others. Article 3.2 of the Regulation gives discretion to Member States to process asylum applications even though they could be referred back to other Member States. **We recommend that in the case of separated children, the best interests test should always be applied before returning separated child asylum applicants to the places of first application for asylum. We recommend that this approach should be legislated for or adopted as a matter of policy.** It is

²⁶ See Elspeth Guild, “Seeking asylum: storm clouds between international commitments and EU legislative measures”, (2004) 29 E.L.Rev. April.

²⁷ Refugee Act 1996 (Section 22) Order 2003, SI no. 423/2003, reg. 7(8)(a).

²⁸ SI no. 423 of 2003

²⁹ SI no. 423 of 2003

³⁰ Information Leaflet for Applicants for Refugee Status in Ireland, p. 17 at 4.2, available at www.orac.ie under Publications

required, in any event, by Article 3 of the Convention on the Rights of the Child, which lays down the best interests principle.

Burden of proof

Further, the fact of having made a prior application for refugee status in another state does not take into account whether the failure to pursue that application is reasonable in the context of child-friendly procedures, standards of assessment, assistance and safety in that state. Proving that an applicant should be recognised as a refugee will be difficult for anyone, and even more so for a minor alone. For these reasons, this provision does not comply with international standards concerning unaccompanied minors.

Assessment of credibility

Similar considerations apply in relation to the new requirements for assessment of credibility. In introducing mandatory directions to the Office of the Refugee Applications Commissioner (ORAC) and the Refugee Appeals Tribunal (RAT) on how to assess credibility, no allowance is made for the particular situation of unaccompanied minors. The new section 11B requires the ORAC or RAT to have regard to a range of factors in assessing credibility. They include the possession of valid identity documents, or whether the applicant has a reasonable explanation for their absence; the applicant's reasonable explanation to justify a claim that this country was the first safe country arrived at; the provision of a full and true explanation of how the applicant arrived in the State; if the application is made from within the State, whether the applicant has a reasonable explanation of why asylum was not claimed immediately (unless claimed on grounds arising later); whether the applicant has a reasonable explanation for forging, destroying or disposing of identity documents; whether the applicant has given manifestly false evidence or made false representations or has failed to co-operate; or whether the applicant has adduced evidence on appeal which was not mentioned earlier. The new section 11C requires the applicant to co-operate and provide all information in his or her possession.

The problem is that these requirements do not fit well with the situation in which most of these minors find themselves. Their arrival is usually decided and organised by adults and they will commonly have been warned to say nothing about the travel arrangements and even their backgrounds. This is usually to protect the adults concerned, because illegality is likely to have been involved. The details which the applicant minor does offer may well have been fabricated by the adults organising the minor's arrival, and may in fact disguise another set of circumstances which amount to persecution of another kind. In these cases, the applicant minor is a victim of the activities of other adults, and it is contrary to the whole intention of protecting refugees that he or she should be made to suffer the consequences of these activities, or should be prejudiced by this fact.³¹

³¹ See Smyth, "Refugee Status Determination of Separated Children: International Developments and the Irish Response, Part I – The Refugee Definition", [2005] IJFL 15 at p. 20.

We recommend that sections 11A, B and C of the Refugee Act 1996 be amended to exempt their application to applicants for refugee status who are unaccompanied minors.

7. FAMILY REUNIFICATION

The statutory framework introduced in this jurisdiction makes little or no reference to the interlocking principles of family unity and best interests of the child. With regard to a family application based upon the principle of family unity, this was considered in the *Nwole* case.³² In that case, the mother of the applicants had applied for a declaration of refugee status on the 11 May 1998, and it was argued on behalf of the applicants for Judicial Review that the children had not been included in their mother's application, or, alternatively, it was contended that if an application was deemed to have been made by them or on their behalf, no determination of their applications had been made in accordance with statutory provisions.³³ At the application for leave for judicial review, in considering the principle of family unity, Ms. Justice Finlay-Geoghegan observed that there was no authorised scheme based upon that principle in existence in the State at the time of the mother's application for refugee status. At the substantive hearing, Mr. Justice Michael Peart accepted that the legislation had not been drafted in a manner that introduced an authorised scheme based upon the principle of family unity, and he relied on the provisions of the Constitution which give primacy to the rights and duties of parents in respect of their children's welfare. He concluded that the absence of a special provision in the legislation or the procedures as to what should happen in relation to an application of an accompanied child did not result in a lacuna in the legislative provisions and that the legislation could be interpreted in a manner consistent with the principle of family unity.³⁴ He did however, at the conclusion of his judgment, make reference to the following remarks made by Smyth J in the *Emekobum* case, when he stated:

“Finally, I observe that for the avoidance of doubt in any future cases in which there are accompanied minor children, the parent or parents, as the case may be, might be requested to make an express declaration as to whether or not they wish to have the minor children's rights, interests, or entitlements included with their own application for refugee status.”³⁵

It is clear that there is need for clarification of the current *ad hoc* system that operates for dealing with family applications. The procedures to be followed in these cases are not clear; nor is it clear what status (“derivative status”) is accorded to children who are deemed to be included in their parent's application and where a declaration of refugee status is made in favour of the parent. For example, what happens if the parent from whom the accompanied minor derives his or her status dies, or in some other way the unity of the family is destroyed? What the UNHCR *Handbook* recommends in such an instance is that:

³² *Supra*, note 16.

³³ S. 3(2)(f) of the Immigration Act 1999.

³⁴ Judgment of Mr. Justice Michael Peart delivered 26 May 2004

³⁵ *Emekobum & Others v Minister for Justice*, 146 JR 2002, judgment delivered 18 July 2002. This issue is in fact now highlighted in the Office of the Refugee Applications Commissioner's *Information Leaflet for Applicants for Refugee Status in Ireland* at 3.1 on p. 13, available at www.orac.ie, under Publications.

“Where the unity of a refugee’s family is destroyed by death, separation or divorce, dependants who have been granted refugee status on the basis of family unity will retain such status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees.”³⁶

We recommend that the Refugee Act 1996 should be amended to make it clear that the principle of family unity is part of Irish law and set out clearly the status accorded to the spouse or minor who derives status through the application of the principle of family unity. Provision could be made in regulations for the procedures to be adopted in dealing with such applications.

We recommend that procedures be put in place to facilitate individual applications for refugee status by accompanied minors. This may arise in cases of conflict of interest between the minor and the person accompanying him or her, or for other reasons. Obviously questions arise as to the legal capacity of a minor to make such an application, the need for a guardian *ad litem*, and issues for solicitors in taking instructions from minors. These questions regarding legal capacity and representation must be resolved consistently with their treatment in other areas of law, and are further discussed in the section of this report on representation for children.

8. UNACCOMPANIED MINORS

The position of ‘unaccompanied minors’ is set out in section 8(5)(a) of the Refugee Act 1996 as amended, which provides as follows:

(5)(a) Where it appears to an immigration officer or an authorised officer that a child under the age of 18 years, who has either arrived at the frontiers of the State or has entered the State, is not in the custody of any person, the officer shall, as soon as practicable, so inform the Health Service Executive and thereupon the provisions of the Child Care Act 1991 shall apply in relation to the child.

(b) Where it appears to the Health Service Executive, on the basis of information available to it, that an application for a declaration should be made on behalf of a child referred to in *paragraph (a)*, the Health Service Executive shall arrange for the appointment of an employee of the Health Service Executive or such other person as it may determine to make an application on behalf of the child.

It can be seen that the above provision is minimalist in its terms. There is no definition of unaccompanied minor, and while reference is made to the fact that “the provisions of the Child Care Act 1991 shall apply in relation to the child”, there are no guidelines as to how the Health Service Executive is to exercise its functions in relation to these children. Some areas apply section 4 of the Child Care Act 1991, which provides for the Executive to take a child into its care if it appears that he or she needs care or protection and would otherwise not get it. Some use section 5, which provides for accommodation for homeless children, but does not require the child to be taken into care. This raises the question of differences in standards of treatment of Irish and asylum seeking children. Any Irish

³⁶ Para. 187.

child without a *de facto* adult guardian would expect to be taken into care. This is not necessarily the position for child refugees and asylum seekers.

Definition of ‘unaccompanied minor’

How an ‘unaccompanied minor’ is defined is important because it is from the definition applied by a State that the practical consequences flow for the protection and well-being of minors who arrive at State borders with respect to identification, investigation into a child’s history, guardianship and interim care, family reunification and prevention of child trafficking.

The Irish Refugee Council in its report on *Separated Children Seeking Asylum in Ireland*³⁷ identified three categories of unaccompanied minors as coming to the attention of the authorities:

- children or young people who arrive alone and have no parent, guardian or relative already living in Ireland;
- children or young people who arrive alone and have a parent, guardian or relative already resident in Ireland; and
- children or young people who arrive accompanied by an adult, and where, through an examination of travel documents, doubt is raised about the relationship of the adult to the minor.

In all these cases, the practice is that the children are referred to the Health Service Executive which has the responsibility for making an assessment with respect to the status of the child as an unaccompanied minor. As a result of the assessment carried out, a child may be placed in the care of the accompanying adult if the Health Service Executive is satisfied that he or she is the child’s parent or legal guardian; or a child may be reunited with parents or relatives within Ireland if the existence of the relationship can be determined. The reason for circumspection is the possible abuse or exploitation of the child, who may have been trafficked for this purpose. Children arriving with siblings aged 18 or over may also be assessed by the Health Service Executive to ascertain if the sibling is capable of providing care. Alternatively, a child can be classified as “unaccompanied” and placed under the care of the Health Service Executive. Where it is determined by the Health Service Executive that an application for asylum should be made on behalf of the unaccompanied minor, the child is registered with the Refugee Legal Service where he or she has access to a solicitor and a caseworker. A project or social worker provides support for each child throughout the refugee determination process.

The interpretation of an “unaccompanied minor” applied in practice in this jurisdiction does not accord with best international practice as it excludes children who are reunited with an adult or relative who is not their parent or legal guardian. Once reunited, the minor is no longer under the care of the dedicated unit within the Health Service Executive for dealing with unaccompanied minors, but the local health services within the region where the child is living are notified of the referral of the child. Due to the application of a restricted definition of “unaccompanied minor” and a lack of resources, there is no

³⁷ At page 15.

follow up by the authorities of these children who are placed with adults or relatives who are not their parents or legal guardians.³⁸ Apart from welfare concerns for such children should they not be receiving adequate care, there are also concerns regarding the use of children for domestic labour and lack of monitoring in order to prevent trafficking. There may be a conflict of interest between the adult into whose care the child has been placed and the separated child.³⁹ The decision to make an asylum claim or to pursue it is also left to the alleged family member, who may not act in the child's best interests. There is also the question of whether these children are being accorded a lower standard of care than Irish children in circumstances of conflict of interest or possible risk.

We recommend that in making an assessment for the purpose of placing a child in the care of a relative or accompanying adult, the Health Service Executive should carry out a DNA test to safeguard against the trafficking and exploitation of children, where appropriate.

We recommend that regulations be made under section 41 of the Child Care Act 1991 in order to ensure that the protection needs of children who are placed with an adult or relative who is not their parent or legal guardian are adequately provided for, and to provide adequate supervision and monitoring given the risks to which they may be exposed. Under section 41 of the 1991 Act, the Minister has power to make regulations in relation to the making of arrangements by the Health Service Executive under section 36(1)(d) for the care of children and for securing generally the welfare of such children. Section 41(2) sets out matters which may be provided for: the regulations may fix the conditions under which children are placed by the Health Service Executive with relatives; prescribe the form of contract to be entered into by the Executive with relatives; and provide for the supervision and visiting by the Executive of children with relatives.

We endorse the recommendation of the Irish Refugee Council that an inclusive definition of "separated child" as set out in the *Statement of Good Practice* be incorporated into existing refugee and child legislation. The definition of "separated child" in the *Statement of Good Practice* builds on the definition set out in paragraph 3.1 of the UNHCR 1997 *Guidelines* where an "unaccompanied child" is defined as a child under 18 years of age ". . . who is separated from both parents, and is not being cared for by an adult who by law or custom has responsibility to do so".

The Separated Children in Europe Programme (SCEP) prefers to use the word "separated" rather than "unaccompanied" because it better defines the essential problem that such children face. The SCEP definition recognises that some separated children appear to be "accompanied" when they arrive in Europe, but that the accompanying adults are not necessarily able or suitable to assume responsibility for their care. The SCEP definition also recognises that separated children may be seeking asylum because of fear of persecution or the lack of protection due to human rights violations, armed conflict

³⁸ Irish Refugee Council, *Separated Children Seeking Asylum in Ireland*, reports that in the period January 1998 to March 2003, a total of 1,113 separated children have been reunited with family members in Ireland.

³⁹ Examples of cases giving rise to serious concerns are given in McDonagh, "Assessing the Refugee Appeals Tribunal: The Case for the Publication of Decisions", April 2005 Bar Review 43 at p. 46.

or disturbances in their own countries. They may be the victims of trafficking for sexual or other exploitation, or they may have travelled to Europe to escape conditions of serious deprivation.

A definition of “unaccompanied minor” is found in EU Directives and Regulations. In Council Regulation No. 343/2003/EC (the Dublin II Regulation), “unaccompanied minors” are defined as:

“unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States.”

We recommend that a uniform definition of “unaccompanied minor” and “separated child” be adopted in legislation to reflect the broader international definition. We recommend that the Child Care Act 1991 be amended to make it clear that separated children as defined in accordance with Separated Children in Europe Programme guidelines are the legal responsibility of the Health Service Executive, and recognise that sufficient resources will be required to enable the Executive to take on this responsibility.

9. AGE ASSESSMENT

The issue of age assessment arises where there are doubts as to whether the applicant is an adult or minor. In a comparative study carried out by the Separated Children in Europe Programme, it noted the prevalence of “age disputes” and how the issue is of growing concern to many immigration and asylum decision-making bodies and welfare agencies who provide care and support to separated children, yet little had happened across Europe in the development of procedures to aid attempts at assessing age.⁴⁰

Statistics from the Office of the Refugee Applications Commissioner (ORAC) show that in 2003, of the 841 persons claiming to be unaccompanied minors who presented themselves at ORAC, 112 were judged to be adults and admitted to the asylum process on that basis,⁴¹ leaving 729 children in the category of unaccompanied minor. In 2004, that number reduced to 124.⁴² Previously, ORAC operated an assessment, based on x-raying the hand and wrist and comparing the x-ray with a reference atlas, but this procedure was considered insufficiently reliable and was discontinued. At present if doubt exists as to whether a person is an adult or minor, according to ORAC, a senior staff member who has received training from UNHCR will interview the applicant. ORAC asserts that, while some consideration may be placed on a person’s stature, it is never the deciding factor and that all of the emphasis in reaching a decision is placed on the degree of maturity of the young person and whether or not he/she displays signs of vulnerability of any description. There is no formal appeal against this

⁴⁰ Separated Children in Europe: Policies and Practices in European Union Member States: A Comparative Analysis, 2004.

⁴¹ Annual Report of Office of Refugee Applications Commissioner, 2003.

⁴² Information taken from Smyth, “Refugee Status Determination of Separated Children: International Developments and the Irish Response, Part II”, [2005] 2 IJFL 21 at p. 26, footnote 2.

assessment. The discretionary and subjective nature of this procedure, the lack of training in child development and the children's background and culture and the lack of an appeal mechanism, casts doubt on its fairness. These doubts have been confirmed by the decision in the *Moke* case described below. The benefit of the doubt may be given by ORAC in some cases, but in others, when the applicant is referred to the Health Service Executive, the Executive sends the applicant back to ORAC with a request for a "reassessment". This almost inevitably leads to a determination that the applicant is an adult.

It appears that the Health Service Executive accepts the ORAC determination without undertaking any independent assessment of its own. It is unclear if it has taken any steps to satisfy itself that the ORAC assessment is the best available. It appears to take no part in the ORAC assessment procedure.

A young person claiming to be a minor, but who has been assessed by ORAC as being over 18, and therefore not placed in care of the Health Service Executive, does not obtain legal aid from the Refugee Legal Service. This is because, under Regulation 5(6)(a) of the Civil Legal Aid Regulations 1996, there is a requirement that where a legal aid certificate is sought by a minor the application is to be made by a "person of full age and capacity and, where the application relates to proceedings which are required by rules of court to be brought or defended by a next friend or guardian *ad litem*, that person will be the next friend or guardian *ad litem*." Under Regulation 5(6)(e), the Board has a discretion to waive that requirement.

The Refugee Legal Service, in this situation, provides assistance to such a minor in the form of legal advice, including assistance with drafting the minor's appeal. The Refugee Legal Service does not submit the appeal nor represent the minor before the Refugee Appeals Tribunal or in court, where grounds for judicial review may exist. Unless a volunteer solicitor undertakes the case, with consequent exposure to costs if the case fails, the applicant will not be represented and will therefore effectively be denied access to a remedy. The decision not to use the discretion under Regulation 5(6)(e) means that this category of people is being denied legal representation and access to the courts, in possible breach of the Constitution and Article 6 of the European Convention on Human Rights. It appears that the Health Service Executive does not act as next friend in any application for judicial review proceedings by a minor, including those whose ages are not in dispute, and this gives rise to an impasse. Without a next friend or suitable relative, the minor cannot apply for legal aid. Without legal aid, the minor cannot apply for the appointment of a guardian *ad litem* to act on his or her behalf in a judicial review application. In cases of applicants whose minority is in dispute, they cannot apply to the court for legal aid without a next friend to act for them, and make the application.

The Statement of Good Practice states:

"At all stages of the asylum process, including any appeals or reviews, separated children should have a legal representative who will assist the child to make his or her claim for asylum. Legal representatives should be available at no cost to the child and, in addition to possessing

expertise on the asylum process, they should be skilled in representing children and be aware of child-specific forms of persecution.”⁴³

In *Moke v The Refugee Applications Commissioner*,⁴⁴ the applicant was found not to be a minor by the respondent, but disputed this. Not eligible for representation by the Refugee Legal Service, a solicitor sought appointment of a guardian by the Health Board to act as next friend without success. The solicitor ultimately decided that the applicant was competent to give instructions and issued proceedings notwithstanding the applicant’s claim to be a minor at that time. In relation to the procedure by which the age assessment was arrived at and acted upon, it was accepted by all parties that the decision-making power to decide on an applicant’s age implied by section 8(5)(a) of the Refugee Act 1996 (as amended) must be exercised by or on behalf of the respondent in accordance with the principles of constitutional justice and fair procedures. Finlay Geoghegan J. noted the context in which such decisions must be made: the pressure of time, as the accommodation to which an applicant is referred will depend on his being under or over 18 years; and the fact that age assessment is an inexact science and is doubly difficult to undertake by interview and observation when the applicant is of a different cultural, racial and ethnic background and may have suffered traumatic events. The respondent emphasised that there were ways in which an applicant could contest a finding of adulthood and mention was made of medical age testing on referral. The judge observed: “The possibility of reassessment appears an important balance to the informal nature of the initial assessment and the admitted inexact science and wide margin of errors of age assessments by interview.” She added that the possibility of such reassessment was of no benefit to an applicant unless its existence was effectively communicated.

Referring to the legal and factual context, the parties’ submissions, the decision of Burton J. in *(R) B v The London Borough of Murton*⁴⁵ and the principles of constitutional justice and fair procedures, she stated the following minimum procedural requirements in relation to initial age assessment:

- i. The applicant must be told the purpose of the interview in simple terms. This may be as straight forward as informing the applicant that the interviewers need to decide whether the applicant is or is not under the age of 18 years.
- ii. Where an applicant claims to be under 18 years of age and the interviewers form a view that this claim may be false, the applicant is entitled to be told in simple terms that reasons for or grounds upon which the interviewers consider the claim may be false and to be given an opportunity of dealing with those reasons or grounds.
- iii. Where, as in this instance, the applicant produces a document which purports to be an original official document which includes a record of his alleged date of birth and the interviewers are not prepared to rely upon such document, the applicant is entitled to be told of their reservations and given an opportunity to deal with same.
- iv. If the decision is adverse to the applicant then he must be clearly informed of the decision and the reasons for same. He reasons need not be long or elaborate but should make clear why the applicant’s claim to be under 18 is not considered credible. The initial information and communication may of necessity be given orally but should be promptly confirmed in writing.
- v. Where the decision is adverse to the applicant and as stated there exists the possibility of reassessment, then such information should be communicated clearly to the applicant again

⁴³ Para. 12.6, *Statement of Good Practice*, 3rd ed., 2004.

⁴⁴ Unrep., HCt., Finlay Geoghegan J., 6 October 2005.

⁴⁵ [2003] 4 All E.R. 280

initially, orally and also in writing. Such communication should include how such reassessment may be accessed by the applicant.”

In this case, the judge concluded on the facts that such minimum procedural requirements had not been met.

We recommend that an objective age assessment procedure with appropriate guidelines and with formal provision for appeal or review be put in place. Clearly the recent situation whereby the ORAC unilaterally made a decision in the absence of a transparent procedure against which there is no appeal or review procedure is unacceptable. In this regard it is noted that the general Ombudsman legislation does not include immigration or refugee matters in its remit, and the Ombudsman for Children Act 2002 specifically excludes them.⁴⁶ The *Statement of Good Practice* of the Separated Children in Europe Programme states the following with regard to age assessment:

“Age assessment includes physical, developmental, psychological and cultural factors. If an age assessment is thought to be necessary, independent professionals with appropriate expertise and familiarity with the child’s ethnic/cultural background should carry it out. It is important to note that age assessment is not an exact science and a considerable margin of error is called for.”

When putting in place an assessment procedure and guidelines, it has to be acknowledged that assessing age is not an exact science and that whatever procedure is put in place should be on a voluntary basis and must respect the dignity of the child. The benefit of the doubt as set out in paragraph 196 of the UNHCR *Handbook* should be applied in all age disputes. Paragraph 196 provides: “Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.”

The issues which arise regarding legal capacity and representation must be resolved consistently with these issues as they arise in other areas of law.

10. PUBLICATION OF GUIDELINES AND DECISIONS

The Department of Justice, Equality and Law Reform does not issue any policy guidelines on any aspects of refugee law, and decisions at application or appeal stage are not published. The probable reason for this lack of transparency is the fear that if this knowledge were freely available, it could be

⁴⁶ S. 11(1)(e).

used by applicants “to fabricate claims on the basis of the factual matrices of published decisions.”⁴⁷ A case was taken to clarify the matter, and in a decision in the High Court in *Atanasov and Others v The Refugee Appeals Tribunal and Others*,⁴⁸ McMenamin J. held that the refusal of the Refugee Appeals Tribunal and the State to make available to the applicants relevant tribunal decisions as requested or identified and as sought constituted an unlawful exercise of the statutory discretion afforded to them under the 2003 Act, as properly interpreted. He held that it also constituted a breach of their rights to fair procedures and natural and constitutional justice under Article 40.3 of the Constitution. In relation to an applicant whose application was made prior to the taking effect of the Immigration Act 2003, he held that by virtue of his having asserted a constitutional entitlement on the basis of natural justice and fair procedures (but not otherwise), he was entitled to obtain copies of relevant and material decisions which may be important, in conformity with his right to fair procedures and natural and constitutional justice under Article 40.3. The judge limited the decisions which should be made available to those dealing with a substantive issue of legal principle. This decision is under appeal to the Supreme Court.

Internal interim guidelines have been developed by both the Office of the Refugee Applications Commissioner (ORAC) and the Refugee Appeals Tribunal (RAT) to assist in determining refugee status in the case of unaccompanied children. They are primarily based on the Statement of Good Practice and were drafted in consultation with the UNHCR, and are subject to ongoing review. In addition, all asylum officers deciding on refugee status applications by unaccompanied minors have received specialised training.⁴⁹ It would therefore not be a major task to put the guidelines in the public domain. But without the publication of decisions, there is no way to assess their application. The case for the publication of guidelines is based on a number of grounds. Publication would promote the interests of transparency and accountability. Where the guidelines have had the benefit of consultation with those who are working with them, they are more likely to be followed as the persons implementing them have had an opportunity to develop a sense of ownership. Their publication would also assist other jurisdictions in developing their own approaches to dealing with separated children, just as the Irish authorities have had the benefit of the guidelines published in the US and Finland. Publication would thereby contribute to the development of international best practice standards.

Sunniva McDonagh, an original member of the Refugee Appeals Tribunal, makes a strong argument for the publication of decisions, arguing that the benefits outweigh the disadvantages. She identifies benefits in the interpretation of legal concepts, in promoting consistency of approach, in examining credibility, in analysing comparative recognition rates and finally, in the treatment of separated children. In relation to these children, she expresses concern at the child protection issues related to these children who are categorised as “accompanied” because they are claimed by a person alleged to

⁴⁷ McDonagh, “Assessing the Refugee Appeals Tribunal: The Case for the Publication of Decisions”, 2005 Bar Review 43 at p. 44.

⁴⁸ Judgment dated 7 July 2005.

⁴⁹ Smyth, “Refugee Status Determination of Refugee Children: International Developments and the Irish Response, Part I”, [2005] IJFL 15 at p. 19.

be a family member, and who therefore do not benefit from continued monitoring by the Health Service Executive.

The present position is that only decisions which are judicially reviewed come to general knowledge. However, these are not representative because they do not include decisions where refugee status was granted, because the Refugee Appeals Commissioner does not appeal such decisions. This in itself prevents clarification, understanding and development of the law arising from decisions to grant asylum. Decisions on judicial review are not full appeals, as they only review the decision-making process rather than the outcome. Only some decisions are judicially reviewed, and they are therefore not representative of decisions by the Refugee Appeals Commissioner as a whole.

We recommend that guidelines for use in determining refugee applications and representative decisions of the ORAC and the RAT should be published, with particular priority given to guidelines and decisions regarding unaccompanied minors. As Sunniva McDonagh argued, there must be a presumption in favour of publishing decisions in the interests of transparency and accountability.⁵⁰ This is so particularly in the case of an unaccompanied minor, who “by reason of physical and mental immaturity needs special safeguards and care, including appropriate legal protection”.⁵¹

11. ROLE OF THE HEALTH SERVICE EXECUTIVE

When dealing with unaccompanied minors, it is clear that the Health Service Executive⁵² has a central role to play in providing for their protection needs. Those protection needs are much wider than making an assessment as to whether or not an application for asylum ought to be made on behalf of such a child (section 8(5)(b) of Refugee Act 1996, as amended). Firstly, the basic needs of these children, such as food, shelter, health services and education, need to be attended to. A guardian needs to be appointed to represent the child’s best interests with a view to identifying long-term durable solutions. A durable solution could mean tracing the child’s family with a view to the child being returned to his or her country of origin or a third country; or the child may be reunited with a parent or legal guardian within the State. If an asylum application is to be made on behalf of an unaccompanied minor, good practice requires the Health Service Executive to assume the role of advocating on behalf of the child and ensuring that he or she is able to participate fully, according to his or her age and maturity, in that process. In the event of the asylum application failing, the Health Service Executive should assess what ought to be done to ensure the best interests of the child are protected which, at the very least, requires that the child is accorded legal status while that assessment takes place.

⁵⁰ See also Kenny, *Asylum in Ireland: The Appeal Stage, a Report on the Fairness and Sustainability of Refugee Determination at Appeal Stage*, Irish Refugee Council, 2003 and Veale, Paludaries and Gibbons, *Separated Children Seeking Asylum in Ireland*, Irish Refugee Council, 2003.

⁵¹ UN Convention on the Rights of the Child, Preamble.

⁵² From 1 January 2005 the Health Service Executive was established and the health boards were dissolved.

As has been averted to before, section 8 of the Refugee Act 1996 does not set out what the duties of the Health Service Executive are in the event that an application for asylum is not made on behalf of such a child (nor does it set out or clarify its role when such an application is made). The reference in section 8(5)(a) that the “provisions of the Child Care Act 1991 apply” give no guidance to the Health Service Executive as to the performance of their functions when dealing with the situation of an unaccompanied minor. Among the provisions of the Child Care Act 1991 applicable to the situation of unaccompanied minors is section 3, whereby a principal obligation of the Health Service Executive is to “promote the welfare of children in its area who are not receiving adequate care and protection”, and it has the duty to identify children who are not receiving adequate care and protection. By virtue of section 4 it is the duty of the Health Service Executive to take a child into its care where it appears to the Executive that the child who resides or is found in its area requires care or protection that he or she is unlikely to receive unless taken into the care of the Executive. Under section 4(4), the Health Service Executive shall endeavour to reunite a child taken into its care with parents where this appears to be in the child’s best interests. Under section 5, the Health Service Executive can act where a child appears to be homeless. Section 12 gives power to the Garda Síochána to take a child to safety where there are reasonable grounds for believing that “there is an immediate and serious risk to the health or welfare of a child”. Sections 13 and 17 provide for the making of an emergency care order or an interim care order by the District Court; and, by virtue of section 19, the Health Service Executive may seek a supervision order in respect of a child in certain circumstances. Section 36 enables the Health Service Executive to make provision for the accommodation and maintenance of children in its care by placing them in foster care, in residential care, or by making such other suitable arrangements (which may include placing the child with a relative) as the Executive thinks proper.

In practice, some children are formally taken into care under section 4, but others are only provided with accommodation under section 5, as already mentioned above.

The Irish Refugee Council in its report on *Separated Children Seeking Asylum in Ireland* noted that there was broad agreement from those interviewed in the course of its research regarding the issues and problems faced by both separated children and the pressures on service providers to address the complex needs of separated children. A major problem related to inadequate staffing and resource provision so that, for example, it was not possible to assign a social worker to each individual minor. The report noted that there were some examples of good practice, particularly in relation to very young or vulnerable children, yet, overall, there was concern that separated children and young people were not receiving adequate levels of guardianship, and that they received a lesser provision of care and support compared to Irish children in the childcare system.⁵³

⁵³ See section 4.3 of Report, *Separated Children Seeking Asylum in Ireland*.

Dr. Pauline Conroy, in her report,⁵⁴ highlighted how the majority of unaccompanied minors, including victims of trafficking, are in hostel accommodation, which may be run by private individuals or other service providers (including local authorities), but not being Children's Residential Centres maintained by the Health Service Executive, do not come under the supervision of the Social Services Inspectorate under section 69(2) of the Child Care Act 1991. This means that unaccompanied minors housed in such hostels are being accommodated outside the direct surveillance of the public authorities responsible for children and for child protection. With regard to children's residential centres, subject to inspection by the Social Services Inspectorate, the absence of proper maintenance of records on children in children's residential centres was highlighted, especially given the importance of being able to track and monitor the movements of unaccompanied minors in an effort to prevent child trafficking.⁵⁵

It would appear that Irish legislation currently does not adequately meet the needs of separated children. This is not to fail to recognise the personal commitment of those in the Health Service Executive who are striving to look after the best interests of these children in an environment of under-resourcing, and in a statutory framework which does little to support their endeavours.

We recommend that in line with the *Statement of Good Practice*, provision should to be made for the Health Service Executive or other organisation to take on the role of guardian as envisaged in those guidelines. The responsibilities of the guardian should be to:

- **ensure that all decisions taken are in the child's best interests,**
- **ensure that a separated child has suitable care, accommodation, education, language support and health care provision,**
- **ensure a child has a suitable legal representation to deal with her or his immigration status or asylum claim,**
- **consult with and advise the child,**
- **contribute to a durable solution in the child's best interests,**
- **provide a link between the child and various organisations who may provide services to the child,**
- **advocate on the child's behalf where necessary,**
- **explore the possibility of family tracing and reunification with the child,**
- **help the child keep in touch with his or her family.⁵⁶**

With regard to legislating in this area, recently enacted legislation, for example, the *Education for Persons with Special Education Needs Act 2004* and the *Disability Act 2005*, provide examples of a

⁵⁴ *Trafficking in Unaccompanied Minors in Ireland*, International Office of Migration, 2004.

⁵⁵ According to a report in the Irish Times of 20 June 2005, "Concern for missing children prompts new service", "Health authorities are introducing changes to way unaccompanied migrant children are cared for following concern at the disappearance of more than 250 children in the past four years. The Health Service Executive (East Coast Area) has stopped placing young people in adult hostels and has developed a new facility for 12- to 16-year olds. It has also submitted a proposal to the Department of Health to develop services for all unaccompanied minors within national standards for residential services for Irish children in care".

⁵⁶ *Statement of Good Practice*, 2004, paragraph 6.

needs-based approach with guidelines and obligations imposed on the Health Service Executive to carry out an assessment of needs, which could be used as models for the care of separated children.

12. COMPLEMENTARY OR SUBSIDIARY PROTECTION

In many cases it may be inappropriate to make an application for asylum on behalf of an unaccompanied minor. This may be because the child does not meet the criteria of the refugee definition, for example, where he or she has fled from a situation of generalised violence or natural disaster in the country of origin. There may be cases where children may not know the reasons why they left their country of origin.⁵⁷ There is no doubt but that in such cases these children are in need of protection and care. The wording of section 8(5)(b) of the Refugee Act 1996 begs the question “what happens if it appears to the Health Service Executive that an application for asylum should not be made on behalf of a child?” The assertion in section 8(5)(a) that “the provisions of the Child Care Act 1991 shall apply in relation to the child” does not provide any assistance, as the fact that a child may be in the care of the Health Service Executive or provided with accommodation under section 5 of the Child Care Act 1991 does not confer any legal status on such a child.

Unless an application for asylum is made on behalf of such a child, then he or she has no legal status. That was the view of Mr. Justice Michael Peart in the *Nwole* case when referring to the status of the minor applicants for Judicial Review in that case. He stated:

"Without any application made on their behalf on arrival they would enjoy no status here and would have no entitlement to remain. The right to remain applies only to those persons who seek asylum, and then only during that process of application."

In other states, there is a system of what is known as ‘complementary protection’ (sometimes referred to as ‘subsidiary protection’) which gives legal status to persons who do not qualify as refugees but nevertheless need some form of protection owing to a well-founded fear, for example, of torture, inhuman or degrading treatment, severe violation of their human rights, or a threat to their life, safety or freedom as a result of armed conflict or systematic human rights violations. Under the EU Common Asylum system a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection was adopted on 29 April 2004.⁵⁸ The proposal aims to harmonise the refugee definition and also covers the introduction of “subsidiary” protection status.⁵⁹ The Directive grants subsidiary

⁵⁷ At a seminar organised by the East Coast Area Health Board in October 2002, Marilyn Roantree, the Principal Social Worker with the Team for Separated Children Seeking Asylum in the East Coast Area Health Board, gave examples of cases where there were children as young as 10 years of age who were either not willing or able to describe who they really are, who had arranged for them to come to Ireland or why and give little or no information about their family of origin.

⁵⁸ Council Directive 2004/83/EC. Under the Amsterdam Treaty asylum and immigration matters were transferred into issues of EU, rather than inter-governmental, competence. In 1999, at the Tampere Summit, the European Council reaffirming “*the absolute respect of the right to seek asylum,*” agreed to work towards establishing a Common European Asylum system, based on the “[...] full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to face persecution.”

⁵⁹ Art. 18.

protection to a person who has shown substantial grounds that he or she would face a serious risk of “serious harm” if returned to his or her country of origin. Serious harm is defined as consisting of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”⁶⁰

The Directive is required to be transposed it into domestic law by 10th October 2006.⁶¹

Some solicitors argue that the current absence of complementary protection does not mean that someone cannot apply, using an appropriate ground; for example, the Criminal Justice (UN Convention Against Torture) Act 2000, which prohibits refoulement in cases of fear of torture. This however involves finding grounds which may or may not have a legislative basis and is not a satisfactory or comprehensive remedy. Far better will be to have a distinct remedy of complementary protection with listed criteria for its application.

We endorse the Irish Refugee Council recommendation that a formal system for granting complementary protection should be adopted for granting protection in a unified investigative process, that is, a system which empowers national determining authorities to process claims for refugee status and complementary protection simultaneously. The same rights should be granted to a person with complementary protection status as are afforded to a person who has been determined to be a refugee.⁶² It is important that the introduction of a system of complementary protection should not undermine the granting of refugee status. The definition of a refugee, as set out in section 2 of the Refugee Act 1996, provides a progressive interpretation of the definition set out in Article 1(A)(2) of the Geneva Convention, by including gender, groups of persons with a particular sexual orientation and those in trade unions as having a membership of a “particular social group”. The implementation of a system of complementary protection should not in any way inhibit the application of a progressive interpretation of the refugee definition, particularly bearing in mind that child-specific forms of human rights violations exist, and that children may have different ways of communicating their fear of persecution.

Apart from complementary/subsidiary protection, there may also be grounds for granting children the right to remain either temporarily or on a more long-term basis. As the law currently stands, until an application for asylum is made, the child has no legal status in the country. We recommend that provision should therefore be made for the granting of a temporary permission to remain in these cases with provision for periodic review. This takes a

⁶⁰ Article 15.

⁶¹ Article 38. Ireland notified its wish to take part in the adoption and application of the Directive, see the preamble, para. (39).

⁶² This is not the case in the Council Directive on Qualification 2004/83/EC. For example, the right to family reunification recognised in relation to refugees is not accorded to beneficiaries of subsidiary protection.

child out of legal limbo while the relevant authorities assess what is in the best interests of the child. An application for temporary leave to remain should be able to be made in its own right and not as a defence to the threat of deportation. Rather than the exhaustive list as currently set out in section 3 of the Immigration Act 1999, a non-exhaustive list of Leave to Remain grounds should be set out in legislation, with the Minister obliged to give reasons for refusing the application. The actual procedure for making the application, which is currently by way of written application, should make provision for an interview, with the child having appropriate legal representation and the input of an appropriate guardian.

13. TRACING THE UNACCOMPANIED MINOR'S FAMILY

While Article 6 of the Dublin II Regulation designates the Member State responsible for examining the application of an unaccompanied minor,⁶³ it does not address the question of tracing the minor's family and consulting with the family on the future of the child. Ciara Smyth makes a strong argument for an obligation on the State to trace and consult with the parents of children sent for refuge where this is possible.⁶⁴

Applicants for asylum must have a well founded fear of persecution and must be able to explain the basis of their fear and the circumstances which caused them to flee. This applies equally to minor applicants. However, minors travelling abroad for refuge are usually sent by adults, and may not know the reasons why they have been sent away, they may have been sheltered from the danger they were in, or they may have been given a partial or faulty explanation for why they had to leave. The UNHCR's 1997 Guidelines state that "if there is a reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution, the child himself may be presumed to have such fear."⁶⁵ The Separated Children in Europe Programme *Statement of Good Practice* similarly provides that in assessing a minor's claim for refugee status, "the situation of the child's family in their country of origin and, where known, the wishes of parents who have sent a child out of the country in order to protect him or her" should be taken into account.⁶⁶ Together, these provisions would seem to imply an obligation on the part of the State to actively seek the view of the parents where this is possible.

The Convention on the Rights of the Child also sets the framework for the involvement of parents and caregivers. In Article 5, the Convention provides that State parties must respect "the responsibilities, rights and duties" of parents and caregivers to provide appropriate direction and guidance in the

⁶³ Art. 6: "... the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application shall be where the minor has lodged his or her application for asylum."

⁶⁴ Smyth, "Refugee Status Determination of Separated Children: International Developments and the Irish Response, Part I", [2005] 1 IJFL 15 at p. 17.

⁶⁵ Para. 8.9, reproducing para. 218 of the UNHCR *Handbook*. See also paras. 8.8 and 8.10.

⁶⁶ Section C, para. 11.6.

exercise by the rights recognised in the Convention, and in Article 22, a child seeking refugee status is entitled to receive appropriate protection (whether or not accompanied). Read together, there is a clear legal obligation to seek the views of parents in relation to an application for refugee status. If contact with the parents is unavailable, efforts should be made to trace them. The obligation to consult the parents arises in all cases of children separated from their parents.⁶⁷ In cases of refugee status determination, the obligation must be all the stronger.

There is at present no tracing agency which can undertake the systematic tracing of unaccompanied minors. The Irish Red Cross do what they can with limited resources and the International Organisation for Migration also assists, although it is not mandated to provide this service. **We recommend that a system for the systematic tracing of the families of unaccompanied minors be instituted to enable consultation with the families in cases of minors' applications for refugee status, and otherwise.**

14. AGED-OUT MINORS

Aged-out minors are minors who reach the age of 18 during the asylum determination process. The *Statement of Good Practice* provides that:

“Separated children who become adults during the course of the asylum process (sometimes called “aged-out” minors) continue to benefit from the same special procedures as those under 18 years of age. In this regard states should eliminate unnecessary delays that can result in a child reaching the age of majority during the process.”⁶⁸

Under our system, separated children who reach the age of 18 during the asylum process are then treated as adults and processed as adults. This means they are no longer entitled to receive the support from a guardian or social worker while their case is being processed. They are no longer under the care of the Health Service Executive. The Refugee Legal Service, in its best practice guidelines, states that it is the practice of the Unit to retain aged out minors within the Unit, save in exceptional circumstances. Issues also arise as to the procedures adopted for the deportation of aged-out minors. Best practice provides that they should be treated in the same way as unaccompanied minors, and that their personal circumstances should be taken into account. In *Edionewe v Refugee Appeals Tribunal and Others*,⁶⁹ in a decision to grant leave for judicial review, Peart J. held on the facts of that case that regard should be had to the particular disadvantages of the applicant:

“In relation to the age of the applicant, it is true that she was over the age of majority by the time the appeal was heard. Nevertheless she was still illiterate and uneducated. In my view even though she does not come within the UN Guidelines dealing with the procedures for dealing with unaccompanied minors, February 1997, and which highlight the need to look to “the best interests of the child”, this applicant was nevertheless a child in every way except her actual age. . . particular care is required in dealing with her application, especially from the point of view of the benefit of the doubt and assessment of credibility.”

⁶⁷ CRC Arts. 9.3, 10.2 and 22.2, UNHCR 1997 *Guidelines* para. 5.17 and SCEP *Statement of Good Practice*, para. 3.

⁶⁸ *Statement of Good Practice*, 2004, para. 12.2.2.

⁶⁹ [2004] IRLHC 338.

We recommend that there should be transitional provision made for aged-out minors, similar to the aftercare provision in section 45 of Child Care Act 1991. Under that section the Health Service Executive may provide aftercare assistance to a child who leaves the care of the Executive up to the age of 21 years.

Education

While an application for asylum is being determined, asylum-seeking children (accompanied or unaccompanied) only have a right to full-time education while they remain under the age of 18. They are entitled to first and second level education, but once they complete their Leaving Certificate examinations, they cannot access third level education or post-leaving certificate courses and are not entitled to maintenance grants from local authorities. In July 1999, a once-off scheme gave the right to work to asylum seekers in Ireland who had already claimed asylum and who were in the asylum process for more than a year. These individuals also have limited access to adult education and training schemes. Other asylum seekers, unless they have residency rights, for example as the parents of Irish children or the spouses of EU nationals, are not entitled to attend FÁS training courses or active labour market programmes such as the Vocational Training Opportunities Scheme (VTOS) or the Post-Leaving Certificate (PLC) programme.

Asylum seekers who are over 18 are not entitled to take advantage of government adult education programmes. If there is a negative determination made in respect of a minor, it seems that whether he or she can continue with his/her education depends on the school in question.

We endorse the recommendation of the Irish Refugee Council that asylum seekers should be entitled to the same rights to adult education and training as refugees and Irish citizens have now.⁷⁰ With regard to minors who receive negative determinations of their asylum applications, we recommend that they should have the right to continue in education until such time as durable solutions to their situations are found.

15. CONCLUSION

Essentially, what is being proposed is that a child centred approach is taken to the issue of unaccompanied minors. First and foremost they are children and our legislation needs to turn away from boxing them into some kind of immigration category. Rather than focusing in on the Refugee Act, the policy informing and driving reform in this area needs to take account of our international obligations under the UNCRC, and develop legislation informed by the principles in that Convention.

⁷⁰ Information Note on Adult Education and Training for Asylum Seekers, 3 June 2004.

CHAPTER 5

CHILDREN NOT IN THE CARE OF THEIR PARENTS: CHILDREN'S RIGHT TO IDENTITY

Historical context and proposed changes to secrecy in adoption

Old stories abound with children of mysterious antecedents. There are abandoned children found on hillsides and raised by shepherds and woodcutters. Other children are lost by parents and found again against all odds after great adventures. Still others, with fathers who are unknown or absent, eventually reclaim their birthrights. Today there are more children than ever who grow up in families which were not their own. They may be fostered or adopted, the father may be entirely absent or replaced by a stepfather, or they may be the product of donated genetic material – gamete (sperm or egg) or embryo. They may have origins in faraway countries with very different cultures, so that their new lives are quite different from what they would have had in their places of birth. Any of these circumstances can cause emotional and psychological difficulties for such children and the adults they later become, who must reconcile what they are with what they might have been, understand the different facets of their personalities and accept a history in which there will often have been pain, implied rejection or mystery.

In earlier societies, birth and family were of great social importance. While this is less so the case today, knowledge of a person's true origins is commonly of great importance to that person. People who were adopted have emphasised the importance of this information, to enable them to integrate their life experiences with their biological origins and achieve a complete sense of identity, without unknown and missing elements. Knowledge and understanding are accepted human goods; that is, most people accept that it is good to have knowledge and understanding for their own sakes. For many with uncertain antecedents, there is nothing more personally relevant than knowledge and understanding about their origins.¹

It would be fair to say that adoption rules in the past were designed to primarily protect the interests of the adults involved – the birth mother and the adoptive parents. In the background were two realities: the first that illegitimate, abandoned and foundling children were indeed lucky to be taken into new families and that in some cases they were even lucky to be alive, with abortion or infanticide as the unspoken alternative.² The second was the very real necessity to protect unmarried mothers from the consequences of their mistakes and preserve their reputations, because of the serious stigma attached to extra-marital sexual relations. Now with the much greater tolerance and acceptance of unmarried

¹ On the general issue of children's right to identity, see a paper delivered by Dr. Ursula Kilkelly at the Four Jurisdictions Family Law Conference in Belfast in February 2004, "Family Law and Human Rights: Modern Challenges". See also G. Shannon, *Child Law*, (Roundhall Thompson 2005), chs. 10 and 12.

² This comes across clearly in *Odievre v France*, (42326/98) (2004) 38 EHRR 43

motherhood in the western world at least, the interests of adopted children can command greater consideration.

The interests of children change, of course, as they grow up. In contrast to custody, access and maintenance, the question of antecedents usually arises for children who are now adults, for whom decisions were made when they were children. The best interests principle therefore has to take into account not only what is best for children while they are still young and dependant, but also what is best when they have grown up.³

While Ireland has not yet seen much legislative change, other European countries have seen reforms resulting in much greater access to birth records for adopted young people, usually after the age of 18. Information made available can range from non-identifying information to full details, although commonly there is a restriction on direct contact with the mother without her consent, because of the possible difficulties of her position. The present position in the UK is that adopted children have a right to access their original birth certificates on reaching the age of 18,⁴ although in practice most young people do not have to wait that long because adoption agencies have a policy of encouraging adoptive parents to give the children information about the circumstances of their adoption in response to interest on the part of the child.⁵

In this jurisdiction, the Adoption Board has established an Information and Tracing Unit and a Contact Preference Register. The Register is a mechanism whereby parents of adopted children, their relations or people who were adopted can register their interest in making contact, and may leave information for people from whom they have been separation due to adoption. Contact is subject to agreement by both parties.⁶ The Register does not exclude people seeking information or contact in other ways, for example, through application to adoption societies or the Adoption Board, as is done at present.⁷

In relation to past and current adoptions, there is much debate as to whether identifying information of birth mothers can or should be made available against their wishes. Most adoptions in the past proceeded on the basis that the mother would be assured of lifelong anonymity. Although there is no specific requirement for this in the adoption legislation, the normal practice on the part of adoption societies and health boards has been to preserve the anonymity of the parties, so that the birth mother and the adoptive parents do not know each others' identities. The Adopted Children Register maintained as part of the civil registration system is linked through an index to the Register of Births, but the 1952 Adoption Act provides that the index is not to be open to public inspection and that

³ The Report of the Commission on Assisted Human Reproduction (Government Stationery Office, 2005), Appendix VII, contains an excellent discussion of the issues arising in relation to the best interests of the child in assisted human reproduction, and refers to research in the area.

⁴ Adoption and Children Act 2002

⁵ For an excellent summary of the position in a number of different countries, see the Report of the Commission on Assisted Human Reproduction, Appendix VIII, (Government Stationery Office, 2005).

⁶ Around 5,000 entries for the Contact Preference Register had been received in early 2006, and around 100 matches had been made.

⁷ *Adoption Legislation: 2003 Consultation and proposals for change*, January 2005, Dept. of Health and Children, p. 93

information from it may only be made available by order of a court or the Adoption Board.⁸ Section 8 of the 1976 Adoption Act applies the best interests of the child test to the making of such an order, and to any order against the Adoption Board for other information in its possession.⁹ This leaves open the possibility of birth information being made available to an adopted person, once he or she can prove it is in his or her best interest.

The Supreme Court decision in *IO'T v B*¹⁰ held that a child's right to know his or her mother was an unenumerated constitutional right which flows from the natural and special relationship between a mother and her child, but that the mother's right to privacy was also a constitutional right and could take precedence over the child's right, depending on all the circumstances. The case concerned two informal adoptions and the rights of non-marital children to equal succession rights arising from the Status of Children Act 1987. The case stated was remitted to the Circuit Court with a list of criteria to be considered by the Circuit Court judge in balancing the respective constitutional rights of the applicant daughters and respondent mothers. It appears that if the adoptions had been formalised in accordance with the adoption legislation, the children's right to know their mothers could have been argued on the basis of the children's best interest under s. 8 of the Adoption Act 1976. How far a countervailing constitutional right to privacy could have been argued by the birth mothers is unclear.

The child's right to identity in international law

The UN Convention on the Rights of the Child (CRC) of 1989 was ratified by Ireland in 1992 and is the impetus behind many of the reforms of law currently in hand. The two articles dealing with identity are as follows:

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

The scandal of children without birth certificates is not a common occurrence in Ireland, although it arises in other parts of the world through abandonment of babies, or as a result of the lucrative trade in babies for adoption where birth certificates are deliberately not obtained or destroyed and all traces of the origins of the babies are covered up. A child's lack of a birth certificate must trigger questions

⁸ S. 22(5)

⁹ See Shatter, *Family Law*, 4th edition, 1997, pp. 505 – 509, also generally G. Shannon, *Child Law*, (Roundhall Thompson 2005), ch. 9.

¹⁰ [1998] 2 IR 321

about the origins of the child and the credibility and good faith of the persons involved in offering the child for adoption.

Where Article 7 recognises a child's right to know his or her parents, Article 8(1) recognises a child's right to preserve his or her identity which includes nationality, name and family relations. Family relations are not defined, but the term is wide enough to include both blood and adoptive relations, and thus can be used to support a child's right to access information on his or her birth parents. Article 8(2) refers to illegal deprivation of elements of a child's identity, which was intended to cover, *inter alia*, the theft of children from their "disappeared" parents during the Junta regime in Argentina in the 1970s. Deprivation of elements of a child's identity which is legal may be by closed adoption, anonymity of the donor of genetic material, and the lack of sufficient efforts to trace the parents of a child who is abandoned and for whom no birth certificate exists.

The child's right to identity and donated genetic material

Articles 7 and 8 of the international Convention on the Rights of the Child represents an important step in the wider recognition of findings of much research, that not only is it important for people to know the details of their histories, but also that the majority of them seek out that information. While it is now widely accepted that adopted children should be told early in life¹¹ about the fact of their adoption and given some background information on their parents, there is less general consensus about the need to tell children about their origins in cases of donation of genetic material. Perhaps the implications for the offspring of such donations and their legitimate need to know have not yet been faced up to, as they have been for adopted people. The UK Human Fertilisation and Embryology Act of 1990 (HFE Act) colludes in the concealment of donated genetic material by providing that the birth certificate of any child born through these means should name the parents undergoing the fertility treatment and not the donor of genetic material, although such a person is in fact one of the biological parents. The registered parents of a child are entitled to obtain information about the characteristics and medical history of the donor, but no identifying information. Anyone born after the HFE Act 1990 came into effect can, on reaching 18, apply to the HFE Authority to discover if he or she was born as the result of donated genetic material, and is entitled to limited information such as height, hair colour and race, and also information on whether he or she is closely related to someone he or she intends to marry.

The ECHR - *Rose v Secretary of State for Health*

A person's right to identity has been the subject of some cases under Article 8 of the European Convention on Human Rights,¹² which was given direct effect in this jurisdiction by the European Convention on Human Rights Act 2003. In *Rose v Secretary of State for Health*¹³ the question arose as to what, if any, obligation rested on the State to protect the applicants' private and family life, where the applicants were the offspring of sperm donors. The applicants had both been conceived by artificial

¹¹ The best time, it appears, is between the ages of 4 and 8. Those told as adolescents and adults experience the greatest distress and shock. See J Triseliotis, *In Search of Origins* (1973), Routledge & Keegan Paul

¹² Respect for private and family life

¹³ [2002] EWHC 1593 and [2002] 2 FLR 1962

insemination, and asked the Secretary of State to make non-identifying information available, or if possible, identifying information or a contact register. At the time a public consultation was being conducted, and the Secretary of State replied that the results of the consultation exercise would be considered in the political process, but refused to accede to this request. In proceedings for judicial review, the claimants argued infringement of their rights under Articles 8 and 14. They argued that the State had a positive obligation to collect and ensure that certain information was available for children born as a result of artificial insemination, including the information preserved in adoption cases. Secondly, they argued that the State should establish a contact register for willing donors and willing offspring, and that failure to take these steps involved continuing breaches of Articles 8 and 14.

Mr. Justice Scott Taylor concluded that Article 8 did apply. He considered *Gaskin v UK*,¹⁴ where the applicant had spent most of his life in care, staying with different foster parents. Mr. Gaskin wanted to find details from his official file of where he lived, with whom and in what conditions. He felt he had been ill-treated in care, and that this information was necessary to enable him to overcome his problems and learn about his past. The European Court of Human Rights said at paragraphs 36 and 37:

36. In the opinion of the Commission, ‘the file provided a substitute record for the memories and experience of the parents of the child who is not in care’. It no doubt contained information concerning highly personal aspects of the applicant’s childhood, development and history and thus could constitute his principal source of information about his past and formative years. Consequently lack of access thereto did raise issues under Article 8.

37. The Court agrees with the Commission. The records contained in the file undoubtedly do relate to Mr. Gaskin’s ‘private and family life’ in such a way that the question of his access thereto falls within the ambit of Article 8 . . .

It went on to refer to *Johnston v Ireland*¹⁵ and held that while Article 8 functioned to protect the individual against arbitrary interference by the public authorities, there could in addition be positive obligations inherent in an effective ‘respect’ for family life.

Mr. Justice Scott Taylor noted that the Court quoted, with apparent approval, “that the Commission considered that ‘respect for private life’ requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification.” The Court found for Mr. Gaskin.

Scott Taylor J. also considered other cases including *Mikulic v Croatia*.¹⁶ In this case, the applicant complained that the procedure to establish her paternity took so long that her private and family life were violated. The Court held that respect for private life “includes a person’s physical and psychological integrity and can sometimes embrace aspects of an individual’s physical and social identity. . . . The Court has held that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual’s entitlement to

¹⁴ (1989) 12 EHRR 36

¹⁵ (1987) 9 EHRR 203

¹⁶ [2002] 1 F.C.R. 720 and 11 B.H.R.C. 689

such information is of importance because of its formative implications for his or her personality (*Gaskin v UK*).¹⁷ Scott Taylor J referred to some other cases¹⁸ and drew the following principles:

- Private and family life is a flexible and elastic concept incapable of precise definition.
- Respect for private and family life can involve positive obligations on the State as well as protecting the individual against arbitrary interference by a public authority.
- Respect for private and family life requires that everyone should be able to establish details of their identity as individual human beings. This includes their origins and the opportunity to understand them. It also embraces their physical and social identity and psychological integrity.
- Respect for private and family life comprises to a certain degree the right to establish and develop relationships with other human beings.
- The fact that there is no existing relationship beyond an unidentified biological connection does not prevent Article 8 from applying.

The judge held that Article 8 was engaged in relation to identifying and non-identifying information, but did not at this stage consider whether there was a breach by the State, and how the balance between competing interests should be struck. He held that everyone should be able to establish details of his or her identity as a human being, and that this includes the right to obtain information about a biological parent who will inevitably have contributed to the identity of his or her child.

Ireland

This area is as yet unlegislated for in Ireland, though in principle the right to know a parent was recognised by the Supreme Court as an unenumerated constitutional right in *IO'T v B*,¹⁹ mentioned above. The Government appointed a Commission on Assisted Human Reproduction in March 2000 and it published its report in May 2005. The report contains recommendations among which are some of particular relevance to the issue of children's right to identity. They are:

22. Any child born through use of donated gametes or embryos should, on maturity, be able to identify the donor(s) involved in his/her conception.
27. Donors should not be able to access the identity of children born through use of their gametes or embryos.
28. Donors should, if they wish, be told if a child is born through use of their gametes.
29. In general, donors should not be permitted to attach conditions to donation, except in situations of intra-familial donation or the use of donated gametes/embryos for research.
32. The child born through surrogacy, on reaching maturity, should be entitled to access the identity of the surrogate mother and, where relevant, the genetic parents.

¹⁷ Paragraphs 52 and 54.

¹⁸ In particular, *Gunn-Russo v Nugent Care Society and Secretary of State for Health* ([2001] UKHRR 1320.

¹⁹ [1998] 2 IR 321.

Procedures to achieve these objectives include procedures to ensure the traceability of donated genetic material, requiring donors to be willing to be identified to eventual offspring, requiring parents seeking assistance of this kind to undertake to be open with their children and inform them of their biological origins, and the maintenance of records which children, on reaching maturity, can consult. Assisted human reproduction techniques have been in use in Ireland for some time, and are carried out under medical ethics guidelines.²⁰

The Assisted Reproduction Sub-Committee of the Executive Council of the Institute of Obstetricians and Gynaecologists prepared a report in 1999 which is reproduced as Appendix V of the Report of the Commission on Assisted Reproduction.²¹ Under the heading *Guidelines for Doctors practising Assisted Reproduction Techniques*, it states the following:

- “2. ... All children born following assisted reproduction procedures have the right to identify their genetic parents.
3. Relevant records must be maintained to allow all children born following assisted reproduction procedures to identify their genetic parents.”

and it refers to the 4th edition of the *Guide to Ethical Conduct and Behaviour and to Fitness to Practice* of the Medical Council. The current 6th edition does not however contain these directives, and it is unclear why they were dropped. It would be surprising if these directives were not followed in practice, in the light of the UK HFE Act 1990 and international standards, but it would be better if they were explicitly included.

The current lack of a system to provide information to children on their biological parents fails to achieve the objectives of Article 8(1). Recognising this, the UK Government announced in January 2004 that the anonymity of gamete and embryo donors would cease as of 1st April 2005. Any child born as a result of a donation after this date will have the right, 18 years after his or her birth, to know the identity of the donor.²² Evading these rules remains possible while other jurisdictions continue to permit anonymity.²³

²⁰ Medical Council, *A Guide to Ethical Conduct and Behaviour*, 6th Ed. 2004:

“24. 4 Frozen Sperm and Ova: Artificial insemination by Donor (AID)

There is no objection to the preservation of sperm or ova to be used subsequently on behalf of those from whom they were originally taken. Doctors who consider assisting with donation to a third party must have regard to the biological difficulties involved, and pay meticulous attention to the source of the donated material. Doctors who fail to advise both donor and recipient about the potential implications of such measures and the possible consequences for the would-parents and their baby could face disciplinary proceedings.

24.5 In Vitro Fertilisation (I.V.F.)

Techniques such as I.V.F. should only be used after thorough investigation has failed to reveal a treatable cause for the infertility. Prior to fertilisation of an ovum, extensive discussion and counselling is essential. Any fertilised ovum must be used for normal implantation and must not be deliberately destroyed.

If couples have validly decided they do not wish to make use of their own fertilised ova, the potential for voluntary donation to other recipients may be considered.”

²¹ Government Stationery Office, 2005.

²² The UK Department of Health further announced in August of 2004 that it would also consult on the wider range of people, including homosexual couples, who seek and receive assisted reproduction in the 21st century.

²³ Irish Times, 28 June 05, “Couples face fertility time bomb over delayed motherhood and sexual diseases,” contains the following paragraph:

“Reproductive tourism is already having an Irish impact. A new British law, requiring that donors be willing to be identified by any offspring, has meant the ending of some donor treatments in the UK, including Belfast. Couples are now travelling for treatment to the Republic, where Danish donor sperm is not subject to this requirement.”

The future availability of identifying information in the UK is to be welcomed, but the announcements did not state whether steps were contemplated to make children aware that they were the result of assisted human reproduction techniques in the first place. At present many parents conceal this fact from the world and their children. It has been suggested that the removal of donor anonymity may result in even fewer parents telling their children about their donor origins because of a fear that the children will seek to trace and make contact with donor progenitors. Another problem anticipated is the reluctance of donors to donate if they have to agree to forego anonymity. However, these fears may be entirely misplaced.²⁴

If the child's right to identity is to be protected, it will not be sufficient to ensure access to identifying information only. It will also be necessary to ensure that children are told of the role of donors of genetic material in their conception. It is not clear how this could be achieved. Will prospective parents have to undertake to give this information to their children in due course as a precondition of treatment? Will the children be officially notified at some point? In such a sensitive matter, it is not realistic to rely on official communication. Consultation and research will be needed to decide on how this aspect of the right to identity is managed. The Report of the Commission on Assisted Reproduction in Appendix VII mentions research which indicates a suggested association between secrecy regarding genetic parentage and negative outcomes for children. In general, children benefit from knowledge about their biological parents. In general also, secrets tend to be bad for family functioning, creating boundaries between those who know and those who don't, and stress arises when topics close to the secret are being discussed. Children discovering their genetic parentage may be angry and frustrated, but generally do not feel rejected or abandoned. Some express gratitude for the gift of life. The research suggests that negative outcomes may be overcome by discouraging secrecy.

The results of a UK Department of Health consultation on donation of genetic material held from December 2001 to July 2002 were as follows:

- 237 responses were received, from 18 donors, 58 recipients of treatment, 17 donor offspring and others.
- 211 supported the proposition that regulations should be made to enable donor offspring to obtain non-identifying information about the donor.
- 132 said that identifying information should be available, and the main reason given for this was the right of the child to receive this information. Many said that the concern that there might be a fall off in donors was not sufficient reason to deny the offspring this information.
- Of 17 offspring, 12 wanted non-identifying information and 11 identifying information.
- 53 of the 58 parents advocated the availability of non-identifying information and 38 the availability of identifying information.

²⁴ In New Zealand, the opposite would seem to be the case. See Vivienne Adair, "Redefining family: issues in parenting assisted by reproduction technology", paper at Changing Families, Challenging Futures, 6th Australian Institute of Family Studies Conference, 1998.

- Only eight donors agreed with the provision of identifying information.²⁵

These results show that the debate on the balance of rights to be achieved between all parties is ongoing, but that there is significant acceptance of the child's rights in the matter. However, there is reason to believe that many parents of children conceived with the assistance of donated genetic material do not tell their children of this fact.²⁶ It is possible for a child who has suspicions to check with the HFE Authority on reaching 18, but this does not address the ambiguous position of those who have no suspicions.

In February 2004 the Irish Medical Council amended its Guide to Ethical Conduct and Behaviour to countenance the donation of surplus embryos conceived using *in vitro* fertilisation techniques to infertile couples. In this way, embryos can be effectively adopted. This development has not as yet been matched by any legislative requirements to protect the identities of children conceived, implanted and born in this way. It would be important that, as with gamete donors, information about genetic parents should be preserved and made available to any resulting children in due course.²⁷ It also raises the question as to whether prospective embryo adopters should be screened for suitability as prospective parents in the same way that prospective adoptive parents are. A duty of care is likely to be owed to the child, with consequent liability for the genetic parents and the medical personnel if they are negligent in permitting donation of an embryo to unfit parents. The difficulties of deciding what approach to take are well discussed in the Report of the Commission on Assisted Human Reproduction²⁸ in Appendix VII.

Unregulated donation

Donor gametes and children for adoption are available on the internet on a commercial basis, a situation which presents a challenge for those who believe such activities should be regulated. For example, www.mannotincluded.com (which appears to be based in the UK) is an introduction agency which does not come within the terms of the UK HFE Act 1990, which applies only to clinics which provide IVF services, donor insemination and the storage of gametes and embryos. Its website claims that it is "the world's only confidential and anonymous sperm donation service" and that:

"we provide a non-discriminatory, confidential and totally anonymous sperm donation service available to any woman wishing to conceive, regardless of sexual orientation or marital status (age restrictions apply), or any man wishing to become a Donor (age restrictions apply & full screening required)."

²⁵ James Lawford-Davies and Laura Forsyth, "The end of donor anonymity", *The Lawyer* 6 May 2004

²⁶ A study published in the journal *Human Reproduction* in 1997 compared 38 Dutch families with either children conceived through IVF or through donation of genetic material. All the parents with IVF children intended to tell their children of this fact, but 74% of the donation families did not.

²⁷ At a young age may be best – see report of study in Adair, "Redefining family: issues in parenting assisted by reproduction technology", paper at Changing Families, Challenging Futures, 6th Australian Institute of Family Studies Conference, 1998:

"In the ongoing study with donor conceived offspring (n=29) those who took the opportunity to give suggestions to parents and people running programmes, all said "Tell them when they are young". This came from children aged 9 – 22 years old. Three teenagers said, "Don't be afraid. It's quite normal". This contrasts with experiences reported in a compilation of letters from donor conceived offspring published by the Donor Conception Support Group in NSW, which showed that finding out about the involvement of a donor as an adult can have traumatic effects."

²⁸ Government Stationery Office, 2005.

Insemination takes place “in the comfort of your own home, it is quick, simple and very affordable.” Prices range from £1,700 for the Silver Plan to £4,150 for the Diamond Extra Plan. Under “Legal Information”, the website states:

Donor and Recipient Anonymity - tri-party commitment;

www.mannotincluded.com uses its best efforts to protect the anonymity of both recipients and donors. All records of successful conceptions are kept "off line" and are destroyed by ***www.mannotincluded.com***

Despite these precautions, ***www.mannotincluded.com cannot entirely guarantee the anonymity of recipients or donors.***

The implication of such arrangements is the deliberate suppression of elements of the identity of any resulting child. There is no reason to think that this organisation is not supplying its services to clients in this jurisdiction at present.

A quick search of the internet under “sperm donation” shows that in fact there are many other such services, for a fee, including offers of “embryo adoption”. For example, at the California Cryobank in Los Angeles, anonymous donors are chosen by characteristics such as eye colour, hair colour, education level, ethnicity and even personality. Vials of sperm can cost as much as \$275 each, and are shipped all over the world in liquid nitrogen, which keeps them frozen for seven days. The Xytex Corporation sells sperm through their online catalogue, and specifically states that they can supply to meet Canadian requirements. Some of their donors agree to release their identity to their offspring once they reach 18.

Little can prevent a woman who is determined enough from seeking fertilisation in the traditional way, but the existence of arms-length sperm supply services indicate that there is a demand for a service which can offer health screening of the donor, anonymity and an impersonal conception. The absence of such a service may deter some women from creating children without fathers, and the regulation of an Irish-based service in such a way as to preserve donor information for the child’s sake should be possible, within this jurisdiction at least.

Unregulated adoption

The dangers of unregulated adoption are well known and preparations to implement the Hague Convention on Inter-country Adoption in Irish law have been underway in the Department of Health and Children for some years, following the preparation of a Law Reform Commission Report on the Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption, 1993.²⁹ At present, once a couple have their certificate of fitness from their local health authority, they are free to seek a child for adoption abroad. Acting alone leaves them and their prospective adoptive child more vulnerable to the possibly unreasonable demands of adoption agencies and foreign authorities, than if a state authority were also involved.

²⁹ LRC 58-1998, June 1998

Domestic and intercountry adoption is the subject of articles 20 and 21 of the Convention on the Rights of the Child.³⁰

A brief internet search throws up many websites which deal with international adoption: adoptachild.org, adoptionagencies.org, opendooradoption.com, childrenshopeint.org, adoptionhelp.org and adoption.com. According to the Amrex website, there are over 18,000 international adoptions annually, and international adoption has become a lucrative industry funded by would-be adoptive parents. This is not to say that these organisations do not respect ethical standards and work within the legal frameworks of the countries concerned, but there must be questions over the protection of the children's rights where commercial pressures are a reality, bidding wars among agencies for suitable children are a fact of life and the money at stake is very large relative to incomes in many countries. There are well documented occasions when inter-country adoption got out of control. For example, a moratorium was put on foreign adoptions in Romania in June 2001 because of international criticism of the corruption engendered by the money at stake and the resulting disrespect of children's rights, and a law of June 2004 provides that only grandparents may adopt children out of the country.³¹

Typical abuses arise from the lack of effort made to reunite children with their parents and support those parents who wished to keep their children. The money offered to a family for a child may tempt parents who are very poor and may lead to criminal activity such as the failure to register births and the "abandonment" of children. "To meet the demand for children, abuses and trafficking flourish: psychological pressure on vulnerable mothers; negotiations with birth families; adoptions organised before birth; false maternity or paternity certificates; abduction of children; children conceived for

³⁰ *Article 20*

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

A further article deals with abduction, sale and traffic of children:

Article 35

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

³¹ A previous moratorium was called by the President of Romania in July 1991 because of the abuses and trafficking that were taking place. During the previous 18 months from January 1990 over 10,000 children were adopted out of the country.

adoption; political and economic pressure on governments . . .³² Contrary to the popular image, many children adopted internationally were not rescued from dilapidated orphanages. In fact, troubled and damaged children in orphanages are of little interest when younger, healthier and more attractive children are available.

These realities are very threatening to the identities of internationally adopted children. Much remains to be done to fortify the systems of exporting countries to remove these pressures, improve controls and accreditation and generally raise awareness.

While little can be done by way of legislative reform in Ireland to control abuses in other countries, it is important that such steps as are possible, such as the implementation and application of the Hague Convention on Inter-country Adoption, are taken. It is also important that Ireland continue to collaborate with other countries to achieve international agreement on these issues.

Unregistered fathers

The Civil Registration Act 2004 introduced new requirements for the registration of children's births. It requires more extensive information on the parents of a child to be registered, including the personal public service number (PPSN) of each parent. Access to a person's PPSN will not be available to the public through the civil registration system, but it is intended to be used to improve administration in the civil service and is seen as a contribution to the objective of "joined-up government". It may also, however, have unintended consequences. There are reports that some fathers of children born outside marriage refuse to be registered on the birth records of their children because of a fear of financial repercussions in the future. Informed by the reputation of the British Child Support Agency, their main fear is that they will be required to contribute to the maintenance of their children at some time in the future, and that this will be made easy for the State by the use of PPSNs linked in with social welfare, taxation and other administrative records. While it is too early to assess whether refusal by fathers to register is occurring in fact, it is a possibility which should be flagged and monitored. There is no obvious solution, short of scrapping the requirement for registration of the father's PPSN, or imposing restrictions on the uses to which a father's PPSN obtained from the birth register can be put (and many suspicious fathers will suspect even this, knowing it can be changed in the future). Distrust of the motives of the civil registration requirements may result in the enlargement of a small class of children being born: those with no registered fathers. The implications of this for the psychological well-being of the children concerned must be balanced against the State's legitimate objective of efficiency.

We recommend that the right of a child to his or her identity should be given statutory recognition and protection in legislation regulating adoption and donation of genetic material. This right should encompass the child's right of access to identifying information on his or her biological parents. In the case of children who are the product of donated genetic material,

³² Chantal Saclier, International Social Service, "Children and Adoption: which rights and whose?" in the Innocenti Digest on Intercountry Adoption, UN, 1998.

research and consultation should take place on the best method to enable them to acquire knowledge of this fact.

The State and organisations working in this field have a responsibility to foster greater understanding of the issues of identity for children among the public at large, and to uphold high standards in this regard in their work involving other countries. They also have a role in relation to the development and application of internationally accepted rules and standards on inter-country adoptions and the control of donated genetic material. The Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption, 1993 should be implemented in Irish law without further delay.

Natural fathers should be encouraged to register as the parents of their non-marital children and the possible disincentive to registration arising from the new requirements of the Civil Registration Act 2004 should be monitored.

CHAPTER 6

MINORS' CONSENT TO MEDICAL TREATMENT

1. "MEDICAL TREATMENT"

To date, there is no explicit statutory definition of medical treatment.¹ However, section 23(2) of the Non-Fatal Offences Against the Person Act, 1997 defines "surgical, medical or dental treatment" as including "any procedure undertaken for the purposes of diagnosis, and ... applies to any procedure (including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment." Thus, according to this Act, medical treatment includes exploratory acts for the purposes of diagnosis, as well as treatment for a medical condition. It is unclear whether non-invasive examination would also fall within the definition. The inclusion of "administration of an anaesthetic" under the term "procedure" suggests that "procedure" is intended for more than examination and non-invasive actions, such as mouth swabs, for example.

However, the Child Care Act 1991 distinguishes between examination and treatment, as in section 13(7), where it provides that the court may give directions with respect to the "medical or psychiatric examination, treatment or assessment of the child." In *In The Matter of A Ward of Court*,² the Supreme Court accepted that artificial hydration and nutrition are medical treatment. Thus, it would appear that any treatment imposed for palliative or medicinal purposes is "medical treatment" if the manner of treatment is invasive or exploratory in any way.

We recommend that the distinction between "examination" and "treatment" be clarified in legislation, on the basis that "examination" be defined as non-invasive, and that invasive exploratory acts for the purpose of diagnosis should come within the definition of "treatment".

2. "CONSENT"

Kennedy and Grubb³ state: "The ethical principle that each person has a right to self-determination finds its expression in law through the concept of consent ... Thus, the law relating to consent ... is of the utmost importance in medical law, serving as it does as the means of protection and preserving the

¹ See generally Tomkin and Hanifin *Irish Medical Law* (Round Hall Press, Dublin, 1995); Kennedy and Grubb, *Medical Law* (3rd ed., Butterworths, London, 2000); Fortin, *Children's Rights and the Developing Law* (LexisNexis, 2003); Mills, *Clinical Practice and the Law* (Butterworths, Dublin, 2002); Madden, *Medical Ethics and the Law* (Butterworths, Dublin, 2002); Donnelly *Consent: Bridging the Gap Between Doctor and Patient* (Cork University Press, 2002) and G. Shannon, *Child Law*, (Roundhall Thompson 2005), ch. 7.

² [1995] 2 ILRM 401.

³ Kennedy and Grubb, *Medical Law* (3rd ed., Butterworths, London, 2000).

right of a patient to decide what is to happen to him.”⁴ A legally valid consent, (that is one which will not lead to a tortious action in battery or negligence or a criminal action in battery) needs three elements: (1) it has to be given by a competent person, (2) it has to be given voluntarily, and (3) it has to be an informed consent. In order to avoid either a tortious or a criminal action, a doctor has to ensure that his patient can validly consent to the treatment; otherwise, he may be liable.

The Medical Council has published a guide, *A Guide to Ethical Conduct and Behaviour*⁵ which, while not a set of rules, is “a Guide by which the individual members of the profession may judge particular situations.”⁶ In the section on consent, it is noted consent is required in order to treat, and that people have the right to refuse consent for investigation or treatment. The Guide then gives advice on “Special Situations”, and in particular, children. It states:

“If the doctor feels that a child will understand a proposed medical procedure, information or advice, this should be explained fully to the child. Where the consent of parents or guardians is normally required in respect of a child for whom they are responsible, due regard must be had to the wishes of the child. The doctor must never assume that it is safe to ignore the parental/guardian interest.”⁷

Thus, there are no formal guidelines as to how doctors should weigh up the interests of the child, the wishes of the parents, and the medical opinion of doctors.

While young children may not have the knowledge or experience to enable them to make their own decisions on medical treatment, they may well have views on the costs and benefits to them of a proposed course of action. Even as young children, they are entitled to the dignity and respect of being consulted on matters which intrude on their bodily integrity, as is recognized in the *Guide to Ethical Conduct and Behaviour*. If they are left with the consequences of treatments or omissions to treat in later life, they will be justified in feeling angry if their views were not taken into account, or they were not given the opportunity to have any views. They will also respond better to treatment which they understand and to which they have agreed.

In accordance with Article 12 of the UN Convention on the Rights of the Child, a child has a general right to express his or her views in matters affecting him or her, and to have them given due weight in accordance with his or her age and maturity. We recommend, as a general principle, that doctors be required by law to give children an opportunity to express their views and have them given due weight, in accordance with their age and maturity.

Where children are concerned, there are varying degrees of capacity to consent. According to these degrees, this chapter will be divided into three distinct sections: consent by proxy for very young children and treatment to which parents cannot consent; the capacity to consent of 16- to 18-year-olds;

⁴ *Ibid.* at page 574.

⁵ The Medical Council, *A Guide to Ethical Conduct and Behaviour*, (6th ed., Irish Medical Council, Dublin, 2004). Also G. Shannon, *Child Law*, (Roundhall Thompson 2005), ch. 4.

⁶ *Ibid.* at para 1.2

⁷ *Ibid.* at para. 18.3

and the capacity of the “mature minor” to consent to medical treatment. Two further situations also deserve attention: consent for children who are in the care of the Health Service Executive, and medical treatment for children with psychiatric or psychological difficulties.

Consent by proxy for the young child

When parents act as proxy decision-makers for their children, consent needs to be obtained from the parents by the doctor. Thus, the parents themselves must consent in accordance with the general principles; that is, they must have the capacity to consent, they must consent to the treatment voluntarily, and the consent they give must be informed.⁸ The only exception to this is in the case of emergency, where consent may be given by someone other than the parent, such as a teacher or relative, or in extreme cases, where doctors can treat in the absence of consent.

The question as to whether the consent given by parents should be joint or several has not been addressed by the Irish courts or legislature. One could assume, however, that if the situation arose in an emergency, the consent of one parent would suffice. If the treatment were elective, the situation is less clear, and it is arguable that consent of both parents would be required. In the English case, *Re R*,⁹ Lord Donaldson was of the opinion that the parents have “a joint, as well as a several” right to give consent, and if the parents disagreed, “the doctor will be presented with a professional and ethical, but not with a legal, problem because, if he has the consent of one authorised person, treatment will not without more constitute a trespass or criminal assault.”¹⁰ However, in *Curran v. Bosze*,¹¹ the Supreme Court of Illinois were of the opinion that the consent of the parents must be jointly given.¹² It may be safely assumed that where possible, consent should be obtained from both parents. Where the parents are unmarried, the situation is even more unclear. In *R v General Medical Council*¹³ Munby J stated:

“It was said that there is ‘a small group of important decisions made on behalf of a child which, in the absence of agreement with those with parental responsibility, ought not to be carried out or arranged by a one-parent carer’ and where ‘a decision ought not to be made without the specific approval of the court’ ... Thus far this category has been held to include circumcision, other than in the case of medical necessity, and what have been described as ‘hotly contested issues of immunisation’: see *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* [2000] 1 FLR 571 and *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148.”¹⁴

Certainly, decisions on elective treatments such as circumcision should not be made without the consent of both parents.

⁸ The corollary is that parents must have access to the necessary information to enable an informed consent. In *McK -v- The Information Commissioner* [2006] IESC 2 (24 January 2006), the Supreme Court held that the Information Commissioner was wrong to withhold access to an 11-year-old girl’s medical records from her father and joint guardian, despite the wishes of the other joint guardian. The regulations under which the decision was made fell to be interpreted in accordance with the Constitution and there was a presumption that the father’s actions were in accordance with the child’s best interests.

⁹ *Re R (a minor)(wardship: medical treatment)* [1991] 4 All ER 177.

¹⁰ *Ibid.* at p. 184

¹¹ 566 N.E. 2d 1319 (1990)

¹² This case involved two unmarried parents, one of whom wished to consent to blood tests for their children, and one of whom refused to consent. Because the parent refusing to consent was the primary caregiver, and the tests were sought to establish if the children were suitable bone marrow donors, this case may lie on the extreme end of the spectrum.

¹³ [2004] EWHC 1879

¹⁴ *Ibid.* at para. 197

We recommend that legislation should clearly set out the circumstances in which the joint consent of parents is required to treat a child. The general position should be that while the consent of one parent is sufficient, consent of both parents should be required where reasonably practicable. In cases of emergency, or where the condition of the child is life-threatening, the consent of one parent will suffice.

Where one parent withholds consent, there should be means of making an informal emergency application to the High Court for a decision under section 11 of the Guardianship of Infants Act 1964.

If the parents of a child are not married, the father should be treated in the same way as a marital father if he has been appointed as a guardian under section 2 or section 6A of the Guardianship of Infants Act 1964.¹⁵ If the non-marital father has not obtained a guardianship order, his consent should not be strictly necessary.

As was argued in *Department of Health and Community Services v. JWB and SMB*,¹⁶ “the power [of parents to consent to the medical treatment of a child] does not extend to, for example, the right to have a child’s foot cut off so that he or she could earn money begging.”¹⁷ This is quite an extreme example, but generally parents are not endowed with the capacity to consent to non-therapeutic procedures unless the procedure is deemed to be in the child’s best interests. The corollary of this statement is also true: parents are expected to consent to treatment that is in the best interests of their child. In assessing these issues, the statement of the U.S. Supreme Court in *Prince v. Massachusetts*¹⁸ is apt:

“Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”¹⁹

In an Irish context, it was stated in *Ryan v Attorney General*:²⁰

“There is nothing in the Constitution which recognises the right of a parent to refuse to allow the provision of measures designed to secure the health of his child when the method of avoiding injury is one which is not fraught with danger to the child.”²¹

Medical procedures to which a parent cannot consent

Female Genital Mutilation

In 2001, the Prohibition of Female Genital Mutilation Bill was initiated. The Bill prohibits what is called “female circumcision” or “female genital mutilation” (FGM). This is a practice which evolved in certain African and Islamic countries, and involves the removal of the outer part of the female

¹⁵ As amended by the Status of Children Act 1987, s. 12 and the Children Act 1997, s. 4(4) and s. 6.

¹⁶ Secretary, Department of Health and Community Services v. JWB and SMB (1992) 175 CLR 218. The case is commonly referred to as “Marion’s case”.

¹⁷ *Ibid.* at para. 26 of the judgment of Mason C.J.

¹⁸ 321 U.S. 158 (1944).

¹⁹ *Ibid.* at p. 170.

²⁰ [1965] IR 294.

²¹ *Ibid.* at p. 350.

genitalia. As is noted in the explanatory memorandum to the Bill, as the “operation” involves the removal of healthy tissue, and serves no medical purpose, it is quite unnecessary. Besides being unnecessary, however, it can also cause severe long-term and short-term medical problems which are detailed in the explanatory memorandum to the Bill.

Section 1(1) of the Bill provides that it shall be an offence to perform any procedure for the genital mutilation of a woman. Section 1(2) provides:

“In a prosecution for an offence under *subsection (1)*—
it shall not be a defence to prove that a consent (including, where relevant, a consent of a parent, guardian or other person having responsibility in relation to a person who has not attained the age of 16 years) was given by or on behalf of a woman to her genital mutilation.”

The introduction of the Bill, while late compared to the United Kingdom,²² is unsurprising, given the almost universal condemnation of the practice.²³ What is surprising is that, as a Private Member’s Bill, the Bill has lapsed, and it appears that it will not be enacted.

We recommend that Female Genital Mutilation be prohibited in legislation.

According to Fortin²⁴, legislation²⁵ in the UK which criminalizes female genital mutilation is rarely used, and caution in this respect may be due to the experience of the harm and suffering caused by back street abortions, before abortion was legalised. However, a clear statement of prohibition and the availability of criminal sanctions both carry strong moral force. In the longer term, the best prospect of eradicating the practice is the education of communities from within, and their persuasion of its dangers and disadvantages.

Male circumcision

A related, but apparently less contentious, issue involves male circumcision. This is a well-accepted and often-performed medical procedure, and is not generally considered in the same category as FGM, having different motivation and effect. However, it is noted in the explanatory memorandum to the Prohibition of Female Genital Mutilation Bill, 2001, that “while [FGM] and male circumcision both include the removal of well-functioning parts of the genitalia and are quite unnecessary, FGM is far more drastic and damaging than male circumcision.” This is not to say that male circumcision is acceptable – merely that it is less harmful than FGM. There are generally two reasons as to why parents have their male child circumcised: for health reasons, or for religious or cultural reasons.²⁶ A

²² Female Circumcision Act 1985, repealed and replaced by the Female Genital Mutilation Act, 2003.

²³ See, for example, Natalie Angier *Woman: An Intimate Geography* (Houghton Mifflin Company, New York, 1999); Wanis Dirie with Miller, *Desert Flower* (William Morrow and Company, New York, 1998).

²⁴ Fortin, *Children’s Rights and the Developing Law*, (Lexis Nexis UK 2003) p. 300.

²⁵ Prohibition of Female Circumcision Act 1985.

²⁶ Circumcision performed for religious reasons is generally referred to as “ritual circumcision”. The issue arose in England in *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FLR 678 (Family Division); [2000] 1 FLR 571 (Court of Appeal) where the Court refused to grant the application of a Muslim father to have his child circumcised in a situation where the mother refused consent to the procedure. The trial judge made it clear, however, that he “[did] not think that it can be said that the court would not, in any circumstances, order a child to be circumcised.” *Ibid.* at page 700.

prohibition on male circumcision is likely to be divisive along cultural and ethnic lines and difficult to enforce, and risks driving the practice underground with all the attendant risks. These are the conclusions of a report by an expert committee, commissioned by the Minister for Health and Children, which reported in January 2006.²⁷ It recommended that the Health Service Executive establish regional services to carry out cultural male circumcisions, and that medical staff who have ethical objections to the procedure should be permitted to opt out of the service. Newspaper reports indicate that in recent times, circumcision of male infants is taking place. In October 2005 it was reported that a man who circumcised a young boy, which led to the death of the boy, was found not guilty of child endangerment.²⁸

Practical and cultural considerations aside, there is a serious question on whether parents have the power, in law, to consent to what is an unnecessary and potentially dangerous operation.

The Law Reform Commission of Queensland, Australia published a research paper²⁹ on the lawfulness of male circumcision in 1993. That paper made reference to the Australian High Court case of *Secretary, Department of Health and Community Services v JWB and SMB*³⁰ and concluded that non-therapeutic (ritual) male circumcision was unlawful.

The common law operating in Queensland appears to be that if a young person is unable, through lack of maturity or other disability, to give effective consent to a proposed procedure and if the nature of the proposed treatment is invasive, irreversible and major surgery and for non-therapeutic purposes, then court approval is required before such treatment can proceed. The court will not approve the treatment unless it is necessary and in the young person's best interests ... The basis of this attitude is the respect which must be paid to an individual's bodily integrity ... Unless there are immediate health benefits to a particular child from circumcision, it is unlikely that the procedure itself could be considered as therapeutic ... The circumcision is invasive, irreversible and major. It involves the removal of an otherwise healthy organ part. It has serious attendant risks. ... On a strict interpretation of the assault provisions of the Queensland Criminal Code, routine circumcision of a male infant could be regarded as a criminal act. Further, consent by parents to the procedure being performed may be invalid in the light of the common law's restrictions on the ability of parents to consent to the non-therapeutic treatment of children.

However the paper failed to propose further action which would enforce the rights of children.

The UK Law Commission paper on *Consent in the Criminal Law*³¹ takes the view that male circumcision is legal as "it has little effect on a man's ability to enjoy sexual intercourse, and this act is not, therefore, regarded as mutilation". On the other hand, Professor J.G Dwyer³² argues that parents cannot claim rights over minor children - the rights reside in the children, and parents only have the privilege of raising them, provided that they fulfil their obligation to care for them. He states:

"Justifications based on parents' interests or on societal interests, such as pluralism and the preservation of traditional communities, are morally flawed because they implicitly adopt an

²⁷ The Irish Times 24 January 2006.

²⁸ The Irish Times 8 October 2005.

²⁹ Available at <http://www.cirp.org/library/legal/QLRC/>

³⁰ (1992) 175 CLR 218

³¹ Consultation paper 139 of 1996

³² "Parent's religion and children's welfare; debunking the doctrine of parents' rights", California Law Review (1994) 82(6) 1371-1447, extract available at <http://www.cirp.org/library/legal/dwyer2/>

instrumental view of children, treating them as mere means to the furtherance of other persons' ends.”

A strong argument against juvenile circumcision for cultural reasons with parental consent, based on legal principles, is made by Christopher Price.³³ Eike-Henner Kluge takes the logical view that to regard male circumcision as less serious, in principle, than female circumcision is discriminatory, arguing that both involve non-consensual mutilation of a minor for non-medical reasons, while recognising that the effects of FGM are more serious.³⁴ Price argues that the UN Convention on the Rights of the Child makes the position clearer in respect to circumcision. Article 24(3) provides: "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." Some have sought to argue that this provision was only aimed at female circumcision; but this argument cannot hold when the Convention is read with the interpretative provisions of the Vienna Convention on the Law of Treaties 1969.³⁵

In relation to the right to religious practice under the European Convention on Human Rights, Article 9(2) provides:

"Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, *or for the protection of the rights and freedoms of others*" (emphasis added).

The Convention thus distinguishes between the unfettered right to freedom of thought, and the more restricted right to manifest one's religion. *In re J (specific issue orders: Muslim upbringing and circumcision)*³⁶ the father's claimed right under Article 9 of the Convention to have his son circumcised in accordance with his religion was rejected. The reasoning in the decision, which held that the procedure was legal, did not discuss the rights of the child in any detail. The decision established that where parents do not agree on the procedure being carried out, they must seek court consent.

Circumcision infringes a child's right to bodily integrity under Article 8(1), without necessarily being counterbalanced by any advantages in promoting health or morals in accordance with Article 8(2). Noting the judge's observation in *Re J* (above) that a child might be at a severe social disadvantage in being brought up in a Jewish or Muslim community without being circumcised, Jane Fortin suggests that a stronger argument could be made under Article 9, in relation to the child's own religious rights, and a claim to freedom from discrimination on religious grounds, under Article 14.³⁷

³³ Christopher Price, "Male Circumcision: An Ethical and Legal Affront", *Bulletin of Medical Ethics* Number 128, May 1997, 13-19.

³⁴ E. Kluge "Female circumcision: when medical ethics confronts cultural values". *CMA Journal* (1993) 148, 288-9: "If these are insufficient to justify the circumcision of girls then, unless there are distinguishing medical reasons, they are also insufficient to justify the circumcision of boys. To argue differently is to be guilty of discrimination on the basis of sex. The fact that female circumcision is a more serious intervention does not alter the situation. Both involve what in other contexts would be called non-consensual mutilation of a minor for non-medical reasons."

³⁵ By virtue of Article 31 the words of treaty provisions must be given their ordinary meaning; and by Article 32, recourse may not be had to the travaux préparatoires unless the meaning of the treaty provisions is on the face of it unclear, or possibly, where all the parties are in agreement so to refer.

³⁶ [1999] 2FLR 678, decision affirmed in the Court of Appeal at [2000] 1 FLR 571

³⁷ Fortin, *Children's rights and the developing law*, (Lexis Nexis UK 2003) at p.332

From a rights-based child law perspective, most members of the Committee believe that the circumcision of male children violates their right to bodily integrity, and from a legal point of view, that it is not capable of proxy parental consent. Others are concerned with the practical implications of prohibition, and the strong cultural and religious significance for many.

Young adults, of course, may choose this course, subject to obtaining the agreement of medical practitioners to perform the operation. Further, parents are free to bring their children abroad to have the operation carried out. Their right to travel is enshrined in Article 40.3.3° of the Constitution, which though set in a context concerning abortion, refers to a general right to travel. As adults, circumcised men may have a cause of action in damages against parents who gave proxy consent to unnecessary medical procedures, and against the State which did not vindicate their right to bodily integrity and did not prevent the parents having the procedures carried out.

We recommend that, as a minimum, infant male circumcision should be unlawful unless carried out by appropriately trained personnel, to protect the interests of the child. This will of course have cost implications for the Health Service, and guidelines on appropriate training and conditions will need to be prepared.

Sterilisation of mentally handicapped children

A third issue is whether parents can consent to the sterilisation of their mentally handicapped child. Tom Cooney, in his article *Sterilisation and the Mentally Handicapped*,³⁸ argues that the sterilisation of minors should be subject to court authorisation. He gives three reasons why this should be the case: that the procedure might not be necessary to maintain the health of the child, that the parent's decision to sterilise may be coloured by other concerns, and that the decision made might not necessarily be what the child would decide upon on reaching majority. He argues that "A judicial or legislative rule, that no person under 16 should be sterilised without the authorisation of the court or unless the operation is a strict or urgent necessity in order to preserve the child's health, would be defensible."³⁹ The involvement of the court would be defensible, he maintains, due to the protective nature of the court's jurisdiction in relation to personal rights. In *Glass v UK*,⁴⁰ the European Court of Human Rights held that the parental consent must be "free, express and informed", and that where agreement between medical staff and the parents cannot be reached, the matter must be brought before the court.

We agree with Cooney, and **we recommend that legislation be enacted to provide that no sterilisation procedure be performed on a minor without court approval, unless medically necessitated. Such legislation should define clearly the circumstances in which a sterilisation can be sanctioned.**

³⁸ Cooney, "Sterilisation and the Mentally Handicapped" (1989) 11 DULJ 56.

³⁹ *Ibid.* at page 62

⁴⁰ (2004) 39 E.H.R.R. 15 and [2004] 1 F.L.R. 1019

We further recommend that such legislation be extended to the protection of mentally disabled adults.

Organ and tissue donation

A fourth instance of limitations of the rights of parents to consent to medical treatment is the issue of tissue and organ donation. While an arguable proposition can be made that circumcision and sterilisation are in the best interests of a child, organ and tissue donation by children is always in the best interests of another person, generally a sibling or close relative of the child. The only apparent benefit from organ or tissue donation is the psychological benefit of not losing a family member, or feelings of altruism.

Debate on the issue generally distinguishes between the donation of regenerative tissue, such as bone marrow, and the donation of non-regenerative organs, such as kidneys.⁴¹ However, as Fortin⁴² notes, despite the regenerative abilities of the tissue removed, parents are still infringing the donor's right to bodily integrity and endangering the child's future.⁴³

Article 20(1) of the Council of Europe's *Convention on Human Rights and Biomedicine*⁴⁴ states that "No organ or tissue removal may be carried out on a person who does not have the capacity to consent...". Paragraph (2) of the same Article states that there is an exception to this general rule. It states:

"Exceptionally and under the protective conditions prescribed by law, the removal of regenerative tissue from a person who does not have the capacity to consent may be authorised provided the following conditions are met:

- (i) there is no compatible donor available who has the capacity to consent;
- (ii) the recipient is a brother or a sister of the donor;
- (iii) the donation must have the potential to be life-saving for the recipient;
- (iv) the authorisation provided for under paragraphs (2) and (3) of Article 6 has been given specifically and in writing, in accordance with the law and with the approval of the competent body;⁴⁵
- (v) the potential donor concerned does not object."

Ireland has not ratified the Convention, and there is no legislation or case law which applies to the issue. In Dáil Debates, the Minister for Health and Children, Mr. Cowen was asked by Mr. Bruton if medical practice in Ireland conformed in full with the Convention. The reply stated that medical practice in general accords with the Convention, and that "The detailed regulation of medical practice

⁴¹ See, for example, The British Medical Association, *Consent, Rights and Choices in Health Care for Children and Young People* (BMJ Books, London, 2001) at 158-161.

⁴² Fortin, *Children's Rights and the Developing Law* (Lexis Nexis UK 2003).

⁴³ *Ibid.* at 327.

⁴⁴ Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine* (Oviedo, 4.IV.1997).

⁴⁵ Paragraph 2 of Article 6 states:

"2. Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.

The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity."

Paragraph 3 deals with the situation of adults with mental disabilities.

is ... the responsibility of the relevant professional bodies and of the medical council.”⁴⁶ However, the only reference to this issue in the Medical Council’s *Guide to Ethical Conduct and Behaviour* (6th ed.) is contained in paragraph 21.1, which states:

“A doctor involved in organ transplantation has duties towards both donors and recipients. Living donors should be counselled as to the hazards and problems involved in the proposed procedures, preferably by an independent physician.”

This clearly falls short of the protection afforded to minors under the Convention, and it is clear that there is an absence of protection in this area as regards the minor who is unable to consent to the treatment. It could be argued that the decision in *North Western Health Board v. HW and CW*⁴⁷ has effectively left the decision to donate or not in the hands of parents. However, the two scenarios can be easily distinguished. The Supreme Court case concerned the capacity of parents to *refuse to consent* to medical treatment in a situation where good medical practice stated that the child should undergo the procedure. As regards organ or tissue donation, the question is rather the capacity of the parents to submit their child to a medical procedure which is clearly not in the child’s best medical interests, but rather in the best interests of, in most cases, a close family member. It would therefore be helpful if legislation made clear the circumstances in which parents can consent to their child donating tissue or an organ, and when doctors can perform such a procedure.⁴⁸ Doctors, of course, can never be obliged to treat a patient in a manner inconsistent with their ethical or medical positions.⁴⁹ Because of parents’ potentially conflicting interests, a court may be best placed to ensure the protection of a potential child donor’s best interests, with the child donor represented before it by a guardian *ad litem*. The disadvantage of such a requirement is the potential delay in decision-making. In any legislation or incorporation of the Convention, certain elements of the Convention need to be clarified:

- Are there any circumstances in which the wishes of a child, reluctant to donate, can be overridden?
- What is the position if the donor does not object, but the parents do?
- What is the position if the donor and one parent do not object, but the other parent does?
- Is the objection unreviewable?

We recommend that consideration should be given to ratifying the Convention on Human Rights and Biomedicine and incorporating it into Irish law through legislation. In any event, the position of child donors should be clarified and protected in domestic law, either in conjunction with, or in the absence of, the Convention.

⁴⁶ Dáil Eireann, Volume 506, 23rd June 1999.

⁴⁷ [2001] 3 IR 622.

⁴⁸ A decision of the Supreme Court of Illinois in *Curran v Bosze* 566 NE 2d 1319 (1990) set down three criteria for the best interests test for a child donor: (1) the parent consenting on behalf of the child donor must be fully informed of the risks and benefits of the procedure; (2) emotional support should be available to the donor from a trusted carer; and (3) there must be an existing and close relationship between the donor and the recipient so that the donor may realistically gain a psychological benefit from the donation.

⁴⁹ As a matter of practice, practitioners refuse to accept children and young people as donors of non-regenerative organs, see Mason, McCall Smith and and Laurie, *Law and Medical Ethics* (Butterworths, 2002), p. 432.

3. THE DUTY OF A PARENT TO CONSENT TO CERTAIN MEDICAL PROCEDURES

Where a child is in the care and custody of her parents, it is clear that the right to consent to her treatment vests solely in her parents. The Health Act 1953 provides for a health service, including a mother and baby service for the public, and section 4 of the Act provides:

“(1) Nothing in the Act or any instrument thereunder shall be construed as imposing an obligation on any person to avail himself of any service provided under this Act or to submit himself or any person for whom he is responsible to a health examination or treatment.

(2) Any person who avails himself of any service provided under this Act shall not be under any obligation to submit himself or any person for whom he is responsible to a health examination or treatment which is contrary to the teaching of his religion.”

While legislation is clear that parental responsibility in terms of medical treatment is bordering on the impenetrable, there have been two reported instances in which the courts have considered the possibility of overruling parental consent. These cases are brought on the basis that either the parents are failing to respect the personal and unenumerated rights of the child under the Constitution, or that they have failed to care for their children under Article 42.5 of the Constitution.

The first case of *North Western Health Board v. H.W. and C.W.*⁵⁰ dealt with the complex issue of parental autonomy and state interference with reference to a medical procedure. Here, the parents had refused to allow their newborn son to undergo a screening test. The test is routinely carried out on all children between 72 and 120 hours after their birth, and was highly recommended by the medical profession.⁵¹ It is commonly known as the PKU test, and is in effect a blood test which screens for the possibility of a four metabolic conditions and one endocrine condition,⁵² all of which are treatable when detected at an early stage, but which, if not detected, can cause serious and irreparable harm.

The parents, being Jehovah’s Witnesses, refused to consent to the test being administered to their son, “Paul”, on the basis that it was their “strong religious belief that nobody is allowed to injure anybody else.”⁵³ The Health Board sought a number of declarations from the Court, including a declaration that it was in the best interests of the infant to have the test, that the defendants were failing to vindicate the personal rights of the infant, and a declaration that they be permitted to carry out the PKU test. They also sought a number of injunctions against the defendants to facilitate them carrying out the test.

The application was refused by McCracken J in the High Court, and the Health Board appealed to the Supreme Court. All four of the majority opinions referred to Articles 40.3, 41.1, 42.1 and 42.5 of the Constitution. They agreed that the family has a unique position in Irish law, as being the fundamental unit of society. They also all referred to the rights of children as members of that family, and rights

⁵⁰ [2001] 3 IR 622

⁵¹ Indeed, the Court stated that on average, only 6 children per year did not have the test.

⁵² The medical conditions for which the test was designed to test for are phenylketonuria, galactosaemia, homocystinuria, maple syrup urine disease and hypothyroidism, which have an incidence level in this State of 1:4,500 (phenylketonuria) to 1:200,300 (hypothyroidism).

⁵³ This argument was not relied on in the Supreme Court pleadings.

children possess autonomously from that family. Denham J. noted that, while historically case law indicated that parental authority should be protected in all but the most exceptional cases, there has been a recent trend which has recognised that children have rights, not only as part of the family, but also personal constitutional rights. She went on to say, “It is settled law that the courts have a constitutional jurisdiction to intervene to protect the constitutional rights of a child. The courts will protect such rights whether legislation exists or not.”⁵⁴

All of the five judges seem to have been of the opinion that, were the best interests test, or a test of “medical benefit” used, the test would be ordered. Murphy J. explicitly stated what is implicit in the rest of the majority judgments when he said: “It is beyond doubt that the performance of a PKU test is unquestionably in the best interests of the infant tested.”⁵⁵ However, the members of the court were of the opinion that, due to the constitutional protection of the family, this was not a case in which the State was entitled to intervene.

The four judges then went on to establish a constitutional test for State intervention which was aimed at protecting the best medical interests of the child. Denham J. was of the opinion that the State could only intervene in affairs of the family in exceptional cases, for example, where the child was in immediate danger and needed a life-saving operation. Murphy J. stated that the subsidiary and supplemental powers of the State in relation to the welfare of children only arises

“where either the general conduct or circumstances of the parent is such as to constitute a virtual abdication of their responsibility or alternatively, the disastrous consequences of a particular parental decision are so immediate and inevitable as to demand intervention and perhaps call into question either the basic competence or devotion of the parents.”⁵⁶

A particularly ill-advised decision, such as that made by the parents in this case, did not amount to a default of the parents’ moral and constitutional duty. Murray J. was hesitant to establish a test, stating that it would be impossible to define one neat rule or formula regarding the circumstances in which the State could intervene in the interests of the child against the wishes of the parents. He was only willing to go so far as stating that there should be some “immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically, morally, or socially, deriving from an exceptional dereliction of duty on the part of the parents”⁵⁷ before State intervention would be justified. Hardiman J. was of the opinion that where the parents have not failed in their duty towards their child for physical or moral reasons, their decision should not be interfered with by the State or the courts in the absence of a jurisdiction conferred by statute. The presumption that the welfare of the child is best addressed within the confines of the constitutional family could be displaced, he thought, where there were countervailing constitutional considerations, or perhaps in the case of an immediate threat to the life of the child.

⁵⁴ *Ibid.* at p. 718.

⁵⁵ [2001] 3 IR 622, at page 729.

⁵⁶ *Ibid.* at p. 733.

⁵⁷ *Ibid.* at p. 740-741.

A number of factors were taken into account by the Court in coming to the majority ruling. All the judgments referred to the fact that the test had not been made compulsory by legislation in Ireland, nor in any other country in which the test is routinely administered. The Court was of the opinion that, were the order sought granted, it would make the test compulsory. This, they believed, was outside the ambit of the Court's jurisdiction as being in breach of the doctrine of the separation of powers. They were also of the opinion that if the order were granted, it would have far-reaching effects in terms of its application to other tests and medical procedures.

Mary Donnelly⁵⁸ notes:

“... as the consequences of parental refusal become more serious or the grounds for the parents' objections become less serious, the justification for interference with parental autonomy grows. When the threat to the child's welfare becomes too great, it is both ethically desirable and legally justifiable to interfere.”⁵⁹

Deirdre Madden is of the opinion that a change in language might well mitigate the issues raised by the PKU case. She states:

“... it may ... be preferable to move towards replacing the language of parental rights with 'parental responsibility' which places the parents, in consultation with their children, in the position of educating and maintaining them, not because of an authority conferred on parents, but in the interests of the child. The would recognise children as persons to whom duties are owed, as opposed to possessions over which power is wielded.”⁶⁰

At the other end of the spectrum was the seemingly straightforward case in Waterford in 2000. Newspaper reports⁶¹ stated that the child, whose parents were Jehovah's Witnesses, required a blood transfusion, but due to their religious beliefs, they refused the transfusion. Medical opinion was that the transfusion was necessary to save the life of the child. Surgeons from the hospital contacted the Gardaí, the child was taken into care, and an emergency care order was granted. Pursuant to the order, the Court granted consent so that the operation could go ahead. Once the order had been made, the parents did not object to the operation going ahead. As Tony Murphy, the chairman of the Jehovah's Witnesses' Hospital Liaison Committee in Waterford said, “We just accepted that that was the law of the land and whether we liked it or not we would abide by it.”⁶² This is clearly an example of the “life-threatening situations” envisaged by Supreme Court. The situation arose again in Dublin in 2004, and an order permitting a blood transfusion to a five-month-old girl was granted by Abbott J. in the High Court.⁶³

It would thus appear that in order for the State to intervene to protect the best medical interests of a child, there needs to be a threat to the life, as opposed to the health, of the child.

⁵⁸ Donnelly, *Consent: Bridging the Gap Between Doctor and Patient* (Cork University Press 2002).

⁵⁹ *Ibid* at p. 56.

⁶⁰ Madden, *Medical Ethics and the Law* (Butterworths, Dublin, 2002) at 464-465.

⁶¹ The Irish Times, 2nd and 3rd of March, 2000.

⁶² The Irish Times, 3rd March 2000.

⁶³ The Irish Times, 6th August 2004.

We recommend that the State should have the capacity to intervene to protect the best medical interests of the child in the event of a long-term threat of a deteriorating nature, which could be prevented by early intervention. Proportionate intervention should be permitted where the effects of not intervening are severe, and best medical practice suggests that intervention is necessary for the future health of the child.

4. THE MATURE MINOR

While, from a constitutional perspective, it would appear that parents have the same control over their children until the age of 18 years of age as they do when the child is 18 months, at a certain stage, it is only correct that children should begin to be able to make decisions for themselves regarding their medical treatment. The transition from childhood to adulthood is not an instantaneous one, rather it is a journey whereby the child is endowed with more responsibility as she grows towards the age of majority, 18. As was stated, albeit in a different context, by Denning M.R.,

“The legal right of a parent to the custody of a child ends at the eighteenth birthday; and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice.”⁶⁴

This is best exemplified in the criminal justice arena: under the Children Act 2001, the age of criminal responsibility is set at 12.⁶⁵ However, between the ages of 12 and 14, the principle of *doli incapax* applies. This principle provides that there is a rebuttable presumption that the child is incapable of committing a crime, and is the truest legislative statement of the gradual maturing of children into adults.

In medical law, this position is less than clear. Legislatively, it would appear that minors over the age of 16 have the authority to consent, and by corollary, refuse, medical treatment under section 23 of the Non-Fatal Offences Against the Person Act, 1997. However, other statutory and common law authorities, combined with the absolutist nature of the Constitution, lead to some confusion and ambiguity in the law. The Medical Council Guidelines do not seem to shed much light on the issue. The Guidelines state:

“If the doctor feels that a child will understand a proposed medical procedure, information or advice, this should be explained fully to the child. Where the consent of parents or guardians is normally required in respect of a child for whom they are responsible, due regard must be had to the wishes of the child. The doctor must never assume that it is safe to ignore the parental/guardian interest.”⁶⁶

The Non-Fatal Offences Against the Person Act, 1997

Section 23 of the Non-Fatal Offences Against the Person Act, 1997 states:

⁶⁴ *Hewer v. Bryant* [1969] 3 All ER 578 at p. 582.

⁶⁵ This has not yet been implemented.

⁶⁶ Medical Council, *A Guide to Ethical Conduct and Behaviour* (6th ed. Medical Council 2004) at para. 18.3.

“The consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his or her person, shall be as effective as it would be if he or she were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his or her parent or guardian. ... Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.”

The most obvious result of this particular section is to obviate the need for parental consent for the medical treatment of minors who have reached the age of 16. Whether they are given total autonomy as regards their medical treatment, or the parents still hold some level of concurrent control, is a question that needs to be addressed.

In England and Wales, section 8 of the Family Reform Act 1969 is remarkably similar to section 23 of the 1997 statute. Case law in that jurisdiction is interesting for two reasons: first, the courts have held that the right to consent to medical treatment under section 8 is not absolute, in that minors aged between 16 and 18 can be compelled to submit to medical treatment in certain circumstances,⁶⁷ and second, that minors under the age of 16 have the right to consent to, and thus refuse, medical treatment in certain circumstances.⁶⁸

The question then arises if a minor under the age of 16 in Ireland could be capable of consenting to medical treatment outside the boundaries set by the 1997 Act. As has already been noted, it is generally accepted that children, until the age of majority, are under the control and care of their parents due to the constitutional protection afforded to the family. Tomkin and Hanafin,⁶⁹ having discussed *Gillick*,⁷⁰ note that “the presence in the Constitution of Articles 41 and 42 may constitute a barrier to a decision similar to that in the *Gillick* case being arrived at.”⁷¹ Madden agrees that there is a potential conflict between a child’s right to privacy and bodily integrity on the one hand, and Articles 41 and 42 of the Constitution on the other.⁷² While doctors should take into account the maturity of the patient involved when treating her, it is arguable that they are also under a constitutional duty to inform the parents of the child in question that they are treating the child.

Simon Mills⁷³ is perhaps the only academic writer that has argued that *Gillick* would be accepted in Ireland, albeit in limited circumstances. Drawing an analogy with the decision in *North Western Health Board v. W and W*,⁷⁴ he notes that the Supreme Court in that case recognised that there were circumstances where a treatment decision could be made by parties other than the parents of the child. He goes on:

⁶⁷ See *In Re W (A Minor)(Medical Treatment: Court’s Jurisdiction)* [1992] 3 WLR 758 and *In Re C* [1997] 2 FLR 180.

⁶⁸ *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

⁶⁹ Tomkin and Hanafin, *Irish Medical Law* (Round Hall Press, Dublin, 1995).

⁷⁰ [1986] 1 AC 112.

⁷¹ *Ibid.* at page 40.

⁷² Madden, *Medical Ethics and the Law* (Butterworths, Dublin, 2002) at p. 491.

⁷³ Mills, *Clinical Practice and the Law* (Butterworths, Dublin, 2002).

⁷⁴ [2001] 3 IR 622.

“The court did not define these rights clearly nor did they stipulate the circumstances in which the child’s rights would take precedence over the parents’ rights as decision makers. However, it appears that, in some ill-defined form, children’s rights to treatment do exist.”⁷⁵

However, it can also be argued that the Supreme Court in the PKU case did in fact set out when the child’s rights take precedence over the rights of the parents: where there was a risk to the life of the child if the medical treatment was not carried out. Further, the court did not declare that if the right to consent was temporarily taken away from the parents, the child itself would have the right to consent: in such circumstances, a proxy decision-maker would step in and make a decision based on the best interests of the child.

It is arguable that the issue of medical consent for such minors should not be determined by an arbitrary factor such as age, but based on the maturity of the individual minor. This approach would protect the immature minor from making unwise decisions, yet ensure that the mature minor is endowed with decision-making capacity, determined on a case by case basis by individual doctors, thus protecting and furthering the individual’s personal autonomy. Currently, the situation remains unclear and deserves attention from the legislature. Indeed, on a purely practical basis, it is at best, naïve, and at worst, reckless, for both the legislature and medical practitioners to ignore the very real problem of underage pregnancies and drug addiction in Ireland. The very real fact is that a sexually active 15- or 16-year-old girl is highly unlikely to inform her parents of the fact, and if a doctor insisted on informing her parents that he was providing her with contraceptive treatment the minor might in fact refuse the treatment, thereby running the risk of an unwanted pregnancy rather than informing her parents of her sexual activity.

Siobhan Rooney⁷⁶ also refers to the problem of the treatment of under-aged drug users whose parents must consent to their treatment, but who may not wish their parents to know of the extent of their drug use. Again, the risk is that such minors would forgo medical treatment so as to avoid informing their parents of their habits. Indeed, anecdotal evidence obtained through discussions with general practitioners seems to show that Irish doctors are unsure as to whether they are required to inform parents of a minor, be they over or under the age of 16, prior to administering medical treatment.

In some cases parents will wish a mature minor to undergo a medical or psychiatric examination or treatment, and the minor may refuse. If the mature minor is deemed to be capable of refusing treatment, then a parent cannot override that refusal. However, if the mature minor is not capable of consenting or refusing, then the parents could consent on behalf of the child. A doctor might have ethical problems treating a 15-year-old who is trying to avoid treatment, but legally, there would only be a problem if the child has been deemed capable of consenting, in which case, it would be assault. If a mature minor is in the care of the Health Service Executive, there is provision for application to court for an order that the minor should undergo the examination or treatment under the Child Care Act

⁷⁵ Mills, *Clinical Practice and the Law* (Butterworths, Dublin, 2002) at p. 69.

⁷⁶ Rooney, “The Medico-Legal Impact of Consent to Treatment of Under-aged Drug Users” (1998) *MLJI* vol. 4(2) 74.

1991, discussed below. It may be difficult to enforce such an order short of a committal order under the Mental Health legislation, but that is something the court must take into account in deciding whether to make it.

Contraceptive Treatment

Section 5(1)(a) of the Health (Family Planning) (Amendment) Act, 1992, provides that contraceptive sheaths may lawfully be provided to persons over the age of 17. This is due to the fact that it is legal for a minor aged 17 to have sexual intercourse; Mary Donnelly argues that it would be contrary to the authority of the family under the Constitution to provide contraceptive treatment to a child aged under 17 without the consent of her parents.⁷⁷ Whether girls aged 16 can get contraceptive treatment from their doctors without parental consent under section 23 of the Non-Fatal Offences Against the Person Act, 1997 is unclear.⁷⁸ In fact, there are no restrictions on minors purchasing condoms from machines in public areas. The law in this area should be clarified, but achieving this may involve a divisive debate. Meanwhile, the current uncertain situation continues, and allows individual doctors to take the view that their primary duty is to the confidentiality of the relationship with their young patients, or to the rights of their patients' parents under the Constitution.

In England and Wales, pragmatism has won⁷⁹ and doctors may give contraceptive advice and treatment to under-16-year-olds without informing or consulting their parents, provided that the young person concerned meets the test set in *Gillick v West Norfolk and Wisbech Area Health Authority*⁸⁰ by the House of Lords. Under this test, the young person must understand the doctor's advice; she cannot be persuaded to inform her parents of the matter; it is likely that her physical or mental health will suffer should she not receive the treatment; and her best interests require her to receive the treatment without her parents' consent. *Gillick* has recently been followed in a decision that under-16s can, in principle, have abortions without their parents' consent.⁸¹

Criminal Justice (Forensic Evidence) Act, 1990

Under section 2 of the Criminal Justice (Forensic Evidence) Act 1990, the general rule is that consent must be obtained from a suspect in order for the Gardaí to obtain a body sample. However, in section 2(10), it is provided that in cases of those aged 14 to 17, consent must be obtained from the parents or guardians and from the minor in order for a sample to be legally obtained. Similarly, from the age of 17, the minor consents on her own behalf, and under the age of 14, the parent or guardian consents on

⁷⁷ Donnelly, "Capacity of Minors to Consent to Medical and Contraceptive Treatment" (1995) 1 MLJI vol. 1(1) 18 at p. 21

⁷⁸ The Irish Times of 27 July 2005 reported that Tánaiste and Minister for Health and Children Mary Harney suggested that contraception should be liberally available for young teenagers in the interests of preventing teen pregnancy, subject to parental consent for under-16-year-olds. The Tánaiste acknowledged that "huge issues" arise around the question of parental consent. This sparked a controversy in the press over the following days. The Irish Times, in the same report, quoted a spokeswoman from the Irish Medicines Board to the effect that a doctor can decide to prescribe an unlicensed product (such as the morning after pill, which is unlicensed for under-16-year-olds) if he or she believes it to be in the best interests of a patient, on a case-by-case basis. However, any prescriptions to under-16s have to be made with the consent of a parent or guardian, according to the spokeswoman.

⁷⁹ See Fortin, *Children's Rights and the Developing Law*, (Lexis Nexis UK 2003) at p. 135 et seq.

⁸⁰ [1986] AC 112.

⁸¹ *Axon, R (on the application of) v Secretary of State for Health & Anor* [2006] EWHC 37 (Admin) (23 January 2006).

behalf of the minor. Whether this is because of the presumption of *doli incapax*, which ends at age 14, or as Mills argues, due to a “[suggestion] of the law’s intuitive recognition of the autonomy of the minor”,⁸² is unclear.

The situation regarding consent by mature minors to medical treatment, be they over or under the age of 16, is clearly in need of reform. If a child is capable of forming a view on her medical treatment, it is arguable that legislation should “[give] minors as much rope as they can handle without an unacceptable risk that they will hang themselves.”⁸³

We recommend the general principle that minors aged 16 and 17 should have the capacity to consent to, and refuse, medical treatment.

We recommend that legislation should set out guidance on the minor’s age and other factors which may be considered to determine the capacity of minors of under 16 years to consent to, and refuse, medical treatment. The test developed in the *Gillick* case is a useful starting point. Under this test, the young person must understand the doctor’s advice; she cannot be persuaded to inform her parents of the matter; it is likely that her physical or mental health will suffer should she not receive the treatment; and her best interests require her to receive the treatment without her parents’ consent. If a minor does not have capacity in accordance with the proposed legislative guidance, the consent of parents or guardians should be required.

If minors do not consent to, or refuse, medical treatment which is deemed to be in their best medical interests, consideration should be given to the factors other than age which may be considered to determine their capacity. If they have capacity, a court should still be able to intervene to order treatment which is necessary to preserve life and is in their best interests, on the principle that minors should be protected against making choices which irreversibly limit their future choices, and in accordance with the State’s obligation to protect the right to life under Article 2 of the European Convention on Human Rights. In the event of such a court application, the minor should be represented by a guardian *ad litem*.

The Child Care Act 1991

When children are put into care under the Child Care Act, 1991, the parents of the child are essentially absolved of their rights and duties, and the courts and the Health Service Executive are given powers under the various orders to consent to the medical treatment of the child. It will be necessary to go through each of the orders to determine whether the Health Service Executive or the court has the

⁸² Mills, *Clinical Practice and the Law* (Butterworths, Dublin, 2002) at p. 84, and G. Shannon, *Child Law*, (Roundhall Thompson 2005), ch. 4.

⁸³ *In re W (a minor) (medical treatment: court's jurisdiction)* [1992] 3 WLR 758 at 770

capacity to consent. However, if the child is capable of expressing an opinion, the court has to take account of that opinion before coming to its conclusion.

Voluntary care order

Voluntary Care Orders are provided for in section 4 of the Act. Sub-section (3) of the section states:

“Where the Health Service Executive has taken a child into its care under this section, it shall be the duty of the Executive –

...

to have regard to the wishes of a parent having custody of him or of any person acting *in loco parentis* in the provision of such care.”

Thus, when a child is the subject of a voluntary care order, the Health Service Executive should have regard to, but not abide by, the wishes of the parent, or any person acting *in loco parentis*, with regards the medical treatment of that child. This allows full consultation with the parents.

Emergency care order

Where a child is the subject of an emergency care order, section 13(7) of the Act states that that where a District Justice makes such an order, he may,

“of his own motion or on the application of any person give such directions ... as he thinks proper with respect to –

...

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

If the parents are in court for the making of the order, they may be heard on the issue of medical or psychiatric examination, treatment or assessment for the child. An application may be brought to the Justice by any person, including the Health Service Executive, the parents of the child, the guardian of the child or any person acting *in loco parentis* in respect of the child, to vary an emergency care order under section 13(7)(b). This gives the parents or guardians of the child the opportunity to apply to vary the order if they are unhappy with the child’s medical treatment.

Interim care order

Where a child is the subject of an interim care order, section 17(4) states that the justice

“may order that any directions given under subsection (7) of section 13 may remain in force subject to such variations, if any, as he may see fit to make or the justice may give directions in relation to any of the matters mentioned in the said subsection....”

Thus, the court has the same powers over the medical treatment of a child when she is the subject of an interim care order and an emergency care order. The function of the court in this regard was examined in the case of *A and B v. Eastern Health Board*.⁸⁴ The child, pregnant as a result of rape, was the subject of an interim care order. The Health Board were of the opinion that the best course of action

⁸⁴ *A and B v. Eastern Health Board, Judge Mary Fahy and C. and the Attorney General (notice party)* [1998] 1 ILRM 460 (hereinafter referred to as “the C case”).

was for the child to travel to have an abortion, and the child agreed. The court granted the Board's application for the girl to have an abortion under section 17(4) of the Act. The parents appealed.

Geoghegan J. in the High Court first ruled that termination of pregnancy was "medical treatment" within the meaning of the Act. It was argued by the parents that the District Justice had failed to take account of the wishes of the parents, and the right to life of the unborn child under section 24 of the Act.⁸⁵ Geoghegan J. again disagreed, but noted, "Under section 24 the court must undoubtedly regard the welfare of the child as the first and paramount consideration ... but it must do so within a constitutional framework ...".⁸⁶ In hearing applications under this section, therefore, it is important that the wishes of the parents are heard and taken into account by the judge. The level of importance the judge wishes to place on these wishes is discretionary.

Care order

If the court makes a care order under section 18 in respect of the child, the child is committed to the care of the Health Service Executive. Section 18(3) states that

- "Where a care order is in force, Health Service Executive shall –
- (a) have the like control over the child as if it were his parent; and
 - (b) do what is reasonable (subject to the provisions of this Act) in all the circumstances of the case for the purpose of safeguarding or promoting the child's health, development or welfare; and shall have, in particular, the authority to –
- ...
- (ii) give consent to any necessary medical or psychiatric examination, treatment or assessment with respect to the child ..."

Subsection (4) of the section emphasises this authority by stating:

"Any consent given by the Health Service Executive in accordance with this section shall be sufficient authority for the carrying out of a medical or psychiatric examination or assessment, the provision of medical or psychiatric treatment ... as the case may be."

It would appear from section 18 that the Health Service Executive has absolute authority over children in its care, and that any consent given by it to medical treatment for a child will be sufficient. Importantly, however, section 18(3)(b) states that this power is subject to the provisions of the Act. It is clear that this includes section 3 of the Act, which states that the powers of the Health Service Executive are subject to the rights of the parents under the Constitution, and section 47 of the Act, which states:

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

⁸⁵ S. 24 of the Act states:

"In any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of the parents, whether under the Constitution or otherwise, shall – regard the welfare of the child as the first and paramount consideration, and in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child."

⁸⁶ [1998] 1ILRM 460, at p. 475.

Thus, if the parents of the child disagree with the treatment authorised by the Health Service Executive, they can apply to the court to direct what form of treatment, if any, the child should receive.⁸⁷

Supervision Order

Under section 19(4) of the Act, if a child is the subject of a supervision order under the section, the court may:

“on the application of the Health Service Executive, either at the time of the making of the order or at any time during the currency of the order, give such directions as it sees fit as to the care of the child, which may require the parents of the child or a person acting *in loco parentis* to cause him to attend for medical or psychiatric examination, treatment or assessment at a hospital, clinic or other place specified by the court.”

Regarding children who are the subject of voluntary care, emergency care, interim care, care and supervision orders, the question as to who should be the decision-maker for the child and the degree of consultation necessary with the child and the parents should be determined by reference to the seriousness of the medical procedure involved. This appears to be the practice at present.

Special Care Order

The Children Act, 2001 inserted a new Part IVA into the Child Care Act, which provides for two new types of orders: a special care order, and an interim special care order.⁸⁸ Section 23B of the Act provides for a special care order. When the child is detained in a secure detention centre, section 23B(8) provides that sub-sections (3), (4), (6), (7) and (8) of section 18 of the Child Care Act 1991 apply, giving the Health Service Executive parental responsibility for the medical treatment of the child, so that parental consent is not necessary.

Section 23C(1) of the Act provides for an interim special care order. Section 23C(4) provides that sub-sections (3) and (7) of section 13 of the Child Care Act apply to the interim special care order as they apply to an emergency care order, so that Health Service Executive consent is sufficient, and parental consent is likewise not necessary.

In relation to special and interim special care orders, while the legislation would appear to allow parental wishes and indeed children's wishes to be disregarded, this is contrary to best practice as set out in the *National Standards for Children in Residential Centres, 2001*.⁸⁹ The National Standards recognise that young people and their families should be consulted about decisions which affect their

⁸⁷ This power of the District Court was emphasised in the cases of *Eastern Health Board v. District Judge James McDonnell and C.K., N.W. and C.K. Jnr (notice parties)* and *Eastern Health Board v. District Judge James McDonnell and P.D. and T.B. (notice parties)* [1999] 2 ILRM 382 and *In the Matter of section 52(1) of the Courts (Supplemental Provisions) Act, 1961: The Western Health Board v. Karen M.* Unrep. SCT 21st December 2001 (McGuinness J.).

⁸⁸ See generally G. Shannon, *Child Law*, (Roundhall Thompson 2005), ch. 11.

⁸⁹ Published by the Department of Health and Children and available on the Department's website www.dohc.ie. The Standards (at p. 1) state they are to be read in conjunction with the Child Care Act 1991, the Child Care Regulations 1995, Child Care (Standards in Children's Residential Centres) Regulations 1996 and Guide to Good Practice in Children's Residential Centres. The Standards also refer to the Report of Findings Relating to inspection of Children's Residential Centres (SSI 2001). According to a social worker involved with residential centres, social workers try to work with parents and explain why a course of action is appropriate. If, for example, a child is indicated for a sexual abuse assessment which is opposed by the parents, despite explanations, the decision is likely to be made by a case conference. Court orders may be sought by the Health Service Executive if there is an issue about treatment opposed by the parents on religious grounds.

lives and future,⁹⁰ and that parents are to be kept informed about events in their child's life, and are to have every opportunity to make a positive input to the care of their child, and are to be invited to participate in events such as medical and dental appointments.⁹¹

5. CHILDREN WHO ARE WARDS OF COURT

It is generally accepted that in exercising the jurisdiction of wardship, the courts have a wide scope in determining the future care of the child. As regards medical treatment, it is arguable that once a child has been made a ward of court, all medical decisions pertaining to the ward will be made by the court under the wardship jurisdiction. This was made abundantly clear in *In Re a Ward of Court*,⁹² where the court ordered that it would be in the best interests of the ward for the invasive medical treatment she was receiving to be withdrawn. However, there has been no reported case in Ireland dealing with wardship and the medical treatment of a minor. Drawing an analogy with the position of children in care and those who are being protected by the wardship jurisdiction of the court,⁹³ it would appear that the President of the High Court, in exercising the jurisdiction of wardship, would have a similar duty to ensure that the child was receiving adequate medical treatment, and would have the capacity to grant orders to that effect. Under Rule 65 of the *Rules of the Superior Courts*, any application for a child to be made a ward must be accompanied by an affidavit stating who is to be the guardian of the child. It is presumed that such a guardian would have considerable discretion to approve routine and minor treatment for the child.

In practice, the wards of court system for the care of children with no adequate guardians has been superseded by the child care system. However, the child care system has not superseded the wardship jurisdiction, and a number of children each year are made wards of court, primarily to provide for the management of their property. Typical circumstances in which this arises are the award of a substantial sum of money as compensation for an injury to the child.

The Law Reform Commission in its recent Consultation Paper, *Consultation Paper on Law and the Elderly*,⁹⁴ recommended the abolition of the wardship jurisdiction and its replacement with a new Public Guardianship system.⁹⁵ The Commission focused on the needs of the elderly, and did not address the differing needs and constitutional position of child wards. The Commission recommended that a public guardian or a tribunal could make decisions regarding the medical treatment of "Protected Adults". Due to constitutional limitations, this system would clearly not be appropriate for children without due consideration of the constitutional rights of the family.

⁹⁰ Para. 4.1.

⁹¹ Para. 5.21.

⁹² *In Re a Ward of Court (No. 2)* [1996] 2 IR 79; [1995] 2 ILRM 401

⁹³ See, *infra*, for a discussion of the Health Boards and the Court under its inherent jurisdiction.

⁹⁴ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 32-2003)

⁹⁵ *Ibid.* at para. 4.61.

In any adaptation of the proposals recommended by the Law Reform Commission in relation to the proposed Public Guardianship system, we recommend that account should be taken of the constitutional position of children.

6. CHILDREN UNDER THE MENTAL HEALTH ACT 2001

In the treatment of adults, a person can be a voluntary or an involuntary patient in a psychiatric institution. Voluntary patients admit themselves to the hospital, and can discharge themselves whenever they decide. They can also only be treated with their consent. An involuntary patient is detained without his or her consent, either because he or she is too ill to have the mental capacity to consent to treatment and detention, and/or because his or her mental condition is such that he or she would be a danger to self or others were he or she not detained.⁹⁶

It is interesting to observe how this general rule regarding the medical treatment of mentally unwell adults interacts with the position of mentally unwell adolescents.⁹⁷ There seems to be an anomaly in the Mental Health Act, 2001.⁹⁸ Involuntary admission, by its very definition, means the admission of a patient to a psychiatric institution without his or her consent, and by the very fact that a child arguably cannot “consent” to medical treatment as such, it would appear that any child admitted to a psychiatric institution should be regarded as an involuntary patient. However, under the 2001 Act, children who are admitted to psychiatric institutions with the consent of their parents are treated as voluntary patients, and do not have the protections available to involuntary patients, such as review of their detention under section 25 (below). Therefore, while children may be able to consent to certain types of medical treatment,⁹⁹ treatment may be involuntarily administered to them if they are patients in an institution while they are still regarded as “voluntary patients”.

The definition of “child” in section 2 of the Mental Health Act 2001 refers to a person under 18 years of age (other than a person who is or has been married). This is inconsistent with section 23 of the Non-Fatal Offences Against the Person Act 1997, which provides that minors of 16 years have competence to consent to and refuse medical treatment, as though they were of full age. This conflict should be resolved, and **we recommend that the Mental Health Act 2001 should be amended to be consistent with section 23 of the Non Fatal Offences Against the Person Act 1997 so that children of 16 and 17 years are presumed to have capacity to consent to, or refuse, medical psychiatric**

⁹⁶ Involuntary detention is provided for under Part 2 of the Mental Health Act 2001.

⁹⁷ See in general O’Neill, *Irish Mental Health Law*, Firstlaw 2005, pp.93-94, 144 et seq. Also G. Shannon, *Child Law*, (Roundhall Thompson 2005), ch. 7.

⁹⁸ The relevant sections are not yet in force.

⁹⁹ In s. 56 of the Mental Health Act 2001, consent is defined, in relation to treatment, as meaning consent freely obtained without threats or inducements, where (a) the consultant psychiatrist responsible for the care and treatment of the patient is satisfied that the patient is capable of understanding the nature, purpose and likely effects of the proposed treatment, and (b) the consultant psychiatrist has given the patient adequate information, in a form and language that the patient can understand, on the nature, purpose and likely effects of the proposed treatment.

treatment as if they were of full age. In relation to voluntary admission, children of 16 and 17 years should be treated as adults.

We recommend that the consent of the parents or guardians of a child under 16 years should be sufficient proxy consent for the admission of that child to a psychiatric hospital or the child's treatment there, where a doctor is satisfied that the child does not have capacity, in view of his or her age, maturity and understanding, to consent to or refuse medical treatment, that the child is suffering from a mental disorder warranting voluntary admission, that such admission is in the child's best interests, that the child will be admitted to a hospital with appropriate facilities for the care and treatment of children with mental illness and that no more appropriate alternative method of treatment is available at the time. We recommend that such a child's admission be subject to automatic review by a Mental Health Tribunal.

In the event that the child is judged to have sufficient capacity in view of his or her age, maturity and understanding to consent to or refuse medical treatment, the child should be entitled to agree to voluntary admission or be admitted in accordance with the procedures under the Mental Health Act 2001 as though the child were an adult.

In relation to all persons under 18 years of age, we recommend that a court should not direct involuntary admission unless it is satisfied that the child is incompetent to make a decision about the need for hospitalisation, the child will be admitted to a hospital with appropriate facilities for the care and treatment of children with mental illness, the hospital proposed to admit the child will provide treatment which is appropriate for the child's condition, and that an individualised treatment plan has been written and presented to the court by the admitting hospital.

Section 25(1) of the Mental Health Act, 2001 provides for the involuntary admission of children by the Health Service Executive. Under this section, if the Health Service Executive is of the opinion that a child is suffering from a mental disorder and that the child requires treatment, the Health Service Executive can make an application to the local District Court for an order authorising the detention of the child in an authorised centre. This is subject to the child being examined by a consultant psychiatrist.¹⁰⁰

If the parents of the child, or either of them, or a person acting *in loco parentis* to the child either refuse to consent to the examination of the child by a consultant psychiatrist, or if they cannot be found, the Health Service Executive may make an application under section 25(1) without any prior examination of the child by a psychiatrist.¹⁰¹ In such a case, if the District Court is satisfied that there is "reasonable cause" to believe the child is suffering from a mental disorder, the Court can direct the Health Service

¹⁰⁰ S. 25(2) of the Mental Health Act 2001.

¹⁰¹ S. 25(3) of the Mental Health Act 2001.

Executive to arrange for the examination of the child, and require a report from the consultant psychiatrist on the issue to be furnished to the court.¹⁰²

There is no legislative provision for the situation which arises if the child refuses to be examined by a psychiatrist under section 25 of the Mental Health Act 2001. In that event, we recommend that legislative provision be made for other evidence to be brought before the court to enable it to decide that the child may be suffering from a mental disorder, and to enable it to make an order that the child should be detained for assessment.

At present in the case of non co-operation by the child, the Health Service Executive must get a care order and force the production of the child under sections 34 or 35 of the 1991 Act, if necessary by obtaining a search warrant. Once the child is in the care of the Health Service Executive, it may seek directions under section 47 on any matter touching of the welfare of the child. However, it should be noted that references to psychiatric examination, treatment or assessment under the Child Care Act 1991 do not include references to treatment under the Mental Health Act 2001.¹⁰³

If, following the consideration of the report furnished under section 25(1) or 25(5), the court is “satisfied” that the child is suffering from a mental disorder, the court must make an order that the child be admitted and detained for treatment in an approved centre for a period not exceeding 21 days.¹⁰⁴ Both detention and treatment are ordered. During the course of these 21 days, on an application of the Health Service Executive, the period can be extended for a further 3 months at the discretion of the court.¹⁰⁵ This period can then be extended for a further six months, and by periods not exceeding six months thereafter.¹⁰⁶ This is subject to the court being satisfied that the child is still suffering from a mental disorder following a report of a consultant psychiatrist. Any application under section 25 of the Act can be made *ex parte*.¹⁰⁷ While it is of importance that the detention of children is periodically reviewed, it is unclear why the court, as opposed to the Mental Health Tribunal, has jurisdiction over this.¹⁰⁸

Importantly, sections 25 and 26¹⁰⁹ of the Child Care Act 1991 apply to proceedings under the section, thus permitting the child who is the subject of proceedings under section 25 of the Mental Health Act 2001 to be legally represented at the proceedings. If a child is not a party, a guardian *ad litem* can be appointed in certain circumstances. If the child becomes a party, the child will lose his or her guardian *ad litem*. Section 24 of the 1991 also applies, which means that the welfare of the child is to be considered as paramount, and that the wishes of the child, where possible, should be taken into account,

¹⁰² Ss. 25(4) and 25(5) of the Mental Health Act 2001.

¹⁰³ S. 25(15) of the Mental Health Act 2001.

¹⁰⁴ S. 25(6) of the Mental Health Act 2001.

¹⁰⁵ S. 25(9) of the Mental Health Act 2001.

¹⁰⁶ S. 25(10) of the Mental Health Act 2001.

¹⁰⁷ S. 25(7) of the Mental Health Act 2001.

¹⁰⁸ Part 3 of the Act provides for the review of the detention of patients. Adults who have their detention reviewed are automatically entitled to legal representation, they are examined by two consultant psychiatrists, and the Tribunal which is composed of a lawyer, a consultant psychiatrist and a lay person makes a decision as to their detention.

¹⁰⁹ S. 26 is not yet in force.

having regard to the child's age and understanding. However, there is a potential for conflict if the child wishes to refuse treatment, and his or her welfare is considered to require it. In such a case, the child's welfare will prevail over the child's wishes.

A child may be joined as a party to proceedings before the District Court under section 25 of the Mental Health Act 2001.¹¹⁰ The Court must be satisfied with regard to the age, understanding and wishes of the child and the circumstances of the case that this is necessary in the child's interests, and the interests of justice. The child does not have to be represented by a next friend, and may be represented by a solicitor, who may instruct counsel. In this event, the costs of legal representation must be met by the Health Service Executive, or another party as the Court directs. Even though the child may be joined as a party, the Court is not obliged to accede to a request that the child be present during the hearing or part of it, and may refuse if it considers, in view of the child's age and the nature of the proceedings, that it would not be in the child's best interests. Thus the Court may make an order that the child be detained in his or her absence, although if the child objects to this, he or she should be present and be heard. The Court may appoint a guardian *ad litem* to represent the child under section 26 of the 1991 Act,¹¹¹ at the expense of the Health Service Executive or another party, as the Court directs.

Section 61 of the Act deals with the medical and psychiatric treatment of children in respect of whom an order under section 25 is in force. It states:

“Where medicine has been administered to a child in respect of whom an order under section 25 is in force for the purposes of ameliorating his or her mental disorder for a continuous period of 3 months, the administration of that medicine shall not be continued unless either –

- (1) the continued administration of that medicine is approved by the consultant psychiatrist responsible for the care and treatment of the child, and
- (2) the continued administration of that medicine is authorised (in a form specified by the Commission) by another consultant psychiatrist, following referral of the matter to him or her by the first-mentioned psychiatrist,

and the consent or, as the case may be, approval and authorisation shall be valid for a period of 3 months and thereafter for periods of 3 months, if, in respect of each period, the like consent or, as the case may be, approval and authorisation is obtained.”

The drafting of the section is confusing. Given the presence of the word “either” in the first paragraph, followed by the word “and” at the end of paragraph (a), it is unclear whether two consultant psychiatrists need to approve further treatment, or whether approval by one or other psychiatrist is sufficient. Arguably, the former is the more appropriate. Also, the presence of the word “consent” in the final paragraph muddies the waters further. Exactly whose “consent” the section refers to is unclear: it may be a fictitious consent which is provided by proxy by either the treating psychiatrist or the court. The exceptions to this general rule are psycho-surgery¹¹² and electro-convulsive therapy, which the court must sanction in order for the hospital to administer.¹¹³

¹¹⁰ By virtue of s. 25(14) of the Mental Health Act 2001 and s. 25(1) of the Child Care Act 1991.

¹¹¹ By virtue of s. 25 (14) of the Mental Health Act 2001.

¹¹² The term “psycho-surgery” is defined in section 58(6) of the Mental Health Act 2001.

¹¹³ Ss. 25(12) and 25(13) of the Mental Health Act 2001.

We recommend that section 61 of the Mental Health Act be amended and clarified. We recommend that both the approval of the treating consultant psychiatrist and another consultant psychiatrist be required. We also recommend deletion of references to "consent" in section 61.

CHAPTER 7

CHILDREN'S SUCCESSION RIGHTS

1. INTRODUCTION

It is not unusual for the adult children of an elderly, widowed parent to inherit shares of the parent's estate. Cases where the successors are adults established in life, and no claims from a surviving spouse or dependant child supervene, are relatively straightforward.¹ In contrast, the succession rights of minor children, not yet established in life, are less clearcut. The major reason for this is the competing right to succession of the deceased's spouse. In such cases, children will inherit their shares (if any) after their surviving parent or stepparent has been provided for.

Children's succession rights in different jurisdictions

In Ireland, prior to the Statute of Distribution 1695, the traditional law on succession decreed that a man's estate should be divided into three parts, one third going to his wife, one third to his children and one third free to be disposed of by will. If he had no wife or no children, the proportion going to his survivor(s) was one half, with one half disposable by will. The Statute of Distribution 1695 abolished this custom, giving greater testamentary freedom to testators.

The notion of freedom of testamentary disposition was justified as a necessary aspect of the rights inherent in private property. However, it takes no account of the moral and legal obligations to family members which can be enforceable during the testator's lifetime, for example, by orders for maintenance made by a court. In proposing the legislation which became the Succession Act 1965, the Minister for Justice expressed this overriding responsibility: "In a country such as ours, which recognises the very special position of the family as a moral institution forming the necessary basis of social order, freedom to disinherit one's wife and children is a paradox which cannot be defended on any ground."²

In most systems of law there are rules of intestate succession which govern the division of property between spouse, children and sometimes other members of the family such as the parents of the deceased. The Irish Succession Act sets out largely non-discretionary rules of intestate succession.³ They have the advantage of being clear, though without the flexibility to deal with special circumstances which is available in cases of testate succession.

¹ Though of course subject to claims on the estate from creditors.

² Dáil Debates, vol. 213, col. 335

³ Section 56 (10) provides for some discretion on the part of a court to enable a widowed spouse to retain the family home.

In relation to testate succession, three general approaches have been developed in different jurisdictions to give family members and dependents legal right shares or an entitlement to claim “proper provision”.

In Scotland, Belgium, France, Spain, Switzerland and other continental countries, a fixed portion of a deceased’s estate is reserved to certain beneficiaries and cannot be disposed of by will. Only very seriously culpable conduct on the part of a beneficiary will disqualify him.

In Germany and the states of New York and Louisiana, certain relatives and dependants are entitled to prescribed shares of the estate, for which they can apply to the heir, and ultimately the court.

In common law jurisdictions, the concept of discretionary family provision was introduced by New Zealand in 1900 and adopted in due course in the different Australian jurisdictions, eight Canadian provinces, England and Wales and Northern Ireland. This does not reserve any specific share to spouses or children, but permits certain relatives and dependants to apply to the court for proper provision, which may be in the form of maintenance, property transfer, a lump sum, trust fund or whatever the court in its discretion judges appropriate.

The Succession Act 1965 implements the first approach for spouses, and the third approach for children.

2. RULES OF SUCCESSION

Intestacy

The rules developed to deal with intestate succession are influenced by the realities of the majority of cases to which they apply. Most people, men slightly earlier than women, die between 70 and 80 years of age. This has two main implications: a surviving spouse is usually past the age of income-earning through employment and is therefore dependent on whatever provision she and her husband (it is usually a widow) have been able to make in the course of their lives for their old age. This would include their home and any pension and capital. Taking a share of that common provision away from the survivor of a marriage increases the risk that a vulnerable and dependent old person would be deprived of resources to the benefit of the children. The second implication is that, usually, the children of a deceased person are mature or middle aged, established in life with earning power and therefore not financially vulnerable in comparison to an elderly parent.

In the 19th century it was common for the average life span to be considerably shorter, and for a surviving widow to be dependent on and the responsibility of her children, thus allowing a distribution of the family assets among the children on the death of the father. This is no longer the case, and it is

now accepted as desirable that a surviving spouse should remain financially independent if possible, in her existing home or a suitable alternative.

The modern rules of intestate inheritance still encompass certain of the principles of previous centuries. Priority is given to the spouse and children, with next of kin taking in a well defined order of priority; any children take in equal shares; any advancements are taken into account; and the State is the ultimate successor in the absence of any other. The trends introduced by legislation in the last century which affect the rights of children include the increasing primacy given to the surviving spouse. Although a *de facto* spouse or partner has no claim in this jurisdiction to a share in his or her partner's estate,⁴ the possibility of ownership of the family home passing by joint tenancy⁵ to a cohabitant may impact on the size of the estate available to children.

On intestacy, which is dealt with under Part VI of the Succession Act 1965, the estate of a deceased person is divided between a surviving spouse, if any, and the deceased's children (or their children if the deceased's children have died before the deceased). The share going to a child or children of a deceased person is therefore related to the legal right share of the deceased's surviving spouse. No distinction is made between real and personal property.

Section 67(2) of the Succession Act 1965 provides:

- (2) if an intestate dies leaving a spouse and issue-
the spouse shall take two-thirds of the estate, and the remainder shall be distributed among the issue in accordance with subsection (4).
- (3) If an intestate dies leaving issue and no spouse, his estate shall be distributed among the issue in accordance with subsection (4).
- (4) If all the issue are in equal degree of relationship to the deceased the distribution shall be in equal shares among them; if they are not, it shall be *per stirpes*.⁶

Since the coming into effect of the Status of Children Act 1987 on 14 June 1988, non-marital children have the same rights of inheritance as children born in a marriage. Adopted children have the same rights as natural children under the Adoption Act, 1952 to their adoptive parents' estates. However, stepchildren and other children to whom the deceased was *in loco parentis* are not regarded as issue, and it is questionable whether a child's adopted child, that is an adopted grandchild, would be regarded as issue of the adopted grandparent.⁷

Subsection (3) provides for distribution in equal shares among brothers and sisters. Subsection (4) provides for the inheritance by a deceased's child's children of his or her share. However, if the relationship to the deceased of his or her surviving issue is of equal degrees, for example, if

⁴ In the Law Reform Commission's Consultation Paper *The Rights and Duties of Cohabitees*, April 2004, the Commission recommends that the law should be changed to allow a cohabitee to apply to a court for discretionary provision out of the estate of his or her partner.

⁵ Where property is held on a joint tenancy and one joint tenant dies, the surviving tenant takes the deceased tenant's interest. The deceased tenant's interest does not become part of the deceased tenant's estate.

⁶ Shared according to rights of the person through whom the property is inherited. For example, children of the deceased will inherit equally, and if a son of the deceased predeceases his parent, his children will take his share between them.

⁷ Re Stamp deceased: *Stamp v Redmond* [1993] ILRM 383

grandchildren are the only issue to survive the deceased, then they will inherit in equal shares even though such shares may be greater or less than a share inherited through a parent. For example, a grandmother may die, leaving five grandchildren. Four are the children of her son, who predeceased her, and the other one is the child of her daughter, who also predeceased her. In such a case the five grandchildren would inherit equally, even though if either the son or daughter had survived, the child or children left without a parent would only get that parent's share.

The surviving spouse is entitled by section 56 to require appropriation of a dwelling house in which the surviving spouse was ordinarily resident at the time of the deceased's death as part of the spouse's share.⁸ Any household chattels may also be appropriated. If the spouse's share is not sufficient to cover the value of the house, then the share of any infant for whom the surviving spouse is a trustee may also be appropriated by the surviving spouse towards the house, in the interest of preserving the family home for the child as well as the spouse.

If issue but no spouse survive, the children take in equal shares, grandchildren take *per stirpes* unless there are no surviving children, in which case the grandchildren take in equal shares.

With the exception of judicial discretion conferred by section 56(10) described below, there is no judicial discretion to make greater provision for a particularly vulnerable member of the family, such as a disabled child. While this may be harsh in some cases, it has the advantage of certainty and equality.⁹

Testacy

Succession rights on the death of a testator are governed by Part IX of the Succession Act 1965, as amended. Section 111 prescribes a minimum entitlement for a spouse, and none for children. If the deceased has children, the surviving spouse's legal right share is one third of the deceased's estate, even if no provision or a lesser provision is made by will. If the deceased has no children, the spouse's legal right share increases to one half. If a bequest to a spouse is made by will, the spouse may elect to take under the will, or take the legal right share.¹⁰

If a testator dies only partly testate, the part of his estate which he has not devised by will is treated as though it were his only estate and is divided as though on an intestacy, without regard to the property left by will.¹¹ A surviving spouse may elect to take either her¹² legal right share (one third or one half) or her share on the intestacy, together with any bequest under her spouse's will.¹³ In choosing to take her legal right share, she may elect to take any bequest which is less in value than the share, in partial satisfaction of it.¹⁴ Depending on what is gifted in the will, it may be more advantageous to take the

⁸ Subject to time limits and considerations affecting the viability of other property adjoining the house.

⁹ See further below.

¹⁰ S. 115(1).

¹¹ S. 74.

¹² Demographically, a surviving spouse is more often a woman.

¹³ S. 115(2).

¹⁴ S. 115(3).

legal right share, or the gift plus share on intestacy. Of course, any entitlements of the surviving spouse will impact on the property which remains for the children. It commonly happens that a spouse inherits the main family asset, the family home, by survivorship under a joint tenancy, and also inherits under the spouse's will and /or on intestacy or partial intestacy.

3. THE DUTIES OF PERSONAL REPRESENTATIVES AND TRUSTEES IN THE PROTECTION OF CHILDREN'S SUCCESSION RIGHTS

Protection of minors' succession rights in Ireland

Reconciling the protection of children's property rights with the orderly administration of estates poses a challenge because of children's legal incapacity to act for themselves. In most cases, a child successor will have a parent or guardian who can represent his interests, who can consent to appropriations or settlements on his behalf, collaborate with the personal representative on the appointment of suitable trustees, and if necessary keep the trustees up to the mark. In a small number of cases minor beneficiaries may not be so fortunate, and the law seeks to protect the position of such children in a number of ways:

- If an executor is appointed in a will, the executor is presumed to be trustworthy as he is the choice of the testator. A prudent parent can therefore do much to protect his child's interests by appointing a good executor.
- If no executor is appointed, an administrator will be appointed. An administrator of an estate is required to swear an oath and give a bond (until recently usually an insurance bond) for double the gross assets. If there is a breach of the administrator's duty, the bond can be assigned by the High Court to a claimant to sue on. If an insurance company is involved in providing the bond for the administration of the estate, it will seek to ensure that satisfactory arrangements are made to secure the interest of a minor, for example, by the appointment of responsible trustees. The involvement of an outside party such as an insurance company can therefore serve to protect the position of minor beneficiaries. The bond however only secures the activities of the estate's administrator, and does not protect against any mismanagement by trustees appointed by the administrator.

Since 1st September 2004, insurance bonds are no longer required and administrators' personal bonds are accepted. Sureties are also no longer routinely required.¹⁵ This protection for minors will no longer exist as a matter of course in the future.

- The personal representative is responsible to a minor beneficiary until he appoints trustees in accordance with section 57 of the Succession Act 1965, whereupon the trustees become

¹⁵ The longstanding practice of routinely requiring insurance bonds and sureties in addition to bonds for applications for a grant of administration was changed from 1st September 2004, by a practice direction re Succession Act 1965, s. 34 (1), from the President of the High Court date 26 July 2004. One of the reasons for this change was that bonds and sureties were virtually never sued on. Other reasons were the anomalous distinction between executors (who required no bond) and administrators, the difficulties in getting reasonably priced insurance policies and the limited market for this kind of insurance, the difficulties in getting individuals to act as sureties with the increasing values of the property element of estates, the undesirability of exposing individual sureties to being sued for compensation when they have no control over any mismanagement of an administration, and the delays which obtaining sureties under these circumstances could cause.

responsible under trust law. If the personal representative omits to appoint trustees, he is considered the trustee.

- Under trust law, trustees owe extensive duties to the beneficiaries of a trust: primarily to act in good faith and in a responsible and reasonable manner, and also to secure and safeguard the trust property, invest it, account for it, provide information to the beneficiaries, distribute it and pay for a (minor) beneficiary's maintenance and advancement as appropriate. Trustees must not make a personal profit from the trust and if they fail to act correctly, they will be liable in damages for breach of trust and be required to make good any loss. A minor beneficiary's remedy in the event of trust arrangements failing to secure his interest is a right of action for breach of trust.

Difficulties can arise from the fact that minors are not in a position to call their trustees to account until reaching majority, when losses may have been incurred and money spent. Other family members who might be expected to look out for the interests of minors may not wish to get involved and confront dubious behaviour on the part of a trustee relation. In family situations it is not unusual to have a potential for conflict of interest between trustees and minor beneficiaries. For example, a minor may be left in the care of a mother/ trustee who is inclined to treat his property as her own, and who fails to account for it separately. Further, the mother/trustee may be vested with full ownership of a shared asset such as the family home,¹⁶ leaving the minor's interest off the title for practical reasons, and treating the entire property as her own to sell or mortgage. Another example of a potentially difficult situation is when grandchildren inherit from a grandparent's estate, bypassing their parent who however is appointed their trustee and who is naturally inclined to treat the children's property as family property.

Minors have a remedy in breach of trust for three years, after attaining their majority at 18, against trustees who failed to perform their duties of accounting for and protection of trust property so that it could be handed over intact.¹⁷ If fraud or fraudulent breach of trust is involved, there is no limitation period for seeking a remedy for breach of trust. But in most cases a right of action is not a satisfactory remedy if there is a close family bond and personal loyalty, because a claim will cost money to mount, because it will not restore money which has been lost, and because the scandal of a public hearing would not be worth it. It would be better if there were a pre-emptive solution, for example an independent authority to which trustees would have to account periodically and which could intervene to protect the minor's property if it were perceived to be at risk.

¹⁶ Appropriated for herself and the minor for whom she is trustee under section 56 of the Succession Act 1965. In order to be able to appropriate a child's interest, the surviving spouse would have to be appointed as one of at least two trustees for the child's share by the personal representative under section 57, unless the surviving spouse is also the personal representative and a trustee, in which case an assent in the vesting of property may be implied by the circumstances, for example, where the administration of the estate has been completed. See *Mohan v Roche* [1991] 1 IR 560, which held that an assent was desirable but not necessary in circumstances where the interest in the land could not be vested in anyone other than the personal representative. However, in that case the personal representative held her interest beneficially and not partly as trustee. See also Spierin and Fallon, *The Succession Act 1965 – A Commentary*, (3rd ed. 2003), p. 171: "Good practice would dictate, however, that the vesting of assets in trustees should not be implied (in particular for taxation reasons) and that assets should be properly vested in the trustees in such capacity. Where land is involved, this will require a deed of assent" (s. 53 Succession Act 1965).

¹⁷ S. 43, Statute of Limitations 1957 and s. 127, Succession Act 1965.

The protection of minor's interests was noted as a matter of concern by the Law Reform Commission in its Consultation Paper on *Trust Law, General Proposals*.¹⁸ It stated:

“For example, one spouse may die and leave his or her estate to the surviving spouse and child(ren). In such circumstances the surviving spouse will act as trustee for the children's share and should transfer the property when the children become of full age. In such circumstances, because there are no control procedures in place, if the property is not eventually transferred, the children may never become aware of their entitlement. The consequences of divorce and re-marriage may also affect the entitlements of children of the original marriage.”

The Law Reform Commission recommended that at least two trustees or a corporate trustee should be required, even in situations not involving minors.

Protection of minors' succession rights in England and Wales

The position in England and Wales is similar to that in Ireland in relation to the protection of minors' succession rights. The personal representatives of a deceased must either act themselves as trustees or appoint other trustees to receive property on behalf of a minor, and thereafter the protection afforded is that of trust law.¹⁹

Protection of minors' succession rights in Scotland

In Scotland, the position is now governed by the Children (Scotland) Act of 1995, sections 9 and 10. The provisions of these sections apply not only to children who inherit property, but also to those who acquire property in other ways, for example, by way of damages arising out of a civil case.

Prior to the 1995 Act, parents and guardians were subject to the rules governing “judicial factors”, which involved the factor in preparation of inventories and accounts and keeping of separate accounts for the child's money. The problem was that the rules were not enforced, and were cumbersome and not realistic for small sums of money. The Scottish Law Reform Commission identified two problems: the lack of guidance for an executor who had doubts about the transfer of property to a parent or guardian in whom he did not have confidence, and the cumbersome procedures for accounting when the property involved was relatively small. The Commission recommended that where a bequest to a child exceeded £20,000 in value, the executor should request directions from the Accountant of Court's office. In the case of lesser sums, the executor should have the option of seeking directions.

In the event, the section 9(1) applies where:

- (a) property is owned by or is due to a child;
- (b) the property is held by a person other than a parent or guardian of the child; and

¹⁸ LRC CP 35-2005 at p. 35.

¹⁹ See Kerridge & Brierley, *Parry & Clark, The Law of Succession*, 2002, 11th ed., p. 579 et seq.

- (c) but for this section, the property would be required to be transferred to a parent having parental responsibilities in relation to the child, or to a guardian, for administration by that parent or guardian on behalf of the child.²⁰

Section 9(2) provides (*inter alia*) that:

- (a) If the value of the property exceeds £20,000, [the executor or trustee] shall; or
- (b) If that value is not less than £5,000 and does not exceed £20,000, he may, apply to the Accountant of Court for a direction as to the administration of the property.

The same applies if the person holding the money is not an executor or trustee.

If a parent or guardian has been appointed as a trustee by a deed of trust to administer the property, the protective provisions in section 9(2) above do not apply and the person holding the property is required to transfer it to the parent or guardian trustee.²¹

When the Accountant of Court is applied to for directions, section 9(5) provides that he may

- (a) apply to the court for the appointment of a judicial factor (who may be the parent or guardian) to administer part or all of the property;
- (b) direct that all or part of the property be transferred to himself; or
- (c) direct that all or part of the property be transferred to the parent or guardian for administration.

In the event of option (c) being chosen, the Accountant of Court may include such conditions as he considers appropriate including

- (a) that no capital expenditure shall be incurred without his approval;
- (b) the securities and bank books representing the capital be submitted annually for inspection.

These conditions are likely to be less onerous than those applying previously to judicial factors, and can be tailored by the Accountant of Court to individual circumstances.

Section 10 deals with the rights and obligations of persons administering a child's property:

10. – (1) A person acting as a child's legal representative in relation to the administration of the child's property –
- (a) shall be required to act as a reasonable and prudent person would act on his own behalf; and
 - (b) subject to any order made under section 11 of this Act, shall be entitled to do anything which the child, if of full age and capacity, could do in relation to that property; and subject to subsection (2) below, on ceasing to act as legal representative, shall be liable to account to the child for his intromissions with the child's property.
- (2) No liability shall be incurred by virtue of subsection (1) above in respect of funds which have been used in the proper discharge of the person's responsibility to safeguard and promote the child's health, development and welfare.

²⁰ The restriction in section 9(1)(c), that the property must be *required* to be transferred to a parent or guardian before the requirements of section 9(2) apply, appears to leave a loophole of discretion for the executor, so that he may choose to avoid the requirements of section 9(2) and still pass on the property to the parent or guardian, without the benefit of directions from the Accountant of Court's Office.

²¹ S. 9(4)

The power of the legal representative to do anything the child would be able to do, if of full age and capacity, gives the representative greater power than if he were a trustee. Trustees have a primarily preservative function, and would normally not be entitled to dispose of property without petitioning the court. Subsection (2) gives the parent or guardian protection in expending funds for the welfare of the child, provided the expenditure is “proper”.

Section 11 of the Children (Scotland) Act 1995 is in many ways the core of the Act, giving a court wide powers relating to parental responsibility and a range of matters arising in connection with the welfare of children, including the protection of their property. It enables the Court of Session or Sheriff Court, on an application or of its own volition, to make orders dealing with the administration of a child’s property. Such orders may include an order prohibiting the taking of any step in relation to the administration of the property, appointing a judicial factor to manage the property or remitting the matter to the Accountant of Court to report on suitable arrangements for the future management of the property. There is provision for the views of the child concerned to be expressed and taken into account.²²

The significance of the Scottish reforms is that provision is made for the safeguarding of a child’s property interests, if over a certain size, in accordance with the judgment of the Accountant of Court, and this may involve control over who is to hold the property and how that may be supervised. This is potentially a greater degree of protection than that afforded under trust law to children in this jurisdiction.

Protection of minors’ succession rights in South Africa

In South Africa there is a more rigorous supervision of the succession interests of minors, set out in the Administration of Estates Act 1965. It is a default system which may be superseded by the terms of a will, so that the protections of the Act may be dispensed with. Salient points of the legislation are as follows:²³

- Security by insurance bond, mortgage bond or independent sureties by individuals are required in many instances. The costs of security are payable out of income derived from the property concerned, or out of the property itself.
- A natural guardian (such as a parent) may receive monies and movable property provided it is secured to the satisfaction of the Master of the High Court with jurisdiction.
- Any dealings with property in which a minor has an interest must have the approval of the Master or the court.
- If there is no natural guardian, a tutor (responsible for the person of the minor beneficiary) or a curator (responsible for both the person and the property) cannot act without being authorised by letters of tutorship or curatorship from the Master, whether the appointment is testamentary or by the court. However, the Master has limited discretion to refuse. Note however that a

²² S. 11(7).

²³ See D. Meyerowitz, *The Law and Practice of Administration of Estates*, Juta & Co., 2004, chs. 20 and 21.

will may appoint trustees, who do not need a letter of appointment under the legislation. Unless dispensed with by will or by court decision, every curator²⁴ must furnish security to the Master's satisfaction before letters of appointment can be granted. If the curator does not perform his functions properly, the Master may enforce the security and recover the loss from the curator or from the sureties.

- On appointment, the curator must take the minor's property in charge, prepare an inventory and if necessary get a magistrate's warrant to take possession. Failure to do this is an offence. He must lodge the inventory within 30 days, and supplement it if further property turns up. Disposal of any of this property by the curator outside the course of ordinary business is an offence.
- On receipt of the inventory, the Master furnishes the register of deeds with a return showing the minor, the curator and the details of the property. The Registrar of Deeds must not register any transaction in respect of the property by the curator except in accordance with the will, the letter of appointment or an order of the Master or the Court.
- Accounts must be lodged annually by the curator with the Master in prescribed form, and must be accompanied by supporting documentation. The Master may require further information including the production of securities. Failure to produce accounts or comply is an offence, and enables the Master to get a court order for production.
- When the curator's duties are completed to the Master's satisfaction, he can apply to be discharged. This will usually be after submission of appropriate accounts to the Master and delivery of property to the beneficiary. If the curator fails to produce final accounts with vouchers, this is an offence.
- Money or investments may be dealt with in accordance with the will, or otherwise may be used as necessary for the protection of property or the maintenance and education of the minor. Otherwise funds are required to be deposited in the Guardian's Fund through the Master, who may however authorise a different investment if it can be shown to be to the benefit of the minor. The standard of care for investments is that of the prudent man, the investment must be safe and secure and not exposed in any way to any business risk. The sale of landed property requires the approval of the Master or the court.
- Subject to provision otherwise by will, if a natural guardian wishes to sell or mortgage property in which a minor has an interest, it must be shown beyond all reasonable doubt to be to the advantage of the minor before the Master or court will authorise it. The Master's consent is required for partition and subdivision.
- A curator is entitled to remuneration out of income derived from the property or from the property itself. The rate can be set in the will or is in accordance with a prescribed tariff and it must be taxed.

²⁴ In the following text, the term is used to include a tutor.

- On application by the curator, the Master may authorise payment out of the Guardian's Fund of money belonging to the minor beneficiary, whether capital or income, on a regular or occasional basis.

The main difference between this system and that under section 56 of the Succession Act 1965 is the relative lack of accountability for trustees in this jurisdiction in contrast to the considerable accountability of curators under the South African system.

- In South Africa, money is only paid over to natural guardians if it is secured and curators must provide security (at a possible cost to the estate); in Ireland, money is paid to trustees, who are not required to offer any security.
- In South Africa, realising the security if the estate is not properly administered may be done by the Master; in Ireland, this must be done by the beneficiary or someone on his behalf.
- In South Africa, the Master takes the initiative to have a minor's interest noted on the register of deeds; in Ireland, the practice is to keep a minor's interest in land off the title.
- In South Africa, the curator's reports and accounts are required annually if not more frequently; in Ireland, while trustees have an obligation to keep accounts and to account to beneficiaries, there is no independent authority to ensure they do.
- In South Africa, money not needed for the minor or his property is paid into the Guardian's Fund, unless a case is successfully made to the Master that it should be invested elsewhere; in Ireland, money is required to be kept in a separate bank account and to be dealt with in the utmost good faith for the purposes of the trust, but there is no independent authority to ensure this happens.
- In South Africa, any transactions involving real property must be approved by the Master; in Ireland, the trustees do not need any outside approval.

Interestingly, the regime in South Africa goes further in supervising the protection of minors' property than the system in Ireland for the estates of minor wards of court. Although the majority of people who are made wards of court in this jurisdiction are elderly, there is provision for minors to be made wards and this is mainly done in the event of a large monetary award being made to the minor, (now often in excess of €3 million) and the court directing that a wardship application be brought. These are cases where, because of the size of the award and the care needs of the minor, the case needs to be managed on an ongoing basis. Another situation is if there is a need to order medical treatment against the wishes of the parents or the minor.²⁵

²⁵ In the great majority of cases in which minors receive damages for personal injuries, the funds are lodged in court without the minors being made wards. Interim applications for payment pending the minor's majority are made to the Master of the High Court. See further Shatter, *Family Law*, 4th ed. 1997, pp. 595 – 599 for the range of circumstances in which the wardship jurisdiction may be used.

Minor wards of court

Rule 65 of the Rules of the Superior Courts governs applications for making minors wards of court. There is no obligation on a guardian or trustee of a minor to account annually to the Registrar of Wards of Court. In contrast, the Committee of the estate of an adult ward has specified accounting duties:

- to apply for and receive monies on behalf of the ward;
- to apply money for the ward's maintenance and benefit and payment on the outgoings of his property, where authorised by the President;
- to lodge money to the credit of a separate bank account for the ward's estate;
- to produce annual accounts of the ward's affairs, and otherwise as required by the Registrar and lodge accounts verified by affidavit with supporting documentation in the Office of the Wards of Court, and attend as required by the Registrar to have accounts taken and passed; and
- to satisfy the Registrar that sureties are solvent and present in the jurisdiction.

If the Committee fails or delays, there are sanctions ranging from withholding of his fees to his removal as committee. It is anomalous that the persons dealing with the affairs of adult wards are accountable, while those dealing with minor wards' affairs are not.

Rule 65 provides for the appointment of a guardian for a minor ward. Section 10 of the Guardianship of Infants Act 1964 details the powers and duties of guardians:

10. (1) Every guardian under this Act shall be a guardian of the person and of the estate of the child unless, in the case of a guardian appointed by deed, will or order of the court, the terms of his appointment otherwise provide.

(2) Subject to the terms of any such deed, will or order, a guardian under this Act-

(a) as guardian of the person, shall, as against every person not being, jointly with him, a guardian of the person entitled to the custody of the child and shall be entitled to take proceedings for the restoration of his custody of the child against any person who wrongfully takes away or detains the child and for the recovery, for the benefit of the child, of damages for any injury to or trespass against the person of the child;

(b) as guardian of the estate, shall be entitled to the possession and control of all property, real and personal, of the child and shall manage all such property and receive the rents and profits on behalf and for the benefit of the child until the child attains the age of [twenty-one] years or during any shorter period for which he has been appointed guardian and may take such proceedings in relation thereto as may by law be brought by any guardian of the estate of a child.

If the only step necessary to protect the property of a ward is the transfer of funds into court, it will not be necessary to appoint a guardian, (unless a guardian is needed for other purposes). The duties of a guardian do not include accounting for the ward's property to any other person or authority. However, a guardian of the estate is regarded as his ward's trustee, receiving rents and profits "on behalf and for the benefit of the child".²⁶ A guardian may apply to the court under section 11(1) of the Guardianship Act 1964 for directions on any question affecting the welfare of the child.

²⁶ See also Shatter, *Family Law*, 4th ed. 1997, p. 569.

If however a guardian is considered necessary for a minor ward, security in the form of insurance bonds or personal sureties are technically required but are proving difficult to get. The Registrar gives directions regarding the nature and amount of security to be given by a guardian, who is the equivalent of the curator in South Africa. If income only is paid over to the guardian, the usual amount of an insurance bond is twice the annual income of the ward to cover the event of the guardian failing to account to the Registrar for all monies received on behalf of the ward.

On appointment the guardian must collect up the ward's property and secure it, and pay debts although the maintenance of the ward has priority. The President can authorise the guardian to deal with property for example by sale, mortgage and lease, and has wide power to decide matters affecting the ward's life such as his custody and residence, education and holidays, the management of property and payment of maintenance out of funds in court.

An application to make a minor a ward of court currently costs in the region of €5,000. For supervision of the ward and administration of the ward's estate, the costs to the ward's estate are any legal fees, court fees and stamp duty, and a percentage of the clear annual income after the first €900, ranging from 2.5% to 4%, which is payable to the Courts Service capped at a maximum of €750.²⁷ Remuneration of a guardian is on terms and conditions as the President may decide, but no costs or expenses out of the ward's estate are usually allowed for any work properly done by the guardian personally and not requiring professional assistance. Reasonable legal, accounting and banking expenses are allowed. For an estate of any but the smallest size, this seems to be a modest charge in return for the supervision and security afforded by the Office of the Wards of Court.

However, the Courts Service has undertaken a review of the fees payable in relation to wards of court and is proposing an annual case management fee to replace the court percentages now charged, which would reflect the work involved in managing each case. It is likely, therefore, that the cost of the Wards of Court Office monitoring the activities of committees is set to increase in the future.

If guardians of minor wards were currently accountable to the Registrar of Wards of Court in the same way as are the committees of adult wards, it would be straightforward to suggest that the trustees and guardians of minors who succeed to property should be accountable to the Registrar on an annual basis until the minor reaches majority. Recognising the lack of an existing supervisory role for the estates of minors, the possible increased cost implications in the future and the difficulty in getting additional resources for the Wards of Court Office to take on such a role, we nevertheless believe that the protection of minors' property rights does require accountability by trustees to an official body such as the Office of the Registrar of Wards of Court.

²⁷ Supreme and High Court (Fees) (No. 2) Order 2001, SI 488/01, Schedule 2, Part 1, § 2.

Law Reform Commission proposals for recasting the wards of court system for the elderly

The Law Reform Commission is currently working on proposals for reform of various aspects of the law affecting the elderly, the wards of court system among others. It published a Consultation Paper on Law and the Elderly²⁸ which proposed replacement of the wards of court system with a guardianship system involving personal guardians, a public guardian, a tribunal and a court or President of the High Court. While the needs of elderly adults in need of protection are often different from those of minors, the system proposed could be adapted to serve the interests and special needs of minors without much difficulty, subject to the constitutional rights of the family. An interesting aspect of the proposals is that the Office of the Public Guardian could act even if a person was not formally a protected adult. If this principle were extended to minors, it would not be necessary for a minor to be made a ward or protected person for the attention of the Public Guardian's Office to be brought to a possible abuse.

Forty years after the Succession Act 1965

Section 57 of the Succession Act 1965 envisages the use of trustees to protect the interests of minors and does not provide for, or mention, alternative, greater protections involving supervision of trustees such as might be afforded by the wards of court system, if such minors were adult wards. The question arises whether forty years after the enactment of that Act circumstances have changed to such an extent that reform of these provisions should be considered. In that period Irish society may have become less close knit so that it may be less likely that knowledge of a minor's inheritance will be known to relations, neighbours and friends, and through them, to the minor. This however is impossible to verify. In that period also the value of estates has tended to increase because of increases in the value of houses and land and general prosperity, and therefore the value of a minor's interest is likely to be greater than before in absolute and relative terms. In that period the age of majority has been reduced from 21 to 18 years,²⁹ so that young people come into control of their property at a younger age and the limitation period of three years which may apply³⁰ expires at the age of 21 instead of 24. However this may be balanced by the earlier maturity of many young people. These changes of themselves are not conclusive arguments for reform. Perhaps the most important difference nowadays is the greater expectation on the part of the public that matters should be regulated to protect the vulnerable.

Information is not available on the number of minors who inherit property and to what extent abuses arise because of the actions or omissions of personal representatives and trustees. There is anecdotal evidence that child successors are not well protected, that they often do not know what, if anything, they have inherited, or how to find out about it. Their property, care and upbringing may be left to trustees who do not keep accounts or distinguish the child's property from their own (which can of course sometimes benefit the child). Abuse of trust powers or negligence may be suspected and the lack of supervision of trustees makes this more likely. In such circumstances it can also be difficult for a minor on reaching majority to find out exactly what his inheritance is, its final value and how to take

²⁸ June 2003

²⁹ Age of Majority Act 1985

³⁰ 3 years under section 127 of the Succession Act 1965, reduced from 6 years for breach of an express trust under s. 43 (10) (a) of the Statute of Limitations 1957

possession of it. The proportionate share of an estate (provided it is solvent) may be discernable in the absence of a will by operation of law, or from any will available from the Probate Office, subject to the rules of advancement, partial insolvency of the estate, or other provision being made outside the terms of the will such as a settlement. While an Inland Revenue Affidavit will be available on the probate or administration file in the Probate Office, the final accounts will not be, and will usually only be found on the file of the solicitor acting for the personal representative, provided that a solicitor was involved and the personal representative did not make a personal application. Such files may be destroyed or untraceable.

The likelihood is that the number of minors inheriting property worth more than a threshold amount, say over €50,000, is quite small. Should such minors not be afforded the same protection as that afforded to elderly vulnerable people who are made wards of court?³¹ Like adult wards, minors and their property may be in need of protection against members of their families and others who can exploit their vulnerability. The very fact of a default system of accountability is likely to pre-empt abuses, and the supervision afforded can result in intervention to minimise loss which may be irrecoverable. The cost to the estate of a minor of such supervision should be relatively modest, based on current charges by the Office of Wards of Court, although it is accepted that these costs will increase. Additional costs could be incurred, however, in the preparation of accounts, for example, and it would be important that such supervision with its related costs should not be applied to estates which are too small to reasonably support it and make it worthwhile. If a testator wished, he could exempt any trustees appointed from supervision and thereby avoid the supervision costs. However, the option of availing of supervision by a public authority is one which is not open to testators at present, and it may be welcomed by testators seeking to protect minors.

We recognise that making personal representatives and trustees accountable in this way may have the effect of making potential personal representatives and trustees more reluctant to take on the often thankless burden of acting in the administration of an estate. Nevertheless, proper administration does require the keeping of accounts and records, and if the law makes it clear that a certain standard is expected, some individuals will rise to it, and in other cases, professional assistance will have to be sought.

Pending any future reforms of the wards of court system in general, we recommend that a system of accountability for personal representatives and trustees of minors' inheritances be instituted in a like manner to the wards of court system for adult wards. Such a system should provide for supervision of the management of property of minors with a value over a threshold amount, which amount would take into account the relative costs and benefits of supervision.

³¹ According to the Law Reform Commission's Consultation Paper, around 160 individuals come into wardship each year, the number is rising, and the total number of wards is estimated at 2,600. Under 10% are minors.

In the context of the debate on reform of the wards of court system and the proposals for added protections for vulnerable elderly people, we recommend that a system of accountability by trustees for the protection of minors' estates be also considered, where the value of the interest would make the cost of such a system worthwhile. If abuses are suspected, any person should be able to alert the supervising authority, which should be empowered to investigate, make orders and impose sanctions. An additional objective of such a system should be to make transparent the details of the administration and disbursement of estates involving property inherited by minors.

It should be acknowledged that much can be done by individuals and their solicitors to ensure that proper arrangements are made to provide for the care of minors and property left to them in the event of the deaths of their parents. Careful arrangements for the disposition of property and selection of trustworthy trustees can usually accomplish all that is necessary for the protection of minors' interests. The recommendation above is to provide for those cases where such careful precautions have not been taken.

4. PROVISION FOR CHILDREN ON APPLICATION TO THE COURT UNDER S. 117

On the death of a parent, a child has no legal right share in the same way that a surviving spouse has. To remedy what may be the considerable moral injustice of a child being left unprovided for, section 117 of the Succession Act 1965³² gives a child in this position (who may be an adult child) the option of applying to the court for a discretionary award from the estate. The section provides:

117.—(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

(1A) (a) An application made under this section by virtue of Part V of the Status of Children Act 1987, shall be considered in accordance with subsection (2) irrespective of whether the testator executed his will before or after the commencement of Part V.

(b) Nothing in paragraph (a) shall be construed as conferring a right to apply under this section in respect of a testator who dies before the commencement of the said Part V.

(2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.

(3) An order under this section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.

(4) Rules of court shall provide for the conduct of proceedings under this section in a summary manner.

(5) The costs in the proceedings shall be at the discretion of the court.

(6) An order under this section shall not be made except on an application made within six months from the first taking out of representation of the deceased's estate.

³² As amended by the Status of Children Act 1987, s. 31 and the Family Law (Divorce) Act 1996, s. 46.

The section makes it clear that an application cannot affect the legal right of a surviving spouse and cannot succeed against a natural parent in respect of a legal right or intestate share or a devise or bequest. The rationale for this is that a surviving natural parent owes a moral obligation to provide for the child. Clearly, it would not be desirable or realistic to award part of the family property to a young child, and thereby hamper the surviving parent's free hand to act in the interests of the whole family. Equally valid considerations apply in the case of adult children. When an elderly parent dies, adult children are likely to be established in life and not need provision to the same extent as a surviving widow or widower, whose earning power will be much reduced, and whose home and security may be threatened by their inheritance claims.

However, a child will have a right to claim under this section if the surviving spouse is a stepparent or if the child is a non-marital child of the deceased, though not to the extent that the stepparent's legal right share would be affected. This recognises the divergent loyalties which arise in such situations. If such a claim is successful, the spouse's legal right share is not affected but any devise or bequest under the will is potentially vulnerable, as the Act does not provide that any such devise or bequest to the spouse will not be reduced to a figure less than the value of the legal right share.

Limitation period for section 117 application

The original time limit in subsection (6) was twelve months, and it was reduced to six months by section 46 of the Family Law (Divorce) Act 1996. While reducing the time period has the perceived advantage of speeding up the administration of estates, in practice it has been found to be too short a time period, particularly as it cannot be extended.³³ The administration of an estate may be delayed by other matters, for example, the right of a surviving spouse to make an election between a bequest and the legal right share, which does not expire until six months after the spouse has received notification or one year from the date of taking out representation, whichever is the later. In many cases, an extension of time from six months to twelve would make little difference to the finalisation of an estate's administration.

The short time limit also has the effect of forcing a decision to issue proceedings quickly, where more time would give an opportunity for more consideration, and possibly scope for a settlement.

In 1989, while the limitation period was still 12 months, the Law Reform Commission identified the inflexibility of the time limit as leaving the provision vulnerable to constitutional challenge.³⁴ It is possible that the absence of safeguards for minors, in particular the lack of flexibility in the time limit for a section 117 application and the absence of a duty on the part of the personal representative or anyone else to notify possible minor claimants or persons on their behalf, raises doubts over the section's compatibility with the Constitution. This is particularly so in light of a Supreme Court

³³ The lack of flexibility to extend was confirmed in *MPD v MD and MSD* [1981] ILRM 179. Submissions in relation to 6 months being too short a space of time were made separately by the Law Society's Probate, Administration and Taxation Committee (28 Aug 2002) and the Law Reform Committee (7 Nov 2003).

³⁴ *Report on Land Law and Conveyancing Law (1), General Principles*, LRC 30, 1989.

decision on a comparable provision, s. 49(2)(a)(ii) of the Civil Liability Act 1961, in the case of *O'Brien v Keogh*.³⁵ The provision applied the ordinary limitation period for the making of a claim to minors who had a parent or guardian who could act on their behalf to institute proceedings for compensation for a personal injury. An extended period could apply only to minors without a parent or guardian to act for them. The Supreme Court held that the right to litigate was a property right protected from unjust attack by Article 40.3.2 of the Constitution, and section 49 did not adequately protect or vindicate such a right of a minor in the care of a parent. The parallels of this decision with section 117 are clear, and if anything, the Succession Act provision is even more disregarding of the special position of children than the Civil Liability Act was, as all minor children, whether with people to act for them or not, are treated similarly.³⁶

All the submissions received by the Law Reform Commission in relation to the time limit were in favour of reform, either by extending the period beyond 12 months or (the majority) giving the court discretion to allow a longer period. The Commission recommended “that s. 117(6) of the Succession Act be amended so as to give a discretion to the court to extend the one year time limit within which applications may be made.”³⁷

In England and Wales, the solution to the time limit for family provision applications is to allow unfettered discretion to the court to extend the time limit for an application, but without requiring the personal representative to delay distribution because of a possible future claim.³⁸ The Law Reform Commission recommended the adoption of a similar provision, and protection for personal representatives similar to that in the English legislation.

There is much to be said for a cut-off point, in the interests of certainty. A period of three years after first taking out representation to the deceased’s estate would appear to be reasonable, when combined with a mechanism for independent decisions to be taken on whether section 117 applications should be made, proposed below.

We recommend that section 117(6) be amended to provide for a limitation period of twelve months from the first taking out of representation of the deceased’s estate,³⁹ and that on an application to the court, it should have discretion to extend the limitation period in the interests of justice up to a maximum period of three years from the first taking out of representation. A personal representative should not be prevented from making a distribution of the estate by the existence of this discretion once the standard limitation period has expired, and no liability should attach to a personal representative who distributes an estate after the standard limitation period but before any other application is made. However, once an application is made, the

³⁵ [1972] IR 144

³⁶ Note, however, *Moynihan v Greensmyth* [1977] IR 55, in which the Supreme Court upheld the constitutionality of the 2 year post death limitation period for survival of actions against the estate of a deceased under s. 9, Civil Liability Act 1961.

³⁷ At para. 47.

³⁸ Inheritance (Provision for Family and Dependents) Act 1975, ss. 4, 20, England and Wales.

³⁹ This would return the position to what it was before enactment of s. 46 of the Family Law (Divorce) Act 1996.

existing rule that an estate may not be distributed until the court has adjudicated on the application should be preserved. Any assets already distributed should be traceable in the hands of their recipients if so ordered by the court.

Independent decisions on section 117 applications

Whoever has care of a child after a parent's death may not know of the option of a court application under section 117 within the time limit. A personal representative's solicitor is under an obligation to his client and may not alert a potential claimant to the fact that he may have a claim, even if he privately believes this to be the case. Further, the child's carer may have an interest in the child not making an application, for example if the carer is a stepparent or sibling in whose care the child is left, who stands to lose part of an inheritance by will if an application on behalf of the child succeeds. In such a case, the stepparent or sibling owes no legal duty to provide for the child under the Succession Act in the event of his or her own death, so that when the stepparent or sibling dies, the stepchild or younger sibling will have no standing to make a claim against what was partly his or her natural parent's estate.

Another concern on the part of a person left caring for a child is the cost of such an application, and the uncertainty about the outcome. Section 117 provides that costs are at the discretion of the court, and the person acting on behalf of a child in these circumstances will not be assured of recouping the cost of a court application.⁴⁰ There is no obligation on the personal representative to inform the minor children of a deceased person of their right to make a section 117 application, and in some cases the personal representative may have a conflict of interest with a child's interest, as in the case of a stepparent or older sibling, above.⁴¹

A procedure is required:

- to protect the position of minor children and adult children under a disability of illness or mental incapacity, in accordance with the Constitution, and
- to give certainty so that the administration of the estate may proceed without the threat of future proceedings and the resulting difficulties.

⁴⁰ While younger children will generally have the strongest moral claims on their parents, and their applications are therefore more likely to succeed, there may be great uncertainty on the facts, for example if provision has been made, but arguably not enough provision.

⁴¹ Another example is given in Spierin and Fallon, *The Succession Act 1965 – A Commentary*, (3rd ed. 2003) at p. 319: "For example, a testator dies leaving his son and disabled daughter. He leaves all his estate to his son and appoints him sole executor. The son looks after the daughter. The son extracts the grant and the time limit expires six months later. There is no moral duty on the part of the son to look after his sister. There is a positive incentive on his part not have proceedings instituted under s. 117 on his sister's behalf."

In *MPD v MD* [1981] ILRM 179 Carroll J gave a further example. A father of a young family might leave a life interest to his wife for life, with remainder to his eldest child. The wife might accept this, intending to provide for the other children out of her life interest. If she should then die, the eldest child would take all and the other children would be unprovided for. In such a case, a discretion to extend the time limit for a section 117 application would be appropriate.

We envisage a procedure requiring an independent state assessment to decide on whether a section 117 application should be made, or not, within a reasonable time. The cost of such a procedure should be kept to a minimum.

We propose a Child Provision Assessment Procedure for the event that a minor child or adult child with a learning disability of the deceased is not provided for in a testamentary disposition, or where the parent has failed in his or her moral duty to make proper provision for that child, and where the surviving natural parent is not the surviving spouse of the deceased parent (because of remarriage). We propose that the personal representative should be placed under a statutory obligation to apply to the Registrar of the Wards of Court within three months of being appointed, to have an assessment carried out by his office, to review the facts of the case as applying to the child and make a reasoned recommendation on whether or not a section 117 application should be made. We envisage that the same officer could act in the case of more than one child in relation to the same estate. On completion of the written recommendation within a limited time, the Registrar would apply on notice to the personal representative to the Circuit Court, for consideration of the report by the Wards of Court officer and a decision by the Court on whether or not a section 117 application should be made. The expenses of this procedure, which should be kept at a modest level, should be born by the estate.

Guidelines should be drawn up to assist the Wards of Court officer to arrive at his or her conclusions. Such guidelines (to be periodically reviewed) would list matters to be considered by the officer such as the value of the estate and the child's potential share thereof, any offer of settlement of the child's interest, the cost/benefit of any arrangements including the section 117 application itself, other safeguards to secure the child's future (e.g. the setting up of a trust), the requirements of other beneficiaries of the estate and other resources already available to the child.

In making their assessments, officers should be afforded access to all relevant information by the personal representative. Officers should have standing to apply to the Circuit Court for an order to require disclosure of information, if necessary.

In many cases, the matter will be straightforward and will involve only a few hours work on the part of the officer, and be correspondingly inexpensive. In more complex cases, where the child may already be a beneficiary of a family trust, for example, the officer's work will be greater, but the role of the officer will be all the more important in securing constitutional protection of the child's property interest, and in giving certainty to allow the administration of the estate to proceed.

Where the Circuit Court directs that a section 117 application should be made, such application should be made within six months from that direction. In making a decision to order a section 117 application, the Circuit Court would be required to appoint a Guardian *ad Litem* to act for

the child. The Wards of Court Office should be consulted on whether an official would be in a position to act as Guardian *ad Litem* of the child in suitable cases. If circumstances require the Guardian *ad Litem* to be a professional, he or she should be paid by the estate. The Guardian *ad Litem* would be empowered to agree a settlement on behalf of the child, subject to Court approval.

Express power to rearrange disposition of estate

Section 117 does not clarify how the side effects of an award to a child for proper provision are to be dealt with. Clearly, the extra allocation of part of an estate to an existing or new beneficiary will impact on what remains for other beneficiaries. This question has arisen in a number of cases and the courts have taken upon themselves the power to set aside or adjust existing gifts in order to enable proper provision to be made.⁴² The power to do so can be considered to arise by implication, and for the avoidance of doubt, **we recommend that section 117 be amended to grant an express power to the courts to make additional orders to adjust the distribution of the estate, where the making of the section 117 order has distorted the relative values of the shares of the estate provided for by the testator.**

Dependent foster children, stepchildren and others

The principle of freedom of testamentary disposition is protected by the Succession Act 1965, and the discretionary power to adjust testamentary dispositions in favour of children under section 117 is not lightly exercised by the courts. In the following discussion, the extension of the right to make application under section 117 to dependent children who are currently not entitled to make such an application is not intended to undermine the general principle of freedom to bequeath property. Rather, it is intended to give discretion to the courts in exceptional cases, where non-natural children are able to show compelling reasons which would morally entitle them to some provision.

The Succession Act 1965 distinguishes between issue and children, issue being understood to include descendants of natural children as well as natural children and adopted children. There is authority that the adopted child of a natural child does not come within the definition of issue.⁴³ Foster children, stepchildren and others (such as grandchildren) who are dependent on the deceased do not have succession rights, nor are they entitled to make an application for discretionary provision under section 117.

Children to whom the parents of a family stand *in loco parentis* are entitled to maintenance under the terms of the Family Law (Maintenance of Spouses and Children Act) 1976. A “dependent child of the

⁴² *Re McG, McG v B*, 8 Nov 1978, unrep. HC and *Re FF, HL v Bank of Ireland*, 27 July 1978, unrep. HC, Costello J. See further Spierin and Fallon, *The Succession Act 1965 – A Commentary*, (3rd ed. 2003), p. 350.

While not directly concerning children, it would also be very helpful to have legislative guidance on what part of an estate the spouse’s legal right share should primarily be taken from.

⁴³ *Re Stamp, Stamp v Redmond* [1993] ILRM 383

family” in relation to a spouse or spouses means any child under 18 years, or under 23 if undergoing fulltime education,

(a) of both spouses, or adopted by both spouses under the Adoption Acts, 1952 to 1991, or in relation to whom both spouses are in *loco parentis*, or

(b) of either spouse, or adopted by either spouse under the Adoption Acts, 1952 to 1991, or in relation to whom either spouse is in *loco parentis*, where the other spouse, being aware that he is not the parent of the child, has treated the child as a member of the family.

A child over 18 or 23 is still regarded as a “dependent child of the family” if he is suffering from mental or physical disability to such extent that it is not reasonably possible for him to maintain himself fully.⁴⁴

This maintenance legislation recognises the reality of families which include children other than natural children. It would be consistent to extend this recognition to proper provision being made for dependent children in the event of the death of the person in whose care they are living.

Certain foster children are now treated in the same way as natural children by taxation legislation for gift and inheritance tax purposes.⁴⁵ It would also be consistent with this legislation to extend any assumed parental responsibility to responsible and reasonable provision after death.

The European Convention on Human Rights Act 2003 brings the jurisprudence of the European Court of Human Rights into Irish law, subject to compatibility with existing Irish law interpreted where possible to be compatible.⁴⁶ The wider definition of family developed by that court may now lend weight to the claim of children in a family relationship, who would not qualify under the Succession Act as interpreted heretofore, to be provided for. The caselaw of the Court has tended to favour legal certainty over individual rights, and it remains to be seen whether this body of law will enable the definition of “child” to be extended, or whether a declared incompatibility will result in a change in the law.⁴⁷

Grandchildren are given a specific right to apply in several Australian jurisdictions, but restrictions are imposed in others, such as that the grandchild’s parents must either be dead or not maintaining the grandchild. In Queensland a grandchild may apply as an under-18-year-old dependant.

In Queensland anyone under 18 who was being wholly or substantially supported by the deceased at the time of death may apply for provision, including of course a former stepchild or grandchild. Other young people may apply as dependants or members of the household of the deceased in New South Wales.

⁴⁴ Family Law (Maintenance of Spouses and Children Act) 1976, s. 3.

⁴⁵ Finance Act 2001, s. 221. They are children who have been formally fostered under the statutory provisions, or who have lived with the disponent and under his care for a period of 5 years, and were maintained at his expense. S. 222 extends the gift tax exemption for children to adopted children inheriting from their natural parents.

⁴⁶ S. 2.

⁴⁷ See further Egan, “Succession Rights under the European Convention on Human Rights”, in Breen, Casey and Kerr, *Liber Memorialis Professor James C. Brady*, (2001), p. 203.

We recommend that qualifying foster children, dependent stepchildren and other dependent children should have the right to apply to the court for discretionary provision on the basis of a failure of the deceased's moral duty.

The stepparent *in loco parentis*

The question of a moral claim on a stepparent can also arise, where the stepparent has acted *in loco parentis*. For example, a stepchild raised in a family with stepsisters and brothers may have been fully integrated into that family, but on an intestacy of the stepparent, may suffer the invidious distinction of being the only child left unprovided for. We believe that in the small number of cases in which circumstances such as these arise, it would be desirable to give to the stepchild, whether still a dependent minor or an adult, the right to make a claim under section 117 of the Succession Act, on a par with natural children. **We recommend that in cases where a deceased stepparent has been *in loco parentis* to a child, that child, whether still a dependent minor or otherwise, should be granted the standing to make an application under section 117 of the Succession Act.** It will of course still be necessary for the stepchild to show that the deceased had assumed a moral duty to make provision.

If the above reforms are accepted, the question arises whether the relationship of stepchild should depend upon the subsistence of the marriage which brought it into being. Even though the marriage between parent and stepparent may be dissolved, the relationship between stepchild and stepparent may continue.

It was held by the Full Court of the Queensland Supreme Court, overruling previous decisions, that the relationship of stepchild and stepparent ceases to subsist after the termination of the marriage which created it, whether by divorce or death.⁴⁸ This interpretation however is not necessarily binding on other Australian jurisdictions, and has been strongly criticised as distorting family relationships which may have developed between the stepchild and parent. The ruling potentially puts a stepchild in conflict with a stepparent, by requiring any claim for proper provision to be made at the time of the parent's death and therefore requiring the child to compete for family resources with the stepparent, instead of being able to wait until the stepparent's death.

This is illustrated by the following example:⁴⁹

- A and B marry and have a child Janice.
- A and B divorce. A marries C and B marries D.

⁴⁸ *In re Burt* [1988] 1 Qd R 23 at 29, also *Re Marstella*, [1989] 1 Qd R 638, also reported at *Glover v Executors, Estate of Marstella (Decd)* (1988) 12 Fam LR 787.

⁴⁹ Taken from NSW Law Reform Commission Issues Paper 11 (1996), on Uniform Succession Laws: Family Provision, at 2.4.

- If the stepparents predecease the parents, Janice will be able to make a family provision application against four estates, that is those of her parents A and B and her stepparents C and D.
- But if the parents predecease the stepparents Janice will have to make application on the death of each of her parents: she cannot wait and apply on the subsequent death of the former stepparent, even although the former stepparent may have inherited her parent's estate: she will have to compete with the stepparent in the application.
- If Janice could defer making an application until the death of the stepparent, entirely different considerations would govern the application, including how much the parent had left the stepparent and the other obligations of the stepparent at the time of the stepparent's death. She would not have to compete with the stepparent.

The limitation of the stepchild-stepparent relationship can also be criticised on the ground that it unnecessarily limits a court's jurisdiction in an area where judicial discretion has been introduced to achieve fairness.

We recommend that the relationship between stepparent and child should survive the dissolution by death or divorce of the marriage creating it, for the purposes of a stepchild's entitlement to make a section 117 application. This would not remove the requirement for the child to show that the stepparent assumed a moral duty to make provision.

Family property and the stepchild

There is another set of circumstances where the absence of a section 117 remedy may be unjust. This is where the deceased natural parent has left all his or her property to the stepparent, and the stepparent has ignored the moral claim of a stepchild for proper provision out of what was the estate of the natural parent, and has left the property elsewhere, for example, to members of his or her own family. If the reform above is adopted, a stepchild will be able to argue these facts to support his argument that the stepparent had a moral duty to make provision.

Assisted conception

As yet in Irish law, there is no special provision for the status and position of children born as a result of new techniques of assisted conception, including surrogacy or artificial insemination with donated sperm or ova. Therefore the existing principles and presumptions apply, for example, that a child born in wedlock is presumed to be the child of the husband unless proved otherwise. Cases must be decided by the courts on the basis of laws which do not take account of these new developments, as happened in the English case of *X, Y and Z v UK*, ultimately decided by the European Court of Human Rights.⁵⁰

⁵⁰ (1997) 24 EHRR 143. This case involved a transsexual father (formerly a woman) X, who could not be registered as the parent of the child Z, born as the result of artificial insemination of the mother Y arranged on the initiative of both X and Y. The European Court of Human Rights accepted that family life existed on the facts, but held that the absence of intestate and tenancy succession rights did not constitute an infringement of the Convention. "In the Court's view, there was no common European standard with regard to the granting of parental rights to transsexuals or the manner in which the social relationship between a

Other jurisdictions have taken the initiative and are grappling with the results of new technologies for artificial conception.⁵¹ For example, in the UK and the Australian states and territories, the general principle is that if a married woman becomes pregnant as a result of a fertilisation procedure involving donated sperm with her husband's consent, then he is considered to be the father of the child, and the sperm donor is not. If a married woman undergoes fertility treatment using the ovum from another woman, then for the purposes of the law the woman is considered to be the mother and the ovum donor is not.⁵² In both cases there is a rebuttable presumption that the husband consented to the procedure. The references to marriage may include *bona fide*, *de facto* marriages. In other circumstances – an unmarried mother, or a wife acting without her husband's consent – the donor of semen is considered not to be the father of the child,⁵³ unless, in some jurisdictions, he subsequently marries the mother.⁵⁴ This can result in a child having only one parent. Other refinements have been introduced. For example, in Western Australia, a partner in a same sex relationship who consents to her partner undergoing artificial fertilisation is presumed to be a parent of the resulting child,⁵⁵ so that such a child has two mothers.

These matters, and related ones such as the issue of the right of an artificially conceived child to have information about its biological parents, and the question of surrogacy, should be legislated for.⁵⁶ They are discussed elsewhere in this report. We note their relevance to child succession law and recommend a public debate and consultation on assisted human reproduction, to result in legislation.

Appropriation of a dwelling and the adult child with learning disability

Section 56 deals with the right of a surviving spouse to require her dwelling and household chattels to be appropriated to her share.⁵⁷ If the entitlement of the spouse is not sufficient to cover the value of the house, section 56(3) entitles the spouse to also appropriate the share of an infant for whom she is trustee. Section 56(10) gives a surviving spouse the right to apply to the court for an order appropriating the dwelling and chattels to her and/or to an infant for whom she is a trustee. To avoid hardship in the special circumstances of the case, the court has discretion to order appropriation of the house without the payment of money, and to make other orders affecting the distribution of the estate.

child conceived by AID and the person performing the social role of father should be reflected in law. The law was in a state of change and hence a wide margin of appreciation must be afforded to the State." See Suzanne Egan, "Succession Rights under the ECHR," in Breen, Casey and Kerr, *Liber Memorialis Professor James C. Brady*, (2001), p. 223.

⁵¹ Family Law Reform Act 1987, s. 27 (UK), Human Fertilisation and Embryology Act 1990, ss. 27 and 28 (UK), and in Australia: Artificial Conception Act 1985 (ACT); Artificial Conception Act 1984 (NSW); Status of Children Act 1978 (NT) ss 5A – 5F; Status of Children Act 1978 (Qld) Pt III; Family Relationships Act 1975 (SA) Pt IIA, IIB; Status of Children Act 1974 (Tas) ss. 10A – 10C; Status of Children Act 1974 (Vic) Pt II; Infertility (Medical Procedures) Act 1984 (Vic); Artificial Conception Act 1985 (WA).

⁵² Not in New South Wales – Artificial Conception Act 1984, s. 6(1).

⁵³ S. 7.

⁵⁴ For example, Queensland and the Northern Territory.

⁵⁵ Artificial Conception Act 1985, s. 6 A (inserted by no. 3/2002, s. 26).

⁵⁶ See the Report of the Commission on Assisted Human Reproduction, (Government Stationery Office, May 2005).

⁵⁷ The provisions of the Succession Act 1965 as amended apply equally to both sexes.

This section can be useful to protect the family home of a minor child, but adult children with learning disabilities cannot avail of it. In the event that it is in the interest of an adult child with a learning disability to continue living in the family home with a surviving parent, it is currently necessary to take the expensive course of making the adult child a ward of court, and getting the agreement of the ward's committee to the appropriation. Further, there is no option to avail of the court's discretionary power under subsection (10).

We recommend that the options under section 56 of a surviving spouse to require appropriation, or apply for appropriation without supplementary payment, of the share of a minor child (for which she is trustee) towards the spouse's dwelling should be extended to the share of an adult child with a learning disability in circumstances which will secure a home for that child.

Spierin and Fallon comment that "The lack of provision in the (Succession) Act for beneficiaries under a disability causes widespread difficulties when suitable provision is not made by will."⁵⁸ For example, a mentally incapable child may be left a right to residence in the family home for life, and is then incapable of releasing it when other arrangements have to be made. In such a case, the incapable person may have to be made a ward of court, with all the expense and delay involved.⁵⁹ In its Consultation Paper on Law and the Elderly,⁶⁰ the Law Reform Commission has made reform proposals to accommodate the needs of elderly people who may lack legal capacity, or who may be in need of care and protection. As acknowledged by the Commission,⁶¹ the reformed system proposed by them could be usefully extended to cover mentally ill and disabled people and minor children when necessary.

Intestate succession – the absence of discretionary provision

Intestacy rules are inevitably rough justice and cannot take the place of a will. They apply in the same way to rich and poor, old and young, the deserving and the undeserving. They are developed with the majority of cases in mind and cannot be relied upon to deal fairly with atypical circumstances. Where their application is manifestly unsatisfactory, the question arises whether discretion should be given to a court to make provision for members of the family and sometimes others who have a moral claim on the support of the deceased, through legislation similar to section 117.

The discretionary provision for children available through section 117 applies only to cases where the deceased has left a will. As Spierin and Fallon comment: "It is arguable that it is a major limitation that the discretion does not extend to the cases of intestacy. Is the claim of a child suffering from a handicap or other personal disadvantage to receive greater provision than his brothers and sisters any the less meritorious because his parents have made no will? . . . The 1965 Act had to strike some sort

⁵⁸ Spierin and Fallon, *The Succession Act 1965 – A Commentary*, (3rd ed. 2003), p. 171

⁵⁹ See the Law Reform Commission Consultation Paper on *Law and the Elderly*, June 2003, p. 153 on the shortcomings of the existing Wards of Court system.

⁶⁰ June 2003.

⁶¹ P. 2 of the Consultation Paper.

of balance and if intestacy provisions could be the subject of variation, that would result in an explosion of litigation.”⁶² Elsewhere they add: “Arguably this (the absence of discretionary provision) does not take account of disparity in the financial circumstances of the children or allow for variation, but given the level of litigation that section 117 has resulted in, this may be no bad thing. It has the virtue of certainty.”⁶³

The Law Reform Commission considered the matter in 1989, and came down in favour of extending the application of section 117 of the Succession Act to intestacies, in order to remedy the real possibility of serious injustice.⁶⁴

The Family Provision legislation in other jurisdictions, such as Australia, England and Wales and Northern Ireland, does not restrict applications to cases of testacy only, as testified to by an extensive caselaw.⁶⁵

For example, section 6 (1) of the Inheritance (Family and Dependents Provisions) Act 1972 of Western Australia mentions adequate provision, but subsection (2) adds:

The Court in considering for the purposes of subsection (1) of this section whether the disposition of the deceased’s estate effected by the law relating to intestacy, or by the combination of the deceased’s will and that law, makes adequate provision for the purposes of this act shall not be bound to assume that the law relating to intestacy makes adequate provision in all cases.

While there is merit on both sides of the argument, we believe that the weight of convenience and practicality comes down in favour of the present position, which serves the interests of certainty and equality among siblings. However, we believe it would be helpful to facilitate transfers of property between beneficiaries of an inheritance in the interests of family solidarity, without the present, often prohibitive, cost of stamp duty and capital acquisitions tax. This would enable siblings who inherit equally on an intestacy to make provision between themselves for their disabled or otherwise deserving brother or sister, without the penalty of additional taxation. We recognise that this proposal has revenue implications, and therefore **we recommend that the revenue cost and benefit implications of family arrangements consequent on an inheritance and within two years thereof be investigated and considered.**

⁶² Spierin and Fallon, *The Succession Act 1965 – A Commentary*, (3rd ed. 2003), p. 318.

⁶³ *Ibid* p. 292.

⁶⁴ Report on *Land Law and Conveyancing Law*, (1) *General Proposals*, LRC 30, 1989, para. 49.

⁶⁵ See for example the UK Inheritance (Provision for Family and Dependents) Act 1975, s. 1.