Annual Report of the Special Rapporteur on Child Protection 2020

A REPORT SUBMITTED TO THE OIREACHTAS

Dr Conor O'Mahony

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CONTENTS

Chapter 1: Annual Review

Chapter 1 of the report provides an examination and discussion of the findings of reports of national and international bodies published during 2019 in relation to child protection in Ireland. Almost all of the reports gave examples of positive developments at systemic level and/or good practice at individual case level. They provide evidence of important progress and a desire to improve the level of protection provided to children at risk of abuse and neglect. Positive trends in relation to child participation in the work of the DCYA and HIQA are noted (see section 1.6), and the launch of the Onehouse project is identified as a particularly strong example of progress and good practice (see section 1.5.3). Nevertheless, the reports also point to some areas of significant concern. The most prominent of these are the child protection risk posed by the increasing incidence of child homelessness (see section 1.2.1) and the existence of a culture of denial and obstruction on the issue of State responsibility for historical violations of children's rights (see section 1.7). There is room for further improvements to be made in the area of inter-agency collaboration, governance and leadership, and also evidence that essential services are under-resourced at key stages in the child protection system (see section 1.8).

Chapter 2: Investigating and Responding to Complaints of Child Sexual Abuse

Chapter 2 considers section 3 of the Child Care Act 1991 and the law and policy governing the investigation of complaints of child sexual abuse. It sets out the State's legal obligation to investigate complaints and to take steps to mitigate risks of which it is aware or ought to be aware (see section 2.2). It proceeds to examine how this obligation is currently implemented by way of section 3 of the 1991 Act and the 2014 *Policy & Procedures for Responding to Allegations of Child Abuse & Neglect*, under which Tusla may share information with third parties (such as employers or voluntary organisations) if a complaint is deemed to be founded (see sections 2.3 and 2.4). Legal difficulties in the operation of the current framework are highlighted (see section 2.5). Proposals are made for a new approach which would make use of the safeguards provided by the National Vetting Bureau (Children and Vulnerable Persons) Act 2012. This would obviate the need for Tusla social workers to conduct quasi-legal investigations and reduce the risk of secondary traumatisation for complainants, while still providing the necessary protections for the constitutional rights of a person accused of abuse (see section 2.6).

Chapter 3: Voluntary Care Agreements

Chapter 3 considers section 4 of the Child Care Act 1991, which governs voluntary care agreements (under which children can be placed in the care of Tusla with the consent of their parent(s)). It will provide new qualitative evidence from the *Voluntary Care in Ireland Study*, which is the first empirical examination of this aspect of the child protection system. The evidence indicates that voluntary care agreements offer significant advantages in certain types of cases, and can reduce the adversarialism, stigma and costs associated with District Court proceedings leading to a care order (see section 3.3). However, they are regulated quite loosely in Ireland by comparison to other jurisdictions, and this gives rise to a number of risks to the rights of both children and parents. Risks to children's rights

include the potentially unlimited duration of agreements and absence of independent oversight; weak mechanisms for ascertaining the views of the child; inferior resource allocation compared to court-ordered care placements; and potential instability due to parents being allowed to withdraw consent with no notice (see section 3.4). Risks to parental rights include barriers to parental understanding of the agreements that they sign; questions about the voluntariness of the agreement; and the absence of independent legal advice (see section 3.5). The chapter makes a series of recommendations for reform that draw on elements of best practice from a range of jurisdictions (see section 3.6).

Chapter 4: Ascertaining the Views of Children in Child Care Proceedings

Chapter 4 examines the legal provisions governing the ascertainment of the views of children in child care proceedings. The main focus is a comprehensive assessment of the proposals in the Child Care (Amendment) Bill 2019 for reform of the law governing guardians *ad litem* (GALs); but the direct participation of children is also examined (see section 4.4). It is noted that the Bill contains a range of welcome measures governing the independence, regulation and qualifications of GALs, and dual representation by a GAL and solicitor. However, on a number of crucial points (including the functions, powers and status of the GAL, the criteria for appointment, legal advice and representation for GALs, and service of documents), the Bill does not go far enough in its current form to adequately discharge the constitutional obligation to ascertain the views of children and treat their best interests as the paramount consideration for the court (see section 4.3). Recommendations are made for how the Bill can more effectively discharge this constitutional obligation, and for how direct participation could be facilitated in a more child-friendly way (see section 4.5).

Chapter 5: Legal Developments and Research Update

Chapter 5 considers developments in international law and in national court decisions during 2019. This includes several judgments of the European Court of Human Rights on the issue of adoption of children from care without parental consent (see section 5.2.1); a new General Comment of the UN Committee on the Rights of the Child on juvenile justice (see section 5.2.2); and numerous Irish court decisions (see section 5.3). Academic research on child protection published during 2019 is also explored (see section 5.4). Among a wide range of issues considered, particular attention is drawn to the importance of making sufficient efforts to facilitate reunification before children in care are placed for adoption (see sections 5.2.1 and 5.5.1); the need to raise the minimum age of criminal responsibility to 14 for all cases (see sections 5.2.2 and 5.5.2); and the need to adequately resource special care placements so that the needs of troubled teenagers can be met in Ireland without having to place them in facilities in other jurisdictions (see sections 5.3.1 and 5.5.3).

TERMS OF REFERENCE OF THE SPECIAL RAPPORTEUR ON CHILD PROTECTION

The role of the Special Rapporteur on Child Protection was established following the Supreme Court Decision in May 2006 in *CC v Ireland*, which held that section 1(1) of the Criminal Law (Amendment) Act, 1935, which made it an offence to have unlawful carnal knowledge of a girl aged under 15 years, was unconstitutional as it did not allow for a defence of mistaken belief as to the age of the girl. The term of office for the Rapporteur is three years and he/she is required to prepare, annually, a report setting out the results of the previous year's work.

The terms of reference for the Special Rapporteur are as follows:

1. The Rapporteur shall, in relation to the protection of children and on the request of the Minister for Children and Youth Affairs:

   a) Review and report on specific national and international legal developments for the protection of children;

   b) Examine the scope and application of specific existing or proposed legislative provisions and to make comments/recommendations as appropriate; and

   c) Report on specific developments in legislation or litigation in relevant jurisdictions.

2. The Rapporteur shall report on relevant litigation in national courts and assess the impact, if any, such litigation will have on child protection.

3. The Rapporteur shall prepare, annually, a report setting out the results of the previous year's work in relation to 1) and 2) above.

4. The Rapporteur will provide, if requested by the Minister, discrete proposals for reform prior to the submission of the annual report.

5. The annual report of the Rapporteur will be submitted to the Government for approval to publish and will be laid before the Oireachtas and published.

All of the Reports of the Child Protection Rapporteur are published on the *website of the Department of Children and Youth Affairs*.

Dr Geoffrey Shannon held the post from 2006 to 2019. He was succeeded in 2019 by Dr Conor O'Mahony.

Dr Conor O'Mahony is a senior lecturer at the School of Law at University College Cork, where he specialises in child law, children's rights and constitutional law. He is the Director of the Child Law Clinic, which supports litigation and advocacy on a range of children's rights issues. His research on child protection law, children's rights, educational rights and constitutional law has been published in leading international journals including the *Human Rights Law Review*, the *Child and Family Law Quarterly*, the *International Journal of Law Policy and the Family*, the *Journal of Social Welfare and Family Law*, *Child and Family Social Work*, *Public Law* and the *International Journal of Constitutional Law*. With colleagues in UCC, he has jointly produced award-winning research on District Court child care proceedings and led child protection research and training projects funded by the EU Commission and the Department of Children and Youth Affairs. He has also contributed to expert reports for the Council of Europe Venice Commission and the DCYA.

ACKNOWLEDGMENTS

A report of this nature cannot be produced without the support and input of a wide range of people. In my work on this year's report, I was extremely grateful to the following people:

Dr Elaine O'Callaghan for providing top quality and characteristically efficient research assistance, contributing in particular to Chapter 5, but also adding her input across the report as a whole.

Dr Kenneth Burns and Dr Rebekah Brennan, who kindly agreed to allow material from the *Voluntary Care in Ireland Study* to be published for the first time in Chapter 3. The Study is a joint and equal venture between all three of us and it is a tribute to their generosity and to the spirit of the team that they did not hesitate to allow this report to benefit from their hard work.

My family (my wife Claire; Oran, aged six, and Siún, aged three) for their understanding during the difficult months of the COVID19 restrictions when the bulk of this report was written (under circumstances that were less than conducive to large-scale research and writing).

University College Cork, and in particular the Dean of Law Professor Mark Poustie, for affording me the flexibility to balance my role as Special Rapporteur with my commitments in the School of Law.

Multiple staff of the Department of Children and Youth Affairs, Tusla, EPIC, Barnardos, One in Four, the Child Care Law Reporting Project and numerous solicitors, who gave freely of their time, expertise and insight on aspects of the child protection system on which their knowledge was greater than mine.

Dr Geoffrey Shannon and Dr Niall Muldoon, who were similarly supportive and collegial.

Alison Burns of Studio 10 Design, for her creative input and professionalism.

Any errors or omissions in the report are mine alone.

Dr Conor O'Mahony
School of Law, University College Cork
30 June 2020

This is my first report as Special Rapporteur on Child Protection. Following the format of previous reports, it will cover events and developments from the previous calendar year (in this case, 2019), and also provide a more in-depth assessment of a number of issues in need of scrutiny. The selection of issues to focus on is difficult, and it is not possible to cover everything in a single report. My term as Special Rapporteur is for three years, so issues that were not examined in this year's report will wherever possible receive attention in one of the next two years. Developments occurring after 31 December 2019 will generally be left to next year's report, unless their omission would undermine the accuracy of the analysis in this report. This includes the child protection implications of COVID19 (on which it is too soon to make a reasoned judgment in any event).

Conscious of the ongoing work in the Department of Children and Youth Affairs in reviewing the Child Care Act 1991 (and prompted by the publication of the Child Care (Amendment) Bill 2019, as well as by my own work with the Department's Expert Assurance Group in 2019 and with the *Voluntary Care in Ireland Study*), the topics selected for detailed examination in this year's report relate to three aspects of the 1991 Act that merit substantial reform:

- Chapter 2 will consider section 3 of the Act and the law and policy governing the investigation of complaints of child sexual abuse. Legal difficulties in the conduct of such investigations will be identified, and proposals made for a new approach which would make use of the safeguards provided by the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 and obviate the need for Tusla social workers to conduct quasi-legal investigations.
- Chapter 3 will consider section 4 of the Act, which governs voluntary care agreements. It will provide new qualitative evidence from the *Voluntary Care in Ireland Study*, which is the first empirical examination of this aspect of the child protection system, and make recommendations for reform that draw on elements of best practice from a range of jurisdictions.
- Chapter 4 will examine the provisions governing the ascertainment of the views of children in child care proceedings. The main focus will be a comprehensive assessment of the proposals in the Child Care (Amendment) Bill 2019 for reform of the law governing guardians *ad litem*; but the direct participation of children will also be examined. Recommendations will be made for how the 2019 Bill can more effectively discharge the constitutional obligation to ascertain the views of children in child care proceedings, and for how direct participation could be facilitated in a more child-friendly way.

Either side of these three chapters, Chapter 1 will provide an examination and discussion of the findings of reports of national and international bodies published during 2019, while Chapter 5 will consider developments in international law, national court decisions, and academic research during 2019.

The citation style follows legal writing conventions. Page numbers are represented as "p 123"; paragraph numbers are placed in square brackets (eg "at [23]"). Hyperlinks have been provided to courts judgments and other online sources. All URLs were last accessed on 30 June 2020.

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https://www.gov.ie/en/collection/51fc67-special-rapporteur-on-child-protection-reports/

Chapter 1

Annual Review

1.1 INTRODUCTION

The purpose of this chapter is to explore what we learned in 2019 about child protection in Ireland through an analysis of the findings and recommendations of a range of relevant reports of national and international bodies. (Decisions of national and international courts will be considered separately in Chapter 5.) Although published in 2019, the analysis contained in the various reports that will be discussed may relate to circumstances prior to 2019 that have changed by the time of the publication of this report in 2020. In some cases, more recent analysis has been included that relates directly to 2019.

The chapter will conduct a thematic assessment of what these reports indicate in relation to Ireland's performance in preventing child abuse, neglect and exploitation; investigations and court proceedings; the treatment of children within the care system; meeting the needs of victims of abuse; addressing historical rights violations associated with child abuse, forced labour and illegal adoptions; and child participation in decisions affecting them. Common themes and lessons from these various reports will be discussed at the end of the chapter.

1.2 PREVENTING CHILD ABUSE, NEGLECT AND EXPLOITATION

1.2.1 Child homelessness as a child protection risk factor

Statistics in October 2019 indicated that 10,514 individuals were in emergency accommodation, of whom 3,826 were children.[1] This represents a 3% increase in the number of children in emergency accommodation since October 2018,[2] and a 24% increase since December 2017.[3] These figures under-represent the extent of the problem to an unknown degree, since they do not include children experiencing homelessness who are not accessing emergency accommodation. In short: far too many children in Ireland experience homelessness, and the problem worsened during 2019.

The detrimental impacts of homelessness on child welfare are well documented and multi-faceted. The Joint Oireachtas Committee on Children and Youth Affairs *Report on the Impact of Homelessness on Children*, published in November 2019, cited a range of Irish research demonstrating how child homelessness undermines child development, physical health, mental health and educational attainment.[4] The Royal College of Physicians of Ireland published a further report the same month setting out the impact on physical health.[5] Similar findings were reported in the Ombudsman for Children's Office *No Place Like Home* report, which included the views of children who had experienced living in family hubs.[6]

Of particular concern to the role of the Special Rapporteur on Child Protection is the link between homelessness and child neglect, abuse and exploitation. It was reported in November 2019 that the number of reports of suspected child abuse or neglect being made to Tusla by managers of homeless accommodation was increasing, with 97 reports in seven months between January and July 2019 (compared with 133 reports for 12 months in 2018).[7] The rate of increase in reports to Tusla (approximately 27%) significantly outstrips the rate of increase in child homelessness.

Child homelessness has been identified internationally as creating a heightened risk of sexual exploitation[8] and human trafficking.[9] Research in Ireland has shown that relying on emergency accommodation can lead to children sharing space with adults who are abusing

1. Department of Housing, Planning and Local Government, *Homelessness Report October 2019*, available at https://rebuildingireland.ie/wp-content/uploads/2019/12/homeless-report-October-2019.pdf.
2. Department of Housing, Planning and Local Government, *Homelessness Report October 2018*, available at https://rebuildingireland.ie/wp-content/uploads/2018/11/Homeless-Report-October-2018.pdf.
3. Department of Housing, Planning and Local Government, *Homelessness Report December 2017*, available at https://rebuildingireland.ie/wp-content/uploads/2018/01/Homeless-Report-December-2017.pdf.
4. Joint Oireachtas Committee on Children and Youth Affairs, *Report on the Impact of Homelessness on Children* (November 2019) at pp 11-13, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_children_and_youth_affairs/reports/2019/2019-11-14_report-on-the-impact-of-homelessness-on-children_en.pdf. See further AM Halpenny, A Keogh and R Gilligan, *A Place for Children? Children in Families Living in Emergency Accommodation: The Perspectives of Children, Parents and Professionals* (2002), available at https://arrow.dit.ie/cgi/viewcontent.cgi?article=1017&context=aaschsslrep.
5. Royal College of Physicians of Ireland, *The Impact of Homelessness and Inadequate Housing on Children's Health* (November 2019), available at https://rcpi-live-cdn.s3.amazonaws.com/wp-content/uploads/2019/11/Impact-of-Homelessness-full-position-paper-final.pdf.
6. Ombudsman for Children's Office, *No Place Like Home* (2019), available at https://www.oco.ie/app/uploads/2019/04/No-Place-Like-Home.pdf.
7. N Baker, "Tusla reports rise in number of homeless children experiencing abuse or neglect", *Irish Examiner*, 19 November 2019.
8. Homeless Link, *Young People and Sexual Exploitation* (2020), available at https://www.homeless.org.uk/sites/default/files/site-attachments/Child%20Sexual%20Exploitation%20and%20Homelessness%20Jan20.pdf.
9. See, eg, *Understanding and Responding to Modern Slavery within the Homelessness Sector: A Report commissioned by the Independent Anti-Slavery Commissioner* (2017), available at https://www.antislaverycommissioner.co.uk/media/1115/understanding-and-responding-to-modern-slavery-within-the-homelessness-sector.pdf.

drugs or alcohol or being exposed to inappropriate adult behaviour or to distressing incidents such as stabbings or attempted suicides. Parents may walk the streets with their children late into the evening to avoid being in these situations.[10] Even in family hubs, which have been introduced since 2017, there is evidence of alcohol and drug use, and of children being exposed to distressing fights between adults in an environment where there is a lack of space and privacy.[11]

Given the many stresses placed on families who experience homelessness, and the difficulty of providing safe play spaces in emergency accommodation, it is unsurprising that a sustained crisis in child homelessness would generate an associated increase in child protection referrals to Tusla. Moreover, these referrals only account for risks that have been identified and reported, and are likely to understate the extent of the problem. The continuous deterioration in the homelessness crisis poses an ongoing child protection concern, and risks exposing children to deep and lasting harm due to neglect or abuse in addition to multiple other detrimental impacts. Recommendations made by two separate Oireachtas Committees about how this issue might be addressed will be discussed in section 1.8 below.

1.2.2 Protection from abuse and neglect

The European Committee of Social Rights (ECSR) is the body responsible for monitoring compliance by States Parties with the European Social Charter (revised), which was ratified by Ireland in 2000. In its 2019 conclusions, the Committee raised a number of questions about Ireland's performance in relation to child protection obligations under Articles 7 and 17 of the European Social Charter (revised).[12] Article 7 of the Charter protects the right of children and young persons to protection, and focuses in particular on issues related to child labour and economic exploitation, while Article 17 obliges States Parties, *inter alia*, to protect children and young persons against negligence, violence or exploitation, and to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support.

Of particular concern for the Committee in respect of Article 17 was the lack of data available on "the scope and different forms of sexual abuse and exploitation of children".[13] The Committee noted the failure to implement "safeguarding policies and procedures in practice" as well as a "culture of silence around issues of childhood sexual abuse and exploitation in Ireland".[14] (The introduction of mandatory reporting and safeguarding statements in December 2017 following the commencement of the Children First Act 2015 is a relevant development in this regard; but notably, the Committee's comments post-date this development.) In addition, the Committee sought further information about online safety for children and young people in Ireland.[15] The Committee also sought clarification about the use of "private non statutory placements" and about "independent monitoring of private residential centres" under Article 17 of the Charter.[16] It also asked what measures were being taken to address repeated criticism of the Direct Provision system by human

10. Halpenny *et al.* (n 4 above) at pp 32 and 64-67.
11. Ombudsman for Children's Office (n 6 above) at pp 31-60.
12. European Committee of Social Rights, *Conclusions 2019: Ireland*, available at https://rm.coe.int/rapport-irl-en/16809cfbc0.
13. *Ibid* at p 16.
14. *Ibid*.
15. *Ibid*.
16. *Ibid* at p 35.

rights bodies, as well as what assistance is given to unaccompanied minors, especially to protect them from exploitation and abuse.[17]

1.2.3 Child labour

In relation to child labour, the ECSR issued four conclusions of conformity with Article 7 and six conclusions of non-conformity. It found that Ireland is complying with its obligations under Article 7 in respect of the following issues:

- Article 7§2: to provide that the minimum age of admission to employment shall be 18 years with respect to prescribed occupations regarded as dangerous or unhealthy.
- Article 7§6: to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day.
- Article 7§9: to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control.
- Article 7§10: to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

However, the Committee found that Ireland is failing to comply with its obligations under Article 7 by virtue of the following:

- Articles 7§1: failure to prohibit employment under the age of 15, on the ground that the minimum age of 15 years for employment does not apply to children employed by a close relative,[18] and that the duration of work permitted for children aged between 14 and 16 is excessive.[19]
- Article 7§3: failure to prohibit employment of children subject to compulsory education, on the same grounds as for Articles 7§1.
- Article 7§4: failure to provide that the working hours of persons under 18 years of age shall be limited in accordance with the needs of their development, on the ground that it has not been established that the working hours of persons under 18 working for close relatives are sufficiently limited.
- Article 7§5: failure to ensure fair pay for young workers and apprentices, on the ground that the wage paid to young workers between 16 and 18 years is too low, and young persons working for close relatives are not covered by the National Minimum Wage (Low Pay Commission) Act 2015.
- Article 7§7: failure to ensure that employed children are entitled to four weeks' annual holiday with pay, on the ground that young workers employed by a relative, and whose place of employment is a private dwelling house or a farm in or on which he or she and the relative reside, do not have this entitlement under the Organisation of Working Time Act 1997.

17. *Ibid* at p 37.
18. Protection of Young Persons (Employment) (Exclusion of Close Relatives) Regulations 1997.
19. Protection of Young Persons (Employment) Act, 1996, s 3.

• Article 7§8: failure to establish that the great majority of persons under 18 are prohibited from working at night, since the provisions of the Protection of Young People at Work Act 1996 do not apply to young persons employed by close relatives.

1.2.4 Child trafficking

In the US State Department's *Trafficking in Persons Report* for 2019,[20] Ireland remained at Tier 2, where it had fallen to in 2018 following a sustained period at Tier 1. The report found that Ireland does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so:

> "The government demonstrated overall increasing efforts compared to the previous reporting period; therefore Ireland remained on Tier 2. These efforts included beginning coordination with stakeholders to develop a new national identification and referral mechanism and identifying a greater number of victims. However, the government did not meet the minimum standards in several key areas. The government has not obtained a trafficking conviction since the law was amended in 2013. Authorities failed to initiate any prosecutions in 2018 and had chronic deficiencies in victim identification, referral, and assistance."[21]

The report stated that "human traffickers exploit domestic and foreign victims in Ireland and traffickers exploit victims from Ireland abroad. Traffickers subject Irish children to sex trafficking within the country."[22] A gradual increase in the number of identified victims was evident; authorities identified 64 suspected trafficking victims (including five children) in 2018, compared with 57 in 2017 and 41 in 2016.[23] It noted that "[e]xperts raised concerns about the government's inability to identify trafficking victims due to shortcomings in its identification mechanism",[24] and that the government did not make efforts to reduce the demand for forced labour or fund the operation of a dedicated trafficking national hotline.[25]

The UN Special Rapporteur on the sale and sexual exploitation of children noted that Ireland's restrictive regime on intercountry adoption limits the potential for adoption to become a vehicle for the sale or trafficking of children,[26] and welcomed the Government's decision to begin separating data on the trafficking of children from data related to prosecutable offences under the Child Trafficking and Pornography Act 1998.[27] The European Committee on Social Rights sought further information from Ireland about child trafficking, particularly concerning the recommendations made by the Council of Europe Group of Experts on Action against Trafficking in Human Beings ("GRETA").[28]

20. US State Department, *Trafficking in Persons Report* (June 2019), available at https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf.
21. *Ibid* at p 251.
22. *Ibid* at p 253.
23. *Ibid* at p 252.
24. *Ibid*.
25. *Ibid* at p 253.
26. *Visit to Ireland: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, UN Doc No A/HRC/40/51/Add.2, 15 November 2019 at [12], available at https://undocs.org/A/HRC/40/51/Add.2.
27. *Ibid* at [33].
28. European Committee of Social Rights (n 12 above) at pp 17-18.

1.3 INVESTIGATIONS AND COURT PROCEEDINGS

1.3.1 Investigations of complaints of abuse

In 2018, following completion by HIQA of a statutory investigation directed by the Minister for Children and Youth Affairs in response to Tusla's handling of a false allegation of child sexual abuse against Sergeant Maurice McCabe, the Health Information and Quality Authority published its report on the management of allegations of child sexual abuse against adults by Tusla.[29] The report made a range of recommendations on how Tusla should address defective points in its systems in the areas of screening and preliminary enquiry; safety planning; and management of retrospective cases. The final recommendation was that the Department of Children and Youth Affairs should establish an expert quality assurance and oversight group to support and advise Tusla and the Department on the implementation of the recommendations of the HIQA report.

The Expert Assurance Group (EAG) commenced work in August 2018. It held monthly meetings with Tusla senior management to assess Tusla's action plan and progress in implementing it, and issued its final report in September 2019.[30] Overall, the EAG was satisfied with the progress made by Tusla and the Department across a range of reforms, and with the underlying momentum to complete the agreed actions. The EAG noted that Tusla has put in place a national approach for child protection practice and the capacity to evaluate its delivery and effectiveness, and made substantial progress in the area of information and communications technology. The Tusla Board had approved a workforce strategy which identifies a multi-disciplinary model over the medium to long term to manage the shortage of social workers known to Tusla and identified by HIQA as a barrier to improving standards.[31] Momentum towards inter-agency working was evident and the EAG noted the pro-active steps by Tusla and the Health Services Executive (HSE) in progressing a data sharing protocol. However, most of the actions, although on track for completion, were overdue. In particular, the EAG recommended that joint specialist training between Tusla and An Garda Síochána (AGS) be prioritised.[32]

While Tusla now has governance structures in place, the EAG had difficulty in comprehending the length of time it has taken to make modest progress in putting in place an effective performance management system across the organisation. It was the view of the EAG that the introduction of Tusla's proposed performance achievement and development system should be prioritised.[33] Substantive work had been done by Department officials in establishing a Social Work Education Group comprising all relevant stakeholders to address the shortfall in the graduate pool; but the EAG found that it was unlikely that progress would be made in 2020, due to the absence of funding for bursaries or for the development of a national placement framework to increase the supply and the capacity of third level institutions to expand the number of social work places.[34]

29. Health Information and Quality Authority, *Report of the investigation into the management of allegations of child sexual abuse against adults of concern by the Child and Family Agency (Tusla) upon the direction of the Minister for Children and Youth Affairs* (2018), available at https://www.hiqa.ie/sites/default/files/2018-06/HIQA-Investigation-Report.pdf.
30. *Final Report of the Expert Assurance Group to the Minister for Children and Youth Affairs* (September 2019), available at https://assets.gov.ie/48194/18906f6d5e294c12a8ba9f62b729181b.pdf.
31. *Ibid* at p 7.
32. *Ibid* at p 8.
33. *Ibid* at p 35.
34. *Ibid* at pp.40-41.

Although not directly reviewed in HIQA's investigation report, the EAG's attention was brought to the legal framework for the management of retrospective allegations by Tusla when it comes to communicating a concern about a person to a third party. The EAG concluded that the existing provisions of the Child Care Act 1991 do not adequately equip Tusla to conduct investigations with a view to making findings on the balance of probabilities while also observing fair procedures, and recommended that the Department continue its exploration of a mechanism of an enhanced role for the National Vetting Bureau which appears to have a clear statutory basis and fair procedures for receiving and communicating information of this kind.[35] Pursuant to this recommendation, this issue will be examined in detail in Chapter 2 of this Report.

1.3.2 Child care court proceedings

The Child Care Law Reporting Project published *District Court Child Care Proceedings: A National Overview* in March 2019,[36] based on attendance at a full-day sitting in 35 court venues, covering each of the 24 Districts, between October 2018 and January 2019. The report made numerous findings about how poorly equipped the courts system is to deal with child care cases. A lack of capacity was the main issue emphasised:

> "One of the most striking issues that emerged from this survey was the volumes of cases dealt with by certain courts, and the difficulties this posed both for the judges attempting to deal with child care and for the parties. For example, in one court on one day, in a District where there was just one sitting judge, there were 139 cases listed, consisting of crime, general civil law, family law and child care. This clearly poses considerable difficulties in dealing appropriately with cases that could be difficult, like child care. In another District, the judge can have up to 126 cases listed on family law days."[37]

As a result, "some of … the courts are severely over-worked, which cannot but affect how child care proceedings are dealt with."[38]

The report also highlighted how the physical environment in many court venues is unsuitable for child care and family law cases due to access difficulties, a lack of privacy, absence of proper waiting areas, and close proximity to criminal proceedings.[39] In a quarter of the courts attended, child care was included in general lists;[40] this is in clear contravention of the statutory requirement that child care proceedings be heard "at a different place or at different times or on different days" to other proceedings of the court.[41] Lengthy lists and variations in list management practices across districts can result in parties waiting all day for their case to be called, increasing stress for the families

35. *Ibid* at p 45.
36. C Coulter, *District Court Child Care Proceedings: A National Overview* (March 2019), available at https://www.childlawproject.ie/wp-content/uploads/2019/03/CCLRP-regional-report-2019_FINAL.pdf.
37. *Ibid* at p 1.
38. *Ibid* at p 38.
39. *Ibid* at pp 2-3.
40. *Ibid* at p 38.
41. Child Care Act 1991, s 29(3).

involved and wasting the time of professionals.[42] The report concluded that the evidence presented "underlines the point made previously by the CCLRP that a specialist family court is urgently needed, with dedicated child care days separate from [the] private family list. Such courts should sit in court venues which afford the litigants dignity and privacy and provide for private consultations with their lawyers along with a minimum level of physical comfort."[43]

1.3.3 Prosecution of child sexual abuse

The report of the UN Special Rapporteur on the sale and sexual exploitation of children made a number of critical observations regarding the low rates at which child sexual abuse is prosecuted in Ireland. Her report noted that there are several factors impeding successful prosecution, challenges with the gathering of evidence; unclear testimony about incidents, and difficulty proving the specific legal elements of the crimes. It was found that there are "slowdowns at various points in the investigation and prosecution process that affect case outcomes, such as at the point when police record reported incidents of abuse and interview witnesses; in the time between investigation and referral for prosecution; when cases are awaiting the availability of a judge; and when procedural challenges arise."[44] Delays in investigations and court proceedings may mean victims are obliged to testify well after the incident, leading to inconsistencies and difficulties in obtaining corroborating evidence. It may also result in the accused challenging the constitutionality of certain evidence presented.[45]

The report noted that although the Ryan Report had found that molestation and rape were endemic in facilities for boys, an analysis of the cases recorded by the Gardaí in 2014 noted very few reported cases of clerical or institutional abuses. There were only three such cases in the Garda database for the period analysed, out of a sample of 170 child sexual abuse reports. This deviates from the hundreds of cases recorded by the National Board for Safeguarding Children in the Catholic Church in Ireland, which recorded 265 allegations against priests and religious orders from April 2014 to May 2015. The UN Special Rapporteur expressed concern about the lack of criminal prosecutions of historical institutional abuse cases and called on the Government to ensure accountability for these abuses and to guarantee support to the victims.[46]

The report also flagged that the National Board for Safeguarding Children in the Catholic Church is not entitled to receive information about allegations made against church personnel. The Rapporteur commented that this creates a protection gap in which church communities may not be notified despite an incident of abuse being revealed and clerical offenders benefiting from impunity.[47]

42. Coulter (n 36 above) at p 2.
43. *Ibid* at p 38.
44. Special Rapporteur on the sale and sexual exploitation of children (n 26 above) at [60].
45. *Ibid* at [24].
46. *Ibid* at [31] to [32].
47. *Ibid* at [74]. See further C Gallagher, "Sharing of unproven abuse claims must have 'legal basis', says agency", *Irish Times*, 28 June 2018.

1.4 TREATMENT OF CHILDREN WITHIN THE CARE SYSTEM

1.4.1 National Review Panel reports

The National Review Panel published eight case reviews in 2019 in respect of children known to or in contact with Tusla who experienced serious abuse (one case) or who had died (seven cases – three through natural causes, three following tragic accidents, and one suicide). Six of these reviews found that the children in question had received prompt, consistent and child-centred responses (Eddie, Fiona, Kim, Niamh, Oscar and Ray). While praising the work of the professionals involved, these six reviews identified a number of lessons to be learned from the cases, including the importance of face-to-face contact time with families[48] and of establishing direct contact with young people themselves when making decisions or putting supports in place.[49] In one case, the panel noted that while immediate concerns about the child's safety were always responded to, the longer term options for the child could have been given more consideration as there were extended periods when there was no evident improvement in either of his parents' drug treatment.[50] In the review of the case in which the young person died by suicide, the Panel noted:

> "This case is poignant in its depiction of a young person clearly in distress and seeking help regarding her mental health. Niamh was twice referred to the hospital for emergency psychiatric assessment and was eventually placed on a waiting list for CAMHS. She had still not received an appointment when she died by suicide three months later. It is noted that a residential addiction service was recommended by her addiction counsellor but that no such service exists for girls."

Acknowledging that mental health services are outside the remit of Tusla, the review recommended that this gap in service is drawn to the attention of the Department of Health and the HSE, and also highlighted the need to provide services for young people whose clinical diagnosis does not fit within eligibility guidelines operated by CAMHS.[51]

Two of the reports contained more critical findings in respect of the care system, as will now be examined.

1.4.1.1 Review of a serious incident: abuse of children in the care of the health board

This review related to a widely-reported case in which three children under 10 years of age in foster care were repeatedly raped and sexually abused by the son of the foster carers between 2003 and 2011.[52] When the first child disclosed her abuse, the two other children in the foster home at the time denied that anything untoward had happened to them and a decision was made to leave them in the placement under a safety plan which stipulated that the alleged perpetrator would live elsewhere and have no unsupervised

48. National Review Panel, *Review undertaken in respect of a death of a baby who had contact with Tusla and the HSE: Kim* (September 2019), available at https://www.tusla.ie/uploads/content/Kim_executve_summary_final.pdf.
49. National Review Panel, *Review undertaken in respect of a death experienced by a young person whose family had contact with Tusla: Eddie* (March 2019), available at https://www.tusla.ie/uploads/content/Eddie_executive_summary.pdf.
50. National Review Panel, *Review undertaken in respect of a death experienced by a child known to Tusla child protection social work services: Ray* (March 2019), available at https://www.tusla.ie/uploads/content/Ray_Executive_Summary.pdf.
51. National Review Panel, *Review undertaken in respect of a death experienced by a young person who had contact with Tusla: Niamh* (June 2019), available at https://www.tusla.ie/uploads/content/Niamh_Executive_Summary_final.pdf.
52. National Review Panel, *Review of a serious incident: abuse of children in the care of the health board* (December 2018), available at https://www.tusla.ie/uploads/content/Abuse_in_foster_care_Summary_Report_December_2018.pdf.

contact with them. Four years later, one of these children, by then a teenager, disclosed that she had in fact been abused by the same person over a number of years prior to disclosure by the first child. The other child who had remained in the placement, also a teenager by then, continued to insist that nothing untoward had happened. During the ensuing Garda investigation, a fourth young person who had lived with the foster family many years earlier disclosed that she too had been abused by the same perpetrator.

The reviewers noted that the fostering assessment reports were brief and lacked the type of detail that might at the time have been expected in assessments of foster carers. There was no evidence that the family's children had been included in the process or that the implications of placing female children into a family of boys were addressed. The reviewers stated their opinion that, following the first disclosure of child sexual abuse, the social work department made their decisions in good faith and with the belief that they were acting in the children's best interests. Individual social workers and their line managers showed considerable commitment to the children who were allocated to them and in some cases went beyond their brief to provide them with support.

Notwithstanding the foregoing, the review team was of the belief that serious errors of judgement occurred in this case. There was flawed assessment and decision-making and a lack of management oversight at critical points during the involvement of the social work department with the foster family. While the reviewers believed that it would have been difficult for the children's social workers to identify that the three girls were being abused prior to the first disclosure, sufficient evidence existed at the time of that disclosure to indicate that the children should be moved from the placement even though it would have been disruptive to their stability in care and to the attachments they had formed with the foster carers. This was because of the risks to which they would be exposed by remaining and the unsuitability of the foster carers as protectors given their expressed disbelief that abuse had occurred.

The safety plan was neither sound nor implemented in a way that was sufficiently protective. It did not identify the obstacles that would be posed by the foster carers' refusal to believe that any abuse had taken place, or fully consider the logistics of supervising contact between a child in the family and an adult man who was a family member and spent frequent periods in the house. Although no evidence exists to indicate that the children were sexually abused after the first disclosure, the review could not attribute this fact to the effectiveness of the safety plan developed by the HSE social work. Measures taken by the social work department to protect the foster children were deficient in a number of respects, including weak assessment reports; inadequate monitoring and review of services; failure to formally ascertain and document the needs of each foster child; and the failure to conduct a review in respect of the children who had been previously placed with the foster carers to ascertain whether or not they had experienced abuse. The child sexual abuse assessment of one of the children was compromised by several factors, and risk assessment was narrow and inadequate. Finally, the review noted the operation of cognitive dissonance whereby disclosures made by the first child were considered credible by both the social work department and the paediatrician who examined her; yet the evidence given by the first child that the second had been abused was considered insufficient without a criminal conviction of the perpetrator.

1.4.1.2. Review of the death of a young person known to HSE/Tusla services: Simon

This review concerned a young person, here named Simon, who died tragically in his late teenage years as the result of a road traffic accident outside the jurisdiction, some months after he had left state care in Ireland.[53] Simon was taken into care as a young child following several years of instability, deprivation and neglect in his family environment, as well as exposure to abuse. His parents actively opposed the work of the social work department from the outset, and maintained contact with Simon when he was in care. He was placed in at least twenty short-term foster placements between his fourth and sixth years alone, as well as multiple other foster and residential placements at various times (including one long-term foster placement). Simon became involved in criminality as he grew older, and spent time in both youth and adult justice settings.

The review found that when Simon first came into care, he needed to be provided with safety and long-term emotional and psychological stability to redress early childhood trauma and to support him to manage issues of identity. His best opportunity to achieve the stability, re-assurance and certainty about his future was in his long-term foster placement, where he lived until he was an adolescent. This foster placement required and received a great deal of support to deal with his complex presentation as well as legal protection to minimise the efforts of his birth parents to undermine it. However, it took a number of years for the District Court to issue a full care order, leading to legal uncertainty in the management of this case.

Simon formed a lasting relationship with his foster parents despite difficulties relating to behaviour but continued to struggle with unresolved issues of identity and connectedness to his birth parents. By the time of the end of his foster placement, he had begun to actively model some of the criminal and anti-social aspects of his birth parents' lifestyle. Simon was subsequently able, without the permission of the social work department, to re-join his parents for substantial periods of time. This coincided with increased involvement with An Garda Síochána and the justice system.

The review concluded that the chances of a good outcome for Simon were greatly reduced because the actions taken to mitigate his early experience—firstly by the social work department and later by the Court—were problematic. The difficulty was compounded by the efforts of his parents to undermine the efforts of committed foster parents to create stability for him. There was evidence of commendable efforts by social workers and other professionals to manage the case in very trying circumstances. However, effective care planning was distorted by too much emphasis on family re-unification at the early stages. The negative influence of Simon's parents was ultimately allowed by the authorities to prevail, enticing him into anti-social behaviour and criminality.

Care planning took place but was limited, lacked rigour and structure, and was not implemented to address crucial episodes of change and transition. The agencies with responsibilities for youth offending and youth justice needed to be more centrally involved in his care planning at the time when he was designated as 'missing'.

The dominant themes which emerged in Simon's case were permanency planning for children in care and the management of parental contact. The review noted that case law from both the Irish courts and the European Court of Human Rights has emphasised that

53. National Review Panel, *Review of the death of a young person known to HSE/Tusla services: Simon* (April 2019), available at https://www.tusla.ie/uploads/content/Simon_Executive_Summary.pdf.

care orders are in principle to be temporary measures, with family reunification being the ultimate goal wherever possible. However, in Simon's case, the social work department's planning for family re-unification was not appropriate to his needs. The inability of the department to restrict parental contact was extremely destabilising, and a key decision of the District Court was poorly synchronized with care planning.

This review noted that the management of conflict with parents is a recurrent theme of practice and recommended that Tusla develop guidance to assist social workers to manage parental contact and access based on the best interests of the child, and to escalate such cases internally, where necessary. It also expressed concern about the interpretation of the 1995 Child Care Regulations by the social work department that an annual review met the department's obligations. Whilst the basic statutory requirement is for an annual formal review, the review emphasised that care planning must be seen by practitioners and managers as an active and responsive process, and its frequency should be determined not just by minimum statutory compliance but also by the assessed and changing needs of the child. Significant changes in any of a range of factors may require the plan to be changed or adjusted, and good practice requires that this is mandated at multi-agency child in care reviews convened according to the needs of the case.

1.4.2 Ombudsman for Children reports on *Molly*

In 2018 the Ombudsman for Children's Office published *Molly's case*, a report detailing a complaint received by the Office about a child with a disability who is in foster care.[54] The report found that there was a lack of co-ordination between Tusla and the HSE which meant that services and supports provided by both organisations were insufficient. Neither agency saw Molly as a child in care and also a child with a disability. Instead Tusla recognised her protection and welfare needs, but made no distinction with regard to her disability requirements. The HSE recognised her disability needs but made no distinction with regard her protection and welfare vulnerabilities as a child in care. The report also found that this is a problem facing many children with disabilities in care.[55]

The 2019 report provided an update on the implementation of recommendations made in the initial report.[56] It found that the social work department has made significant progress in re-assessing Molly's needs and working with the HSE in order to put in place the therapeutic supports and services which might enable her to reach her full potential. Planning and co-operation had significantly improved.[57] However, Molly's foster carers continued to face financial challenges due to a deduction of foster care allowance for weeks when Molly was in respite care (in spite of transporting her to and visiting her in the residential centre), and did not always feel listened to about Molly's education and her new feeding programme.[58] Contrary to its previous commitment, Tusla did not make any business case to the Government as regards enhanced support payments for foster carers of children with a moderate or severe disability. Extra financial payments remained at the discretion of Tusla Area Managers and approved through the care-planning process.[59]

54. Ombudsman for Children's Office, *Molly's case: How Tusla and the HSE provided and coordinated supports for a child with a disability in the care of the State* (2018), available at https://www.oco.ie/app/uploads/2018/01/OCO-Investigation-Mollys-Case-Jan-2018.pdf.
55. *Ibid* at p 19.
56. Ombudsman for Children's Office, *Molly One Year On: Have Tusla and the HSE delivered on commitments to children with a disability in the care of the State?* (2019), available at https://www.oco.ie/app/uploads/2019/04/Molly-One-Year-On.pdf.
57. *Ibid* at pp 3-4.
58. *Ibid* at p 4.
59. *Ibid* at p 3.

Progress had been made in implementing the Joint Protocol for Interagency Collaboration between Tusla and the HSE. Tusla had implemented more effective processes for escalating complex cases that cannot be resolved at local level.[60] However, in the HSE, more progress needed to be made; each Community Healthcare Organisation area was proceeding at a very different pace in terms of Joint Protocol implementation. Not all areas and front-line staff members fully understood their roles and responsibilities under the protocol, and not every area was aware of the Molly investigation and the recommendations agreed upon by the HSE. Only four out of nine Community Healthcare Organisation areas has identified children with disabilities in foster care in their areas. The HSE did not know how many of the children identified have had care plan review meetings or how many of these children have individualised plans to meet their needs from the HSE. Of the nine Community Healthcare Organisation areas, only one had reviewed the needs of these children through the care planning process, and two had not yet begun planning for the systemic reviews committed to at the time of publication of the initial report. The report found that the HSE's response was not satisfactory in this respect.[61]

Overall, while the report found "some definite progress", particularly in the case of Molly herself, it concluded that not enough had changed since the publication of Molly's case in 2018. As a result, the Ombudsman decided to continue to monitor these issues for a further twelve months.[62]

In January 2020, the Office published a further update.[63] The report noted commitments from both the CEO of TUSLA and the Director General in the HSE to ensure the necessary leadership to give effect to the recommendations arising from this investigation and stated that despite the lengthy delay in this occurring, this was to be warmly welcomed. It noted ongoing work on Joint Tusla & HSE Protocol arrangements, indicating that all of the key decision makers including the Department of Health, the Department of Children and Youth Affairs, HSE and TUSLA are, at long last, coming together to work collaboratively to meet the needs of vulnerable children in the care of the state.[64]

While it is "obvious that these vulnerable children are no longer invisible to the HSE and Tusla", the report made the following striking observation on inter-agency collaboration:

> "At the most basic level it is incomprehensible that two years on the HSE has still not managed to come to an agreement with Tusla to identify the children in state care with moderate to profound disabilities. Together the HSE and Tusla have 17 Joint Area Working Groups and a series of national, regional and local processes have been introduced to deal with this small and very specific cohort of children. Despite this impressive new network, the HSE and Tusla cannot come to an agreement about the number of moderate to severely disabled children in care. There also remain significant and inexplicable disparities across the nine HSE CHO areas in relation to their engagement with Tusla's care planning process to meet the needs of these children.
>
> The HSE and Tusla are proud of the fact that they have worked together successfully to identify the children in this cohort who will turn 18 in 2019/2020, and that is good.

60. *Ibid* at p 5.
61. *Ibid* at pp 5-6.
62. *Ibid* at p 7.
63. Ombudsman for Children's Office, *Molly Two Years On: Have Tusla and the HSE delivered on commitments to children with a disability in the care of the State?* (2020), available at https://www.oco.ie/app/uploads/2020/01/Molly-Two-Years-On.pdf.
64. *Ibid* at p 4.

> However, is it not possible that the same process could be used to identify younger children and plan for their care from as early as possible? A failure to do so suggests a focus on the financial implications to their budget when they take over the care of an individual, rather than a drive to plan for and provide the best care for children when they need it."[65]

In this regard, while implementation of the Joint Protocol for Interagency Collaboration has progressed, the report concluded that there is still a long way to go.[66]

Several additional points of concern arose. The Ombudsman for Children's Office remained deeply concerned about the provision of respite services to children overall and more specifically to children in care with disabilities.[67] The foster carers remained unhappy with their engagement with Tusla and their relationship with the social work department remains difficult because they do not feel their views are fully considered with respect to Molly's speech and language therapy, paediatric care and dietary needs.[68] Confusion had arisen between Tusla and the regarding home support entitlements; the report noted that while there has been obvious improvement, it is disheartening that two years later there is a lack of clarity on this issue.[69]

1.4.3 HIQA inspection reports

HIQA's *Annual overview report on the inspection and regulation of children's services* for 2019 was published in June 2020 and has been included in this report as the most up-to-date inspection report available for the year 2019.[70] For the most part, children experienced being cared for in a way that made them feel valued and significant to those responsible for their care and development. Children who met with inspectors said they were aware of their rights and were encouraged and supported to exercise them. Family members were happy with the level of care their child received and they felt included in the decisions being made about their children. Specific positive findings outlined in the report included:

- There were some examples of good practice in the four areas inspected. They included the measures in place to divert families to external services where a welfare response was more appropriate. There was also good interagency working between Tusla and An Garda Síochána, particularly where children were deemed to be at immediate risk. Overall, in the longer term, when children had an allocated social worker, most children received a good service.[71]

- Two of the areas inspected demonstrated a noted improvement in screening and preliminary enquiries and initial assessments.[72]

- Care planning was generally good for children in residential care. Reviews were undertaken in a timely manner across three of the four regions. Supervision and visiting

65. *Ibid* at pp 12-13.
66. *Ibid* at p 13.
67. *Ibid* at p 5.
68. *Ibid* at p 6.
69. *Ibid* at p 8.
70. Health Information and Quality Authority, *Annual overview report on the inspection and regulation of children's services – 2019*, available at https://www.hiqa.ie/sites/default/files/2020-06/2019-Childrens-Overview-report_0.pdf.
71. *Ibid* at pp 37-38.
72. *Ibid* at pp 35-36.

of children in residential care was generally good; the majority of children were visited within the time frames set out in the regulations, but also in response to risk or their level of need. Records of visits reflected child-centred practice and demonstrated the positive relationships that had been established with children.[73]

- Assessments of children were comprehensive, multidisciplinary when required and assessed all required areas of a child's needs. Matching of children to carers who had the capacity to meet their assessed needs was evident in the majority of areas.[74]

- There were positive findings in relation to the quality of care provided to children placed in special care units. Children's right to a voice and right to express their views was promoted and they had influence, where possible, over decisions made about their lives. There was a concerted effort made across the three special care units to reduce the need for restrictive practices.[75]

At the same time, the report found that compliance with the national standards on leadership, governance and management presented challenges for some of the services inspected. It noted national variations in governance and management practices in children's residential centres. Critical findings included the following:

- 482 out of 5,461 children in foster care (9%) did not have a named social worker allocated to their case at the end of 2019.[76] Some areas had significantly high numbers of unallocated children in care and as a result, these unallocated children were not receiving a good quality service and were not being visited in line with the regulations.[77]

- None of the four service areas inspected met the five-day time frame for the completion of screening and preliminary enquiries.[78]

- In one area inspected, not all child protection and welfare referrals had their own preliminary enquiry, which posed a potential risk to children.[79]

- In one area, not all children were met with by social workers or social care workers as part of the initial assessment process, which is not in line with good practice.[80]

- Waiting lists were in place in three of the areas for preliminary enquiries to be completed and substantial waiting lists existed in all four areas for an initial assessment. There was no national approach being taken by Tusla to manage waiting lists for children and families awaiting a service from Tusla and this resulted in variance and a lack of consistency within the areas inspected.[81]

- Several areas had backlogs in relation to child-in-care reviews and in particular, service areas that held high numbers of unallocated children in care, also had a high number of care plans that were not up to date. The quality of care plans also varied and placement plans were not routinely completed in some areas.[82]

73. *Ibid* at pp39-40.
74. *Ibid* at p 45.
75. *Ibid* at pp 48-49.
76. *Ibid* at p 31.
77. *Ibid* at p 44.
78. *Ibid* at p 35.
79. *Ibid*.
80. *Ibid* at p 36.
81. *Ibid*.
82. *Ibid* at p 45.

1.5 MEETING THE NEEDS OF VICTIMS OF ABUSE

1.5.1 Report of the UN Special Rapporteur on the sale and sexual exploitation of children

The report of the UN Special Rapporteur on the sale and sexual exploitation of children found that there is a need for care and recovery services to be bolstered around the country so that the services available to child victims are timely and continuous.[83] It noted lengthy waiting lists before victims of child sexual abuse receive social services; low rates of prosecution of sexual offences; and delays in the criminal process. It also highlighted the limited number of judges available to hear childcare cases, which causes delays in care proceedings that affect the timeliness of decisions on care and recovery services, as well as their evaluation. The Rapporteur recommended that the capacity of the court system should be reviewed to ensure that it is equipped with the resources necessary to reduce delays; and that court infrastructure be enhanced to accommodate personnel supporting child victims.[84]

The report welcomed the ongoing review of the protocol governing joint interviewing, given that joint interviewing does not always happen in practice. In this regard, the Rapporteur cited a study of 10 complex childcare cases published by the Child Care Law Reporting Project which found that, despite child sexual abuse allegations emerging in 8 of the cases, in none of the cases was there a joint interview of the child victims by Gardaí and social workers.[85] The Rapporteur observed:

> "Not only are repeat interviews with children harmful, but they can have negative consequences for accountability. As an example, some interlocutors directed the Special Rapporteur to the case of a child who had been interviewed nearly a dozen times and had begun losing track of her testimony, which, they gathered, had contributed to the case being dropped."[86]

The Rapporteur was concerned about the fact that the Child and Adolescent Sexual Assault Treatment Unit is the only specialised forensic examination unit for victims of sexual abuse under the age of 14 years, while there are six such centres for older children and adults. In practical terms, the result of this limitation is that many children will be required to travel for hours for examination and treatment after experiencing abuse. This additional burden on young victims could compound the harm that they experience while also increasing the chance that forensic evidence of crimes against them is compromised. In addition, some victims living far from the specialised unit may be fully deterred from accessing the service. A recent inter-agency report of the activities of all the forensic examination units in Ireland showed that 82% of the cases examined by the Child and Adolescent Sexual Assault Treatment Unit related to incidents that had taken place in Galway and Mayo Counties only; that is, the county in which the unit is located and another one immediately adjacent to it.[87] In light of these findings, the Rapporteur

83. Special Rapporteur on the sale and sexual exploitation of children (n 26 above).
84. *Ibid* at [66].
85. *Ibid* at [58], citing C Coulter, An Examination of Lengthy, Contested And Complex Child Protection Cases In the District Court (2018) at p 40, available at https://www.childlawproject.ie/wp-content/uploads/2018/06/CCLRP-Examination-of-Complex-Child-Protection-Cases-March-2018.pdf.
86. Special Rapporteur on the sale and sexual exploitation of children (n 26 above) at [59].
87. *Ibid* at [62].

welcomed the Government's plans for the launch of the Onehouse project in 2019.[88] This will be discussed in the next section.

The Rapporteur expressed further concern that there is no national therapeutic service for child victims of abuse, meaning that child victims are not guaranteed counselling that is appropriately specialized and nearby after they experience abuse. Non-governmental organizations are heavily relied upon to provide specialized therapeutic services, but lack the resources necessary to meet the present demand and to ensure that care is continuous. Furthermore, waiting lists are extensive for the public mental health services provided by the Health Service Executive, which risks leaving abused children in crisis.[89]

1.5.2 US State Department Trafficking in Persons Report

The US State Department's *Trafficking in Persons Report* for 2019 was highly critical of Ireland's treatment of victims of trafficking.[90] It noted that there was no legally mandated psychological assistance for victims and a lack of specialized services to address the physical and mental health needs of victims. The counselling services provided by NGOs were insufficient. There were no dedicated shelters for victims of trafficking; mixed-gender housing in the direct provision system had inadequate privacy, was unsuitable and potentially unsafe for traumatized victims, could expose them to greater exploitation, and undermined victim recovery. Experts noted a lack of specialized services for all victims, but especially for female victims who had been traumatized due to psychological, physical, or sexual violence.[91]

1.5.3 Barnahus, Onehouse Galway

In September 2019, the Minister for Children and Youth Affairs and the Minister for Justice and Equality jointly launched Barnahus, Onehouse Galway, a multi-agency integrated service developed to respond to the needs of children who have experienced sexual abuse, and of their families. All services necessary to address the investigation and treatment of child sexual abuse (including forensic examination, interviewing and therapeutic) are combined in a single location. This avoids the need for children to travel to multiple locations and repeat their story on multiple occasions, which mitigates the inherent risk of secondary traumatisation associated with engagement with therapeutic services and the criminal justice system. It is planned that the Galway service will be a pilot project that will lead to the development of a national service. A review of this pilot project's operation in practice will determine when and if Onehouse can be launched nationwide.[92]

The project is based on the Icelandic 'Barnahus' model, which is widely recognised as best international best practice. The model was replicated in Sweden, Norway, Greenland and Denmark, and subsequently adapted in other European Countries including the

88. *Ibid* at [59].
89. *Ibid* at [65].
90. US State Department (n 31 above).
91. *Ibid* at p 252.
92. The Department of Children and Youth Affairs funded a review of this pilot project in 2019: S Hanafin, C Lynch and E O'Callaghan, *Appraisal of One House Pilot Project implementation in Galway and issues arising in terms of scaling up* (Department of Children and Youth Affairs, 2020). At the time of writing, this review is unpublished.

UK, Germany, Poland and Croatia.[93] Its introduction in Ireland (which has been widely welcomed by experts from all disciplines working in this field[94]) represents real progress in meeting the needs of children who experience sexual abuse and is to be commended. All steps necessary to build on this initial pilot project and to make the service available nationwide should proceed as soon as practicable.

1.6 CHILD PARTICIPATION IN DECISIONS AFFECTING THEM

The UN Special Rapporteur on the sale and sexual exploitation of children commended Ireland's efforts to incorporate the perspective of children into policies that affect them, including the National Strategy on Children and Young People's Participation in Decision-Making 2015-2020; the interaction between the Department of Children and Youth Affairs and Comhairle na nÓg; and consultations with young people held by Tusla and the Ombudsman for Children.[95] At the same time, the Rapporteur noted that "children face obstacles in having their views taken into account, especially on sensitive topics such as sexual violence. At times, young leaders face stereotypes and dismissive attitudes from adults about their agency and desire to effect change."[96]

Notably, during 2019, HIQA inspectors underwent training on child participation, and have since adopted a range of methods to encourage participation by children appropriate to the environments in which inspections occur. HIQA applied the participative principles of the Lundy Model of child participation to its inspection processes.[97] This was a welcome implementation of international children's rights principles and of academic literature, and it enriched the inspection report with valuable qualitative data from those who are most affected by the issues examined by the inspectors. HIQA is to be commended for adopting this approach.

In the specific context of court proceedings, the Joint Oireachtas Committee on Justice and Equality *Report on Reform of the Family Law System* found that "the right of the child to be heard is not being adequately fulfilled—with inadequate facilities, legislative gaps, adversarial proceedings and a lack of appropriately trained staff all proving to be major barriers to upholding the constitutional obligation" set down in Article 42A.4.[98] Legislative proposals to address this issue in the context of public law child care proceedings were published in the Child Care (Amendment) Bill 2019; this will be examined in detail in Chapter 4 of this report.

93. See, eg, D Wenke, *Enabling Child-Sensitive Justice: The Success Story of the Barnahus Model and its Expansion in Europe* (Council of the Baltic Sea States Secretariat, 2017) at p 5, available at https://www.childrenatrisk.eu/promise/wp-content/uploads/PROMISE-Enabling-Child-Sensitive-Justice.pdf, and S Johansson, K Stefansen, E Bakketeig and A Kaldal, "Implementing the Nordic Barnahus model: Characteristics and local adaptions" in S Johansson, K Stefansen, E Bakketeig and A Kaldal (eds), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (Palgrave Macmillan, 2017) at pp 1-23; and S Johansson and K Stefansen, "Policy-making for the diffusion of social innovations: the case of the Barnahus model in the Nordic region and the broader European context" (2019) 33 *Innovation: The European Journal of Social Science Research* 4.
94. See, eg, C O'Keeffe, "Child therapy experts welcome opening of specialist centre in Galway", *Irish Examiner*, 16 September 2019 and C Gallagher, "Project seen as 'game changer' in helping child abuse victims", *Irish Times*, 16 September 2019.
95. Special Rapporteur on the sale and sexual exploitation of children (n 26 above) at [68].
96. *Ibid* at [69].
97. HIQA (n 70 above) at pp 20-21. The Lundy Model is based on L Lundy, "Voice is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 *British Educational Research Journal* 927.
98. Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at p 32, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.

1.7 ADDRESSING HISTORICAL RIGHTS VIOLATIONS

1.7.1 Redress for survivors of abuse in schools

In July 2019, the Independent Assessor appointed by the Government to review applications rejected by the *ex gratia* scheme established in response to the ruling of the European Court of Human Rights (ECtHR) in *O'Keeffe v Ireland* in 2014[99] determined that the *ex gratia* scheme failed to comply with the terms of the *O'Keeffe* judgment. In *O'Keeffe*, the European Court of Human Rights held that Ireland had violated Articles 3 and 13 of the European Convention on Human Rights by failing to establish an effective system to protect children in schools from abuse, and by failing to provide compensation to the applicant on foot of the State's failure to protect her from abuse.

As part of the general measures taken by Ireland to implement the judgment, an *ex gratia* scheme was established that would provide out-of-court settlements of up to €84,000 to survivors of abuse in primary schools provided that they could demonstrate that 1) they had previously commenced and then discontinued litigation against the State in relation to its liability for the abuse; 2) they could demonstrate that the abuse had occurred in the aftermath of a "prior complaint" against the abuser; and 3) that their claim was not precluded by the Statute of Limitations. By July 2019, every single application to the scheme had been rejected for failure to satisfy the "prior complaint" criterion.

In the course of assessing 19 appeals against rejections of applications to the scheme, the Independent Assessor (former High Court judge Mr Justice Iarfhlaith O'Neill) examined the issue of whether the "prior complaint" criterion was consistent with the judgment of the ECtHR in *O'Keeffe*. Legal submissions were made on this point by the State, the Irish Human Rights and Equality Commission, the Child Law Clinic at University College Cork and a number of solicitors representing applicants to the scheme. The Assessor concluded that the requirement to demonstrate prior complaint was "an inherent inversion of logic and a fundamental unfairness to applicants", and was "inconsistent with the core reasoning of the judgment of the ECtHR in the Louise O'Keeffe case".[100]

The immediate consequence of this decision was that 13 of the 19 applications considered by the Assessor were deemed to be eligible for settlements. However, the more significant implication is that the scheme as a whole requires revision so as to bring Ireland's conduct into line with its obligations under the *O'Keeffe* judgment. This would allow many applicants who have not yet applied to the scheme (since they knew that they could not demonstrate prior complaint) to make applications and receive redress in line with the findings of the ECtHR in *O'Keeffe*.

Following the decision of the Independent Assessor, settlements were offered in the 13 cases directly considered by the Independent Assessor and in three additional cases in which applications were pending. (Not all of these offers have been accepted; issues remain in dispute concerning the absence of provision for legal costs even though applicants are required to have commenced and then discontinued litigation, and thus would have incurred substantial legal costs). More broadly, both the Taoiseach and the Minister for

99. 35810/09, 28 January 2014.
100. Decision of the Independent Assessor at [46] and [52], available at https://www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/ECHR-OKeeffe-v-Ireland/independent-assessment-process/okeeffe-v-ireland-decision-of-the-independent-assessor.pdf.

Education made statements in the Dáil in which they committed to dispensing with the prior complaint criterion and re-opening the scheme.[101] A notice was published on the Department of Education website stating that the process of reviewing the scheme would "take a number of weeks to complete".[102] In November 2019, the Minister for Education stated that the matter was being treated with the "most urgent attention" and that he was "confident we will have a report back within the next few weeks".[103] However, at the time of writing in June 2020 (almost exactly one year after the ruling), the scheme remains closed and under review. No timeline has been published indicating when it is expected that the review will be completed and the scheme re-opened.

The Government's failure to re-open the *ex gratia* scheme places Ireland in continuing violation of Article 13 of the European Convention on Human Rights, and causes significant trauma to those affected (who have already been denied their rightful entitlement for over six years since the *O'Keeffe* judgment). Moreover, many of the survivors are of advanced age and do not have the luxury of time. There is no justification for further delays in vindicating the right of survivors of abuse in schools to an effective remedy.

1.7.2 Report of the UN Special Rapporteur on the sale and sexual exploitation of children

The report of the UN Special Rapporteur on the sale and sexual exploitation of children expressed concerns in relation to the response of the Government to addressing historical rights violations in the context of Magdalene Laundries (which the Rapporteur noted as having involved forced child labour and potentially the sale of children under international law[104]) and Mother and Baby Homes. Noting the State's assertion that it has no evidence of systemic human rights violations in the Magdalene Laundries and that the Government has no liability for them, the report stated:

> "The Special Rapporteur is concerned that Ireland maintains this position, given that it is based on the summary results of an inquiry that was limited in scope and gathered information primarily through voluntary contributions. It also runs contrary to the recommendations of the Irish Human Rights and Equality Commission and of the treaty bodies … The Government's suggestion that survivors of abuses have recourse to litigation and criminal complaints fails to acknowledge the obstacles presented in this regard, including difficulty in obtaining justice for historical cases and the apparent precondition that survivors agree to take no legal action against the State in order to benefit from the ex gratia scheme."[105]

In relation to the Mother and Baby Homes Commission of Investigation, the UN Special Rapporteur was "concerned that the limited scope of the Commission's work … will mean that its investigation is not broad enough to uncover the full scale of illegal adoption,

101. See Dáil Debates, 9 July 2019, available at https://www.oireachtas.ie/en/debates/debate/dail/2019-07-09/2/ and Dáil Debates, 10 July 2019, available at https://www.oireachtas.ie/en/debates/debate/dail/2019-07-10/18/.
102. See https://www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/ECHR-OKeeffe-v-Ireland/ex-gratia-scheme.pdf.
103. Dáil Debates, 19 November 2019, available at https://www.oireachtas.ie/en/debates/debate/dail/2019-11-19/17/#s20.
104. Special Rapporteur on the sale and sexual exploitation of children (n 26 above) at [16].
105. *Ibid* at [19].

which still affects Irish citizens today."[106] It was noted that individuals seeking access to information and background records relating to identity and possible siblings were "systematically denied such information" and that "the need for a comprehensive national examination of forced and illegal adoption is urgent. Failure to provide information, redress and justice for these human rights abuses perpetuates the harm inflicted on the victims."[107] The Irish Government responded to this finding by stating that the scope of the investigation is "focused and comprehensive", and that the Commission is also obliged to report on any specific matters outside its scope which it considers may warrant further investigation; the Government will consider any recommendations made by the Commission in this regard.[108]

The UN Special Rapporteur also encouraged Ireland to enact legislation protecting the rights of adoptees to information about their origins and identities, and stated that the rights of children to essential information about their identities should be treated as separate from, and not contingent upon, the desire of any party to be contacted. Adopted children should be entitled to seek this information, in addition to adults who were adopted as children.[109]

1.7.3 Fifth Interim Report of Mother and Baby Homes Commission of Investigation

The Mother and Baby Homes Commission of Investigation submitted its *Fifth Interim Report* to the Minister for Children in March 2019.[110] The limitations in the scope of the Commission's work were noted in the previous section. The *Fifth Interim Report* was concerned with the burial arrangements in the main institutions under investigation and with the transfer of remains to educational institutions for the purpose of anatomical examination. It did not include any analysis of the causes of deaths or the registration of deaths; these issues will be dealt with in the final report.

Although a range of institutions are covered in the report, the main focus relates to burials at Bessborough and Tuam, where several hundred burials remain unaccounted for in each case. More than 900 children died in Bessborough or in hospital after being transferred from Bessborough; however, despite very extensive inquiries and searches, the Commission has been able to establish the burial place of only 64 children. The Congregation of the Sacred Hearts of Jesus and Mary who owned and ran Bessborough do not know where the other children are buried; the Commission stated that it "finds this very difficult to comprehend".[111] The Congregation of the Sacred Hearts of Jesus and Mary, who owned and ran the institution, provided the Commission with an affidavit about burials; but the Commission described it as, "in many respects, speculative, inaccurate and misleading".[112] The Commission considers that it is likely that some of the children are

106. *Ibid* at [14].
107. *Ibid* at [15].
108. Statement of Ireland, 40th Session of Human the Rights Council, 5 March 2019, available at https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/hrc40/IE-right-of-reply---Report-of-SR-Sale-of-Children.pdf.
109. *Ibid* at [47].
110. Mother and Baby Homes Commission of Investigation, *Fifth Interim Report* (March 2019), available at https://assets.gov.ie/25783/a141b69a4a3c46fd8daef2010bf51268.pdf.
111. *Ibid* at p 8.
112. *Ibid*.

buried in the grounds but has been unable to find any physical or documentary evidence of this.[113]

In relation to Tuam, the Commission noted "a great deal of inaccurate commentary" and emphasised what it had and had not been able to establish:

- The memorial garden site contains human remains which date from the period of the operation of the Tuam Children's Home so it is likely that a large number of the children who died in the Tuam Home are buried there.
- The human remains found by the Commission are not in a sewage tank but in a second structure with 20 chambers which was built within the decommissioned large sewage tank.
- The precise purpose of the chamber structure has not been established but it is likely to be related to the treatment/containment of sewage and/or waste water. It has not been established if it was ever used for this purpose although soil analysis illustrates that it is likely it was so used for an unspecified duration.
- It has not been established that all the children who died in the Tuam Children's Home are buried in this chamber structure. There is some evidence that there may be burials in other parts of what were the grounds of the Home.[114]
- However, it seems clear that many of the children who died in the Tuam Home are buried in the chambers described. This was not a recognised burial ground or purpose built burial chamber. It did not provide for the dignified interment of human remains.[115]

The Commission noted that the more difficult question to answer is why the children were "buried" in such an inappropriate manner. Responsibility for the burials lay with Galway County Council as the owner of the institution. The Sisters of Bon Secours who ran the Tuam Home were unable to provide any information about the burials there. As with Bessborough, the Commission expressed surprise at the lack of knowledge about the burials on the part of Galway County Council and the Sisters of Bon Secours.[116]

The final report of the Commission is due to be submitted to the Minister by 30 October 2020. This follows a number of delays and extensions due to the scale and complexity of the work. While the most recent delay due to the impact of COVID19 is understandable, it must be emphasised that delay causes much distress to the survivors of the institutions (as acknowledged on a number of occasions by the Minister for Children). Further delay must be avoided.

1.8 DISCUSSION

This chapter has set out the findings of a wide range of reports that have examined various aspects of Ireland's approach to child protection issues. When so many reports—some quite lengthy—are handed down in a single year, there is a risk of information overload and failing to see the wood for the trees. With this in mind, the common themes and key lessons emerging from the various reports will now be extrapolated.

113. *Ibid* at p 9.
114. *Ibid* at pp 9-10.
115. *Ibid* at p 94.
116. *Ibid* at p 10.

1.8.1 Child homelessness

The detrimental impact of homelessness on a range of children's rights, including the right to protection from harm, was discussed in section 1.2.1 above. The issue was the subject of two separate reports published in November 2019 by the Joint Oireachtas Committee on Children and Youth Affairs and the Joint Oireachtas Committee on Housing, Planning & Local Government. Citing the State's obligations under Article 27 of the UN Convention on the Rights of the Child, the Joint Oireachtas Committee on Children and Youth Affairs concluded:

> "The Joint Committee believes that in light of the current housing crisis and the subsequent impact on children, it is a matter of public interest for the Government to re-examine the issue of enumerating a right to housing in the Constitution.
>
> The Joint Committee also notes that as a party to the UN Convention on the Rights of the Child, the Government should stand by any obligations to protect children under international law."[117]

This recommendation was echoed by the Joint Oireachtas Committee on Housing, Planning & Local Government in its report on *Family and Child Homelessness*.[118] Both Committees recommended that the best interests of the child be taken into account by local authorities when providing homeless supports. The Joint Committee on Housing, Planning & Local Government recommended that this take the form of an amendment to the Housing Act 1988 placing a statutory duty on housing authorities to regard the best interests of the child as paramount,[119] whereas the Joint Committee on Children and Youth Affairs recommended that this be set out in revised guidelines on implementing the Housing Act.[120] The Joint Committee on Children and Youth Affairs also noted that the voice of the child should be considered by local authorities as part of this process, and that appropriate training be provided to staff.[121]

Additional recommendations to Government included:

- To instruct local authorities to end the practice of one-night-only accommodation for families with children.[122]
- The establishment of an independent inspectorate of homelessness services to ensure appropriate monitoring of standards[123] (with the expansion of the remit of HIQA being one way of achieving this).[124]

117. Joint Oireachtas Committee on Children and Youth Affairs (n 4 above) at p 21.
118. Joint Oireachtas Committee on Housing, Planning & Local Government, *Report on Family and Child Homelessness* (November 2019) at p 6, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_housing_planning_and_local_government/reports/2019/2019-11-14_report-on-family-and-child-homelessness_en.pdf.
119. *Ibid* at p 9.
120. Joint Oireachtas Committee on Children and Youth Affairs (n 4 above) at p 24.
121. *Ibid*.
122. *Ibid* at p 32. See also Joint Oireachtas Committee on Housing, Planning & Local Government (n 118 above) at p 11.
123. Joint Oireachtas Committee on Children and Youth Affairs (n 4 above) at p 33.
124. Joint Oireachtas Committee on Housing, Planning & Local Government (n 118 above) at p 13.

- To ensure that local authorities fully utilise budgets for funding for accommodation for Traveller families.[125]

- To end the practice of accommodating homeless families in hotels and B&Bs, on the basis that living in cramped living conditions has a destructive impact on the health of children, with a view to placing families in own-door accommodation as soon as possible.[126]

This report fully endorses all of the above-mentioned recommendations, including the proposed examination of a constitutional right to housing. Experience in South Africa has shown how constitutional protection can be provided for economic and social rights like housing in a way that provides a safety net in cases where Government policy unreasonably fails to provide for those rights, while at the same time ensuring that the courts do not become the primary drivers of policy and resource allocation.[127]

The Oireachtas Committee reports took a different view on how best to provide for the best interests principle. Since the general approach to making provision for the best interests principle and the right of children to be heard is to do so by way of statutory duty (for example, in the Child and Family Agency Act 2013; the Guardianship of Infants Act 1964; the Child Care Act 1991, and the Adoption Act 2010), the preferable approach would be to amend the Housing Act 1988 rather than to rely on non-binding guidelines.

1.8.2 Inter-agency collaboration

A theme repeated in multiple reports was the need to improve inter-agency collaboration. Child protection is an inherently multi-disciplinary space; to work effectively, it requires input at various points from social workers, police, lawyers, judges and court staff, guardians *ad litem*, a wide range of healthcare professionals, as well as teachers and education welfare officers and others who come into regular contact with children. In its General Comment No 13 on *The right of the child to freedom from all forms of violence*, the UN Committee on the Rights of the Child repeatedly stressed the importance of inter-agency collaboration.[128]

Interagency collaboration and coordination is one of the six goals of *Better Outcomes, Brighter Futures*, the national policy framework for children and young people for 2014-2020,[129] and the Department of Children and Youth Affairs is engaged in ongoing work on improving inter-agency collaboration through initiatives such as Children and Young People's Services Committees. In 2019, effective inter-agency collaboration was noted by the National Review Panel in its reviews of the cases of *Niamh*[130] and *Oscar*,[131] as well as by HIQA in its *Annual overview report on the inspection and regulation of children's*

125. Joint Oireachtas Committee on Children and Youth Affairs (n 4 above) at p 34.
126. *Ibid* at p 44.
127. See further G Whyte, "Judicial Capacity to Enforce Socio-Economic Rights" (2014) 37 *Dublin University Law Journal* 203 and A Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing, 2011).
128. Committee on the Rights of the Child, *General Comment No 13: The right of the child to freedom from all forms of violence*, UN Doc No CRC/C/GC/13, 18 April 2011 at [42] and [50].
129. Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014-2020*, available at https://assets.gov.ie/23796/961bbf5d975f4c88adc01a6fc5b4a7c4.pdf.
130. National Review Panel (n 51 above).
131. National Review Panel, *Review undertaken in respect of the death of Oscar, an infant whose family had contact with Tusla services* (June 2019), available at https://www.tusla.ie/uploads/content/Oscar_Executive_Summary_final.pdf.

services.[132] The report of the Expert Assurance Group acknowledged momentum in inter-agency engagements to develop more effective working. However, it also noted that the majority of actions, although on track for implementation, are yet to be completed, and considered the need for joint specialist training between Tusla and An Garda Síochána to be of the utmost urgency.[133]

While there is evidence of progress and good practice, the various reports discussed above nevertheless suggest that there remains considerable room for improvement in the quality of inter-agency collaboration between Tusla, the HSE and An Garda Síochána. Difficulties between Tusla and the HSE in respect of children with disabilities was the central theme emphasised in the Ombudsman for Children's Office reports on *Molly*.[134] The National Review Panel review of the case of *Fiona* found "communication gaps between the parties involved and the lack of any interagency or interdisciplinary meetings to discuss the serious concerns that were identified and to plan a coordinated response,"[135] while the review of the case of *Ray* found that "communication between the addiction services and the SWD was limited".[136] The review of *Simon* found that while there was "good evidence of inter-agency communication at operational level", "shortcomings were very evident at care planning level".[137] The Irish Penal Reform Trust *Care and Justice* report was critical of the lack of co-ordinated policy in relation to involvement of children in care with the criminal justice system and called for a joint protocol aimed at addressing the to be developed by the Department of Children and Youth Affairs and the Irish Youth Justice Service with the involvement of An Garda Síochána and Tusla.[138]

There is an important role to be played by Government in bringing together the various agencies and ensuring that they collaborate effectively, and the ongoing efforts in this area need to be continued and re-doubled. The UN Special Rapporteur on the sale and sexual exploitation of children highlighted the "fragmented nature of the Government's approach to the issue of sexual violence against children" and "the lack of a dedicated and integrated strategy to respond to sexual violence against children".[139] Since State agencies are required to implement Government policy, the development of effective inter-agency collaboration is dependent on the development of coherent policies by the Departments of Children and Youth Affairs, Justice and Equality, Health and Education. The Onehouse project shows what can be achieved when Government departments work together effectively towards a coherent goal.

1.8.3 Capacity and resourcing of services

The under-resourcing of services essential to child protection was repeatedly documented in the various reports, with delays and lengthy waiting lists evident at all points in the system. HIQA pointed to substantial waiting lists for initial assessment of child protection

132. HIQA (n 70 above) at p 38.
133. Expert Assurance Group (n 30 above) at p 28.
134. Ombudsman for Children's Office (n 63 above).
135. National Review Panel, *Review of the death of a child known to Tusla child protection and welfare services: Fiona* (March 2019), available at https://www.tusla.ie/uploads/content/Fiona_Executive_Summary.pdf.
136. National Review Panel (n 50 above).
137. National Review Panel (n 53 above).
138. N Carr and P Maycock, *Care and Justice: Children and Young People in Care and Contact with the Criminal Justice System* (Irish Penal Reform Trust, 2019) at p 48, available at http://www.iprt.ie/files/Care-and-Justice-web.pdf.
139. Special Rapporteur on the sale and sexual exploitation of children (n 26 above) at [56] and [75].

referrals made to Tusla.[140] Both the Child Care Law Reporting Project and the UN Special Rapporteur on the sale and sexual exploitation of children highlighted a lack of capacity in the courts system for child care proceedings, leading to delays in hearing cases and/or over-crowded case lists which reduce the amount of attention given to each case.[141] The Rapporteur also noted lengthy delays in criminal prosecutions of child sexual abuse, and lengthy waiting lists in the provision of therapeutic services to victims, as well as for adolescent mental health services; and the fact that the limited availability of specialised forensic examination unit for victims of sexual abuse results in many children being required to travel for hours for examination and treatment after experiencing abuse.[142] Taken together, these reports provide evidence that the child protection system in Ireland is currently under-resourced at key stages. This has a negative impact on response times and service levels, and likely exposes victims of abuse and neglect to avoidable harm through delayed interventions as well as to secondary traumatisation during investigations and court proceedings.

1.8.4 Governance and leadership

The importance of good governance and leadership in child protection was highlighted by the Ombudsman for Children's Office, HIQA and the Expert Assurance Group. The Ombudsman for Children's Office welcomed commitments from both the CEO of TUSLA and the Director General in the HSE to ensure the necessary leadership to give effect to the recommendations arising from the investigation into *Molly's case*.[143] HIQA stated that there is "ample evidence that good leadership, governance and management in services is essential for building and sustaining effective and resilient services," but noted that "[c]ompliance with the national standards on leadership, governance and management presented challenges for some of the services inspected", including in the areas of monitoring and oversight, quality assurance and risk management.[144] The Expert Assurance Group noted that of seven actions on the theme of governance in Tusla's strategic action plan, all seven were on track, but none had been completed. It expressed concern at the pace of the introduction of a performance management system, but has noted a clear pathway has been proposed by the Tusla Executive.[145]

1.8.5 Child participation

The approach to child participation in decisions affecting them has been mixed. There was evidence of progress in some respects; HIQA's direct engagement with children as part of their inspection process stands out as an example of good practice, while similar consultative initiatives by the Department of Children and Youth Affairs, Tusla and the Ombudsman for Children received positive feedback from the UN Special Rapporteur on the sale and sexual exploitation of children.[146] However, progress in the context of

140. HIQA (n 70 above) at p 36.
141. Coulter (n 36 above) at p 1, and Special Rapporteur on the sale and sexual exploitation of children (n 26 above) at [66].
142. Special Rapporteur on the sale and sexual exploitation of children (n 26 above) at [62] and [65].
143. Ombudsman for Children's Office (n 63 above) at p 4.
144. HIQA (n 70 above) at pp 6-7.
145. Expert Assurance Group (n 30 above) at p 35.
146. Special Rapporteur on the sale and sexual exploitation of children (n 26 above) at [68].

child participation in court proceedings has been more limited. As highlighted by the Joint Oireachtas Committee on Justice and Equality, current arrangements fail to discharge constitutional obligations due to weaknesses in the legislation governing both private and public law proceedings and in the resourcing of mechanisms for allowing children to participate.[147] Chapter 4 of this report will conduct an in-depth examination of draft legislative proposals in relation to child participation in public law child care proceedings. It will be seen that some elements of these proposals are welcome and overdue, while other elements risk undermining the effectiveness of the guardian *ad litem* as a vehicle for child participation.

1.8.6 Disparity of approach to current and historical issues

Notwithstanding the various criticisms made above, there is also evidence of important progress and a desire to improve the level of protection provided to children at risk of abuse and neglect. Almost all of the reports discussed above gave examples of positive developments at systemic level and/or good practice at individual case level. When it comes to current cases, there is clear evidence that the will to vindicate the rights of children exists, even if the manner in which this is carried into effect can be the subject of legitimate criticism.

By contrast, when it comes to historical cases, the Government does not evidence a sufficient willingness to respond to documented human rights violations related to child protection. The failure to implement the decision of *O'Keeffe v Ireland*—over six years after the decision of the European Court of Human Rights and one year after the decision of the Independent Assessor—is a prominent but not an isolated example. The UN Special Rapporteur on the sale and sexual exploitation of children drew attention to restrictive approaches being taken in the context of both Magdalene Laundries and Mother and Baby Homes.[148]

The Irish Government appears to have developed a culture of denial and obstruction on the issue of State responsibility for historical violations of children's rights, even where international human rights bodies determine that State responsibility was engaged. This causes trauma to those affected by forcing them to fight the State for many years to receive an acknowledgment of liability and redress to which they are entitled by international human rights law (thus compounding the original violations of their rights for which the State bears part responsibility). The State's strategy in this respect often involves huge expenditure on legal fees defending actions, which undermines the extent of any financial savings which might be made. This money would be better spent on meeting the needs of survivors.

1.8.7 Conclusion

The analysis above has identified a range of areas where there is room for important improvements to be made in the area of child protection. At the same time, with the exception of historical issues, there is evidence of at least some progress across most

147. Joint Oireachtas Committee on Justice and Equality (n 98 above) at p 32.
148. Special Rapporteur on the sale and sexual exploitation of children (n 26 above) at [14] to [19].

other areas of activity. The launch of the Onehouse pilot project stands out as perhaps the most positive development in 2019. However, it is evident that the pace of change is often slow. This is not to minimise the complexity or the scale of the challenges involved; child protection is a complex, multi-disciplinary space with significant resource implications (both human and financial) and complex legal considerations. Change will not always be easy; it is important to do things well, and to take the time to consult with professionals and stakeholders (and of course with children themselves). However, to borrow a phrase from the Ombudsman for Children's Office report on *Molly*, we must remember that childhood is short. Decisions taken (or not taken) at an abstract systemic level have concrete implications at an individual level. Vulnerable children (and, indeed, elderly survivors of historical rights violations) have needs that must be met now; they cannot afford to wait for the system to catch up.

Chapter 2

Investigating and Responding to Complaints of Child Sexual Abuse

2.1 BACKGROUND

When Tusla receives complaints of alleged or suspected child sexual abuse, its obligation to protect children is engaged on two levels. First, Tusla has an obligation to take steps to protect identified children at immediate risk. Second, there is an obligation to protect other children—whether identified or unidentified—from potential future abuse by a suspected child abuser. A significant category of such cases is what is known as "retrospective complaints", where an adult makes a complaint that he or she experienced sexual abuse as a child. In such cases, the complainant is no longer at risk of being abused, but the alleged abuser may continue to pose a risk to other children many years after the instance(s) of abuse complained of.

Tusla's statutory obligation to protect children from future abuse by a person subject to an abuse allegation (referred to as the "PSAA" throughout this chapter) arises independently of any criminal justice implications that may attach to complaints of past child sexual abuse. Evidential difficulties make a successful prosecution challenging on the criminal standard of beyond all reasonable doubt, particularly in retrospective cases—but an assessment on the lower civil standard of balance of probabilities may find that a complaint is founded and that a risk arises that should be mitigated. Tusla may discharge this obligation in a number of ways, including safety planning with family members (eg through social workers assisting parents to protect their children from a person identified as posing a potential risk of abuse), or sharing information regarding the abuse allegation with third parties such as employers or voluntary organisations. However, as will be seen below, the Child Care Act 1991 does not provide a sufficiently robust legal basis for this challenging work, and creates difficulties for all parties involved (including complainants, PSAAs and the social work team tasked with conducting the investigation and acting on its findings). This chapter will outline the challenges arising from the current state of the law and make recommendations on how it could be reformed.

2.2 OBLIGATIONS UNDER INTERNATIONAL LAW

The obligation on the Irish State to conduct an effective investigation of any allegation of sexual abuse, and to protect children against sexual abuse at the hands of private actors, is clearly established under the European Convention on Human Rights (ECHR). The ECHR makes no express reference to children or to child abuse; but the right to freedom from inhuman and degrading treatment under Article 3 has been extensively applied by the European Court of Human Rights to cases where States have failed to adequately protect against or investigate abuse.[1] Obligations under the ECHR subdivide into procedural obligations (i.e. to investigate complaints of alleged abuse) and substantive obligations (i.e. to protect children against abuse), although there is a degree of overlap between the two.

The ECHR is binding on the Irish State as a matter of international law. Moreover, it imposes obligations on both Tusla and the Irish courts pursuant to the ECHR Act 2003. Section 3 of the 2003 Act obliges organs of the State (which includes Tusla) to perform their functions in a manner compatible with the State's obligations under the ECHR. Failure to do so can be litigated before the Irish courts. In addition, section 2 obliges Irish courts, in so far as is possible, to interpret and apply Irish law in a manner compatible with the State's obligations under the ECHR.

In practical terms, this means that the ECHR case law and obligations discussed below inform the interpretation and application of the Child Care Act 1991 (section 3 of which will be considered in detail below) and related case law. Tusla is obliged to perform its functions under the 1991 Act in a manner compatible with these obligations; and should any litigation regarding Tusla's performance of these functions arise, the courts will be obliged to interpret the 1991 Act in a manner compatible with these obligations.

1. For a comprehensive analysis of child protection obligations under the ECHR, see C O'Mahony, "Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations" (2019) 27 *International Journal of Children's Rights* 660.

2.2.1 Procedural obligations

Once a complaint is made to any State agency regarding any case of sexual abuse, the ECHR obliges the State to carry out an effective investigation of that complaint. The procedural obligation to carry out an effective investigation is independent of the substantive obligation to protect against abuse. A State can be found to have committed a procedural violation due to an ineffective investigation in circumstances where its substantive obligations have been fully discharged; or even in circumstances where it has not been satisfactorily established that ill-treatment actually occurred.[2] Once a complaint has been made, the obligation to mount an investigation is engaged.

In the context of abuse against children, the leading case on the procedural obligations arising under Article 3 is *CAS and CS v Romania*,[3] which concerned an investigation into an allegation of repeated serious and violent sexual abuse of a seven-year-old boy. The Court recognised the obligation to carry out an effective investigation of complaints of abuse, and set out key principles for determining whether an investigation could be regarded as "effective":

- Investigations should in principle be capable of leading to the establishment of the facts of the case.
- Authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, etc.
- Investigations must proceed with promptness and reasonable expedition.[4]

The investigation in the case at hand was found to be ineffective on the basis of a combination of factors, including delays in commencing it and in progressing key aspects[5] (such as questioning the alleged perpetrator[6]), showing evidence of a "lax attitude" on the part of the authorities.[7] Moreover, no proper counselling services were provided to the child, which was not consistent with the need to provide adequate measures for recovery and integration.[8]

As such, when a complaint of abuse is made, the State is obliged to undertake a rigorous investigation of that complaint that is prompt and thorough, capable of securing all available evidence, child-sensitive, and which provides measures to support recovery such as counselling. Failure to adhere to these standards may lead to a violation of Article 3 of the ECHR.

2. *Assenov v Bulgaria* (24760/94, 28 October 1998).
3. *Ibid*.
4. *Ibid* at [69] to [70].
5. See also *PM v Bulgaria* (49669/07, 24 January 2012) at [63] to [67], in which delay of more than 10 years in the investigation of the rape of a 13 year-old girl, with the result that the prosecution of the perpetrators was eventually time-barred, led to a finding of a violation.
6. See also *IG v Moldova* (53519/07, 15 May 2012) at [40] to [45], in which a violation was found in respect of the investigation of the rape of a 14 year-old girl due largely to the fact that the decision to drop the charges was made without two of the three key witnesses being questioned and without any attempt made to establish the credibility of the statements made by the applicant and the alleged perpetrator (eg by questioning people who could have shed light on their trustworthiness).
7. *CAS and CS v Romania* (26692/05, 20 March 2012) at [74] to [79].
8. *Ibid* at para 82.

2.2.2 Substantive obligations

It is also well established that the ECHR obliges States to protect children against abuse at the hands of private actors. This is not merely a reactive duty; even before abuse has occurred, States are obliged to take reasonable measures that mitigate foreseeable risks of ill-treatment occurring. This can arise in two contexts: i) a specific risk to an identified individual, and ii) a general risk to unidentified individuals. The obligation applies not only to risks of which the State is aware, but to risks of which the State ought to be aware (had it taken reasonable measures).

A number of cases have found violations due to a failure to adequately respond to ill-treatment in circumstances where State authorities were aware of a risk to identified individuals.[9] For example, in *E v United Kingdom*,[10] although social services were not actually aware that the children involved were being abused, the Court held that they "should have been aware that the children remained at potential risk", and "failed to take steps which would have enabled them to discover the exact extent of the problem and, potentially, to prevent further abuse taking place."[11] This failure was found to have violated Article 3.

The duty to protect against foreseeable risks was extended beyond specific risks to identified individuals to include general risks to unidentified individuals by the Grand Chamber in *O'Keeffe v Ireland*.[12] The *O'Keeffe* decision was not solely predicated on a failure to respond to actual abuse; the mere risk of abuse was enough to engage a positive obligation to take preventive measures. The Court relied on evidence from official reports on the incidence of sexual abuse of children in Ireland to find that the risk of abuse occurring in schools was foreseeable. Accordingly, as it was a risk of which the State had or ought to have had knowledge, the State should have taken steps to protect children against that risk. Its failure to do so violated Article 3.[13]

Thus, in any situation where the abuse of children is a foreseeable risk, the ECHR obliges States Parties to put in place proactive, protective measures designed to mitigate that risk and prevent abuse from occurring. As with risks to identified individuals, it is clear that States cannot choose to ignore foreseeable general risks and fail to put in place any measures to control against them.

In the context of complaints of child abuse, the case law discussed above shows that the ECHR obliges Ireland to take steps to protect children—whether identified or unidentified—against a risk of sexual abuse in circumstances where State authorities are or ought to be aware of the existence of that risk. If an investigation into a complaint deems the complaint to be well founded, then State authorities are aware of the risk and the obligation to take steps to mitigate that risk is engaged. Moreover, if an investigation into a complaint was ineffective, and no preventive measures were taken in relation to a risk that should have been identified (and subsequently materialised in the form of further abuse), it would be deemed that the State ought to have been aware of the risk. As such, there would be a procedural violation in respect of the ineffective investigation, and a substantive violation in respect of the failure to take steps to mitigate the risk.

9. *Kontrova v Slovakia* (7510/04, 31 May 2007); *Talpis v Italy* (41237/14, 2 March 2017).
10. 33218/96, 26 November 2002.
11. *Ibid* at [96] to [97].
12. 35810/09, 28 January 2014.
13. *Ibid* at [169].

2.3 CHILD CARE ACT 1991

Section 3 of the Child Care Act 1991, as amended, provides as follows:

> (1) It shall be a function of the Agency [i.e. Tusla] to promote the welfare of children who are not receiving adequate care and protection.
>
> (2) In the performance of this function, the Agency shall—
>
> (a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children in its area …

At present, this is the only provision of legislation that imposes obligations on Tulsa to investigate complaints of abuse and to mitigate any risks that are identified. Clearly, it is a very broad and general provision and was not drafted with this issue in mind; it contains more gaps than detail in relation to investigations and proactive measures to prevent abuse. Nonetheless, its application to the issue was confirmed by the High Court in *MQ v Gleeson*.[14] Mr Justice Barr stated that the section 3 duty applies both to children in immediate risk and to children who, although not immediately identifiable, may become subject to a risk which the health board (as it then was) reasonably expects may come about.[15]

The *MQ* case concerned the danger potentially posed to children by a man suspected of child abuse who was accepted to a child care qualification course. The health board furnished a report to the organisers of the course who took steps to remove him. The High Court held that the health board's duties under section 3 obliged it to take the steps which it took; but also emphasized the right to fair procedures of the PSAA. As with the ECHR case law, the High Court was clear that the obligation to protect children is not confined to responding to abuse that has already occurred, but to mitigate the risk of abuse that has yet to occur.[16]

MQ v Gleeson clarifies that section 3 not only authorises but obliges Tusla to take steps to protect children, including sharing information with third parties, in circumstances where an individual poses a risk that children will be abused. The judgment has subsequently come to be recognised as establishing the foundational principles governing the investigation of complaints of abuse and notification of complaints to third parties,

14. [1998] 4 IR 85.
15. *Ibid* at p 99.
16. See *ibid* at pp 99-100: "… in the exercise of their statutory function to promote the welfare of children, health boards are not confined to acting in the interest of specific identified or identifiable children who are already at risk of abuse and require immediate care and protection, but that their duty extends also to children not yet identifiable who may be at risk in the future by reason of a specific potential hazard to them which a board reasonably suspects may come about in the future. Subject to the proper exercise of its functions in the matter of complaints about child abuse and its duty to afford the applicant the benefit of fair procedures, I have no doubt that in the instant case, on the premise that it had taken appropriate steps to inform itself, the fourth respondent would have been entitled to form an opinion that the applicant was unfit for child care work and would have had an obligation under s. 3(1) of the Act of 1991 to communicate its opinion to the second respondent with a view to having the applicant removed from the social studies course of which he was engaged. The fourth respondent was not obliged to wait until a child or children had been actually abused by the applicant after he had taken up child care employment. On the contrary, on becoming aware that he proposed to embark on a career in child care and that he was attending an educational course to qualify for such work, the fourth respondent had an obligation to protect children who in its considered opinion would be at risk of abuse by the applicant should he carry out his stated intention of embarking on a career in that area. Such an obligation would require the communication by the fourth respondent of its opinion to the second respondent coupled with a request to remove him from the course in question."

and has been repeatedly cited in later policy documents and case law (where it is often referred to in shorthand as the "Barr Principles").[17]

As noted above, the ECHR Act 2003 requires that section 3 of the Child Care Act 1991 be read in light of the ECHR and case law of the Strasbourg Court; as such, all of the obligations established in that case law can be read into section 3, including mounting an effective investigation of complaints, and taking steps to mitigate risks both to identified and unidentified individuals.

While the ECHR case law and the Barr Principles provided some clarity as to the nature of the obligation established by section 3, neither those judgments nor section 3 itself provide a framework for conducting investigations; nor does section 3 set out what measures can or should be taken to mitigate risks. In the face of this legislative void, it has been left to Tusla to fill in the blanks in its policy documents, and to the courts to flesh out the governing principles applicable to the process. There are significant points of both principle and detail that need to be determined. The fact that this has not been done in the governing statute gives rise to a number of disadvantages, as will be explained below.

2.4 TUSLA POLICY

2.4.1 Policy & Procedures for Responding to Allegations of Child Abuse & Neglect (2014)

In the context of such a sparse statutory framework, Tusla policy documents take on a heightened significance in the context of retrospective allegations. The procedures to be followed by Tusla in investigating disclosures made to the Agency were set out in the *Policy & Procedures for Responding to Allegations of Child Abuse & Neglect* in September 2014. The 2014 policy is a lengthy document which cannot be explored in detail here; key points relating to investigations of complaints include the following:

- The policy is underpinned by the "Barr Principles" set down by the High Court in *MQ v Gleeson* (see above).
- The importance of affording fair procedures to PSAAs is emphasised throughout; but the policy also states at the outset that "at times this right may need to be secondary to the protection of children at risk" (para 1.2).
- A hierarchy of risk is established: (a) specific or identifiable children at immediate or serious risk and in need of urgent care and attention, and (b) identified children in respect of whom risk is likely to develop in the future, or children yet to be identified. The policy states at paras 4.1-4.3 that priority is to be given to the protection of children in scenario (a), and the PSAA informed of the allegations at the earliest opportunity; whereas the constitutional rights of the PSAA should take priority in scenario (b).
- The importance of inter-agency co-operation is emphasised throughout.
- The policy sets out the sequence of events to be followed where allegations of abuse are notified to Tusla, including when and how to communicate with the complainant, the PSAA and third parties.

17. See J Mooney, "Adult disclosures of childhood sexual abuse and section 3 of the child care act 1991: past offences, current risk" (2018) 24(3) *Child Care in Practice* 245.

- A two-stage assessment process is established, with provision for further assessment if necessary.

- A provisional conclusion of "founded" or "unfounded" is to be made in respect of the complaint; the PSAA is given the opportunity to respond to this and to put forward additional information. Following this, a final conclusion is issued, with provision for appeal.

- Should the final conclusion deem further action necessary, the policy sets out how information is to be shared with third parties.

2.4.2 Case law on operation of 2014 policy

Given the stakes involved in investigations conducted under the Tusla policy, it is unsurprising that there has been a significant volume of litigation mounted by PSAAs challenging aspects of the procedure. A comprehensive survey is unnecessary; the 2018 Report of the Special Rapporteur examined a number of key judgments in detail.[18] The present discussion will confine itself to examining the key points established in the case law regarding the law as it currently stands. (Note that as this case law is based on the interpretation of the existing provisions of the Child Care Act 1991, the principles established therein are open to legislative modification, and should not be interpreted as defining the outer limits of what reforms might be introduced.)

- Tusla's duty to investigate complaints and to communicate information regarding risks that are identified arises independently of the criminal justice process. Such an investigation should always occur at the earliest possible time after the risk to a vulnerable child is apprehended and before the risk crystallises into actual harm (i.e. Tusla should not wait until any criminal investigation has progressed).[19]

- Investigations are to be conducted according to the civil standard of proof, i.e. the balance of probabilities. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.[20]

- Tusla may, in reaching its conclusions, rely on different types of evidence. If the evidence is such as to establish on the balance of probabilities that the complaint is "founded", Tusla is entitled to reach conclusions in respect of serious allegations even if the complainant is not cross-examined or is not available for cross-examination. However, this may be difficult, and the more serious the allegation, the more cogent the evidence required to support it.[21]

- The PSAA has the right to fair procedures in the conduct of the investigation. There is no fixed menu as to what is required by fair procedures. Though precedent is of assistance, whether an investigation is fair and unfair primarily depends on the circumstances of the case and the stage that the process is at.[22] Safeguards that have been identified as necessary include:

18. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018) at pp 128-150, available at https://assets.gov.ie/27444/92175b78d19a47abb4d500f8da2d90b7.pdf.
19. *I v Health Services Executive* [2010] IEHC 159.
20. *TR v Child and Family Agency* [2017] IEHC 595.
21. *TR v Child and Family Agency* [2017] IEHC 595.
22. *A v Child and Family Agency* [2015] IEHC 679.

> The opportunity to respond to allegations before findings are made and shared with third parties.[23]

> All material on which the complaint is based must be released to the PSAA unequivocally. The PSAA must be provided with relevant details and documents in advanced of any proposed meeting with Tusla.[24] The PSAA should be provided with an accurate statement of the details of the complaint, and not merely a summary version.[25]

> Tusla must act with impartiality; give advance notice in writing of each stage in the investigation process; keep the PSAA informed of any developments in the investigation, and give the PSAA sufficient time to respond to allegations. All of these points apply even where the PSAA refuses to cooperate with the investigation.[26]

> The PSAA is entitled to be heard in his own defence and to have the testimony of such persons who can give testimony on his behalf, relevant to the allegations in issue, heard and considered by Tusla.[27]

> The PSAA's version of events must be put to the complainant before a conclusion is reached as to whether the complaint is founded.[28]

> The PSAA may have the right to cross-examine the complainant (by counsel, but not necessarily directly) during the second stage of the assessment.[29] However, cross-examination is not invariably required, and this right may be subject to fair, reasonable and proportionate restrictions to protect the complainant due to factors such as age, mental capacity or levels of trauma. Each case must be considered on its own facts.[30] Tusla has significant discretion in determining the precise requirements for cross examination that might be needed to ensure procedural fairness in a particular case.[31] Moreover, there is no right to cross-examination or to observe the demeanour of the complainant during interviews conducted as part of the first stage of the assessment.[32]

> Records of the investigation should include factors favourable to the PSAA.[33]

- If the complaint is deemed to be founded after appropriate investigation, it is then a matter for Tusla to select the appropriate means to protect any children it finds to be at risk from the abuser in question—Tusla's powers are not confined to those situations where the PSAA has a particular access or relationship with identified or identifiable children.[34]

- Any dissemination of information should be minimal and only to the extent necessary to protect children who may be at risk. Such communication should be targeted in a context of specific child protection concerns.[35]

23. *MQ v Gleeson* [1998] 4 IR 85 and *I v Health Services Executive* [2010] IEHC 159.
24. *PDP v A Secondary School* [2010] IEHC 189.
25. *EO'C v Child and Family Agency* [2019] IEHC 843.
26. *JG v Child and Family Agency* [2015] IEHC 172.
27. *PDP v A Secondary School* [2010] IEHC 189.
28. *EO'C v Child and Family Agency* [2019] IEHC 843.
29. *PDP v A Secondary School* [2010] IEHC 189 and *EE v Child and Family Agency* [2016] IEHC 777.
30. *WM v Child and Family Agency* [2017] IEHC 587 and *TR v Child and Family Agency* [2017] IEHC 595.
31. *EE v Child and Family Agency* [2018] IECA 159.
32. *TR v Child and Family Agency* [2017] IEHC 595.
33. *MQ v Gleeson* [1998] 4 IR 85.
34. *PDP v A Secondary School* [2010] IEHC 189.
35. *I v Health Services Executive* [2010] IEHC 159.

- While challenges to investigations by way of judicial review should normally occur after the conclusion of the investigation, it may be permissible to bring such a challenge prior to its conclusion if the challenge concerns a new point of principle concerning a shortcoming in the procedures being applied by Tusla.[36]

2.4.3 Child Abuse Substantiation Procedure (CASP)

In 2019, in response to the recommendations of a 2018 HIQA Report on foot of a statutory investigation into the management of retrospective complaints of abuse,[37] Tusla finalised a new policy governing investigations of complaints known as the Child Abuse Substantiation Procedure (CASP). CASP was originally due to be fully implemented in 2020, but this has been delayed to March 2021 due to the impact of the COVID19 pandemic. It will replace the 2014 policy once in operation.

CASP aims to incorporate the legal principles established in the case law by providing for, *inter alia*:

- An obligation to provide details on the allegation to the PSAA at the earliest opportunity;
- An obligation to "stress-test" the evidence provided by the complainant;
- An obligation to allow the PSAA the opportunity to put questions to the complainant, whether directly, through a representative or in writing (depending on the circumstances of the case; but note that the complainant always has right to refuse to be questioned directly);
- An appeals mechanism in cases where a complaint is deemed to be founded.

The main CASP policy document is supplemented by a detailed Practice Guidance document. Notable aspects of CASP and the Practice Guidance are discussed in more detail below.

2.5 ISSUES ARISING FROM CURRENT APPROACH

2.5.1 Absence of clear and specific statutory mandate for investigating complaints, making findings and sharing information

The investigation of complaints of abuse, and the mitigation of any risks that are identified through such investigations, is clearly a core child protection obligation of the State (as established both in international human rights law and domestic Irish law). It is also a complex process that involves very high stakes for the rights of children (to protection from harm and to effective investigation of complaints) and the rights of the PSAA (including the right to fair procedures[38] and the right to a good name[39]). A delicate balance must be struck between these rights, and detailed procedures are necessary to this end.

36. *I v Health Services Executive* [2010] IEHC 159 and *PO'T v Child and Family Agency* [2016] IEHC 101.
37. Health Information and Quality Authority, *Report of the investigation into the management of allegations of child sexual abuse against adults of concern by the Child and Family Agency (Tusla) upon the direction of the Minister for Children and Youth Affairs* (Dublin: HIQA, June 2018, available at https://www.hiqa.ie/reports-and-publications/key-reports-and-investigations/report-investigation-management-allegations).
38. The right to fair procedures was recognised as deriving from Article 40.3.1° of the Constitution in *Garvey v Ireland* [1981] IR 75 at p 97, where O'Higgins CJ stated: "...by Article 40, s.3, there is guaranteed to every citizen whose rights may be affected by decisions taken by others the right to fair and just procedures. This means that under the Constitution powers cannot be exercised unjustly or unfairly."
39. Article 40.3.2° of the Constitution.

As such, the general terms of section 3 of the Child Care Act 1991 are arguably unfit for purpose as a legal basis for this specialised and technical area of child protection work. Section 3 was not drafted with investigations of complaints in mind. It contains no detail about the nature of Tusla's obligation to investigate complaints; about the procedural requirements that such an investigation should adhere to; or about the steps that Tusla may take in the event that a complaint is substantiated. All of this crucial detail has had to be filled in "on the job" by Tusla in its policy documents and by the courts in case law. This gives rise to numerous disadvantages, as will be explained below.

2.5.2 Absence of clear guidance on balance to be struck between due process rights of the PSAA and the right of children to be protected from harm

A particular gap in the legal framework that arises from reliance on the general terms of section 3 as a basis for investigating and responding to complaints of abuse rather than on a more tailored provision is that there is no legislative guidance on how the competing rights of children and the PSAA should be weighed against each other. It would be open to the Oireachtas to couch legislation in such a way that strikes a balance so far as possible, but clarifies which set of rights is to receive priority in circumstances where they cannot be reconciled. Doing this in the legislation would limit the scope for successful judicial reviews of investigations, and thus strengthen Tusla's hand in carrying out effective investigations. Instead, since section 3 has nothing to say on this issue, the balance of rights has been left as a grey area that has had to be filled in by Tusla in its policy documents.

There would be three distinct advantages to setting out the balance of rights in an Act of the Oireachtas rather than in a policy document. First, legislation carries the presumption of constitutionality.[40] A PSAA claiming that an investigation infringed their constitutional rights would—provided that the investigation adhered to the legislation—have to attack the legislative basis for the investigation. Since this legislation would be presumed to be constitutional, there would be a heavy onus on the challenger to show why the legislation in question was not within the range of discretion afforded to the Oireachtas under the Constitution. By contrast, a Tusla policy document does not carry the presumption of constitutionality, and is therefore more vulnerable to attack by reference to the constitutional rights of the PSAA.

Second, the presumption of constitutionality has been said by the courts to be particularly strong in the case of legislation that balances competing constitutional rights (as would be the case here).[41] As a general matter, the courts have repeatedly stated that balancing competing rights is a matter for the Oireachtas, and they are particularly slow to strike down legislation of this sort.[42] Again, this does not apply to a Tusla policy document,

40. See Hanna J in *Pigs Marketing Board v Donnelly* [1939] IR 413 at p 424: "When the court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established." See further *McDonald v Bord na gCon (No 2)* [1965] IR 217 at p 239.
41. *Ryan v Attorney General* [1965] IR 294 at p 312.
42. In *Touhy v Courtney* [1994] 3 IR 1 at p 47, Finlay CJ stated: "The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights." To similar effect, see *MD (a minor) v Ireland* [2012] 1 IR 697 at p 719; *Fleming v Ireland* [2013] 2 IR 417 at p 441; and *MR v An tArd Chláratheoir* [2014] IESC 60 at [96] and [113].

since it is issued by a State agency rather than by the Oireachtas. Thus, if the procedure for investigating complaints of abuse were placed on a clear statutory footing, the bar for a successful judicial review of an investigation would be raised significantly higher than it is under the current arrangements. The lower bar that is in place at present has the effect of inviting such litigation.

Third, while Tusla policy has no choice but to comply with principles established by the courts in the face of a legislative vacuum on the balance of rights, it would be open to the Oireachtas to legislate to modify those principles and the balance of rights that has emerged in the case law. Any such legislative modification would be bound to comply with the parameters established by the Constitution and the ECHR; but as outlined, the Oireachtas would be afforded a significant degree of latitude by the courts in this regard. The case law interpreting the current legislation is binding on Tusla in its policy formation, but it is imperative not to confuse this with the case law being an obstacle to future legislative action in this area (beyond the broad position that constitutional rights cannot be entirely disregarded).

2.5.3 Ad hoc development of law by way of court judgments

In the face of a virtual legislative vacuum on investigations into complaints of abuse, and bearing in mind that Tusla policy documents do not have the status of law, the law governing investigations of complaints has developed on an *ad hoc* basis by way of court decisions. As outlined above, the fundamental principles governing the process were set down by Mr Justice Barr in *MQ v Gleeson*[43] in 1998, and many of the central points have remained relatively stable in the intervening 20 years. However, multiple other judgments have addressed important points of detail. Tusla is left in a position where it has to anticipate or second-guess what the courts might or might not decide in the future. Since the clarification of the law in such decisions may result in investigations that took place prior to the court decision being overturned, this is somewhat analogous to taking to the field to play a sport in which the precise rules of the game are subject to clarification or revision after the final whistle has blown.

To take one crucial example: the law governing the cross-examination of the complainant by the PSAA has fluctuated back and forth in recent years. Although the *MQ* judgment in 1998 emphasised the importance of fair procedures, it was not evident that cross-examination was a crucial component of the fair procedures to be guaranteed to the PSAA until the decision of the High Court in *PDP v A Secondary School* in 2010.[44] In this case, and at least one other,[45] investigations were found to be lacking in fair procedures partly due to the absence of an opportunity for cross-examination—a requirement that Tusla possibly could have anticipated, but could not have been certain of until informed of it (after the event) by the courts.

Subsequent cases have seen the position fluctuate further. In *EE v Child and Family Agency* in 2016,[46] Mr Justice Humphreys strongly re-affirmed the right to cross-examination, and held that offering the PSAA the opportunity of putting a written list of questions to the

43. [1998] 4 IR 85.
44. [2010] IEHC 189.
45. *WM v Child and Family Agency* [2017] IEHC 587.
46. [2016] IEHC 777.

complainant was not sufficient (such that the fairness of the entire investigation was compromised). However, the following year, in a separate High Court decision, *TR v Child and Family Agency*,[47] Mr Justice McDermott held that there may be a range of circumstances (such as age, mental capacity or levels of trauma) which may render it inappropriate to allow for cross-examination. Around the same time, Mr Justice McDermott ruled in *WM v Child and Family Agency* that absent a reason relating to the welfare of children or child protection issues or the mental health and welfare of the complainant, cross-examination should be permitted.[48] Since all of these judgments were delivered by the High Court (and were thus of equivalent legal authority), this gave rise to doubt as to which standard—the stricter one envisaged by Mr Justice Humphreys or the more flexible one envisaged by Mr Justice McDermott—was the correct one. Some clarity was provided in 2018, when the Court of Appeal overturned Mr Justice Humphrey's judgment in *EE v Child and Family Agency*. The Court held that Tusla has significant discretion in determining the precise requirements for cross examination that might be needed to ensure procedural fairness in a particular case, and accepting a written exchange of questions and answers was sufficient on the facts of the case.[49]

What the above episode demonstrates is that the vagaries of judicial review can leave Tusla aiming at a moving target. For two years between 2016 and 2018, the Agency would, if it was being cautious, have had to operate on the basis that cross-examination should be facilitated in almost every case (which has potential to re-traumatise vulnerable complainants, and perhaps deter some from proceeding with their complaints). However, the recent Court of Appeal judgment makes it clear that there is significant discretion to refuse to allow it; cross-examination is only strictly required where it gives rise to no issue relating to the protection of children or the mental health and welfare of the complainant. Addressing this and other procedural issues in legislation rather than dealing with them on a policy basis would not eliminate judicial reviews and the challenges associated with unpredictable court decisions; but it would serve to significantly reduce the likelihood and frequency of same, and allow investigations to be conducted in a more predictable legal environment.

It should also be noted that the frequent litigation arising in this area of activity also gives rise to significant costs for both Tusla and the PSAA, as well as additional trauma for the complainant due to the investigation being dragged out over the extended period of time involved with High Court proceedings.

2.5.4 Risk of ineffective investigations or preventive measures

The circumstances outlined above—and the fact that legal challenges to date have been exclusively on the side of the rights of the PSAA—give rise to a risk of defensive practice by Tusla. Research by Mooney has argued that a fear of being sued is a contributory factor in the long delays in investigating complaints that have been noted by HIQA on several occasions.[50] It should be recalled that, as outlined above, delays in the investigation of complaints of abuse may lead to a procedural violation of Article 3 of the ECHR. More generally, defensive practice has the potential to translate into ineffective investigations

47. [2017] IEHC 595.
48. [2017] IEHC 587.
49. *EE v Child and Family Agency* [2018] IECA 159.
50. Mooney (n 17 above) at pp 250-251.

that fail to uncover crucial information, or overly cautious safety planning or information sharing that fails to effectively protect children from future abuse.

The obvious follow-on from ineffective investigations or preventive measures is a risk that alleged abusers commit acts of abuse in the aftermath. Such a scenario is, first and foremost, a calamity for the victims of any such abuse. From the perspective of Tusla and the Irish State, it presents a significant risk of litigation by such victims. If any aspect of either the investigation or the actions taken on foot of the investigation failed to meet the standards set down in the ECHR case law discussed above (namely, that reasonable measures be taken to mitigate foreseeable risks of abuse), litigation against Tusla (in the Irish courts) or against the Irish State (in the European Court of Human Rights) would have a strong chance of succeeding.

2.5.5 Conflict of interest and potential lack of sensitivity in investigation

The current framework involves an inherent conflict of interest on the part of Tusla, in that it is charged with both investigating the complaint and making a decision on whether it is founded and whether information should be shared with third parties. This is problematic from the perspective of both the PSAA and the complainant. A PSAA could potentially challenge this as a breach of natural justice—specifically, the principle of *nemo judex in causa sua* (no one shall be a judge in his own cause). Whether such a challenge would succeed is unclear, but nonetheless, the perception of a lack of independence serves to undermine confidence in the procedure. As the Supreme Court has noted, "[t]here are two fundamental streams of thought within this wider concept. First, that there should be no actual bias, ie a subjective test. And secondly, that there should be no reasonable apprehension that there is bias, ie the objective test. Both of these streams of thought are equally important in the broad river of justice."[51] The 2018 Report of the Special Rapporteur stated that the complexity for social workers of being both the assessor and the adjudicator was "a matter of concern", and recommended that the final determination on whether the allegation is substantiated should be made by an independent and impartial decision-maker.[52]

The impact on the complainant stems from the measures taken by Tusla to avoid the accusation of conflict of interest or bias by adopting an agnostic stance towards the initial complaint and testing its veracity. By their nature, retrospective complaints of sexual abuse involve vulnerable adults who suffered significant trauma as a child and who are likely to face significant re-traumatisation during the process of disclosing that abuse. There is voluminous evidence in the international literature about the barriers to disclosure and the potential for re-traumatisation inherent in any formal legal process that aims to test the veracity of the complaints.[53] It was seen above that the procedural obligations established under the ECHR include an obligation to provide adequate measures to support recovery.

51. *Dublin Well Woman Centre Limited v Ireland* [1995] 1 ILRM 408 (*per* Denham J).
52. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018), pp.125-127, available at https://assets.gov.ie/27444/92175b78d19a47abb4d500f8da2d90b7.pdf.
53. See, eg, D Finkelhor, G Hotaling, I Lewis and C Smith, "Sexual abuse in a national survey of adult men and women: Prevalence, characteristics, and risk factors" (1990) 14(1) *Child Abuse and Neglect* 19; Sharon Lamb and Susan Edgar-Smith, "Aspects of Disclose: Mediators of Outcome of Child Sexual Abuse" (1994) 9(3) *Journal of Interpersonal Violence* 307; DW Smith, EJ Letourneau, BE Saunders, DG Kilpatrick, HS Resnick and CL Best, "Delay in disclosure of childhood rape: Results from a national survey" (2000) 24 *Child Abuse and Neglect* 273; K London, M Bruck, SJ Ceci and DW Shuman, "Disclosure of child sexual abuse: What does the research tell us about the ways that children tell?" (2005) 11) *Psychology, Public Policy, and Law* 194; E Olafson and Judge CS Lederman, "The State of the Debate About Children's Disclosure Patterns in Child Sexual Abuse Cases" (2006) *Family and Court Journal* 27; and D Allnock, "Children and young people disclosing sexual abuse: An introduction to the research" (NSPCC, 2014), available at http://www.childmatters.org.nz/file/Diploma-Readings/Block-2/Sexual-Abuse/3.4-children-and-young-people-disclosing-sexual-abuse-updated.pdf.

However, when investigating retrospective complaints, social workers are currently charged with being impartial adjudicators rather than investigators pursuing a complaint. In criminal complaints, Gardaí are instructed to adopt an attitude of "sympathy and understanding" to complainants, while explaining the importance of obtaining a full and consistent statement.[54] It is for a court to decide whether the offence actually occurred or not. In contrast, social workers investigating complaints made to Tusla do not have the benefit of an independent decision-maker and thus cannot take the position of believing the complainant at the outset, as to do so would prejudice the investigation. Instead, CASP charges social workers with "stress-testing" the complaint through a range of measures, including asking the complainant if they are sure about what happened, or whether they may have misinterpreted the events; and whether they might be willing to be questioned directly by the PSAA or the PSAA's solicitor. (The Gardaí do not need to facilitate such measures, since in criminal cases, they take place in the context of court proceedings.)

While CASP makes it clear that the complainant always has the right to refuse to be directly questioned by the PSAA, the effect of these measures nonetheless is to make the process more intimidating and less victim-friendly. This may re-traumatise victims and deter them from proceeding with a complaint; indeed, the mere presence of references to "stress-testing" and to cross-examination of complainants in CASP may deter complainants from coming forward at all. This aspect of CASP has been the subject of significant criticism by abuse survivors, support groups and academics[55] (although note that under the current state of the law, the absence of such measures would likely lead to investigations being successfully challenged in court, which would undermine the child protection aims of the investigation).

More generally, research by Mooney has argued that the system for investigating retrospective complaints is lacking in core victim-centred or trauma-informed elements due to inconsistencies in practice, delays in processing investigations and failures to keep complainants informed of progress.[56] While Mooney's evidence was collected in 2015 (when the investigation of retrospective complaints was at an earlier stage of practice development), he argues that "the core complexities and problematic issues remain".[57] Indeed, as will be elaborated in the next section, issues relating to stress-testing of complaints and cross-examination are not the only aspects of CASP that are somewhat less than victim-friendly.

2.5.6 Data protection issues

In the context of vulnerable and traumatised adults who were victims of child sexual abuse, the manner in which data relating to retrospective complaints is handled by Tusla gives rise to some concerns. This is especially the case where the data has not been received on foot of a direct complaint made by the adult in question, but has been received on foot of a mandated report made by a counsellor under section 14 of the Children First Act 2015

54. *Garda Síochána Policy on the Investigation of Sexual Crime Crimes against Children/Child Welfare* (2nd Edition, 2013) at p 11, available at https://www.garda.ie/en/About-Us/Publications/Policy-Documents/Policy-on-the-investigation-of-sexual-crime-crimes-against-children-and-child-welfare-.pdf.
55. See J Power, "Guidelines for investigating abuse 'horrifying', says survivor", *Irish Times*, 4 February 2020.
56. J Mooney, "Incorporating the EU Victims Directive into the assessment of retrospective disclosures of childhood sexual abuse", *The Irish Social Worker* (Winter 2019) at pp.33-44.
57. *Ibid* at p 37.

following a disclosure made in the course of a therapeutic session. Section 14 does not give counsellors any discretion; it requires that all disclosures of childhood sexual abuse are reported to Tusla, irrespective of the wishes or the age of the person making the disclosure, or whether the alleged perpetrator has been identified.[58]

The approach currently adopted under CASP is to treat any such report as personal data within the scope of the General Data Protection Regulation (GDPR). As such, Article 14 of the GDPR requires Tusla within one month to notify the adult complainant that data is held on them. If the PSAA has been identified, then Article 14 imposes the same obligation to notify the PSAA. This in turn would allow either party to make an access request pursuant to Article 15 of the GDPR.

Concerns arise in cases involving highly vulnerable adults who are struggling to deal with the impact of the sexual abuse they experienced as children. In many such cases, the person in question is primarily focused on seeking professional therapeutic support. If they are not comfortable making a complaint to Tusla, the prospect of engaging with a formal complaints procedure may carry a risk of significant re-traumatisation. However, once they disclose their abuse to their counsellor, the combination of mandatory reporting and GDPR will lead to them automatically receiving a notification from Tusla that a record of the complaint is held, and inviting them to engage with the formal process. Moreover, in cases where the identity of the PSAA has been disclosed, they will have to confront the fact that the PSAA may also have been notified that Tusla holds a record of the complaint. This heightens the risk of re-traumatisation and potentially creates an additional risk that the PSAA may seek retribution against the complainant. (The use of the terms "complaint" and "complainant" is misleading in this category of cases, since the adult disclosing the abuse has not actually made a complaint and does not wish to do so.)

The 2019 draft of CASP contained a number of contradictory statements about the point at which the PSAA must be notified that a record is held of an allegation of abuse made against them, with several passages appearing to conflate an Article 14 notice (merely informing a party that data is held) with granting an Article 15 access request (and thus providing the party with the data itself). Investigations are broken down into a "Screening and Preliminary Inquiry" phase and an "Investigation" phase. The 2019 document contained a flow chart indicating that the PSAA is to be notified within 30 days of the beginning of "Investigation phase 1" (referred to as "Stage 1" on the following pages). Elsewhere, the document stated that on occasion, PSAAs must be informed of the nature of the allegations against them prior to the completion of the Stage 1 assessment. The separate Practice Guidance document went further by stating that the PSAA is to be informed of the allegation at the earliest possible opportunity and supplied with copies of all relevant material. Thus, the 2019 draft of CASP failed to make it clear to practitioners how much information must be provided to the PSAA, and at which points in the process. This was a recipe for inconsistent practice on this point and clarity is needed before the policy is finalised and implemented.

58. Children First Act 2015, s 14(1): "... where a mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person, that a child—
(a) has been harmed,
(b) is being harmed, or
(c) is at risk of being harmed,
he or she shall, as soon as practicable, report that knowledge, belief or suspicion, as the case may be, to the Agency."

In cases where the complainant prefers not to engage with Tusla, the normal practice is that investigations do not proceed beyond Screening and Preliminary Inquiry. In such cases, there is no requirement from a fair procedures perspective for a PSAA to be informed of the identity of the complainant or the nature of the complaint. However, the 2019 draft of CASP stated that "[w]here an allegation by a complainant is not going to be investigated or where an initial substantiation investigation indicates that further investigation is not appropriate, the PSAA is nonetheless entitled to know that the allegation has been made against them and that a record of the allegation is being kept by Tusla." (In other words, an Article 14 notification must be made.)

There are several difficulties with this. First, knowledge that this notification will be sent may be significantly re-traumatising to a complainant who had no desire to engage with Tusla in the first place. Second, an Article 14 notification is highly likely to trigger an Article 15 access request by the PSAA, heightening the anxieties of the complainant. Although the data provided may be redacted to protect the identity of the complainant (pursuant to the exception provided for under Article 15(4))[59], this may not be sufficient to protect the complainant from the risk of secondary traumatisation. Moreover, the mere fact of being notified that Tusla has created a record of a complaint of abuse may be sufficient for at least some PSAAs to identify the complainant (as, for example, in cases where an abuser has abused just one victim). This creates a risk that the PSAA will confront or seek retribution against the complainant.

Article 14(5)(b) of the GDPR may provide a basis for Tusla to refrain from notifying the PSAA that a record of a complaint of abuse is held. The exception in question relates to situations where the provision of the Article 14 notification "is likely to render impossible or seriously impair the achievement of the objectives" of the data processing. Tusla could argue that the risk of re-traumatisation of complainants and the risk of PSAAs confronting or seeking retribution against complainants is such that the provision of Article 14 notifications would deter adults from disclosing sexual abuse experienced as children either to counsellors or directly to Tusla. This would seriously impair the objective of identifying current risks to children posed by persons who have abused children in the past.

However, the 2019 draft of CASP did not include any provision clearly stipulating that this is a reason to refrain from making an Article 14 notification in cases which do not proceed beyond Screening and Preliminary Inquiry. Indeed, the draft CASP and associated Practice Guidance document contained a number of passages which appear to preclude such an approach. Moreover, the applicability of the exception provided for in Article 14(3)(b) of the GDPR is not as clear as might be desired and may be open to challenge.

2.5.7 Unduly rigid appeals mechanism

Under the appeals mechanism currently provided for within CASP, appeals against any investigation that departs in any way from the prescribed procedure will be upheld. While the importance of adhering to procedure is obvious, the weakness of the current approach is that once an appeal is upheld, the complaint is dismissed in the same way

59. Article 15(4) provides that the right of access to personal data "shall not adversely affect the rights and freedoms of others".

as if it had been deemed to be unfounded. There is no provision for re-starting a fresh investigation that is procedurally sound (which has been expressly permitted by the High Court in judicial reviews which have found investigation of complaints to be procedurally flawed).[60] In cases where there is strong evidence that the PSAA has abused children and may pose an ongoing risk to children, and the collection of that evidence was not tainted by the procedural flaw that led to the successful appeal, it seems unacceptable from a child protection viewpoint that the possibility of sharing information with third parties be permanently ruled out on the basis of minor procedural flaws in the original investigation.

A further difficulty is that there is no database available of the decisions made by the appeals panel and the reasons therefor. Specialist social work teams responsible for investigating retrospective complaints only have access to the decisions directly involving their own teams, which makes it unnecessarily difficult for them to adapt their practice in light of the body of jurisprudence developed by the appeals panel. It also impairs analysis of the quality or consistency of that body of jurisprudence.

2.6 RECOMMENDATIONS

Arising from the above analysis, reform of the legal framework for investigating and responding to complaints of child sexual abuse should have four priorities:

1. Providing a robust statutory basis for the balance of rights between PSAA, the complainant and other children who may be at risk of abuse;
2. Separating the investigative function (i.e. receiving and assessing the complaint) from the decision-making function (i.e. on whether it is necessary to share information with third parties such as employers or voluntary organisations);
3. Streamlining the process so as to make it more sensitive to the needs of complainants and to reduce the burden currently imposed on social workers, while maintaining protection for the constitutional rights of the PSAA;
4. Addressing data protection issues so as to provide a clear basis for refraining from notifying PSAAs that complaints have been made against them in cases where the complainant has no desire to engage and where making a notification may place that complainant's safety or well-being at risk.

Each of these issues will be discussed in turn below.

2.6.1 Robust statutory basis for the balance of rights

It was explained at length above that one of the weaknesses of the current position is that section 3 of the 1991 Act does not currently provide a sufficiently robust statutory basis for investigating complaints of child abuse and sharing information relating to those complaints. As such, the provision of such a framework is a key priority. When it comes to mitigating potential future risks to unidentified children, the main activity consists of sharing information with employers and voluntary organisations through

60. See, eg, *WM v Child and Family Agency* [2017] IEHC 587.

which a PSAA might potentially come into contact with children. This could be achieved by slightly expanding the role of the National Vetting Bureau through some relatively minor amendments to the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 rather than designing and enacting a bespoke legal framework.

The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 established the National Vetting Bureau. Section 12 provides that a "relevant organisation" may not employ or engage or permit any person to undertake "relevant work or activities" unless the organisation has a vetting disclosure from the National Vetting Bureau.[61] Section 10 requires the Bureau to maintain a register of specified information. Section 2 defines "specified information" as:

"information concerning a finding or allegation of harm to another person that is received by the Bureau from—

(a) the Garda Síochána pursuant to an investigation of an offence or pursuant to any other function conferred on the Garda Síochána by or under any enactment or the common law, or

(b) a scheduled organisation pursuant to subsection (1) or (2) of section 19 [which includes Tusla],

in respect of the person and which is of such a nature as to reasonably give rise to a bona fide concern that the person may—

(i) harm any child or vulnerable person,
(ii) cause any child or vulnerable person to be harmed,
(iii) put any child or vulnerable person at risk of harm,
(iv) attempt to harm any child or vulnerable person, or
(v) incite another person to harm any child or vulnerable person".

The Act then sets out a process through which the Chief Bureau Officer may make a decision to disclose specified information on foot of a vetting application, and includes various safeguards in sections 15 and 16 for the subject of the application. These include:

- A requirement to notify the subject of the application if specified information has been referred to the Chief Bureau Officer for assessment and determination, and to allow that person to make a written submission in relation to the information concerned;[62]
- A requirement that the Chief Bureau Officer must, before making a disclosure, be satisfied that the information gives rise to a *bona fide* concern that the PSAA may harm any child, cause any child to be harmed, put any child at risk of harm, attempt to harm any child or incite another person to harm any child, and is satisfied that its disclosure is necessary, proportionate and reasonable in the circumstances for the protection of children;[63]

61. These terms are defined in s 2.
62. National Vetting Bureau (Children and Vulnerable Persons) Act 2012, s 15(1).
63. National Vetting Bureau (Children and Vulnerable Persons) Act 2012, s 15(3).

- Guidance on the factors to be taken into account by the Chief Bureau Officer in determining whether to make a disclosure;[64]

- A requirement that where a determination had been made to disclose specified information to a relevant organisation, the Chief Bureau Officer shall notify the person who is the subject of the application of this determination and the reasons for it; provide the person with a copy of the specified information concerned; notify them of the intention to disclose it after the expiration of a period of 14 days; and inform them that an appeal may be made against this determination within those 14 days;[65]

- A stipulation that no disclosure shall be made until after the expiry of the 14 day period or, where an appeal has been lodged, until the determination or withdrawal of the appeal, whichever is the later;[66]

- An appeals process to appeals officers, who are practicing solicitors or barristers of not less than 7 years' standing appointed by the Minister for Justice, with further provision for appeals on a point of law to the High Court.[67]

The constitutionality of the Act has not been directly challenged, but a number of court decisions have seen judges make remarks to the effect that the approach adopted by the Act strikes a fair and proportionate balance between the need to protect children and the need to protect the right to a good name and fair procedures.[68] It is noteworthy that this has been the case notwithstanding the absence of any provision for the evidence on which the disclosure is based to be directly challenged by way of cross-examination or similar procedure. The safeguards built into the 2012 Act thus appear to be well suited to acting as a legislative framework within which the constitutional rights of PSAAs in investigations of complaints of abuse could be protected while prioritising the protection of children at risk from abuse. Indeed, they are better suited to this task than the arrangements currently in place under CASP, since the safeguards have a statutory basis (rather than a mere policy document) and do not include some of the less victim-friendly elements of CASP.

2.6.2 Separation of investigative and decision-making functions

Utilising the 2012 Act as a framework for deciding whether to disclose information on foot of a complaint of abuse would also address a second issue identified in section 2.5.5 above—namely, concerns related to Tusla being perceived as lacking independence due to having both investigated the allegation and ultimately decided on whether to share information. If the decision as to whether to share information with employers or

64. National Vetting Bureau (Children and Vulnerable Persons) Act 2012, s 15(4). These factors include (a) the information concerned, (b) its relevance to the type of relevant work or activity to which the application for vetting disclosure concerned relates, (c) the extent to which the proposed relevant work or activity is likely to necessitate contact with children or vulnerable persons or both, and the nature of that contact, (d) the source and reliability of the information, (e) any submissions made by or on behalf of the person, (f) whether the rights of the person have been considered and taken account of in a manner that is consistent with fairness and natural justice, and (g) any other matter which the Chief Bureau Officer considers relevant to the application for vetting disclosure concerned.
65. National Vetting Bureau (Children and Vulnerable Persons) Act 2012, s 15(6).
66. National Vetting Bureau (Children and Vulnerable Persons) Act 2012, s 15(7).
67. National Vetting Bureau (Children and Vulnerable Persons) Act 2012, ss 17 and 18.
68. See *GS v Commissioner of An Garda Síochána* [2017] IEHC 190 at [50]; *MP v Teaching Council* [2019] IEHC 102 at [110], [115] and [148]; and *MP v Teaching Council* [2019] IECA 204 at [34].

voluntary organisations were made by the Chief Bureau Officer rather than by Tusla, this would alleviate this concern.

The National Vetting Bureau's role could only be related to disclosing relevant information; it is not equipped to investigate complaints, and would remain dependent on An Garda Síochána and/or Tusla to provide it with information on foot of investigations undertaken into complaints. However, the Bureau may be in possession of other relevant information about the PSAA which was collected from other sources and is not available to Tusla, thus making it better placed to make a holistic assessment of whether a disclosure to a third party is warranted.

2.6.3 Reducing burden on complainant and social workers while protecting rights of PSAA

A third potential benefit of requiring the Chief Bureau Officer to make the decision on whether to disclose relevant information would be that Tusla would no longer be required to make a decision as to whether, on the balance of probabilities, the complaint is founded, and whether information should be shared with third parties. Instead, in line with its current obligations under sections 2 and 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012, Tusla would be required to assess whether the complaint gives rise to information "which is of such a nature as to reasonably give rise to a *bona fide* concern that the person may … harm any child", and to notify the Garda Vetting Bureau if it is deemed that this is the case. There are several advantages to this approach.

First, "*bona fide* concern" is a more flexible standard than making a determination as to whether a particular allegation is "founded" or "unfounded". The obligation under section 19 is to notify "specified information", and this is defined in section 2 as including both a "finding" or an "allegation". As such, unlike the standard set in the Tusla policies governing the investigation of complaints, it is not necessary to make a finding on the balance of probabilities that abuse has actually occurred. For example, where one person is the subject of multiple separate allegations, none of which is deemed "founded" (due to insufficient evidence), the cumulative effect may nonetheless be such as to give rise to a *bona fide* concern that the person may harm children in future.

Second, the fact that the rights of the PSAA are protected in the safeguards built into the vetting process obviates the need for Tusla to construct a complex set of procedural protections at the assessment phase. The High Court confirmed in *MP v Teaching Council* that any impact on legal and constitutional rights "arises from the prospect of disclosure of information and not from the gathering of the information".[69] While a PSAA must be informed that specified information is being notified to the Bureau, there is no question of the PSAA having a means of preventing that notification;[70] their rights are protected by the procedures established in the Act governing whether the Bureau proceeds to disclose that information to third parties in the course of a vetting application. As noted in section 2.6.1 above, these procedures include extensive safeguards for the PSAA and an appeals mechanism.[71]

69. *MP v Teaching Council* [2019] IEHC 102 at [148]. See also [110].
70. See *MP v Teaching Council* [2019] IEHC 102 at [109]: "There is, in sub-s. 3, a requirement to notify the person in respect of whom the scheduled organisation has the concern of its intention to notify the Bureau of it. That notification will, to some extent, enable the person in respect of whom a concern has been notified to decide whether to consent to an application for a vetting disclosure but there is no procedure under the Act to allow the subject to attempt to forestall the notification."
71. National Vetting Bureau (Children and Vulnerable Persons) Act 2012, ss 15 and 16.

In other words, the PSAA's rights are not impacted at the stage where Tusla is assessing a complaint and deciding whether to notify the information to the National Vetting Bureau (at which stage of the process no determination of facts has been made).[72] Those rights are only engaged at the point of the process where the Chief Bureau Officer is deciding whether to disclose the information; and, at that stage of the process, the High Court observed in *MP v Teaching Council* that "[t]he Oireachtas has put in place elaborate rules and procedures to ensure that information gathered by the National Vetting Bureau will not be disclosed except on a reasonable and reasoned belief that it is of such a nature as to give rise to a bona fide concern that the subject may harm a child or vulnerable person, and that the disclosure is necessary and proportionate for the protection of a child or vulnerable person."[73]

The presence of extensive safeguards for the rights of the PSAA within the vetting legislation removes the necessity for Tusla to "stress test" the complaint at assessment stage and allows it to act in a more victim-sensitive manner. This reduces the burden on the complainant and makes it less likely that victims will be deterred from making or persisting with complaints. It also reduces the burden on social workers by removing the necessity for a quasi-legal process with detailed and complex procedural requirements.

The above measures would reduce some of the burdens imposed on the complainant by the process as currently operated. However, further measures to reduce the potential for secondary traumatisation are desirable, and in line with policy developments in other areas of the law (including the development of the Onehouse project, discussed in Chapter 1 of this report). A legislative model is readily available in the form of the Criminal Justice (Victims of Crime) Act 2017.

In criminal cases, the EU Victims' Rights Directive, as implemented in Ireland by the Criminal Justice (Victims of Crime) Act 2017, provides for a range of obligations on State authorities aimed at mitigating the trauma of the criminal justice process for victims of crime, including a right to be provided with information at various stages of the process, including information on support and specialist services;[74] a qualified right to be accompanied when making a complaint and during interviews;[75] special measures for interviews (eg premises, trained officers, continuity of officers, gender);[76] and special measures during criminal proceedings (such as excluding the public, directions regarding questioning, or use of video link).[77] The trigger for the availability of these special measures is an individual assessment of the protection needs of the victim, which An Garda Síochána or the Garda Ombudsman Commission are obliged to carry out when investigating an alleged offence.[78] Mooney has commented that the provisions of the Directive "could be viewed as fundamentally trauma-informed approaches to working with victims".[79]

72. *MP v Teaching Council* [2019] IECA 204 at [28].
73. *MP v Teaching Council* [2019] IEHC 102 at [148]. See also [110]: "The procedures for the sifting and assessing of the information on the database and the requirement that any disclosure be necessary and proportionate, are designed, and in my view, effective to protect the rights of the subject." At [115], the Court continued: "... the Act of 2012 provides for a coherent and proportionate assessment of the quality and reliability of the information collected, and the necessity, proportionality and reasonableness of any disclosure, which takes into account the rights of the subject and the requirements of fairness and justice. In my view it is clear from the legislation that a lower threshold is intended to apply to the collection of information than to its release, including any application for a vetting certificate otherwise than with the required declaration of consent of the subject."
74. Criminal Justice (Victims of Crime) Act 2017, ss 7-11.
75. Criminal Justice (Victims of Crime) Act 2017, ss 12 and 13.
76. Criminal Justice (Victims of Crime) Act 2017, s 17.
77. Criminal Justice (Victims of Crime) Act 2017, s 19.
78. Criminal Justice (Victims of Crime) Act 2017, s 15.
79. Mooney (n 56 above) at p 41.

The Directive is primarily focused on the criminal justice process, and therefore on the investigation of alleged crimes with a view to their prosecution. As such, the 2017 Act in Ireland only imposes obligations on An Garda Síochána and the Garda Ombudsman Commission to provide the various support measures outlined in the Directive. However, the Directive stipulates that it "lays down minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection."[80] The provisions of the 2017 Act should be extended to Tusla so that complainants who engage with Tusla but not with the Gardaí benefit from the support measures contained therein.

2.6.4 Data protection issues

The other aspect of CASP discussed above that undermines the victim-friendliness of the current framework for investigating retrospective complaints of abuse is the approach to data protection and the application of GDPR. An alternative approach that might be a better fit for the circumstances of such cases (particularly where the information has been received on foot of a mandated report and the complainant does not wish to engage with Tusla) would be to treat retrospective complaints of abuse (whether made directly by the complainant, or whether received by Tusla pursuant to a mandated report) as personal data under the Law Enforcement Directive (Directive (EU) 2016/680) rather than the GDPR.

Preventing future cases of sexual abuse from occurring by sharing information about complaints against PSAAs is a key aim of Tusla's investigation of any complaint of abuse; indeed, it is the entire aim of investigating retrospective complaints, since the complainant is no longer at risk of abuse. As such, this activity falls within the definition of the prevention of criminal offences, and Recital 19 of GDPR stipulates that it is governed not by GDPR, but by the Law Enforcement Directive.[81] In turn, this would mean that it is governed by Part 5 of the Data Protection Act 2018, which does not apply to cases governed by the GDPR.

Article 13 of the Law Enforcement Directive requires data controllers to make certain information available to data subjects to enable them to exercise their rights in respect of their data. This is given effect in section 90 of the Data Protection Act 2018, which provides that this information must be provided to the data subject within a reasonable period after the date on which the controller obtains the personal data concerned. Article 14 provides for a right of data subjects to confirmation that data in relation to them is being processed, and to access to the information itself, and this is given effect by section 91 of the 2018 Act.

However, Article 13(3) permits Member States to enact legislative measures delaying, restricting or omitting the provision of information to the data subject to the extent that,

80. Preambular paragraph 11.

81. Recital 19 of GDPR states: "The protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security and the free movement of such data, is the subject of a specific Union legal act. This Regulation should not, therefore, apply to processing activities for those purposes. However, personal data processed by public authorities under this Regulation should, when used for those purposes, be governed by a more specific Union legal act, namely Directive (EU) 2016/680 of the European Parliament and of the Council. Member States may entrust competent authorities within the meaning of Directive (EU) 2016/680 with tasks which are not necessarily carried out for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and prevention of threats to public security, so that the processing of personal data for those other purposes, in so far as it is within the scope of Union law, falls within the scope of this Regulation."

and for as long as, such a measure constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and the legitimate interests of the natural person concerned, in order to protect the rights and freedoms of others. Article 15 permits similar restrictions to the right of access.

Section 94 of the Data Protection Act 2018 gives effect to these provisions by allowing data controllers to restrict the right to information under section 90 and the right of access under section 91. Section 94(3) specifies that one of the grounds on which the rights of the data subject may be restricted is the protection of the life, safety or well-being of any person.

Thus, if notifying the PSAA that personal data has been obtained in respect of them might jeopardise the life, safety or well-being of the complainant, Tusla would be empowered to refrain from notifying the PSAA. Moreover, it would be empowered by section 94(6) to refrain from notifying the PSAA that his or her rights under section 90 had been restricted. Additionally, should (for example) a counsellor making a mandated report notify Tusla that even a letter of notification sent by Tusla to the complainant might place the life, safety or well-being or that complainant at risk (due to secondary traumatisation), section 94(6) would provide Tusla with a basis for refraining from sending such a notification to that complainant.

Therefore, if investigations of complaints of abuse meet the definition of the prevention of crime, then they come within the scope of the Law Enforcement Directive rather than the GDPR. The provisions of the Law Enforcement Directive, as given effect to by sections 90, 91 and 94 of the Data Protection Act 2018 in particular, appear to be a better fit for these cases than Articles 14 and 15 of the GDPR, and to provide a clearer basis for an exception that would allow Tusla to refrain from notifying PSAAs (or even complainants) that a record of an abuse complaint is held in cases where making such a notification would place the life, safety or well-being of the complainant at risk.

2.6.5 Limitations

Relying on the 2012 Act as a vehicle for responding to complaints of sexual abuse carries a number of limitations:

2.6.5.1 Identified children at immediate risk

First, it would not address situations where identified children are at immediate risk. Since one of the aims of reform in this area is to avoid the disadvantages of an insufficiently clear statutory basis (including repeated court challenges), any reformed structure would need to ensure that Tusla has a clear statutory duty and power under the Child Care Act 1991 to share information and undertake safety planning necessary to protect a child at immediate risk. This would be in line with current Tusla policy, which prioritises responding to an immediate risk over affording fair procedures to a PSAA. Giving this approach a statutory footing would make it more robust in the face of legal challenge (for the reasons set out in section 2.5.2 above). Provisions governing this type of activity could make it clear that any information shared pursuant to an immediate risk to an identified child must be appropriately qualified (i.e. by making it clear that it relates to unproven allegations).

2.6.5.2 Absence of proactive disclosure of information

Second, while the National Vetting Bureau is well suited to addressing potential future risk to unidentified children, its role in sharing information is purely reactive under the current law. Although it may be notified of information to the effect that there is a *bona fide* concern that a particular person may harm children, it has no obligation (and indeed no power or discretion) to share that information unless and until an application for Garda vetting is made (whether upon initial employment; a re-vetting application upon expiration of an earlier vetting; or a retrospective vetting application). If the Bureau were to be in possession of information which it did not share in the absence of a vetting application being received, and the person in question were to abuse children in the meantime, it would be highly arguable that the State was in breach of its substantive ECHR obligations by failing to take steps to mitigate a risk of which it was aware. As such, the National Vetting Bureau would not be a sufficient mechanism for dealing with cases where investigations into complaints disclose the existence of a risk to children unless this position were addressed by amending the 2012 Act to require re-vetting (or, if vetting has not previously taken place, initial vetting) for a PSAA in cases where Tusla notifies specified information to the Bureau which indicates that the PSAA is working in a "relevant organisation", as defined by section 2 of the Act. This would allow the Chief Bureau Officer to make a fresh assessment and determination under section 15 of the Act that would take account of the specified information notified to the Bureau by Tusla.

2.6.5.3 PSAA in contact with identified children outside of "relevant organisation"

Third, the proposals set out above would still leave a residual gap in cases where the PSAA has contact with identified children other than through a "relevant organisation", and where the risk is deemed a potential future risk rather than an immediate risk. (For example, a PSAA might come into contact with children in a self-employed capacity, or might spend time with nieces or nephews during the summer holidays.) In such cases, the Act does not require vetting and therefore does not provide a mechanism for information to be disclosed. This needs to be addressed; it would be unacceptable to allow a situation to develop where Tusla is 1) in possession of information giving rise to a *bona fide* concern; 2) knows that this concern will not be addressed by making a notification to the National Vetting Bureau, but 3) has no legal power to act on it.

An important part of current Tusla practice in this area is safety planning with families where a PSAA has access to identified children. Safety planning involves Tusla social workers working with parents to assist them to keep their children safe from PSAAs. In at least some cases, this gives rise to residual concern that such action involves sharing of information with (for example) an extended family member in a way that has implications for the right to fair procedures and right to a good name of a PSAA.

Since one of the aims of reform in this area is to avoid the disadvantages of an insufficiently clear statutory basis (including repeated court challenges), any reformed structure would need to ensure that Tusla has a clear statutory duty and power to engage in safety planning necessary to protect identified children at potential future risk. This should include a power to share information (with appropriate qualifications and warnings) with third parties related to a *bona fide* concern in cases where notifying that concern to

the National Vetting Bureau is insufficient to address the concern, since the PSAA's access to the children arises outside of a "relevant organisation".

By comparison to cases involving immediate risk, sharing information about a *bona fide* concern in cases of potential future risk would be more susceptible to successful legal challenge in the absence of fair procedures having been afforded to the PSAA. This raises the question of how best this should be achieved. One possibility would be to retain the framework provided by CASP for application in this category of cases only. This would carry the downside that many of the disadvantages of the current approach (as analysed above) would continue to arise in respect of at least some complaints assessed by Tusla (although the recommendations made on the issue of data protection might mitigate some of these). As against this, if all cases involving immediate risk or involving employers or voluntary organisations were taken out of the CASP framework, the number of cases remaining would be likely to be small in number. (It is not possible to quantify this due to the absence of proper statistics.)

A second approach would be to devise a way for this category of cases to make use of the fair procedures framework set out in the National Vetting Bureau (Children and Vulnerable Persons) Act 2012. This could take one of two forms. One option would be to amend the 2012 Act to give the Chief Bureau Officer a proactive power to disclose relevant information to parties other than relevant organisations in cases where the information provided by Tusla on foot of a notification of a *bona fide* concern discloses a risk to children that will not be mitigated through the vetting process for relevant organisations. This would have the advantage of piggy-backing on the robust and successful fair procedures framework of the 2012 Act, at the cost of the expansion of the Bureau's role into somewhat new territory. Alternatively, the provisions of section 15 of the 2012 Act could be replicated in the revised provisions of Child Care Act 1991 so as to establish a fair procedures framework to be applied within Tusla for these cases that would move away from the CASP model. This would allow the National Vetting Bureau to maintain its current remit; but it would leave Tusla in the position of acting as both investigator and decision-maker for this small category of cases.

The third option would be to legislate for a separate, independent decision-maker or body to determine whether to share information in cases involving identified children at potential future risk outside of "relevant organisations". A panel could be established analogous to the appeals panels currently envisaged by CASP involving expertise in both law and social work. This would separate the investigative and decision-making functions; however, provision would still need to be made for the form of fair procedures to be applied by the panel in making its decisions. For the reasons set out above, the safeguards set out in section 15 of the 2012 Act are preferable in this regard to the procedures set out in CASP.

2.6.6 Summary of recommendations

The analysis above has shown that there are four overriding obligations that should inform the reform of the law governing investigating and responding to complaints of sexual abuse:

- The obligation to mitigate foreseeable risks of child abuse of which the State is (or ought to be) aware;
- The obligation to mount an effective investigation of complaints of abuse;
- The obligation to minimise secondary traumatisaton of victims who make complaints; and
- The obligation to protect the constitutional rights of the PSAA, including the right to fair procedures and the right to a good name.

In light of the preceding analysis, the following reforms are recommended to meet these obligations:

1. The Child Care Act 1991 should be amended to make provision for:

   a. An express obligation on Tusla to receive and assess complaints of child sexual abuse, whether made as mandated reports or otherwise;

   b. An express obligation and power to share information and undertake safety planning necessary to protect identified children at immediate risk;

   c. A procedure allowing Tusla to engage in safety planning (including the sharing of information) deemed necessary to protect identified children at potential future risk in cases where the social work team has a *bona fide* concern that the risk to the children arises outside of the context of a "relevant organisation" and is therefore not captured by the National Vetting Bureau (Children and Vulnerable Persons) Act 2012. In the absence of immediate risk, such a procedure would need to provide safeguards to protect the rights of the PSAA. Three possible options for establishing such safeguards have been set out above.

2. The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 should be amended to provide that in cases where Tusla notifies specified information to the National Vetting Bureau which indicates that the PSAA is working in a "relevant organisation", as defined by section 2 of the Act, re-vetting (or, if vetting has not previously taken place, initial vetting) of the PSAA will be immediately required.

3. The Criminal Justice (Victims of Crime) Act 2017 should be amended to extend the obligations set down in the Act to Tusla, subject to any necessary adaptation.

4. Tusla should work with the Data Protection Commission with a view to establishing whether its policies governing the investigation of complaints of abuse could, as a means of preventing the commission of future crimes, be drafted in line with the requirements of the Law Enforcement Directive and Part 5 of the Data Protection Act 2018 rather than the GDPR. Clear exceptions should be included in such policies and any related practice guidance documents allowing Tusla to refrain from notifying PSAAs (or even complainants) that a record of an abuse complaint is held in cases where making such a notification would place the life, safety or well-being of the complainant at risk.

Since CASP and the related practice guidance were written in the context of the existing legislative framework, they would become obsolete in the event that the proposed legislative reforms were implemented (subject to the possibility of residual application in cases involving identified children at potential future risk outside of a "relevant organisation").

Chapter 3

Voluntary Care Agreements

With material contributed by
Dr Kenneth Burns and Dr Rebekah Brennan

3.1 BACKGROUND

Voluntary care agreements allow children to be placed into the care of Tusla by consent of their parent(s) without the necessity for a care order made by the courts. Should the parent withdraw their consent, Tusla must return the child immediately unless a care order is obtained from the courts. Under voluntary care agreements, important decision-making powers over issues such as medical treatment remain with the parents (unlike under care orders, which give Tusla the power to make all day-to-day decisions for the child). Tusla statistics indicate that a slight majority of children (55% in 2018, down from a high of 70% in 2014) who enter alternative care in Ireland do so pursuant to a voluntary agreement.

3

Voluntary care agreements are regulated by section 4 of the Child Care Act 1991, which provides:

> (1) Where it appears to the Child and Family Agency that a child requires care or protection that he is unlikely to receive unless he is taken into its care, it shall be the duty of the Agency to take him into its care under this section.
>
> (2) … nothing in this section shall authorise the Child and Family Agency to take a child into its care against the wishes of a parent having custody of him or of any person acting in loco parentis or to maintain him in its care under this section if that parent or any such person wishes to resume care of him.
>
> (3) Where the Child and Family Agency has taken a child into its care under this section, it shall be the duty of the Agency—
>
> (a) subject to the provisions of this section, to maintain the child in its care so long as his welfare appears to the Agency to require it and while he remains a child, and
>
> (b) 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.

The use of voluntary care agreements is commonplace internationally, featuring in child care legislation in common law jurisdictions including England and Wales,[1] New Zealand,[2] Victoria,[3] South Australia,[4] Western Australia[5] and Ontario.[6] In Europe, voluntary care arrangements form a prominent feature of the care systems in Germany,[7] Finland[8] and Sweden[9] (among others). The level of detail in the relevant legal provisions varies considerably across jurisdictions, with the lack of detail evident in the Irish framework being very much at the less-detailed end of the spectrum, giving more discretion to Tusla in how it operates voluntary care.

Although the legal framework governing voluntary care agreements in Ireland has been briefly considered in previous reports of the Special Rapporteur on Child Protection[10] and in a small number of academic papers,[11] to date there has been no empirical evaluation of the operation of that framework in practice. This chapter will present new evidence that aims to fill that gap.

1. Children Act 1989, s 20.
2. Children and Young People's Wellbeing Act 1989, ss 139-149.
3. Children, Youth and Families Act 2005, ss 133-156.
4. Children and Young People (Safety) Act 2017, s 96.
5. Children and Community Services Act 2004, Division 4, ss 74-77.
6. Child, Youth and Family Services Act 2017, ss 21-23.
7. See M Haug and T Höynck, "Removing children from their families due to child protection in Germany" in K Burns, T Pösö and M Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford University Press, 2017) at pp 89-116.
8. See T Pösö, E Pekkarinen, S Helavirta and R Laakso, "'Voluntary' and 'involuntary' child welfare: Challenging the distinction" (2018) 18(3) *Journal of Social Work* 253 and T Pösö and R Huhtanen, "Removals of Children in Finland" in K Burns, T Pösö and M Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Examination of Decision-Making Systems* (Oxford University Press, 2017) at pp 18-39.
9. See G Svensson and S Höjer, "Placing children in state care in Sweden" in K Burns, T Pösö and M Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford University Press, 2017) at pp 65-88.
10. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018) at pp 151-156, available at https://assets.gov.ie/27444/92175b78d19a47abb4d500f8da2d90b7.pdf, and G Shannon, *Twelfth Report of the Special Rapporteur on Child Protection* (2019) at pp 93-99, available at https://assets.gov.ie/45418/612999d7993449c780ecfdf4392b323e.pdf.
11. See, eg, K Burns, C O'Mahony, C Shore and A Parkes, "Decision-making systems for the reception of children into State care in Ireland: Law, policy and practice" in K Burns, T Pösö and M Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Analysis of Decision-Making Systems* (Oxford University Press, 2017), pp.146-173, and M Corbett, "Children in voluntary care: an essential provision, but one in need of reform" (2018) 21(1) *Irish Journal of Family Law* 9.

3.2 *VOLUNTARY CARE IN IRELAND STUDY*

Since 2018, the *Voluntary Care in Ireland Study* has been undertaking the first detailed investigation into voluntary care agreements in Ireland, and one of the first internationally. The study is based in the School of Applied Social Studies and the School of Law at University College Cork. It will conclude in late 2020, and the full findings will be published in a series of academic papers in due course. With the kind permission of my co-authors, Dr Kenneth Burns and Dr Rebekah Brennan, an abridged set of findings are included in this chapter.

The study employed a mixed-methods approach consisting of an online national survey of social workers that collected quantitative data. This was followed by an in-depth exploration of themes identified in the survey and literature review through qualitative focus groups with social workers and individual interviews with solicitors. An online consultation was conducted with front-line social workers, legal practitioners, academics and civil society organisations to assist with the development of the online survey. Responses to the consultation (n=29) were analysed and combined with our analysis of the literature to finalise the online survey. The online survey was piloted, revised and circulated to social work practitioners and managers (max. possible sample n=c.1,400) by the Child and Family Agency through their internal email list between January and March 2019. 243 responses (c.18% participation rate) were received.

The study collected data representing seven counties (out of a possible 26) with a mix of urban, mixed urban/rural, and rural practice settings. 20 solicitors took part in semi-structured interviews. 10 worked for the Legal Aid Board representing parents; seven worked in private firms representing the Child and Family Agency, and three worked in private firms with experience of representing both parents and/or guardians *ad litem* and/or children. (Quotes from solicitors below indicate who that solicitor advises or represents in child protection work.) We also conducted at least one focus group with social workers in each county, with a total of 26 participants.

The first two phases of the study focused on professionals' experiences and perspectives. Phase three, which is ongoing, involves collecting data from parents whose children came into state care on voluntary agreements. A future phase will collect data with young people who are in state care and care leavers.

3.3 STRENGTHS OF VOLUNTARY CARE

It is important to state at the outset that voluntary care has an important role to play in our child protection system. While the analysis below identifies a number of significant weaknesses with the current legal regulation of voluntary care agreements in Ireland, these are issues that can be addressed through reform of law, policy and practice. Voluntary care agreements offer significant advantages in certain types of cases—in particular, cases involving short-term respite; for parents who need time to address difficulties relating to (eg) substance addiction or mental health; or cases in which parents and Tusla have a positive and collaborative relationship. Specifically, voluntary care agreements reduce the adversarialism, stigma and costs associated with District Court proceedings leading to a

care order. Any reform of voluntary care should aim to retain these advantages, which will be discussed in turn below.

3.3.1 Reduced adversarialism

Because voluntary care agreements are agreed rather than imposed, they avoid the highly adversarial dynamic commonly seen in District Court child care proceedings. The detrimental impact of this dynamic has been documented in previous research.[12] The necessity to prove that the threshold for an order has been met requires social workers to present evidence in the highly-charged atmosphere of a court proceeding which paints a negative picture of parents. In turn, this evidence is robustly challenged by the parents' legal representatives, and social workers are often subjected to rigorous cross-examination. The resulting situation is highly stressful for all concerned, and makes it extremely difficult for social workers to develop a positive working relationship with parents after proceedings have concluded. In the long term, this reduces the prospects of parents addressing the circumstances underpinning the care order so that the children can return home. It should be noted that international human rights law principles (as accepted by the Irish courts) stipulate that any placement in care should in principle be viewed as a temporary arrangement, with the ultimate goal being family reunification.[13]

Voluntary care agreements avoid the adversarial dynamic described above, since the parents consent to the care placement and Tusla does not need to apply to the court for a care order. Consequently, there is no need to engage in the detailed and damaging process of demonstrating that the children have been neglected or abused to such an extent that a care order is justified:

> *"… it can create a good working relationship between parents and social workers, which when something goes into court and you have to hammer the parents it can put a strain on working relationships."* (Solicitor 2 (Parents), County A)

This is of particular benefit in cases where a parent has requested short-term respite and does not propose to contest an application for a care order; but is also beneficial in longer-term scenarios where reunification is more remote, but parents wish to remain involved in their children's lives. A collaborative dynamic is created which benefits the child in care:

> *"… if the parents are working really well with the foster parents and are working really well with the service, well, then the child is doing really well because they've got people around them who are co-operating and who care for them."* (Social Workers Focus Group 3, County D)

12. See generally C O'Mahony, K Burns, A Parkes and C Shore, "Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland" (2016) 30 *International Journal of Law, Policy and the Family* 131 and K Burns, C O'Mahony, C Shore and A Parkes "What social workers talk about when they talk about child care proceedings in the District Court in Ireland" (2018) 23 *Child and Family Social Work* 113.
13. See *Johansen v Norway* (17383/90, 7 August 1996) at [78], as quoted with approval by McMenamin J in *Health Service Executive (Southern Area) v SS (a minor)* [2007] IEHC 189 at [94].

By consenting to the agreement, the parents are acknowledging that there are difficulties that need to be addressed. Rather than entering into a lengthy and fraught court dispute over the nature and extent of these difficulties, parents and social workers are freed up to focus on addressing and resolving them. This makes family reunification more likely in the long term:

> *"So, for me, it is about reducing trauma … Once we have taken care orders and assumed parental responsibility, we then set those children up for a pathway in care that may not serve them very well; whereas maybe if we hadn't alienated the parents in the first place, we might be able to get them back home easier."* (SW Focus Group 6 County C)

> *"… a lot of the time the child is completely conflicted when they see their parents reacting to the social workers or, you know, shouting and roaring at them … Whereas if you see a positive working relationship between your parent and the social worker, well, then there's no need for you to worry and you can just get on with being a child and knowing that things are, you know, progressing, because in those cases it is usually a scenario where there's going to be a piece of work done which will hopefully allow reunification."* (Solicitor 5 (Tusla), County B)

It also means that parents can retain important decision-making functions over issues relating to their children's education or medical treatment, as a voluntary care agreement does not transfer these decision making powers to Tusla:

> *"I think you want to keep that relationship open with mum and dad to see if voluntary care is possible, and that way you can work with—I think you can work with the family better. You're not bringing as much acrimony into it. You're letting mum and dad have a continuing say in what happens to the children."* (Solicitor 16 (Tusla), County D)

3.3.2 Reduced stigma

Participants in the study expressed the view that a court-ordered care placement carries a greater stigma for the child than a voluntary care agreement. Partly, this may be connected with the fact that voluntary care agreements may lead to care placements with extended family members; but partly it relates to less adversarial interactions with social workers and courts:

> *"… the child doesn't necessarily feel or identify that they're in care or, you know, especially teenagers if they know that there's a court sitting coming up, you know, their information's going to be discussed. Whereas a child in voluntary care it's kind of like a normal arrangement, especially if it's like with a relative or something. It's just 'this is how my life is'. You know, there's not the stigma or the attachment, you know, the attachment to say like 'I'm in care'. It's just really normal for them."* (Social Workers Focus Group 2, County A)

> *"There is less stigma, the children don't consider themselves to be in care. I still read case notes where children don't have issues around identity because they have grown up in that*

kind of a context. Children that are the subject of care orders who may end up in multiple placements have massive issues with identity." (Social Workers Focus Group 6, County C)

3.3.3 Reduced costs

An application to the District Court for a care order is unavoidably expensive. Social workers have to spend considerable time preparing for and attending court. Expert witnesses may need to be obtained. Legal advice and representation will need to be provided to both Tusla and to parents (the majority of whom are represented by the Legal Aid Board). A guardian *ad litem* may be appointed to represent the child's views and best interests to the court, and may obtain legal advice and/or representation; the guardian's costs are paid by Tusla. (The role of the guardian *ad litem* is discussed in detail in Chapter 4 of this report.) Finally, the Courts Service needs to provide a judge, support staff and facilities. These costs are all fully justified in cases where parents wish to exercise their constitutional right to contest the application. However, in cases where parents agree that their child needs to be placed in care, it can be questioned whether such a considerable expenditure of scarce resources is necessary.

By their nature, voluntary care agreements can be concluded without the majority of the input set out above, thus freeing up considerable resources for Tusla, the Legal Aid Board and the Courts Service:

"... the cost of the court process is quite expensive. Whereas ... if some of the money spent in the litigation could be put into the early intervention family support at a community level to prevent children coming into care and to support parents, obviously it would be well worth it." (Solicitor 14 (Parents/GALs/Children), County B)

3.4 RISKS TO CHILDREN'S RIGHTS

Notwithstanding the important benefits that can flow from voluntary care agreements by comparison to court-ordered care placements, there are also a number of significant weaknesses in the current legal regulation of voluntary care agreements that pose risks to the protection of the rights of children who are the subjects of such agreements. Specific children's rights protected under the Convention on the Rights of the Child (CRC) that arise for consideration here include:

- Non-discrimination (Article 2 CRC): children in voluntary care should not be treated less favourably than children in care pursuant to a care order.
- Best interests of the child (Article 3(1) CRC): the best interests of children in voluntary care should be a primary consideration in all matters affecting them.
- Right to protection and care (Article 3(2) CRC): children in voluntary care have the right to such protection and care as is necessary for their well-being.
- Right to be heard (Article 12 CRC): children in voluntary care have the right to express their views freely in all matters affecting them, and their views should be given due weight in accordance with the age and maturity of the child.

Risks to the above children's rights arise from the potentially unlimited duration of voluntary care agreements; the absence of independent oversight; weak mechanisms for ascertaining the views of children; inferior resource allocation; and potential instability. Each of these will be discussed in turn below.

3.4.1 Unlimited duration

At present, voluntary care agreements have no maximum duration in Irish law or policy. Practice varies from one area to another; but in some instances, agreements can persist for many years. HIQA has documented cases where voluntary care persisted for up to 10 years, and has raised concerns with Tusla that children were being "subjected to voluntary consent for significant periods of time" with no efforts made to formalise the arrangement by securing a care order, "despite clear indications that they would not be reunified" with their parents.[14] The Child Care Law Reporting Project has documented a case in which a voluntary care agreement had persisted for almost eight years; the District Court judge noted that agreements of this length "lead to complications".[15] Our study participants alluded to judges expressing similar concerns:

> "*There's also a problem, which the courts are recognising, of voluntary care arrangements going on for maybe ten, fourteen years or whatever. And the court, particularly [NAME OF JUDGE] … felt that voluntary care wasn't appropriate for long-term care, that really it was like a short-term solution but not something for ten or fourteen [years]; that that should be under the auspices of the court …*" (Solicitor 10, County B)

There is some evidence in the literature on the potential negative effects of long-term voluntary care. Findings from the US indicate that children in voluntary care spend more time in care over their lifetimes and experience more accommodation changes.[16] In addition to issues arising from such instability and lack of permanence,[17] children in long-term voluntary care have unique needs where parental retention of rights, despite long term physical separation, can be an emotionally complex issue.[18] The use of lengthy voluntary care placements is discouraged in Norway[19] and Finland.[20] Some social workers who participated in our study acknowledged the difficulties around long-term voluntary care placements:

14. J Power, "Children left in State care 'twilight zone' indefinitely by Tusla", *Irish Times*, 11 May 2020.
15. Child Care Law Reporting Project, "Need to formalise situation of girl in voluntary care for almost eight years", available at https://www.childlawproject.ie/publications/need-to-formalise-situation-of-girl-in-voluntary-care-for-almost-eight-years/.
16. K Hill, "Prevalence, experiences, and characteristics of children and youth who enter foster care through voluntary placement agreements" (2017) 74 *Children and Youth Services Review* 62.
17. B McKeigue and C Beckett, "Care Proceedings under the 1989 Children Act: Rhetoric and reality" (2004) 34 *British Journal of Social Work* 831.
18. H Bailey, *The relationships and supports that matter to children looked after (CLA) in long term voluntary accommodation* (Children's Workforce Development Council, 2011, available at https://dera.ioe.ac.uk/2757/).
19. M Skivenes and KH Søvig, "Norway: Child welfare decision-making in cases of removals of children" in K Burns, T Pösö and M Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Examination of Decision-Making Systems* (Oxford University Press, 2017) at pp 40-64.
20. T Pösö and R Huhtanen, "Removals of Children in Finland" in K Burns, T Pösö and M Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Examination of Decision-Making Systems* (Oxford University Press, 2017) at pp 18-39.

"I think a big issue for us was we would have brought children into voluntary care, we'd have no time limit on it … it just ended up kind of turning into a long order until 18, parents kind of not really sure of the legalities of whether they could kind of withdraw their voluntary care

… We have probably got some children in long-term voluntary care that would not meet the threshold for an interim care order or for legal care orders in the court and we have had to come back and review them and parents just haven't challenged us in the court … that's a fault in the system really for allowing voluntary care orders to go on and on and on." (Social Workers Focus Group 3, County D)

The Eleventh Report of the Special Rapporteur on Child Protection stated that "it is not ideal for any child to be in care for an indefinite period of time, without any certainty or stability" and recommended that a maximum duration of twelve months should apply to voluntary care placements in Ireland.[21] This recommendation was put to participants in the study, and generated a mixed response. The majority of participants favoured a limit, with solicitors being particularly supportive; but different views were expressed about how long the maximum duration should be:

"… on balance I would agree with that on the basis that if a child is in care that length of time … for certainty for that child, for planning and everything that is involved, I think it would be important because … it would put pressure on the Agency to make decisions at an early stage regarding the planning for the children." (Solicitor 18 (Tusla), Counties E & F)

"I think, yeah, 12 months, because that would give a defined period for the parent to address their issues and if they can't address them within that time, well, then you can take further steps." (Solicitor 10 (Legal Aid Board), County B)

"I think it should be time-limited. I think there's an argument for it. And I would say no more than three months … I think 12 months is far too long." (Solicitor 3 (GALs and Parents), County B)

A sizeable minority of participants disagreed with the concept of a maximum duration on the basis that 12 months is not long enough, or that transitioning to a care order might be damaging in cases that are working well. Social workers were more likely to express this view:

"I don't believe that 12 months is long enough. I think if people are badly affected by alcohol or drug misuse their brain doesn't work like other people and it takes a long time. I think the minimum would be two years for me." (Social Workers Focus Group 3, County D)

"I do think in the longer term things can drift on …That said, my slight concern—and I'm contradicting myself here, I know—… is that if we then—we've had agreement and mum's

21. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection* (2018) at p 153, available at https://assets.gov.ie/27444/92175b78d19a47abb4d500f8da2d90b7.pdf.

never tried to pull the child out, says that she can't cope. But in going to court … would that then make mum think that she's never going to see the child?" (Social Workers Focus Group 5, Counties E & F)

"… if mum and dad are consenting till the child is 18 why would you need a care order? … it might upset the applecart if there was a care order obtained." (Solicitor 16 (Tusla), County D)

The main concern with the unlimited duration of voluntary care agreements expressed by study participants (as well as by the previous Special Rapporteur and HIQA) was that the review process is ineffective; this issue will be considered next.

3.4.2 Absence of independent oversight

On paper, the review process for all children in care (whether pursuant to a voluntary care agreement or a care order) is the same. Section 42 of the Child Care Act 1991 obliges the Minister for Children to "make regulations requiring the case of each child in the care of the Child and Family Agency to be reviewed in accordance with the provisions of the regulations." This obligation has been discharged in a series of regulations governing placement of children with relatives,[22] in foster care[23] and in residential care.[24] Broadly speaking, these regulations require that care placements be reviewed within two months of the initial placement; at least once every six months in the first two years of the placement; and thereafter not less than once in each calendar year. Reviews shall consider, *inter alia*, whether all reasonable measures are being taken to promote the welfare of the child and whether the care being provided for the child continues to be suitable to the child's needs. However, these reviews are internal Tusla exercises, and in voluntary care cases, there would be no input from anyone outside of the Agency.

Where a child is placed in care pursuant to a care order, judges sometimes engage in court-based review of the placement. Evidence from other research shows that only a small minority of District Court judges engage in the practice of court-based review,[25] and it does not have a legislative footing in the current text of the Child Care Act 1991. However, where it does occur, it was highlighted by some study participants as an advantage of care orders over voluntary care agreements:

"… sometimes when the child's in voluntary [care] things just go on, and nobody's putting any pressure on the social workers to do anything and sometimes things aren't being done properly. But once it gets into the court system then you find that the judge is looking at this, that and the other and the solicitors are looking at this, that and the other and making sure that things are done for the child or for the parent … and there's more of a defined plan, I suppose." (Solicitor 10 (Legal Aid Board), County B)

22. Child Care (Placement of Children With Relatives) Regulations 1995 (S.I. No. 261 of 1995), Part IV.
23. Child Care (Placement of Children in Foster Care) Regulations 1995 (S.I. No. 260 of 1995), Part IV.
24. Child Care (Placement of Children in Residential Care) Regulations 1995 (S.I. No. 259 of 1995), Part V.
25. C Coulter, *Second Interim Report: Child Care Law Reporting Project* (October 2014) at pp 7 and 61, available at: www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf, indicates that of 486 cases covered by the Project across the country in 2013-14, children were represented by a solicitor in just seven. See further A Parkes, C Shore, C O'Mahony and K Burns, "The Right of the Child to be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court" (2015) 27(4) *Child and Family Law Quarterly* 423 at pp 441-442.

In voluntary care cases, by contrast, there is no independent input at any point in the process. Notwithstanding the review arrangements which exist on paper, it seems highly questionable whether these are effective in long-term voluntary care placements. The HIQA correspondence to Tusla noted above stated that inspectors had found "no evidence that voluntary consent was reviewed during child-in-care reviews, or that the appropriateness of the child remaining in the voluntary care of Tusla had been reviewed and considered".[26] The previous Special Rapporteur observed that "[i]n view of the stretched resources of Tusla and the fact that urgent cases will demand the immediate attention of social workers with significant caseloads, the concern is that those children in voluntary care arrangements may not always be visible. The voluntary nature of their placement and the consent of their parents may mean that their needs fail to be prioritised."[27]

Similarly, there was a broad consensus among solicitors in our study that child in care reviews are insufficient in voluntary care:

> *"Now, there are some cases where a child is in care sometimes on a voluntary care basis where due to a turnover of staff or where there has been I suppose or even a bereavement or something like that where the parent is not as actively involved, so that there has been a kind of drift from a parent's point of view or a change of staff with the social worker, where there isn't the same management happening of a case, more through effluxion of time than anything else. And in those situations the regulations, the requirements that reviews take place in a certain period of time, they can be missed, there's no doubt about it. I've been aware of situations where—missed by months as opposed to by years, you know."* (Solicitor 15 (Tusla), County B)

> *"Often these arrangements can be quite sort of benign in that the child may go to a relative carer who then facilitates contact. So it's a low enough workload, if it works well, for the social worker. And we all know—I'll go back in and the first cases on my desk that'll get the attention are the ones that people are making noise and demands and writing solicitor's letters. So I do think there should be a built-in mechanism, you know. I know the care planning derives from the statutory reviews but I just wonder sometimes in terms of the degree of care planning are they getting everything that a child in care might get."* (Solicitor 1 (Tusla), County A)

As already stated, a lack of independent oversight was linked in the data to resource provision, but there were also concerns around "drift" in placements which continue for lengthy periods:

> *"Children in care whether they're voluntary or statutory should be subject to child-in-care reviews, but when a child's in voluntary care there's no one reviewing whether that child-in-care review took place. Whereas at least if it's in a care order the Child and Family Agency have to answer to the court if a child-in-care review did or did not take place, or more often than not there'll be a solicitor in the case who can advise the parents that this should happen. Whereas when the children are in voluntary care that oversight isn't there from what I can*

26. Power (n 14 above).
27. Shannon (n 21 above) at p 153.

see. And like there's drift in cases where they're subject to court scrutiny. I can only imagine that there must be drift in cases where there's no scrutiny … Like there is a child-in-care review system but you're reviewing yourself. It's not ideal." (Solicitor 2 (Parents), County A)

Some social workers defended the efficacy of the review process:

"… you would get a total oversight of all aspects of the child's care with that. And like we've an obligation for them to be held and for all the children regardless of their care order to have a care plan. So, I mean, and they are subject to the same statutory guidelines as [care orders] …" (Social Workers Focus Group 3, County D)

However, others acknowledged the weaknesses in the system:

"… the review process here is very overloaded, very under-resourced … maybe it is the children in care or the children subject to voluntary care orders should be given priority because that's the only place they're going to be reviewed." (Social Workers Focus Group 2, County A)

3.4.3 Weak mechanisms for ascertaining views of child

Our study found that the majority of solicitors felt that the voice of the child is not as well represented in voluntary care as where there is a care order (largely due to the absence of a guardian *ad litem)*:

"… my biggest concern about voluntary care is that it just means that those children are unheard and unseen." (Solicitor 3 (GALs and Parents), County B)

"I suppose there's an onus on us to make sure that the child's voice is heard, and I'm just not so sure in the voluntary system if it is at all … So there's no—like in the court system you have your guardian ad litem with an independent person looking at that." (Solicitor 17 (Legal Aid Board), Counties E & F)

Some social workers described how they employ a range of methods to obtain the views and wishes of children:

"*You know, we are also a voice of the child as well, too … There's a hundred different ways … in Signs of Safety you can do your Three Houses. You know, we talk to kids all the time. We bring kids out. We do individual work. Social care workers. Observations. Talk with other professionals."* (Social Workers Focus Group 3, County D)

However, many agreed the absence of a guardian *ad litem* is a disadvantage for the child in voluntary care in terms of representation for the child:

"… they can't be appointed a GAL because they're not subject to court proceedings. And like GALs are constantly advocating for different assessments for children … And I suppose like

a child in voluntary care is not going to get—it's not going to have those, you know, those kind of advocates for them, like. They're not." (Social Workers Focus Group 2, County A)

In a number of comparable jurisdictions, including England and Wales, New Zealand, South Australia, Western Australia, Ontario and Finland, the law stipulates that children may or must consent to voluntary care agreements once they reach a certain age (ranging from 12 to 16). This possibility was put to our study participants. 12 out of 21 solicitors and a strong majority of social workers did not favour putting such a weighty responsibility on the child, noting that the child may not be well placed to make such a decision, due to their age, level of understanding or the trauma they have suffered; and that the child may have conflicted emotions or loyalties in relation to the parent. Some participants expressed the fear that a requirement for child consent would push a lot of voluntary care cases into the courts. However, the vast majority of participants still favoured giving the child the opportunity to express their views:

"It's too much to put on them, you know … [there's a] right for them to be protected from having to make such decisions." (Social Workers Focus Group 4, County B)

"… could it be more harmful to the child if they're not consenting to it? They're a 12-year-old and then you go for your statutory order. What's that showing them? Your view doesn't matter. We're not listening to you. You're going on a care order regardless." (Social Workers Focus Group 2 County A)

"We have to be careful … in an effort to redress the voiceless child that we then burden them with matters that are, you know, very, very difficult even for the adults to navigate." (Solicitor 1 (Tusla), County A)

"I think that is a dangerous road to go down. I am absolutely in favour of the voice of the child, but I think that careful consideration has to be given to the weight that's going to be given to the child's views …" (Solicitor 13 (Legal Aid Board), County A)

A sizeable minority of solicitors (9 out of 21) were in favour of older children being required to consent to voluntary care arrangements. Reasons given included the fact that 16-year-olds can consent to medical treatment; that it would be in line with the enhanced protection for children's rights (including the right to be heard) provided by the 2012 constitutional amendment on children; and that there is a risk that teenagers who do not want to be in a voluntary placement might "vote with their feet" and abscond. Only a small minority of social workers in the focus groups were in favour of child consent. There was some variation on the age at which respondents felt it would be appropriate for children to consent:

"I suppose once you're into the later teenage years the voluntary care arrangement is dependent on the cooperation of the child. They'll just vote with their feet if they really don't want to be there … I wouldn't think any earlier than 15, but depending then on the

understanding of the child and the maturity of the child. Once they're 15 they should probably be consulted." (Solicitor 5 (Tusla), County B)

"I suppose it makes sense. I mean, physically you can't actually get a child in your car … You've got a placement for this difficult 15-year-old—… 'I'm not going'—and then it kind of calms down …" (Social Workers Focus Group 5, Counties E & F)

"… I think 15 I could definitely get on board with insofar as you could make decisions about a number of issues at that age and certainly by 16 you can decide not to go to school … we've have had a situation recently where consideration was being given to a care order for a child who's 15. The child was spoken to and could not have been clearer that they didn't want to go into care. And the only place available was a residential unit. And ultimately a decision was taken that the risk of the child running away and possibly ending up in criminality …" (Solicitor 18 (Tusla), Counties E & F)

3.4.4 Inferior resource allocation

The broad consensus from participants in our study was that children on care orders get access to better resources than children in voluntary care, for various reasons, with 71% of social workers who participated in our national survey either agreeing or strongly agreeing that this is the case. The reason most highlighted in this regard was the independent oversight provided by the courts:

"It is a two-tier system. There's the voluntary care and then there's the care orders. The kids on the care orders get the funding. They get the oversight there." (Social Workers Focus Group 4, County B)

Children who are in care pursuant to care orders may also benefit from resources that were put in place following recommendations made by a guardian *ad litem* during the court proceedings, whereas children in voluntary care cannot currently have a guardian *ad litem* appointed for them:

"… is the child in voluntary care getting as much without a GAL putting in recommendations in a report to get A, B, C, D and E? I wonder. I doubt it, you know. I have my doubts about that." (Solicitor 9 (Tusla), County C)

"… the child who has gone down the 'court' route for want of a better word and the guardian has been appointed then they could end up with more resources and be better looked after because they have somebody fighting their corner … in voluntary care there is probably nobody …" (Solicitor 20 (Tusla), County G)

Other participants highlighted the fact that Section 47 applications are not made in voluntary care cases, since parents usually do not have legal advice and there is no guardian *ad litem* who could make one:

> *"...realistically under Section 4 who's going to be bringing Section 47 applications? There's no guardian. The parents are unlikely. The child's not going to bring the application themselves."* (Solicitor 11, County B)

Another factor is that voluntary cases may be seen as low maintenance cases due to their consensual nature which often involves relative placements where the onus is on family members to address children's issues:

> "*...even when you are on a statutory care order there is a battle to try to get these services for children in care and I just wonder then are children in voluntary consent that little bit quieter; their problems maybe go either managed by family or unnoticed by family.*" (Solicitor 1, County A)

Participants stressed that this tendency continues even after the child leaves care:

> *"And aftercare planning as well. All the kids that are coming through voluntary they're left last for aftercare services. They're bottom of the list for everything."* (Social Workers Focus Group 4, County B)

3.4.5 Potential instability

It was noted above that where voluntary care placements work well, the collaborative dynamic may generate greater stability than court-ordered placements. However, the corollary of this is that where they do not work well, they can involve an inherent element of instability due to the fact that the parent(s) may withdraw their consent and seek the return of the child at any time. Social workers were particularly concerned about the potentially negative impacts of this situation:

> "*But the parent could actually come in and say, 'I want my child back today, give me the form, I want to sign the form,' and that just puts you in a very difficult position because then your options are to send the child home to an unsafe environment or go to court and get an emergency care order, which you might not have the grounds for because it might not be quite an emergency care order.*" (Social Workers Focus Group 4, County B)

> *"... you can have a parent that is like, 'I've gone to a counsellor and now my counsellor says...', and they'll come rocking into the office and demanding this, that and the other when, you know, you're like whoa, where's this all come from? And that can be scary for a kid, you know. Because I know a parent that used to do that often, you know, and then they'd cool off and then they might disappear and you wouldn't see them for four or five weeks ...*" (Social Workers Focus Group 1, County B)

As a response to concerns around return of a child to an unsafe environment, a 72-hour notice period was proposed by the authors to study participants as a potential safeguard for revocation of parental consent. The majority of participants supported it as a buffer to protect the child:

"The obvious difficulty with Section 4 is a parent at 5 o'clock on a Friday can ring up and say, 'Right, I revoke my consent,' and the CFA have no other option but to return the child. Good luck getting a Section 13 [emergency care order] at that stage, you know. So that's the real kind of drawback … The solution is if the parent has had legal advice and has signed a voluntary arrangement, that you have a minimum period, you know, for revocation." (Solicitor 11 (Legal Aid Board), County B)

However, others saw it as undermining the voluntary nature of the agreement:

> *"I think it undermines the concept of voluntary consent. Like if you're saying that you got a voluntary consent and then you—but if you change your mind you're still stuck with it for three days, that's not voluntary consent, you know."* (Solicitor 4 (Legal Aid Board), County A)

There was some evidence that a waiting period clause may have been incorporated into at least some voluntary agreements already in County B:

> "*I mean, some of them and some of the ones I've been involved in have agreed a 48-hour. And I do think that's good, because you don't end up in an emergency situation, because that's not in anybody's interest to go in under an emergency care order. And at least the 48 or the 72 hours will give you time to do an interim care order, when you can settle down and try and see if the matter can be patched up, you know, or is really serious and we do need the court order*." (Solicitor 10 (Legal Aid Board), County B)

One of the social work teams in this county reported having received legal advice that such a clause would be viable, but that a court later said the parent could have the child back any time:

> *"I got legal advice about whether that was possible and the legal advice was that yes, of course you just put that into—write that into the consent form so that when the person is giving consent that's part of it. But then there were different legal views about it and the courts took a different view about it and I was told in the end just the parent can take their child back."* (Social Workers Focus Group 1, County B)

However, this arose in a context where the notice period incorporated into the agreement did not have any basis in statute, and would seem to conflict with the terms of section 4(2) of the Child Care Act 1991. The position would be quite different if the notice period were to have a statutory basis. Such a basis would also be sufficient to allay any possible concerns about the constitutionality of such a clause. While it could be argued to restrict parental rights, the aim of the notice period is to protect children's rights by mitigating a risk that a child is returned to an unsafe environment, as well as a more general risk of instability in the placement. Moreover, the parents would have consented to it at the time of entering into the agreement and would not have had it imposed on them involuntarily. It is well established that any legislation which seeks to balance competing constitutional rights enjoys a particularly strong presumption of constitutionality, and the courts are

extremely reluctant to strike down such legislation when challenged.[28] Thus, it is possible in principle to legislate for the inclusion of notice periods in voluntary care agreements.

3.5 RISKS TO PARENTAL RIGHTS

In addition to the weaknesses documented above from the perspective of children's rights, the current legal framework for voluntary care agreements also creates a number of significant risks to parental rights. Since the agreements are constructed on a legal foundation of parental consent, it is obvious that this consent must be freely given and fully informed. Taking children into the care of the State in the absence of free and informed parental consent would violate the constitutional rights of parents to the care and custody of their children (by depriving them of that care and custody unlawfully) and to fair procedures (by taking the children into care without a fair hearing). The evidence gathered in our study highlights the risk that voluntary care agreements might not always be based on free and informed consent, due to a combination of barriers to parental understanding, questions about voluntariness, and the absence of independent legal advice. Each of these will now be discussed in turn.

3.5.1 Barriers to parental understanding

It has been well documented that parents whose children are placed in care often face significant barriers to understanding due to low levels of educational attainment, mental health issues, addiction issues, cognitive impairments or perhaps a combination of such factors.[29] In child care court proceedings, there is significant evidence of parents struggling to understand the process even where legal advice and representation is provided.[30] In the Committee Stage debates on the Child Care (Amendment) Bill 2019, the Minister for Children and Youth Affairs appeared to acknowledge the fact that some parents may lack capacity to consent to voluntary care agreements when she referred to care orders being granted in cases involving 'a vulnerable parent, in which voluntary care may not be appropriate'.[31]

However, it is not clear that care orders are always used in cases where there are question marks over a parent's capacity. Many of the participants in our study expressed concern around how well-placed parents are to fully understand what they are consenting to in voluntary care agreements. These concerns were particularly evident in interviews with solicitors:

28. See, eg, *Ryan v Attorney General* [1965] IR 294 at p 312; *Touhy v Courtney* [1994] 3 IR 1 at p 47; *MD (a minor) v Ireland* [2012] 1 IR 697 at 719; *Fleming v Ireland* [2013] 2 IR 417 at p 441; and *MR v An tArd Chláratheoir* [2014] IESC 60 at [96] and [113].
29. See, eg, J Masson, "I think I do have strategies': lawyers' approaches to parent engagement in care proceedings' (2012) 17 *Child and Family Social Work* 202 at p 207 and C Coulter, *Final Report: Child Care Law Reporting Project* (2015) at p 36, available at www.childlawproject.ie/wp-content/uploads/2015/11/CCLRP-Full-final-report_FINAL2.pdf.
30. See, eg, J Brophy, J Jhutti-Johal and E McDonald, *Minority Ethnic Parents, their Solicitors and Child Protection Litigation* (Department of Constitutional Affairs, 2005) at p 44; R Sheehan and A Borowski, "Australia's Children's Courts: An Assessment of the Status of and Challenges Facing the Child Welfare Jurisdiction in Victoria" (2014) 36 *Journal of Social Welfare and Family Law* 95 at p 104; and C O'Mahony, K Burns, A Parkes and C Shore, "Representation and participation in child care proceedings: what about the voice of the parents?" (2016) 38 *Journal of Social Welfare* 302 at pp 316-317.
31. Select Committee on Children and Youth Affairs, 23 October 2019, available at https://data.oireachtas.ie/ie/oireachtas/debateRecord/select_committee_on_children_and_youth_affairs/2019-10-23/debate/mul@/main.pdf.

> "*… certainly with our clientele there are frequently issues in relation to mental health, substance abuse, people who are maybe experiencing domestic violence so they're perhaps not in a position to fully appreciate what's involved or they're certainly relying on a social worker to explain to them what's involved. So I think probably it would be a good idea that they would have access to legal advice before signing*." (Solicitor 13 (Legal Aid Board), County A)

This concern was not limited to solicitors acting for parents; it was also expressed by solicitors acting for Tusla and by social workers:

> "*… I'm always banging the drum … are you sure you have informed consent? Are there alcohol difficulties? Are there are drug difficulties? Are there mental health difficulties? If there are, is it informed consent? It makes me nervous. I just don't like it for all these reasons*." (Solicitor 9 (Tusla), County C)

> "*… we've had some parents … saying to us she didn't realise how easy it was to withdraw her consent for it, you know … I suppose [for] some parents obviously things are very difficult when you have to sign a child into voluntary care, and we probably did the very best we could in providing information for them, but they don't understand it or they don't accept it or fully really get to grips with it and then we don't review it*." (Social Work Focus Group 3, County D)

In addition to mental health and addiction issues, cognitive impairment and low levels of educational attainment were also cited as barriers to understanding:

> "*… I had a case two weeks ago where a woman turned around, she mentioned something. She'd been given the report. She whispered something. Newly appointed [Legal Aid] solicitor. And she basically said that she was illiterate. One hundred percent illiterate … I knew there was a difficulty, but I didn't think she'd be able to come out and say that. It's like, even, how can you get informed consent? It would worry me that it's not—it can't be … And I wonder—the profile of people who are signing voluntary care, I doubt it's completely different to the profile of people I'm seeing in court. So if it's the same, I'm pretty certain they're not all getting—they're not all informed consent*." (Solicitor 9 (Tusla), County C)

Some variation was present in the views of participants on the extent to which these issues impact on the validity of consent. Some social workers stated that they would not proceed with a voluntary care agreement if they had concerns about whether the parent was in a position to understand what they were agreeing to:

> "*If somebody was unwell and there was concerns around their mental health it wouldn't be an option, I suppose, because you'd be concerned really that they wouldn't be in their—you know, they wouldn't [be] compos mentis to sign that. Then if they've learning needs, again you'd have to take that into consideration really … I suppose if somebody was uncertain or they were unsure, you wouldn't proceed with it*." (Social Work Focus Group 2, County A)

As against this, one social worker described a situation where a mother signed a consent form while clearly under the influence of illegal drugs, but rationalised it on the basis that the level of drug abuse was such that the children would have to come into care regardless:

> "*In the morning we had a meeting with Mum and Granny and we were aware that mum has an active heroin addiction, been using for seven months on a daily basis, something she'd kind of hide … So we said that's a kind of red line for us. In the morning she consented to voluntary care. She said yes, we'll do this, we'll make it as a plan, we'll do it … we'll meet back at half-past four with the kids and we'll do the signing. She came back off her head, hardly standing up, and I thought, well, she gave consent earlier … I got her to sign it. But there's no way she had capacity at that moment to sign that consent … I wouldn't be leaving the children with her anyway so, okay, there's no harm.*" (Social Work Focus Group 5, Counties E & F)

Taken together, this data suggests that many parents who sign voluntary care agreements may face significant barriers to understanding what they are consenting to, raising questions about whether they have capacity to consent to the agreement. These barriers to understanding are exacerbated by the stressful and highly-charged situation in which voluntary care agreements are concluded. Although the circumstances are less adversarial than court proceedings, previous studies have still found that any contact with child protection services has been characterised by parents as intimidating, stressful and disempowering.[32] Our participants echoed this view:

> "*I think parents are, when they're signing an agreement, are struggling hugely. They're overwhelmed. They're quite traumatised. They may be suffering from withdrawals from alcohol. And I suppose they're under scrutiny as well. They're being interrogated … it's not a hundred million miles away from being in interrogative situation, being in Garda custody. Because you're under pressure.*" (Solicitor 14 (Parents/GALs/Children), County B)

Thus, the situation is inherently pressurised, with potential consequences for whether a parent is in a position to give a fully informed consent. And as will be seen in the next section, the interaction between the parents and the social workers can exert further pressure—whether actual or perceived—on the parents, raising a question mark over whether the consent was freely given.

3.5.2 Questions about voluntariness

Voluntary care agreements involve an inherent danger that parents may come to believe that they do not have a genuine choice of refusing to sign, since they perceive that refusal to sign will inevitably result in a court order being granted instead. Our study did not disclose evidence that social workers actively and consciously coerce parents into signing

32. H Buckley, N Carr and S Whelan, 'Like walking on eggshells: service users views and expectations of the child protection system' (2011) 16 *Child and Family Social Work* 101 and M Gibbons and D Quinn, *A Report on Parental Experiences in CFA Child Protection Conferences in Galway and Roscommon* (2016) at p 46 available at https://www.tusla.ie/uploads/content/Reportfinal_Marie_Gibbons.pdf.

voluntary care agreements; however, it did find that social workers, acting in good faith to protect a child at risk (and conscious of the drawbacks of court proceedings for all parties), present a contrast between undesirable court proceedings and voluntary care as a means of avoiding them. What may not be clear to the parent is the fact that the outcome of court proceedings is not a foregone conclusion, since they will have an opportunity to present their case, and the order sought by Tusla may not be granted.

Concern that this is a feature of at least some voluntary care agreements in Ireland was particularly prominent among Legal Aid Board solicitors who act for parents in child care proceedings:

> "*Nearly every client who signs a document, they're saying, 'I had no choice. I had no choice.' … They were saying, 'If I don't sign this they're going into court this afternoon.'*" (Solicitor 4 (Legal Aid Board), County A)

> "*Well, you see, they're in a bind. You can have the situation where the parent they're being told, maybe not is as many words now, as if you don't sign it, well, then, you know, something worse is going to happen. Then if you withdraw from that something worse is going to happen. So how you square that, you know?*" (Solicitor 6 (Legal Aid Board), County A)

Coupled with the statement that a refusal of voluntary consent will lead to a court application is an implication that this application will inevitably be successful:

> "*… social workers give the impression that the court isn't independent, that the court will do their bidding. So like they don't say, 'We will apply. Of course the court could refuse.' … they make it very clear we're going we're getting our order and we'll get our order this afternoon if you don't sign this, as if the court has no role or function or independence at all.*" (Solicitor 4 (Legal Aid Board), County A)

The key issue here is parental perception. Social workers may have no intention to threaten or pressure the parents by mentioning the possibility of court proceedings if the voluntary care agreement is not signed; indeed, this may be a simple statement of reality:

> *"… you do end up going to court anyway … that is the fact, I suppose, really. You wouldn't be asking them to sign a voluntary consent unless you felt that the child needed to be in care …"* (Social Work Focus Group 2, County C)

However, this may not prevent that statement as being perceived as a threat by the parents:

> *"That's the impression they get. They feel sometimes they're being threatened. You know, if you don't sign your kids away we're taking them away. We'll be in court on Tuesday and we'll get the judge to take them away. You know, speaking as it's a threat. Now, nobody would agree that necessarily they were threatened, but that's the way they perceive it …"* (Solicitor 10, Legal Aid Board, County B)

Having said that, this view was not unanimous among solicitors, with some saying that they did not detect any issues relating to a lack of free consent:

> "*I've never got a suggestion that they felt coerced into it*." (Solicitor 8, Legal Aid Board, County C)

Some social workers rejected any suggestion that parents may be pressured into signing; however, the majority of social workers in our focus groups acknowledged that the effect of the conversation might be to leave the parents feeling like they had little choice:

> *"… really it was always referenced that, you know, I have the power to do this. If I need to do it, I will do it. If you want to almost keep me on side and keep the system working with you, you will sign this … If you don't, we will all head down to Court … It is what goes on; it is what the practice was in the area. You try and get everybody to sign up— if they won't, you force them to sign up. I suppose it is not great practice really."* (Social Work Focus Group 6 County C)

Tusla provides social workers with *Practice Guidance on Voluntary Consent for Admission to Care*.[33] However, only 63% of the social workers who participated in our national survey said they had read this document and only 7% had received training on it. Practice Guidance of this nature has the potential to assist in ensuring best practice when asking parents for their consent in voluntary care cases. However, the substance of the current document is in need of revision. It defines voluntary consent as occurring "when a Tusla social worker asks or agrees with a parent(s) that Tusla will care for their child(ren) and the parent(s) have signed a form consenting to this." This is a circular definition that fails to allow for the fact that even where a consent form has been signed, a parent may not necessarily have given free and informed consent. The document states that "[e]ach professional must determine capacity for every individual parent/legal guardian and confirm that the parent(s) or guardian(s) have the capacity to consent to the placing of their child(ren) into the care of the State", but gives insufficient guidance as to how capacity is to be defined or determined.

As things stand, therefore, it seems likely that this document is an insufficient safeguard to ensure parental consent is freely given and fully informed, especially in the absence of any legal safeguards in the Child Care Act 1991 (see section 3.5.4 below). Improvements in the substance of the Practice Guidance and the provision of training for social workers on how to implement it are a necessary step towards the safeguarding of parental rights. However, this would not be sufficient in itself. In practice, it is unrealistic to expect social workers to bear the responsibility of safeguarding the rights of both the child and the parent in cases where those rights are in tension. The obvious alternative is for parents to be provided with independent legal advice; the next section will discuss this issue.

33. Child and Family Agency, *Practice Guidance on Voluntary Consent for Admission to Care* (PPPG 08/2017, 7 July 2017).

3.5.3 Absence of legal advice

Parents in court proceedings concerning care orders almost invariably have the benefit of legal advice and representation before a full care order is made (unless they refuse it). Before full care orders are made, judges have stated that parents should get a lawyer "no matter what" and that they would "do somersaults" to ensure that this occurs; and the Legal Aid Board prioritises child care cases within its overall workload.[34]

While voluntary care arrangements are less complicated and adversarial than court proceedings, the risk that consent to voluntary care arrangements may not always be fully understood by parents, or that their consent might not always be freely given, speaks to an important role for independent legal advice in voluntary care. Numerous participants in our study expressed the view that legal advice is important for parents before they sign voluntary care agreements:

> "*… I think best practice would say the parents should have access to some sort of independent legal representation, because what that does is it informs them of their rights, it actually has independent information as to what it actually means, and it knows then that the state then in doing it I think will do it much more carefully …*" (Solicitor 3 (GALs and Parents), County B)

However, one solicitor questioned whether the opportunity to consult with a solicitor will really overcome the barriers to understanding outlined above:

> "*… what is the legal advisor going to say? A legal advisor can't make the person have capacity to understand what they are doing.*" (Solicitor 20, representing the Child and Family Agency, County G)

An alternative to legal advice for this particular purpose is the use of parental advocates, who are specially qualified to assist parents to understand and participate in decision-making processes. Several participants identified this as a desirable safeguard, but acknowledged that they are often not available:

> "*[The] gold standard I suppose is firstly provide the information to them in writing. See if they require the assistance of an advocate, something like that. And then give them the full information for legal advice and give them all of the contact details and so on. So ideally you'd never be asked to sign it on the spot. They're given this information, time to consider it, look at your options, and then come back and sign it … But, you know, I accept the realities of the situation that's not always going to be possible.*" (Solicitor 11, Legal Aid Board, County B)

Apart from the issue of parental understanding, independent legal advice also offers an important safeguard against parents feeling pressured into signing voluntary care agreements, since lawyers will be able to place any statements made by social workers in context, and explain to parents the nature of the court process and the prospects of successfully contesting the application. This could guard against the risk that parents form the impression that the court order will be granted as a matter of course.

34. O'Mahony *et al.* (n 30 above) at pp 310-311.

However, our national survey asked social workers whether they advise parents to seek legal advice before signing a voluntary care agreement, and also whether the parents actually obtain such advice. The results indicated that while a large majority of social workers (68%) said that parents are encouraged to seek legal advice, an even larger majority (78%) said that parents do not actually secure such advice. Legal Aid Board solicitors confirmed that it is rare for them to be approached to offer advice on a voluntary care agreement; when they do encounter them, it is usually in the context of providing representation at a later point when the case escalates to court proceedings:

> "*To a very limited extent we might have clients who contact us for advice before signing their children into voluntary care, but that would be the exception rather than the rule and most of our exposure to clients who are involved in the child care system would be when they apply for Legal Aid when care proceedings have actually been issued*." (Solicitor 13, Legal Aid Board, County A)

There was evidence that in at least some areas, social workers are providing an information leaflet to guide parents to the Legal Aid Board, and that legal representatives for the Child and Family Agency are encouraging this practice:

> "*The call will come through to me and say, 'We've met with the parents. They accept that the children can't come home to them. They've got problems they need to deal with and they are agreeing to voluntary care.' It became my practice to say, 'Do they know they don't have to agree to it and do they know that they are entitled to legal representation?' 'Yes, we'll make sure they do.' You know what I mean? And usually social workers will have in their bag a list of Legal Aid Board offices* …" (Solicitor 15, representing the Child and Family Agency, County B)

Legal Aid Board solicitors did stress that they would not turn away requests for advice from parents considering a voluntary care agreement. However, given that there is already evidence that the Legal Aid Board is struggling to resource its caseload in relation to child care court proceedings,[35] it seems inevitable that if all (or even a sizeable proportion of) parents entering into voluntary care agreements were to apply for legal aid, the service would be overwhelmed and unable to respond within the necessary timeframes.

3.5.4 Safeguards for parental rights

Some jurisdictions have enacted legislative measures designed to address the issues identified in this paper. In New South Wales, voluntary care agreements cannot be concluded entirely outside of the court process. Instead, under the Children and Young Persons (Care and Protection) Act 1998, a "care plan that allocates parental responsibility, or aspects of parental responsibility, to any person other than the parents of the child or young person, takes effect only if the Children's Court makes an order by consent to give effect to the proposed changes in parental responsibility".[36] The Act stipulates that the Court may only make on order on consent if it is satisfied that "the parties to

35. O'Mahony *et al.* (n 30 above) at pp 311-315.
36. Children and Young Persons (Care and Protection) Act 1998, s 38(2).

the care plan understand its provisions and have freely entered into it",[37] and that the parents have "received independent legal advice concerning the provisions to which the proposed order will give effect and the nature and effect of the proposed order".[38] Thus, the legislation in New South Wales mandates a double layer of safeguards designed to ensure that consent is free and fully informed. This is certainly a robust system from the perspective of safeguarding parental rights; but it comes at the cost of undermining several of the advantages of associated with voluntary care arrangements.

A more nuanced approach is taken in Ontario, where the Child, Youth and Family Services Act 2017 provides that a consent to a voluntary care agreement is only valid if, at the time the consent is given, the person (a) has capacity; (b) is reasonably informed as to the nature and consequences of the consent or agreement, and of alternatives to it; (c) gives the consent voluntarily, without coercion or undue influence; and (d) has had a reasonable opportunity to obtain independent advice.[39] It is unclear how effective this provision is in practice; much of it merely explicitly states what would be the case anyway (namely, that consent to a legal agreement may be invalidated if it is not free or fully informed). The provision refers only to "reasonable opportunity" and not to actual provision of advice, and so it remains possible that parents do not actually avail of legal advice. Moreover, the primary remedy for a consent being invalid would be that the agreement is invalidated and the children are returned home; but since the parents retain the right to terminate the placement at any time, this would not make much difference after the event. The emphasis needs to be on preventing arrangements being agreed in the absence of free and informed consent, rather than on providing remedies after the event.

3.6 RECOMMENDATIONS

The evidence produced by the *Voluntary Care in Ireland Study* and analysed in this chapter demonstrates that voluntary care agreements have an important role to play in the Irish child protection system. They enjoy several important advantages over court proceedings, including reduced adversarialism, reduced stigma and reduced cost, and should be retained in order to capitalise on these features. However, the evidence also shows that the sparse legal framework provided by section 4 gives rise to numerous risks to the rights of children and parents involved in voluntary care agreements. Risks to children's rights include potentially unlimited duration and absence of independent oversight; weak mechanisms for ascertaining the views of the child; inferior resource allocation; and potential instability. Risks to parental rights include barriers to parental understanding of agreements; questions about voluntariness; and the absence of independent legal advice.

Section 4 lacks several of the safeguards seen in various comparable jurisdictions. These include limits on the duration of voluntary care agreements; limits on whether, or how many times, an agreement can be renewed; provision for legal advice; provision for independent oversight or review; provision for notice periods before an agreement can be cancelled, and provision for child participation in the consent process. Some of these safeguards interlock with each other, and strong provision for one safeguard would

37. Children and Young Persons (Care and Protection) Act 1998, s 38(2B)(b).
38. Children and Young Persons (Care and Protection) Act 1998, s 38(2B)(c).
39. Child, Youth and Family Services Act 2017, s 21(2).

allow for less strong provision to be made for another. For example, concerns around the lengthy voluntary agreements would lessen if parents received legal advice in advance of signing the agreement to assist them to provide free and informed consent, and there was independent oversight of the operation of the agreement to prevent drift. Conversely, the absence of these measures would strengthen the case for voluntary care agreements to be limited to a maximum duration.

Section 4 of the Child Care Act 1991 should be completely overhauled to provide for safeguards that draw on some of the best practice seen internationally, while adapting to the Irish system. Reform of section 4 should be accompanied by a number of policy and practice measures that will ensure that the legislative framework has the desired effect. The following specific reforms are recommended:

3.6.1 Limits on duration and renewal

Statutory limits on the duration and renewal of voluntary care agreements are common in comparable jurisdictions, although they vary considerably in their form and effect. Western Australia limits voluntary care agreements to a maximum of three months per agreement, with extension possible once the agreement operates for a total of not more than six months.[40] Victoria makes provision for short-term agreements which have a maximum duration of six months and may be renewed up to a maximum total period of 12 months; while long-term agreements have a maximum duration of two years, and may renewed more than once with the approval of the Secretary to the Department of Human Services of the Government of Victoria.[41] In Ontario, voluntary care agreements are known as "temporary care agreements" and have a maximum duration of 6 months. They can be extended up to 12 months; but if new voluntary agreements are made subsequently, the outer limit of how long a child can be in care under such an agreement is 12 months for children under six years of age, and 24 months for older children.[42] In New Zealand, the law distinguishes between short term placements (which have a maximum duration of 28 days and may only be renewed once) and extended placements (which have a maximum duration of 6 months for children under 7 years of age or 12 months for older children, but may be renewed more than once if approved by a family group conference).[43] The common thread running through the above examples is that open-ended voluntary care agreements of unlimited duration are not permitted in any of the jurisdictions mentioned.

The evidence presented above in relation to the advantages of voluntary care agreements in Ireland suggests that an absolute upper limit on the duration for which a child may remain in voluntary care is neither necessary nor desirable—provided that appropriate safeguards are in place to mitigate the risks of a lack of free and fully informed consent and a lack of independent oversight. Drawing on the comparative examples set out above, it is recommended that such safeguards should include the stipulation in the Child Care Act of a maximum duration for individual voluntary care agreements, and of conditions which must be fulfilled if an agreement is to be renewed.

40. Children and Community Services Act 2004, s 75(9).
41. Children, Youth and Families Act 2005, ss 135-150.
42. Child, Youth and Family Services Act 2017, ss 75(5) and 75(6).
43. Children and Young People's Wellbeing Act 1989, ss 139 and 140.

The length of the maximum duration should vary depending on whether legal advice has been obtained or not. The provision of independent legal advice may not be practicable or indeed necessary for all voluntary care agreements, and concerns around parental rights are at their least acute in cases of short-time respite agreements. However, where agreements persist for a longer duration, the risks to parental rights arising from the factors discussed in section 3.5 above make it desirable that legal advice be obtained before such an agreement is concluded. It is recommended that voluntary care agreements should have a maximum duration of three months in the absence of legal advice or 12 months where legal advice has been provided, and be renewable subject to specified conditions.

In order to retain the advantages of voluntary care while mitigating the risks to children's and parents' rights, agreements made in the absence of legal advice for the parent(s) should only be renewable once for a maximum duration of three additional months. Where legal advice has been provided to the parent(s) before signing either the initial agreement or the renewal, agreements should be renewable more than once for periods of no more than 12 months per agreement.

Renewal should only take place after a review process that makes effective provision for independent oversight and child participation, along the lines set out in the next section.

3.6.2 Reviews

A formal review should be automatically triggered at least four weeks before the expiry of an agreement, regardless of whether the duration of the agreement was for the maximum permitted or for a shorter period. In order to address concerns related to children's rights highlighted in section 3.4 above, this process should provide for independent oversight so as to ensure adequate provision is made for voluntary care placements and to avoid drift; and should include a mechanism designed to ensure effective child participation in reviews.

It was noted above that the absence of independent oversight was a central concern in relation to voluntary care agreements. For this reason, it is recommended that reviews should be chaired by an independent person who has not been employed by Tusla recently (eg in the past 10 years), and who has at least five years' experience of child care (eg retired judges, solicitors, guardians *ad litem*, independent social workers). This chairperson should have the power to make a binding recommendation as to whether the agreement should be renewed or not. In the event of non-renewal, Tusla would then apply professional judgment as to whether an application for a care order is necessary.

Children in voluntary care should have access to an advocate who would, *inter alia*, participate in reviews. Children who are too young to work with an advocate should have access to a guardian *ad litem* for the review process to ensure that independent representation is provided for the child's views and best interests.

3.6.3 Notice period

The Child Care Act should provide for a 72-hour notice period before a voluntary care agreement can be cancelled by a parent in order to mitigate the risk that a child may be returned to an unsafe environment before there is an opportunity to apply for and obtain

an emergency care order. An example of a statutory requirement for a notice period can be seen in New Zealand, where the governing statute provides that every voluntary care agreement shall "specify the manner in which it may be terminated and, unless so specified, shall provide that the agreement may be terminated by either party on giving 7 days notice [*sic*] in writing".[44] Flexibility could be provided by stipulating that Tusla may waive this period if it is in the best interests of the child to do so.

3.6.4 Assent of mature children

In order to uphold constitutional rights, parental consent is necessary to any voluntary care agreement. Children could not consent to their own placement the care of Tusla without parental consent. However, in cases involving mature children, there are strong reasons of both a principled and practical nature to require that parental consent be supplemented by the assent of the children being placed in care (that is, agreement to the consent already offered by the parents). In such a model, a voluntary care agreement could not be concluded without the agreement of both children and parents; and while children would not be able to conclude a voluntary care agreement without their consent of their parent(s), the same would be true in reverse. If a child did not assent, and Tusla social workers remained of the opinion that the child's welfare required placement in care, an application for a care order would be necessary.

Such a measure—versions of which are in place in multiple comparable jurisdictions—would be in keeping with the principle recognised in the CRC that children have evolving capacities and should have a greater say in decisions affecting them as they mature. It would also mitigate the practical concern expressed by participants in our study that teenagers who object to a voluntary care placement may "vote with their feet" and abscond. Children and young people who have been asked for and given their assent to the placement have an element of ownership over the decision that makes this outcome less likely. Conversely, where a child refuses to assent, it seems ill-advised to proceed with the placement without first going through court proceedings in which the child would have a full opportunity to participate using one of the mechanisms described in Chapter 4 of this report.

This raises the question of the age at which assent of the child should become mandatory. In England and Wales, accommodation may be provided to children from the age of 16 provided that their parents do not object.[45] (Strictly speaking, section 4 of the Child Care Act 1991 allows this approach at present in Ireland, since it is couched in terms of absence of parental objection rather than a positive requirement for consent.) In Ontario[46] and Western Australia,[47] children can consent to voluntary care from the age of 16. In South Australia, a child of 16 or older can initiate negotiations for a voluntary care

44. Children and Young People's Wellbeing Act 1989, s 146(1)(c).
45. Children Act 1989, s 20(5).
46. Child, Youth and Family Services Act 2017, s 22(1).
47. Children and Community Services Act 2004, Division 4, s 75(8).

agreement and must consent to that agreement.[48] Other jurisdictions set the age much younger; in New Zealand[49] and Finland,[50] children over 12 must consent.

Since the proposal being made here is for a requirement of assent rather than consent (and is thus more modest than some of the comparative examples given above), the lower age of 12 is recommended. Ethical guidance provided by the Department of Children and Youth Affairs regarding the conduct of research involving children recommends that the assent of the child always be obtained in addition to parental consent.[51] If this is best practice for a process that involves asking a child to answer some questions, it is surely even more important for a process that will determine where and with whom a child will live.

3.6.5 Summary of recommendations

Section 4 of the Child Care Act 1991 should be reformed to make provision as follows:

1. Voluntary care agreements should have a maximum duration of three months (renewable once) in the absence of legal advice for parents, or 12 months (renewable more than once) where parents have received legal advice.
2. A formal review should be triggered at least four weeks prior to the expiry of a voluntary care agreement.
3. Reviews should be chaired by an independent person with experience of child care who would be empowered to make a binding recommendation as to whether the agreement should be renewed.
4. Children in voluntary care should have access to an advocate who would participate in reviews. Children who are too young to work with an advocate should have access to a guardian *ad litem* who could represent the child's views and best interests in the review process.
5. Cancellation of voluntary care agreements by parents should be subject to a statutory 72-hour notice period, which Tusla may waive if it is in the best interests of the child to do so.
6. The Act should stipulate that parental consent to voluntary care agreements must be supplemented by the assent of the child where the child is 12 years or older.

A miscellaneous issue not addressed in the analysis above is that section 4 does not clarify whether the consent of one or both parents to a voluntary care agreement is required. It also leaves questions open about the position of parents who are not guardians, or guardians who are not parents. This echoes the silence of the law in other areas such as medical treatment, and has potential to be a cause of confusion and defensive practice. For the avoidance of doubt, section 4 should make specific provision that the consent of

48. Children and Young People (Safety) Act 2017, s 96.
49. Children and Young People's Wellbeing Act 1989, s 144.
50. See T Pösö, E Pekkarinen, S Helavirta and R Laakso, "'Voluntary' and 'involuntary' child welfare: Challenging the distinction" (2018) 18(3) *Journal of Social Work* 253 and T Pösö and R Huhtanen, "Removals of Children in Finland" in K Burns, T Pösö and M Skivenes (eds), *Child Welfare Removals by the State: A Cross-Country Examination of Decision-Making Systems* (Oxford University Press, 2017) at pp 18-39.
51. Department of Children and Youth Affairs, *Guidance for developing ethical research projects involving children* (2012) at pp 2-3, available at https://www.lenus.ie/bitstream/handle/10147/311115/xEthicsGuidance.pdf.

one guardian of a child will suffice, provided that reasonable efforts are made to notify any other guardian(s) as soon as practicable (so as to give them the opportunity to object to the placement). This would strike a reasonable balance between the need for flexibility and speed in concluding voluntary care agreements (especially where a parent or guardian is not playing any part in the child's upbringing) while respecting the right of all guardians of a child to jointly determine where the child resides.

In addition to the reform of section 4, the following policy and practice measures should be implemented:

1. Tusla's *Practice Guidance on Voluntary Consent for Admission to Care* should be revised to take account of international literature and best practice on free and informed consent.
2. Tusla should ensure that all social workers involved in concluding voluntary care agreements have been trained on the contents of the revised policy.
3. Provision should be made to ensure that advocates are available to both children and parents involved with voluntary care agreements.
4. Provision should be made to ensure that the Legal Aid Board is in a position to offer legal advice to parents involved in voluntary care agreements of more than 6 months' duration.

Chapter 4

Ascertaining the Views of Children in Child Care Proceedings

4.1 CONSTITUTIONAL OBLIGATIONS

The constitutional obligation to ascertain the views of children in child care proceedings is primarily set out in Article 42A.4 of the Constitution, with additional obligations arising from Article 40.3 pursuant to a number of court decisions. Article 42A.4 provides:

1° Provision shall be made by law that in the resolution of all proceedings –

i. brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

ii. concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

Article 42A.4.2° imposes a clear constitutional obligation on the Oireachtas to legislate to ensure that the views of children will be ascertained and given due weight in a range of specified proceedings. The reference in Article 42A.4.1° to proceedings "brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected" captures child care proceedings, as currently regulated by the Child Care Act 1991.

Article 42A.4 is not couched as a freestanding constitutional right, but rather as an obligation to legislate.[1] As such, its implementation is dependent upon legislative action. To date, no steps have been taken to amend the Child Care Act 1991 to bring it into line with the requirements of Article 42A.4, and therefore—as will be explained below—the Act is currently at odds with constitutional requirements. Proposals to partly address this issue were brought forward in the Child Care (Amendment) Bill 2019. This section will outline the scope of the constitutional obligation, before examining the 2019 Bill with a view to establishing whether it adequately discharges this obligation, and how it compares to the arrangements currently in place. Finally, consideration will be given to mechanisms for ascertaining the views of children that fall outside of the scope of the 2019 Bill.

4.1.1 Procedural right to be heard

Although Article 42A.4 has not been couched as a constitutional right, it is important to note that even before its enactment, the courts had recognised that children have a procedural right under Article 40.3 of the Constitution to be heard in cases affecting them. In her 2004 decision on a guardianship application under the Guardianship of Infants Act 1964 in *FN v CO*, Finlay Geoghegan J held:

> "It is also well established that an individual in respect of whom a decision of importance is being taken … has a personal right within the meaning of Article 40.3 of the Constitution to have such decision taken in accordance with the principles of constitutional justice. Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies. Hence s. 25 should be construed as enacted for the purpose of inter alia giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child."[2]

In the more recent decision of the High Court in *A O'D v Judge Constantine G O'Leary* (which concerned a case under the Child Care Act 1991), Baker J concluded that "[b]ecause of the extent to which a child care order can impact on the rights of a child, it must be the case that the child has a right to fair procedures", noting that the ruling of Finlay

1. See O'Donnell J in *Re JB (A Minor) and KB (A Minor)* [2018] IESC 30 at [6], who observed that "the requirement that 'provision shall be made by law' is not merely a well worn constitutional phrase, but rather has substantive importance"; "[i]t is, explicitly, a requirement to introduce into legislation" rather than a constitutional with independent effect.
2. [2004] 4 IR 311 at p 322.

Geoghegan J in *FN v CO* meant that a child has a right to have "decisions made in regard to its guardianship and custody taken in the interests of its welfare [as] a personal right of the child within the meaning of Article 40.3 of the Constitution".[3] Moreover, Baker J held that the provisions of Article 42A "must be seen as enhancing the rights of the child, and add more weight to the approach described by Finlay Geoghegan J."[4]

The above judgments reinforce the obligation under Article 42A.4 and potentially provide a springboard for arguments to be made on behalf of children in cases where either the terms of the legislative framework, or the manner in which it has been implemented, has resulted in their views not being ascertained and/or given due weight. In other words: whatever the Oireachtas legislates for on foot on Article 42A.4 is not necessarily determinative, and residual scope would exist to argue that any such legislation falls short of vindicating the child's right to be heard under Article 40.3.

4.1.2 Link between views and best interests

A number of key points should be noted about Article 42A.4. First, it is significant that the obligation to ascertain the views of the child has been closely linked in Article 42A.4 to the obligation to have regard to the best interests of the child as the paramount consideration in the same categories of proceedings. The UN Committee on the Rights of the Child has stated that "[a]ny decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests."[5] Thus, the child's views and the child's best interests should be seen as complementary rather than as being in tension with each other. It is in the best interests of the child to feed into the decision-making process, even if the child's views are not ultimately decisive (although note that if the child prefers not to express a view, they should not be compelled to do so). The Children and Family Relationships Act 2015 endorsed this point in the context of private family law proceedings by including "the views of the child concerned that are ascertainable" on a non-exhaustive list of 11 factors that a court should take into consideration when making an assessment of a child's best interests.[6]

4.1.3 Age and maturity

Second, it is crucially important to note that the obligation under Article 42A.4 to ascertain the views of the child is mandatory in all cases where the child is capable of forming those views. This is a marked departure from the approach under the existing provisions of the Child Care Act 1991, which (as will be seen in section 4.2 below) gives the court the discretion to appoint a guardian *ad litem* (GAL) or to make the child a party to the proceedings, but imposes no clear obligation to do so.[7] The process of discharging the constitutional obligation is a three stage one:

3. [2016] IEHC 555 at [89].
4. *Ibid* at [90].
5. Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc No CRC/C/GC/14, 29 May 2013 at [53] to [54].
6. Guardianship of Infants Act 1964, s 31(2)(b) (as inserted by Children and Family Relationships Act 2015, s 63).
7. Child Care Act 1991, ss 25 and 26.

1. First, it should be established whether the child is capable of forming views of relevance to the situation.
2. If so, those views should be ascertained.
3. Having ascertained those views, the court then decides how much weight they should be given, according to the age and maturity of the child.

Guidance on how the Irish courts could approach this process can be gleaned from the case law dealing with international child abduction proceedings under the Brussels II *bis* Regulation, in which the Irish courts have been taking this three-stage approach for some time.[8] In *N v N*,[9] the High Court endorsed a very similar three-stage process. In deciding to hear from a six year-old child, Finlay Geoghegan J stressed: "Anyone who has had contact with normal six year olds knows that they are capable of forming their own views about many matters of direct relevance to them in their ordinary everyday life." In *UA v UTN*,[10] the Court was strongly influenced by a clear and cogent desire expressed by boys aged seven and nine years old to stay with their mother and refused to order their return to their jurisdiction of habitual residence. In *RP v SD*,[11] a child of four years and eleven months of average maturity was found *prima facie* not to be of an age where she was capable of forming her own views in relation to relevant matters.

Notwithstanding the references to age in the judgments above, it is capability of forming views rather than any chronological age that is the benchmark for whether a child's views should be ascertained. A court would be free to attach less weight to the views of a five or six year-old than to those of a 15 or 16 year-old—but that does not mean that the younger children should not be afforded the opportunity to express their views. In this regard, the willingness of the High Court to ascertain the views of very young children in international child abduction cases is a better guide to future practice than the approach in child protection cases under the Child Care Act 1991, where the evidence suggests that the tendency to date has often been to not ascertain the views of children until closer to adolescence (although practice varies widely from district to district).[12]

4.1.4 Mechanisms for ascertaining views

The final point to note is that Article 42A.4 does not prescribe any particular mechanism through which the views of the child are to be ascertained. As long as the implementing legislation requires that those views are ascertained, the provision will be complied with. This echoes the approach taken in Article 12(2) of the United Nations Convention on the Rights of the Child, which envisages that in judicial proceedings, children shall be

8. Article 11(2) of the Regulation provides: "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity." Article 42(2)(a) of the Regulation obliges courts, before ordering the return of a child to the jurisdiction of habitual residence, to certify that 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.
9. In *N v N* [2008] IEHC 382, the High Court described the process as follows: (i) The starting point is that the child should be heard; (ii) maturity determines whether child capable of forming views; and (iii) age is relevant only to the weight to be attached.
10. [2011] IESC 39.
11. [2012] IEHC 188.
12. See further A Parkes, C Shore, C O'Mahony and K Burns, "The Right of the Child to be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court" (2015) 27 *Child and Family Law Quarterly* 423, particularly at pp 431-432.

heard "either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law". There are a range of possibilities here.[13] An expert such as a GAL or a child psychologist could be appointed to ascertain the views of the child and communicate them to the court. The child could be made a party to proceedings and represented by a solicitor. The child could be interviewed by the judge; or the child could give direct testimony in court. The 2013 Report of the Special Rapporteur recommended that legislation enacted to implement Article 42A.4 "should provide for a variety of mechanisms to be employed to ascertain the views of the child".[14]

4.2 CHILD CARE ACT 1991

The Child Care Act 1991 will need to be amended to give effect to the requirements of Article 42A, since it currently provides that ascertaining the views of children is a matter of discretion for the court rather than mandatory. Although section 24 of the Act obliges the Court, "in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child", the Act only explicitly provides for two mechanisms to this end. Under section 25, the Court may make the child a party to proceedings (in which case a solicitor will be appointed for the child); or alternatively, under section 26, a GAL may be appointed to report to the Court on the child's views and best interests. However, both sections are couched as a discretion of the Court to be exercised in the interests of the child and the interests of justice; there is no obligation to utilise either provision. The evidence to date is that the power to appoint a solicitor to represent the child is rarely used, while the rates at which GALs are appointed varies widely: appointments are commonplace in some districts and infrequent in others, creating something of a postcode lottery for children.[15]

Aside from the variable rates of appointment, concerns have long been expressed about the legislative silence on a number of other issues relating to GALs, including the definition of their role; the criteria for their appointment; the qualifications needed to act as a GAL; and related issues concerning training, independence and funding.[16] Some of these issues have been fleshed out in case law over the years; in particular, the role of the GAL was the subject of detailed consideration by the High Court in *Health Services Executive v DK*,[17] in which the court (*inter alia*) identified that the GAL has a dual role of reporting to the court on the child's views and on the child's best interests. Other issues were addressed in guidance provided by the now-defunct Children Acts Advisory Board

13. See further and I Clissman and P Hutchinson, "The Right of the Child to be heard in Guardianship, Custody and Access Cases (II)" (2006) 9(2) *Irish Journal of Family Law* 2 and FE Raitt, "Hearing children in family law proceedings: can judges make a difference?" (2007) 19 *Child and Family Law Quarterly* 151.
14. G Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (2013) at pp 141-151, available at https://assets.gov.ie/27439/b1b21477cdb3435e9bae5435302e1a16.pdf.
15. See further Capita Consulting, *Review of the Guardian* Ad Litem *Service* (2004) at p 36, available at https://www.researchgate.net/publication/257916711_Review_of_the_Guardian_Ad_Litem_Service; C Coulter, *Second Interim Report: Child Care Law Reporting Project* (October 2014) at pp 7, 10 and 61, available at www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf; and Parkes *et al.* (n 12 above).
16. See, eg, Capita Consulting (n 15 above); N Carr, "Guiding the GALs: A Case of Hesitant Policy-making in the Republic of Ireland" (2009) 12(3) *Irish Journal of Family Law* 60 and A Daly, "Limited Guidance: the Provision of Guardian ad Litem Services in Ireland" (2010) 13(1) *Irish Journal of Family Law* 8.
17. [2007] IEHC 488.

(which has remained a point of reference for practitioners in the field),[18] while an element of custom and practice has developed around the role of the GAL. However, the need for a firmer statutory footing remains, especially as a counter-measure to the evidence of inconsistent judicial practice in different districts, which results in variable levels of service being provided to children in different areas.

4.3 CHILD CARE (AMENDMENT) BILL 2019

The Child Care (Amendment) Bill 2019 proposes to address a range of issues relating to GALs; these will be examined in turn below. (Note that the following analysis is based on the latest version of the Bill—namely, as amended in Committee on 23 October 2019—before it lapsed upon the dissolution of Dáil Éireann in January 2020.)

4.3.1 Link between views and best interests

Section 4 of the 2019 Bill proposes a new section 24 of the Child Care Act 1991, which provides in sub-section (1) that in proceedings under the Act, the court shall regard the best interests of the child as the paramount consideration, and sets out in sub-section (2) a non-exhaustive list of seven factors to be taken into account in determining what is in the best interests of the child. These include "the child's age, maturity and any special characteristics of the child", and "the views of the child where he or she has chosen to express such views". As already noted, ascertaining the child's views is a key part of a best interests assessment, and therefore this explicit link is welcome.

A separate point of note is that the list of factors provided in the proposed new section 24 is a shorter version of the list provided in the Children and Family Relationships Act 2015,[19] with just seven of the 11 factors specified for private family law proceedings in the 2015 Act replicated in the 2019 Bill. Of the four which are not replicated, two factors are less relevant to public law child care proceedings than to private family law cases and are understandably omitted, namely:

(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

However, it is less clear why the other two factors specified in the 2015 Act have been omitted from the 2019 Bill, since they seem to be of direct relevance to public law child care proceedings—namely:

18. Children Acts Advisory Board, *Giving a voice to children's wishes, feelings and interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991* (May 2009), available at https://assets.gov.ie/40017/cc3d72232e064fd3bcf0ef9a59a3ed06.pdf.
19. Guardianship of Infants Act 1964, s 31(2)(b) (as inserted by Children and Family Relationships Act 2015, s 63).

(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;

(k) the capacity of each person in respect of whom an application is made under this Act—

(i) to care for and meet the needs of the child,

(ii) to communicate and co-operate on issues relating to the child, and

(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.

While it might seem obvious that any case heard under the Child Care Act 1991 will involve an assessment of these factors, the same might be said of private family law disputes heard under the Guardianship of Infants Act 1964. For clarity and consistency between the two legislative regimes, paragraphs (d) and (k) of section 31(2) of the Guardianship of Infants Act 1964 (as inserted by section 63 of the Children and Family Relationships Act 2015) should be included in the list of factors specified in the proposed new section 24(2) of the Child Care Act 1991.

In addition to replacing section 24 of the 1991 Act and drawing a clear link between best interests and ascertaining the views of the child, the 2019 Bill also proposes the insertion of a new section 24A, which would impose general duty on courts in child care proceedings to ascertain the views of the child, as follows:

24A. Where in any proceedings before a court under this Act in relation to the care and protection of a child, including proceedings before the High Court under Part IVA in relation to special care, the child is capable of forming his or her own views, the court, in so far as practicable shall—

(a) determine the means by which to facilitate the expression by the child of his or her views in the proceedings, and

(b) give such views as the child wishes to express due weight, having regard to the age and maturity of the child.

The primary means through which this duty shall be discharged is through the appointment of a GAL; the remainder of the Bill proposes to make significantly more detailed provisions governing the role of the GAL than exist at present, and these will be discussed in detail below. Significantly, however, the Bill also proposes a new section 35B(5), which obliges District Court judges who decide not to appoint a GAL to give reasons for this decision; and where the court is satisfied that a child is capable of forming his or her own views in the proceedings, to determine the means by which to facilitate the expression by the child of those views. (One option would be that the judge would interview the child; this issue is not addressed by the 2019 Bill, and will be considered in section 4.4 below.)

Section 35B(5) is welcome in that it clarifies that the obligation to ascertain the views of children still applies even if a GAL has not been appointed, and compels the court to determine how this will be facilitated. It avoids a weakness seen in the provisions of the Children and Family Relationships Act 2015 governing private family law proceedings, which gave a power to the court to appoint an expert to ascertain the views of the child, but remained silent on what should occur in cases where the court declined to exercise this power.[20] Experts are often not appointed due to cost implications, and this results in private family law cases being heard in which the child's views are not ascertained (in contravention of the constitutional obligation to do so).[21]

For this reason, it is important and welcome that the Bill makes it clear that if a GAL is not appointed, the views of children capable of forming them must still be ascertained through some other means. However, if other means are to be used in at least some cases, it is desirable that the Act make some provision regulating these means. At present, no such provision is made or proposed. Alternative means of ascertaining the views of children in child care proceedings will be discussed further in section 4.4 below.

4.3.2 Functions, powers and status of GALs

As noted above, the Child Care Act 1991 does not currently define the functions of a GAL. The generally accepted statement of those functions is to be found in the judgment of MacMenamin J in *Health Services Executive v DK*, in which he stated that "[t]he function of the guardian should be two-fold; firstly to place the views of the child before the Court, and secondly to give the guardian's views as to what is in the best interests of the child."[22] This wording was replicated in the guidance issued by the Children Acts Advisory Board in 2009.[23] The Child Care (Amendment) Act 2011 enacted a new section 26(2B) providing that the functions of the GAL were to "promote the best interests of the child concerned and convey the views of that child to the court, in so far as is practicable, having regard to the age and understanding of the child";[24] however, this section was never commenced, and therefore does not currently form part of the 1991 Act.

The 2019 Bill proposes to insert a new section 35E into the 1991 Act, which would provide as follows:

> (1) The functions of a guardian *ad litem* appointed for a child shall be—
>
> (a) in so far as practicable and where the child is capable of forming his or her own views, to ascertain any views expressed by the child in relation to the matters to which the proceedings relate, and
>
> (b) having considered the views, if any, referred to in paragraph (a), to make recommendations to the court regarding what is in the best interests of the child, and

20. Guardianship of Infants Act 1964, ss 31 and 32 (as inserted by Children and Family Relationships Act 2015, s 63).
21. Sees further Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at pp 36-37, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.
22. [2007] IEHC 488 at [59]. Various authors have noted an inherent tension in this dual role, which may result in different practitioners emphasising one or other aspect to a different degree—see A McWilliams and C Hamilton, "'There isn't Anything like a GAL': The Guardian ad litem Service in Ireland" (2010) 10 *Irish Journal of Applied Social Studies* 31 at p 35.
23. Children Acts Advisory Board (n 18 above) at p 3.
24. Child Care (Amendment) Act 2011, s 13(c).

(c) to represent the child's interests in the proceedings to which the guardian *ad litem* has been appointed.

(2) Without prejudice to the generality of subsection (1), a guardian *ad litem* appointed for a child shall—

(a) furnish to the court a report that—

(i) conveys to the court any views expressed by the child in relation to the matters to which the proceedings relate, and

(ii) contains the recommendations of the guardian *ad litem* regarding what is in the best interests of the child and the reasons for those recommendations,

(b) having regard to the age and maturity of the child, inform him or her of—

(i) the recommendations referred to in paragraph (a)(ii),

(ii) the outcome of the proceedings, and

(iii) such other matters relevant to the proceedings as the guardian *ad litem* considers appropriate,

and

(c) inform the court of any additional matters, relevant to the best interests of the child, coming to his or her knowledge as a result of the performance by the guardian *ad litem* of his or her functions.

(3) A guardian *ad litem*, in the performance of his or her functions under this section, shall regard the best interests of the child as the paramount consideration.

Broadly speaking, the terms of the proposed Section 35E reflect the functions of the GAL as currently understood. The proposal to place this definition on a statutory footing is welcome, as it will serve to solidify existing practice and provide a clearer benchmark to ensure consistency of practice across districts. The most notable aspect of the current text of the proposed section 35E is subsection 1(c), which adds a third function to MacMenamin J's "two-fold" statement of the functions of the GAL: namely, "to represent the child's interests in the proceedings to which the guardian *ad litem* has been appointed". This additional function, which corresponds to statements made about the functions of the GAL in other High Court judgments,[25] was not contained in the original text of the Bill. It was the product of an amendment at Committee Stage (to which the Government objected) following concerns expressed by Committee members around the potential of the Bill to dilute the status of the GAL by comparison to current practice.[26] This issue will be discussed in full in the next section.

In addition to the functions set out in section 35E, the Bill proposes a new section 35F which would give the GAL the power to apply to the court to procure a report on any question affecting the welfare of the child, and to call as a witness the person who prepared the report. This implies a power of examination in chief of that particular witness. However, the proposed Section 35F makes no reference to the power to call any other

25. *AO'D v Judge Constantine O'Leary* [2016] IEHC 555 at [57].
26. Select Committee on Children and Youth Affairs, 23 October 2019, available at https://www.oireachtas.ie/en/debates/debate/select_committee_on_children_and_youth_affairs/2019-10-23/2/.

witnesses, or to cross-examine witnesses called by other parties. Neither does it itemise any other powers of the GAL. The relevance of this will become clear in the analysis of the status of the GAL, to which attention will now turn.

4.3.2.1 Current Status

Due to the lack of detail in the current text of the Child Care Act 1991 on the role of the GAL, the precise status of the GAL in court proceedings currently exists in something of a grey area. The position might be described as follows: the GAL is something less than a full party to proceedings, but is something more than a mere witness.

The most detailed consideration of the current status of the GAL came in the judgment of Baker J in the High Court decision in *AO'D v Judge Constantine O'Leary* (hereafter *AO'D*).[27] Baker J compared the effect of the appointment of the GAL to cases where the Court exercises its power under section 25 of the Act to make the child a party to the proceedings and to appoint a solicitor for the child. She held that the power under section 25 to appoint a solicitor was not intended to be used in respect of children of tender years, but would only be exercised in respect of children who have sufficient age, capacity and understanding,[28] but went on to hold that:

> "… an absurdity could arise if a younger and vulnerable child could not be as fully represented in care proceedings as the child with the age and capacity to be a party or to have some of the rights of a party. For that reason I consider that the power to appoint a guardian *ad litem* must be intended as an alternative means by which a child could participate in the proceedings in such a manner as the District Court may deem appropriate. It does not impute a lesser status or lower degree of participation."[29]

Baker J accepted that the GAL was not a "party" to proceedings in the normal sense.[30] However, she emphasised the importance of the child's constitutional right to fair procedures, which implies a right to have the child's views taken into account by the court when making decisions affecting the child.[31] As noted above, this right was recognised by Finlay Geoghegan J in the High Court in *FN v CO*,[32] and Baker J stated that the enactment of Article 42A of the Constitution "must be seen as enhancing the rights of the child, and add more weight to the approach described by Finlay Geoghegan J."[33] Thus, having compared the role of the GAL to a solicitor acting on behalf of a child who is made a party to proceedings under section 25, Baker J concluded that the role of the GAL is somewhat less than that of a party, although intended to secure many of the same benefits for the child as party status.

Baker J also compared the role of the GAL to a person from whom the court procures a report under section 27:

27. [2016] IEHC 555.
28. *Ibid* at [41].
29. *Ibid* at [46].
30. *Ibid* at [83] and [114].
31. *Ibid* at [89].
32. [2004] 4 IR 311.
33. [2016] IEHC 555 at [90].

"... the guardian *ad litem* in care proceedings in the District Court does not have the sole role of acting as expert with regard to questions of welfare. This is clear from the fact that under s. 27 of the Act, contained in the same part of the Act, the court may of its own motion or on application of any party to the proceedings

> '...give such directions as it thinks proper to procure a report from such person as it may nominate on any question affecting the welfare of the child.'

Section 27 (5) permits the court in its discretion to call the person making the report as a witness, and any party to the proceedings has a similar right.

I must assume in those circumstances on a schematic interpretation of the legislation that the guardian *ad litem* appointed under s.26 is envisaged as performing a role different from the reporting and assessment role carried out by the person preparing a report under s. 27. I consider that the function of the guardian *ad litem* appointed under s.26 is to represent the child in the litigation, and to promote the interests of the child and the interests of justice. The furtherance of the interests of justice by the appointment of the guardian *ad litem* would suggest that *the Oireachtas had in mind that the guardian ad litem would take a role consistent with the furtherance of the interests of justice, and therefore will take a role in the proceedings not merely as a witness*."[34] [Emphasis added]

The last line quoted above leaves no ambiguity that the role of the GAL is currently greater than that of a mere witness. It is clear from the judgment as a whole that Baker J viewed the role of the GAL as being considerably closer to that of party status than to that of a witness. Moreover, her statement that the function of the GAL "is to represent the child in the litigation, and to promote the interests of the child" is strikingly close in its wording to the proposed section 35E(1)(c) contained in the current text of the 2019 Bill. Baker J concluded:

"I consider that the Oireachtas intended the appointment of a guardian to be a means by which a child could engage in the litigation, and the appointment is an alternative to the appointment of the child as a party, or as a person with some of the rights of a party ... A child who is not a party may have his or her interests and the interests of justice in the conduct of the child care proceedings protected by means of the appointment of a guardian *ad litem* for him or her. Many of the children on whose behalf a guardian *ad litem* is appointed will be younger children, who themselves cannot be expected to take part as a party in the proceedings, or even engage the lesser role of engaging as a person with some of the rights of a party. The younger child may have a guardian *ad litem* for the purposes of the proceedings. The guardian acting as a person who represents the child may do so in whatever way the guardian considers appropriate, including if necessary through solicitor, or solicitor and counsel. In this the guardian is no different from any other person involved in litigation, who may choose the degree, if any, of legal representation required ... This interpretation, in my view, gives effect to the provisions of Part V of the Act of 1991 in a purposive manner, is consistent with

34. *Ibid* at [55] to [57].

the Constitutional imperative of fair procedure, the approach identified in the case law with regard to the entitlement of a child to procedural fairness in matters where his or her rights are likely to be effected, having regard to the far reaching impact on the life of the child that will arise following the making of a care order, or indeed the refusal to make one."[35]

4.3.2.2 Status under Proposals in 2019 Bill

While the judgment of Baker J in *AO'D* was interpreting the current provisions of the Child Care Act 1991 (which are open to legislative modification), it provides an important benchmark against which to measure the 2019 Bill. As noted by Baker J, the enactment of Article 42A of the Constitution "must be seen as enhancing the rights of the child";[36] therefore, if legislative proposals on this issue are to be in keeping with the direction of travel at constitutional level, they should avoid doing anything to lessen or undermine the status of the GAL by comparison to the current position.

The Bill proposes to add a new section 35E(6) to the 1991 Act providing that a GAL may be called as a witness in court proceedings, while section 35E(9) would provide that a GAL is not a party to proceedings. This raised questions at Committee stage regarding the possible diminution of the status of the GAL by comparison to the current position, and led to the addition of section 35(1)(c) (which will be discussed further below).

The original text of the Bill included specific functions and powers of the GAL in sections 35E and 35F (as outlined above), but made no reference to any other functions or powers (such as cross-examination, making applications or submissions, or contributing to out-of-court activities like child-in-care reviews). Applying the canon of statutory interpretation *expressio unius est exclusio alterius* (to express one thing is to exclude another), the risk arose that the Bill would be interpreted as not intending the GAL to have those functions or powers. The specific statement that the GAL is not a party to proceedings would further reinforce this conclusion. While individual District Court judges might choose to take a flexible approach and afford GALs scope to engage in these activities, a judicial review in the High Court could see a stricter and more technical approach to the point of law being adopted.[37] Since the powers of the GAL are itemised in the Bill, there is a high risk that the High Court would rule that the Bill does not permit the GAL to exercise any powers outside of those expressly listed (namely, submitting a report, appearing as a witness and calling an expert who procured a report as a witness).

A number of specific examples help to illustrate this point. Section 35E(6) provides that the court or any party to the proceedings may call a GAL as a witness—but what if the GAL is not called as a witness? In such an event, the GAL's only contribution to proceedings would be his or her written report. Current practices whereby a GAL can (for example) cross-examine witnesses or make submissions to the Court on points of law were not envisaged by the original text of the 2019 Bill. As a mere witness, it is unlikely that the GAL would have been entitled to participate in processes occurring outside of the Court arena, such as a child-in-care review.

35. *Ibid* at [105] to [115].
36. *Ibid* at [90].
37. For an example of such arguments being raised in respect of the interpretation of the Child Care Act, see the High Court decision in *Child and Family Agency v MO'L* [2019] IEHC 781 (discussed further in Chapter 5 of this report).

When compared to Baker J's characterisation of the role of the GAL in *AO'D*, the approach originally proposed in the 2019 Bill would have diminished the status of the GAL by comparison to the current approach and excluded powers currently exercised by the GAL. Baker J identified the importance of the GAL having procedural rights in the case in order to fulfil the constitutional mandate of providing the child with fair procedures. A mere witness cannot achieve this, which calls into question the extent to which the diminished role envisaged by the original text of the 2019 Bill would effectively protect the child's constitutional right to fair procedures.

The addition of the function under section 35E(1)(c) of representing the child's interests in the proceedings to which the GAL has been appointed mitigates the above risk by affording the GAL a broader umbrella-type function which could be applied to matters such as cross-examination, adducing evidence, making submissions, seeking disclosures or participating in reviews. Moreover, it would be in line with current law and practice, given the wording seen in section 35E(1)(c) is almost identical to that used in Baker J's judgment in *AO'D*.

If the underlying policy intention is that GALs should be allowed to engage in certain activities that would go beyond being a mere witness (while less than a full party), the Bill should clearly and unambiguously reflect this policy intention. Section 35E(1)(c) offers one way of achieving this end. However, reliance on an umbrella provision such as section 35E(1)(c) carries the risk of inconsistent interpretation and application among District Court judges, with some judges allowing GALs to exercise more extensive functions than others. For this reason, it would be better if important functions currently exercised by GALs (such as cross-examination, adducing evidence, making submissions, seeking disclosures or participating in reviews) were explicitly included in the list of powers set out in section 35F. Section 35F should also stipulate that the list of powers contained therein is non-exhaustive. This would avoid a strict statutory interpretation which would only allow the GAL to exercise those functions which are expressly stated, and provide flexibility to judges who see other opportunities to make use of GALs in specific cases.

4.3.3 Criteria for appointment

As previously noted, section 26 of the Child Care Act 1991 currently gives the court full discretion to decide whether to appoint a GAL. The explanatory memorandum to the 2019 Bill states that it will make the appointment of a GAL mandatory in all High Court special care proceedings, and establish a presumption in favour of appointing a GAL in District Court child care proceedings. If accurate, this would be an important improvement on the current position. However, the actual text of the Bill does not fully reflect this position.

The 2019 Bill proposes to insert a new section 35B in the 1991 Act stipulating the criteria for appointing a GAL. Section 35B(2) stipulates that in special care proceedings, the High Court shall by order direct that a guardian *ad litem* be appointed for a child. This reflects both the position stated in the Explanatory Memorandum and current practice.

In contrast, section 35B(3) provides:

> "In proceedings under Part IV, IVB or VI the District Court, of its own motion or on the application of any party to the proceedings, shall consider whether to direct that a guardian *ad litem* be appointed for a child and the court may by order so direct."

Section 35B(4) sets out a detailed list of factors that the District Court shall have regard to in deciding whether to appoint a GAL, as follows:

(a) the best interests of the child;

(b) the age and maturity of the child;

(c) the nature of the issues in dispute in the proceedings;

(d) any report on any question affecting the welfare of the child;

(e) where the child wishes to express his or her views, whether an order under that subsection will assist the expression by the child of his or her views in the proceedings;

(f) any views regarding such an order expressed by the child and the parties to the proceedings or any other person to whom the proceedings relate.

Finally, the proposed section 35B(5) obliges the Court to give reasons in cases where it decides not to appoint a GAL, and, where the court is satisfied that a child is capable of forming his or her own views in the proceedings, determine the means by which to facilitate the expression by the child of those views.

The proposed Section 35B gives the District Court the power to appoint a GAL; but conversely, it also gives the Court the power to decide not to appoint a GAL. It does not amount to a legal presumption in favour of appointment (which would take the form of stipulating that a GAL "shall" be appointed "unless" specified exceptions are met). The factors to be considered by the Court in deciding whether to appoint a GAL could as easily be used as reasons to not appoint a GAL as to appoint one. The requirement in Section 35B(5) to give reasons for declining to appoint a GAL, and to determine the means by which to facilitate the expression by the child of their views, is welcome to the extent that it is an improvement on the failure of the Children and Family Relationships Act 2015 to stipulate what is to happen in cases when the Court declines to appoint an expert to ascertain the views of children in private family law proceedings. However, in itself, this does not make it more likely that GALs will be appointed by judges who currently appoint GALs in a minority of cases.

The current text of the Bill leaves it open to individual judges who are currently reluctant to appoint GALs to continue their existing practice. This appears to be out of line with the Bill's stated policy objectives. Moreover, given that no other mechanism for ascertaining the view of children in child care proceedings is currently supported by adequate training and developed practices the absence of a presumption in favour of appointing a GAL is out of line with the constitutional imperative to ascertain the views of all children who are capable of forming them. For these reasons, a presumption in favour of appointing GALs in District Court child care proceedings should be included in the Bill and stated in strong terms.

Establishing a presumption would require wording that begins by stating that a GAL should be appointed in all cases, but proceeds to outline any exceptions to this general rule. Such exceptions should be extremely narrowly drawn, and should centre around cases where the constitutional obligation to treat the child's best interests as the paramount consideration, and to ascertain and give due weight to the views of the child, can

be adequately discharged in the proceedings without the necessity to appoint a GAL. (Examples might include cases where an older child is able to engage in effective direct participation, or cases involving a child who is too young to form or express a view and who clearly needs to be taken into care due to serious abuse or neglect.) Building on the approach taken in the current text of sections 3(2) and 24 of the 1991 Act (both of which frame statutory duties in the context of constitutional rights), a revised provision could make explicit reference to Article 42A.4, and require the Court to satisfy itself that the constitutional obligation can be effectively discharged without the appointment of a GAL. This in turn could be linked to the proposed section 35B(5), which obliges District Court judges who decide not to appoint a GAL to give reasons for this decision and to determine the alternative means by which to facilitate the expression by the child of his or her views.

4.3.4 Qualifications, regulation and standards

In *AO'D*, Baker J commented:

> While I am informed that in the majority, if not perhaps in all cases, the person appointed to act as guardian *ad litem* on behalf of a child who is the subject matter of care proceedings in the District Court is a qualified social worker or childcare worker, there is no requirement in the legislation that he or she have such qualification. If the guardian is to represent the interests of a child it would be both reasonable and practical that the person appointed to the role have experience and knowledge in matters of child welfare, although on a strict interpretation of the legislation it seems to me that the court could appoint any person, for example a relative or a teacher, to act as guardian *ad litem*.[38]

The 2019 Bill proposes to address this issue by inserting a new section 35L into the 1991 Act that would govern who would be permitted to act as a guardian *ad litem*. Section 35L(1) provides, *inter alia*:

(1) The Minister may authorise such and so many persons as the Minister considers appropriate to perform the functions of a GAL.

(2) Persons shall only be considered appropriate for authorisation if they meet the requirements of section 35L(3).

(3) The Minister may by regulations— (a) prescribe a class or classes of persons, who in the opinion of the Minister, are suitable to be guardians *ad litem*, (b) specify the requirements that a member of a class or classes prescribed under paragraph (a) shall satisfy in order to be considered appropriate for the purposes of subsection (1), and (c) provide for exemptions from any requirement referred to in paragraph (b) for a specified class or classes of persons.

(4) When prescribing a class or classes of persons under subsection (3)(a), the Minister shall have regard to— (a) the functions to be performed by guardians *ad litem* under this Act, and (b) the qualifications, minimum level of professional experience, training and expertise of such class or classes of persons.

38. [2016] IEHC 555 at [53].

(5) When specifying requirements under subsection (3)(b) and providing for exemptions under subsection (3)(c) in respect of such requirements, the Minister shall have regard to— (a) the functions to be performed by guardians *ad litem* under this Act, and (b) the promotion of high professional standards and good practice.

Section 35M requires GALs to notify the Minister in writing of any relevant matter which would be likely to affect their authorisation as soon as practicable and in any event not later than 14 days after that matter comes to the knowledge. Section 35N empowers the Minister to revoke authorisation for a GAL if it appears to the Minister that:

a) any requirement for the granting of the authorisation is no longer satisfied,

b) the person has failed to comply with section 35M(1),

c) the person has committed a serious breach of regulations,

d) the person has become incapable through ill-health of performing the functions of a guardian *ad litem* under this Act, or

e) there are other good and sufficient reasons to do so.

Taken together, these provisions would provide for the possibility of a degree of legal regulation of who could and could not act as a GAL which has been absent from Irish law to date. The substance of the regulations which the Minister is empowered to make under section 35L remains to be fully developed, and so a full analysis is not possible at this time. The following discussion is based on the state of development at the time of writing, as indicated by the Department of Children and Youth Affairs. In broad terms, the intention is that what was previously Head 6 of the General Scheme of the Child Care (Amendment) Bill would move out of the main Bill and instead be addressed by way of regulations made by the Minister.[39]

The central proposal of Head 6 was that a person would not be eligible for appointment as a GAL unless he or she holds a qualification in one of the following areas:

(i) social work;

(ii) social care;

(iii) psychology, or

(iv) psychiatry.

The person would also be required to have at least 5 years of relevant post graduate experience. An additional layer to Head 6 which is under development is that the person would be required to be registered with their relevant professional body. If included, this would mean that any profession which does not maintain a professional register would not be eligible for appointment as a GAL for as long as that situation persisted. Head 6 also proposed that persons with significant recent experience of acting as GALs would be entitled to apply to the Minister to be eligible for inclusion on the penal of GALs.

In addition to regulating who may act as a GAL, the Bill also proposes to insert a new section 35J, which would empower the Minister to make regulations relating to the performance by GALs of their functions, including to:

39. The General Scheme of the Bill can be viewed at https://assets.gov.ie/27759/d5bee6af05564599a34efe0a8c7ce12c.pdf.

(a) specify the standards to be applied by guardians *ad litem* to the performance by them of their functions under this Act;

(b) make provision for the training of guardians *ad litem*;

(c) make provision for codes of conduct for guardians *ad litem*;

(d) make provision for the procedures that are to apply to monitor, measure and evaluate the performance by guardians *ad litem* of their functions under this Act;

(e) make provision for the establishment and administration of a system of investigation and adjudication of complaints against guardians *ad litem*;

(f) make provision for the procedures that are to apply in respect of the keeping of records by guardians *ad litem*.

The proposal to provide for regulation of the qualifications of GALs and the standards to be observed by GALs is to be welcomed in the interests of ensuring that the highest standards are met. The proposed measures concerning codes of conduct, monitoring, evaluation and complaints will contribute to this aim. So too will the proposed requirement of membership of a professional body, and the power of the Minister to make regulations specifying training requirements, are also welcome as a means of ensuring that GALs meet continuous professional development requirements and keep their knowledge and skills updated in the same way as other professionals.

That is not to say that many people currently acting as GALs are not highly qualified for the role; nor indeed that some GALs who do not meet the proposed qualification requirements are not performing well. The Bill recognises this by allowing people in the latter category the opportunity to apply for inclusion on the panel. Nevertheless, the importance of the role of the GAL in child care proceedings is such that a considered and proactive approach to the regulation of their qualifications, training and professional standards and conduct is a better approach than the looser, *ad hoc* approach which has prevailed to date. The other key professional players in the proceedings (namely, lawyers and social workers) are professionally qualified and subject to rigorous professional standards, and it should be no different for GALs.

4.3.5 Legal advice and representation

The 1991 Act is silent on the issue of legal advice and representation for GALs. In her judgment in *AO'D*, Baker J held that a GAL has the capacity to engage legal advice or representation; the choice as to whether (and to what degree) such representation is necessary is to be made by the GAL, and the payment of costs or expenses is at the discretion of the court.[40] (It may be questioned whether the wording used by Baker J in relation to the payment of costs is a fully accurate representation of section 26(2), which stipulates that "[a]ny costs incurred by a person in acting as a guardian *ad litem* under this section shall be paid by the Child and Family Agency"—although provision is made for the Agency to apply for costs to be measured or taxed.) In practice, any costs associated with legal advice and representation in cases in the District Court (or Circuit Court appeals),

40. [2016] IEHC 555 at [44], [108] and [112].

and in special care cases in the High Court, are paid by the Agency as a matter of course, although there have been cases in which full costs have not been awarded in respect of legal representation of GALs in High Court judicial reviews of District Court care orders.[41]

The Child Care (Amendment) Act 2011 enacted an amendment to section 26 of the 1991 Act, as follows:

> (2C) Where the court makes an appointment under subsection (1) (as amended by the Child Care (Amendment) Act 2011)—
>
> (a) the guardian *ad litem* concerned may instruct a solicitor to represent him or her in respect of those proceedings and, if necessary, having regard to the circumstances of the case, may instruct counsel in respect of those proceedings, and
>
> (b) where a guardian *ad litem* instructs a solicitor or counsel or both pursuant to paragraph (a), the costs and expenses reasonably incurred for that purpose shall be paid by the Health Service Executive and the Health Service Executive may apply to the court to have the amount of any such costs or expenses measured or taxed."[42]

This provision reflects the position set down by Baker J in *AO'D*, with the addition of the stipulation that only costs "reasonably incurred" shall be paid (which seemed implicit in Baker J's judgment in any event). However, this provision was never commenced; therefore the 1991 Act remains silent on the issue of legal representation for GALs.

The 2019 Bill proposes to insert a new section 35D into the 1991 Act which would deal with the issues of legal representation for GALs. Section 35D(1) provides that in High Court special care cases, the Minister shall provide, or arrange for the provision, to the GAL appointed for the child, of legal advice and legal representation. In contrast, for District Court child care proceedings, section 35D(2) provides that the Minister may at the request of the GAL appointed for the child provide, or arrange for the provision, to the GAL of such legal advice or legal representation, or both, as the Minister considers appropriate having regard to the matters specified in subsection (3). These matters include:

> (a) whether it is in the best interests of the child that legal representation be provided;
>
> (b) any views in relation to legal representation for the guardian *ad litem* expressed by the court that made the order;
>
> (c) whether the guardian *ad litem* intends to make an application under this Act in relation to the child;
>
> (d) the opinion of the guardian *ad litem* in relation to any application in the proceedings by the Child and Family Agency;
>
> (e) whether it would be unreasonable to expect the guardian *ad litem* to deal with the matter to which the proceedings concerned relate without legal advice or legal representation, or both, because of its complexity or for any other reason;
>
> (f) whether there are special circumstances that make it appropriate for legal representation to be provided;

41. See, eg, *MM v The Relevant Circuit Court Judge* [2016] IEHC 756, in which the Court made an order that the GAL be entitled to one quarter of her costs of the judicial review applications against the Child and Family Agency, on the basis that the GAL did not need to engage with most of the matters raised.
42. Child Care (Amendment) Bill 2011, s 13(c).

(g) such other matters as the Minister considers appropriate.

Under this proposal, the issue of award of costs of legal advice or representation for a GAL does not arise, as the Minister either provides the legal advice or representation directly, or arranges for its provision.

Section 35D proposes a significant change from current practice, and is considerably more restrictive than what was previously enacted (but never commenced) in the 2011 Act. Whereas GALs at present have effectively full discretion as to whether they wish to engage legal advice or representation, Section 35D would remove this discretion from GALs and place it in the hands of the Minister. While the list of factors provided in section 35D(3) provides some guidance on how this discretion might be exercised, it would be open to a Minister to exercise this discretion as liberally or as restrictively as her or she sees fit.

There is a balance to be struck between ensuring that GALs can perform their role effectively and making efficient use of scarce resources. The provision of legal advice or representation carries significant cost implications that are in addition to the costs of appointing a GAL in the first instance; for example, in 2015, total expenditure on professional fees for GALs was €8.2 million, while total expenditure on legal advice and representation for GALs was a further €5.9 million.[43] A significant proportion of District Court child care proceedings will be of a nature that the GAL will be able to perform his or her functions effectively without any necessity for legal advice or representation. In such cases, the provision of legal advice is unnecessary and potentially wasteful.

At the same time, no solid data is available that establishes that GALs are making inappropriate use of legal representation or advice on a significant scale (or at all). The limited data that is available does indicate that the proportion of cases in which a GAL (having been appointed) engages legal representation has increased over time. A report by Capita Consulting in 2004 placed this figure at 29.4%, based on a sample of 159 cases;[44] while the final report of the Child Care Law Reporting Project in 2015 placed the figure at 88.6%, based on a sample of 636 cases.[45] While there are caveats attached to how representative both of these figures are, the general upward trend is nonetheless clear. But the mere fact that GALs are engaging legal advice or representation at higher rates does not in itself demonstrate that they are doing so in cases that could be effectively resolved in its absence; further research would be needed to provide such evidence.

It is important to stress that GALs are not legally trained, and there may be a variety of reasons why legal advice or representation becomes necessary to the performance of their role. These include (but are not limited to) the various tasks mentioned in section 4.3.2 above, such as cross-examination of witnesses, or making legal submissions to the court. Indeed, even if the GAL does not take any of these steps, legal advice may be necessary to allow the GAL to fully understand and participate in proceedings in which complex legal arguments are made by other parties.

43. *Report on the Accounts of the Public Service 2015*, pp 127 and 139, available at https://www.audit.gov.ie/en/Find-Report/Publications/2016/Guardian-Ad-Litem-Service.pdf.
44. Capita Consulting (n 15 above) at pp 47 and 63.
45. C Coulter, *Final report: Child care law reporting project* (2015) at p 70, available at https://www.childlawproject.ie/wp-content/uploads/2015/11/CCLRP-Full-final-report_FINAL2.pdf.

The proposed model in Section 35D creates a significant risk that many of the cases in which GALs currently make appropriate use of legal advice or representation (for which costs are awarded) would not be granted legal advice or representation by a Minister whose financial priorities lie elsewhere. The inevitable impact of such a scenario would be to weaken the hand of GALs and make them less effective advocates for the best interests of the child. This risk is weighed against an as-yet unsubstantiated possibility that excessive use of legal advice and representation by GALs is making wasteful use of scare resources at present.

Recognition that GALs need access to legal advice and representation in order to perform their role effectively is implicit in Section 35D. Applying the precautionary principle, the proposal to remove the discretionary access to legal advice and representation currently enjoyed by GALs should not proceed in the absence of clear cost/benefit analysis which demonstrates that the detrimental impact of unnecessary costs outweighs the risk that section 35D would undermine the effectiveness of GALs. Until such evidence is available, the wording contained in section 13 of the Child Care (Amendment) Act 2011 strikes a better balance than section 35D of the 2019 Bill by allowing the GAL full discretion to decide whether to engage legal advice or representation, while also stipulating that any costs associated with same will only be awarded if they were reasonably incurred (and that costs can be measured or taxed).

4.3.6 Service of documents

As with many other issues related to GALs, the 1991 Act was silent on the question of what documents held by parties to the case that the GAL would be entitled to obtain or view. The Capita Consulting report in 2004 found that:

> A specific issue with regard to the powers of the GAL relates to their ability to access records held by Health Boards and other statutory agencies … some GALs continue to receive minimal co-operation from public agencies in this regard, and in some cases no access whatsoever, and there is no mechanism for GALs to bring such difficulties before the court. We believe that these difficulties regarding access have the effect of obstructing the GAL from taking an informed, rounded view of the issues connecting the child's welfare, and from presenting the court with a fully balanced report which takes all of the necessary issues into account.[46]

The report recommended that the powers of the GAL be defined to permit the right at all reasonable times to examine, take copies of, and use in evidence, records held by statutory agencies which were compiled in connection with the proceedings, or any reports compiled by expert witnesses which relate to the child or to the proceedings.[47]

The 2019 Bill proposes to partly address this issue through a new section 35G of the 1991 Act, which would give GALs the power to request Tusla to provide to him or her any information relating to the welfare of the child necessary for the performance of his or her functions, and oblige Tusla to comply with this request (subject to data protection laws

46. Capita Consulting (n 15 above) at p 73.
47. *Ibid*.

and the ordinary rules of legal professional privilege). Reasons must be given to the GAL for any refusal on these grounds.

While the proposed section 35G is welcome, it may be questioned whether it goes far enough to address the concerns raised in the Capita Consulting report. Two potential shortfalls stand out. First, the section is limited in its application to Tusla, and does not apply to other relevant statutory agencies who may be in possession of important and relevant information on children. The most obvious example in this regard is the HSE, from whom a GAL might need to obtain documentation in respect of children with (e.g.) disabilities or mental health issues. Other examples might include educational institutions, or agencies involved with children who have been in contact with the criminal justice system, such as An Garda Síochána or the Oberstown Children Detention Campus.

Second, the reference to the obligation being subject to data protection law leaves it open to Tusla (or other statutory agencies that might be added to the scope of the section) to refuse to provide a wide range of information, citing the rights of the child (or others mentioned in the documentation) as a data subject. Data protection law is often complex and opaque, and defensive practice can lead to it being applied in an unduly restrictive manner. It is noteworthy in this respect that Article 6(1)(c) of the General Data Protection Regulation (GDPR) specifies that the processing of personal data by a data controller (such as Tusla) will be lawful where it is necessary for compliance with a legal obligation to which the controller is subject. Therefore, if Section 35G obliges Tusla to provide the personal data in question to the GAL where necessary for the performance of his or her functions, data protection obligations on Tusla would only relate to possible redaction of personal data which is not necessary for the performance of the GAL's functions.

Since child care proceedings by their nature involve a holistic assessment of the child's welfare and family circumstances, it will often be essential to furnish the GAL with sensitive information relating not only to the individual child, but to matters such as the mental health of family members, or drug and alcohol abuse by family members. Any information shared as part of child care court proceedings would be subject to the *in camera* rule, which would in practice limit the sharing of this information to a very small circle. Thus, Article 6(1)(c) of GDPR, when read together with section 35G, would suggest that data protection law would rarely require Tusla to refuse to furnish the GAL with any information held by the Agency in respect of the child's welfare.

Tusla's record on data protection law compliance has been patchy in recent years; the Agency has been found guilty of serious breaches for disclosing data in some cases that should not have been disclosed,[48] while it has been criticised by lawyers for taking an unduly restrictive approach to other issues.[49] Should Tusla adopt a restrictive interpretation of section 35G and data protection law in individual cases, the GAL might not be well placed to question or potentially challenge the refusal if the GAL is unable to access legal advice and representation due to the proposals made in Section 35D.

Therefore, while section 35G is a step in the right direction, it could be improved in two way: first, its application should not be limited to Tusla, but should extent to other

48. C Brennan, "DPC: 75 separate data breaches by Tusla", *Irish Examiner*, 20 February 2020. Details of various investigations involving Tusla are provided in the Data Protection Commission's *Annual Report 2019*, available at https://www.dataprotection.ie/sites/default/files/uploads/2020-02/DPC%20Annual%20Report%202019.pdf.
49. C Ó Fátharta, "Tusla relying on 'flimsy grounds' to justify redacting records and birth certs", *Irish Examiner*, 7 October 2019.

agencies or bodies who may hold important information relating to a child's welfare necessary for the performance of the GAL's functions. Second, section 35G would benefit from the addition of a "for the avoidance of doubt" provision clarifying that Article 6(1)(c) of GDPR authorises the processing of personal data in fulfilment of the obligation imposed by section 35G.

4.3.7 Duration of appointment

Current practice allows courts significant discretion to appoint GALs for periods that fall outside of the formal duration of court proceedings. While this goes beyond the role of the GAL as originally envisaged, it has proven to be beneficial in some instances; for example, it allows GALs to monitor the effectiveness of the operation of supervision orders, and to participate in child-in-care reviews. While it might not be necessary in many cases, it is a useful option at the disposal of the Court.

The 2019 Bill envisages a much more restrictive regime surrounding the appointment of GALs. Pursuant to the proposed new section 35H(2) of the 1991 Act, the appointment of the GAL will automatically cease at the soonest of eight different points at which an order may be made by the Court. The only discretion to maintain the appointment of the GAL following the determination of proceedings arises under section 35H(4), in circumstances where a court directs that the proceedings be kept under review. The usefulness of this exception is greatly undermined in practice by the fact that only a small minority of District Court judges engage in the practice of court-based reviews of child care proceedings.[50] Indeed, the practice does not even have a legislative footing in the current text of the Child Care Act 1991. It has been recognised as being part of the inherent jurisdiction of the High Court in special care cases,[51] but it has no formal legal basis in District Court proceedings.

As such, section 35H will have the effect in practice of denying children the possibility of having a GAL in a range of circumstances where a GAL may currently remain in place. This is a regressive step by comparison with current practice. Section 35H(2) should be amended by the replacement of the phrase "whichever is the sooner" with the phrase "unless the Court in its discretion directs otherwise".

4.3.8 Fees, costs and independence

At present, GALs are predominantly affiliated to either Barnardos or TIGALA, and are engaged on a case-by-case basis. Their fees and costs are paid by the Child and Family Agency, pursuant to section 26(2) of the Child Care Act 1991. The fact that fees are paid to GALs by one of the parties to the case has been criticised on the basis that it represents a "conflict of interest"[52] and could "potentially further undermine the perception of independence".[53] Section 26(2) also provides that the Agency may apply to the Court to have the amount of any such costs or expenses measured or taxed. Prior to the transfer of functions of health boards under the 1991 Act to the HSE and later to Tusla, the taxing

50. Coulter (n 15 above) at pp 7 and 61, indicates that of 486 cases covered by the Project across the country in 2013–14, children were represented by a solicitor in just seven. See further Parkes *et al.* (n 12 above) at pp 441-442.
51. See *Child and Family Agency v MO'L* [2019] IEHC 781.
52. Capita Consulting (n 15 above) at p 37.
53. Carr (n 16 above).

provision was described as "a major cause of disputes between GALs and Health Boards";[54] however, the issue appears to arise less frequently nowadays.

A key part of the proposed reform of the GAL system is the establishment of a national service through which all GALs would be employed centrally by the State. Such a reform was called for by the Law Society as far back as 2001.[55] Rather curiously, this proposal is not expressly mentioned in the 2019 Bill. Instead, the Bill merely proposes the insertion of a new section 35P into the 1991 Act, as follows:

> (1) The Minister may enter into contracts for service with such and such number of persons as the Minister considers necessary for the performance by him or her of the functions under section 35C(1) or 35L(1) and contracts with such persons shall contain such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, determine.

The 2019 Bill also proposes a new section 35I of the 1991 Act, as follows:

> (1) Any costs or expenses reasonably incurred by a guardian *ad litem* in the exercise of his or her functions under this Act shall be paid by the Minister and the Minister may apply to the court to have the amount of any such costs or expenses measured or taxed.
>
> (2) The court may, on the application to it in that behalf by the Minister, order any party to proceedings in which a guardian *ad litem* is appointed to pay to the Minister any costs or expenses payable by the Minister under subsection (1).

This provision replicates the current provisions of section 26 the 1991 Act with respect to costs, save that responsibility for paying the costs has been re-allocated from the Child and Family Agency to the Minister. However, since the 2019 Bill proposes that the GAL's salary will be paid centrally pursuant to section 35P, costs would be less of an issue than they are currently—they would relate only to expenses and not to core fee payments.

The proposal to channel payments for GALs through the Department of Children and Youth Affairs rather than through Tusla is welcome to the extent that it addresses any potential perception of conflict of interest or lack of independence on the part of GALs. The decision to establish a national service with centrally contacted employees is a more far-reaching proposal, and is not without risk. The establishment of a central service with salaried employees was examined in detail in the Capita Consulting report in 2004, which recommended against such an approach:

> "Our research has shown that many of the more established GAL providers in Ireland have by now developed quite effective service structures and standards, and are well-perceived by many key stakeholders. In many instances, their GAL activities form part of a range of child-centred and social work services. Given the resident knowledge and experience in these organisations, we would question whether it would be legitimate

54. Capita Consulting (n 15 above) at p 31.
55. Law Society of Ireland, *Giving Children a Voice, the case for independent representation of children* (2001) at p 27.

to expect that all, or a large proportion, of their experienced GAL practitioners would move into a new State-run agency, or whether they would remain with their existing employers and simply transfer to other work. Furthermore, we would regard it as highly unlikely that self-employed GALs (many of whom also work in other related fields) would opt to transfer to a public agency where they would probably be less well-remunerated than in private practice.

For these reasons, we believe that it is quite likely that many existing GALs would **not** transfer to a new State-run GAL agency. Given the fact that demand for GAL services significantly outstrips supply, and given the absolute need for GALs to be experienced practitioners, failure to attract a large body of experienced GALs quickly into the new agency would seriously undermine it from the outset."[56]

Since 2004, the use of GALs has increased significantly. As a result, larger numbers of GALs work exclusively in this role, and they are more specialised and professionalised. This mitigates the risk that persons currently working as GALs would choose to remain with their current employers working in a different role. However, the other points remain valid. If the terms and conditions offered to GALs by the new service are not sufficiently attractive, the service will risk getting off to a very difficult start if it fails to attract a sufficient number of experienced and high-quality GALs. Avoiding this scenario needs to be a key focus in the development of the national service.

4.3.9 Dual representation

At present, the 1991 Act only allows children to have a GAL or a solicitor. Section 26(4) provides that where a child becomes a party to proceedings pursuant to section 25, the order appointing a GAL in respect of that child shall cease to have effect. This either/or approach to representation of the child may in part be responsible for the low rate at which the power to make a child a party under section 25 and appoint a solicitor is utilised in practice. Judges who wish to have the input of a GAL, who brings a particular skillset to proceedings in addition to an independent perspective, may be reluctant to lose this input by making an order under section 25.

The Capita Consulting report in 2004 consulted with stakeholders on the issue of dual representation, and concluded as follows:

During our consultation programme, the majority of organisations and individuals stated their preference that dual representation should be permitted in Ireland. In particular, representative organisations with an interest in the rights of children felt that this was an important feature of any future system …

In response to this broad consensus that dual representation is appropriate, and as it would appear to be best practice, we believe that dual representation is likely to aid the interests of the child more effectively than the current arrangements.

We therefore recommend that dual representation should be allowed in the Irish system …[57]

56. Capita Consulting (n 15 above) at pp 87-89 (emphasis in original).
57. *Ibid* at p 80.

The 2019 Bill is in line with this recommendation; it proposes the insertion of a new section 35H(5) into the 1991 Act, as follows:

> (5) Where a child in respect of whom a court has made an order under section 35B(2) or (3), as the case may be, becomes a party to the proceedings by order under section 25(1), or otherwise than by reason of such an order, the court that made the order under the section concerned shall determine when it ceases to have effect.

This provision would allow for dual representation of children in child care proceedings at the discretion of the Court. This is a welcome development; a GAL and a solicitor bring different skill sets and functions to the table, and in cases where there might be a sharp divergence between the child's views and the GAL's assessment of the child's best interests, it makes sense to allow children who have expressed a clear and mature view the opportunity to independently advocate for that view.

The manner in which section 35H frames the issue give the impression that dual representation is to be the exception rather than the rule—it is couched as an exception to a provision stipulating a range of circumstances in which an order appointing a GAL ceases to have effect. Strictly speaking, this does not alter the nature of the power of the Court in this context; but it raises questions about how it will be viewed and applied by the majority of judges who, to date, have rarely or never made use of section 25. A positive statement of a power of the Court to grant dual representation to a child in cases where it appears to the Court that this would be in the child's best interests and/or consistent with the child's constitutional rights may be more likely to be utilised, and therefore would be preferable. The language of the section 41 of the Children Act 1989 in England and Wales provides a model that could be drawn on to this end.

4.3.10 Voluntary care

As discussed in detail in Chapter 3 of this report, the Child Care Act 1991 does not currently make any provision for the appointment of a GAL to children who are in voluntary care placements pursuant to section 4 of the Act. The Child Care (Amendment) Bill 2019 does not propose to change this. For the reasons given in Chapter 3, consideration should be given to strengthening the mechanisms for hearing the views of children in voluntary care placements. Child participation in reviews could be strengthened, and the appointment of a GAL for younger children for a short period leading up to and during the review process would strengthen the protection for the child's best interests and right to be heard in voluntary care.

4.3.11 Resourcing

The Explanatory Memorandum to the 2019 Bill states the following under Financial Implications:

> Costing projections indicate that the proposed guardian *ad litem* service can be provided within existing resources and the restructuring of the service will provide scope to extend the service to all children who are the subject of child care proceedings within the current expenditure envelope.

A large proportion of children who are the subject of child care proceedings do not currently have a GAL; thus, meeting the constitutional imperative of ensuring the right of children to be heard in child care proceedings will require a significant increase in the number of GAL appointments. Current expenditure on GALs provides a starting point, and savings will be possible through the establishment of a national service with central contracts and through legal services for GALs being brought into the public service rather than outsourced to private law firms. However, it is unclear and perhaps questionable whether these savings will be sufficient to fund the necessary increase in GAL appointments.

As noted by Baker J in *AO'D*, the enactment of Article 42A of the Constitution "must be seen as enhancing the rights of the child".[58] Extending the GAL service to all (or even the clear majority of) children who are the subject of child care proceedings would be a positive measure; but it would not necessarily enhance the rights of children if the service provided is at a lower level than that provided to date. Children should not be required to settle for an inferior level of representation of their views and best interests. It is in this spirit that the analysis above has made numerous recommendations for how the 2019 Bill can be improved.

4.4 OTHER MECHANISMS FOR ASCERTAINING THE VIEWS OF CHILDREN

As noted in section 4.1.4 above, the GAL is not the only available mechanism for hearing the views of children in child care court proceedings, nor should it be. The appointment of a solicitor to represent a child was mentioned above. However, it is important that any future reforms also make adequate room for direct participation by children in court proceedings rather than relying exclusively on indirect participation. The UN Committee on the Rights of the Child has stated that "wherever possible, the child must be given the opportunity to be directly heard in any proceedings."[59] For some children, the opportunity to see at least some of the process that will lead to life-changing decisions about where and with whom they will live, and to meet and speak with the person charged with making that decision, is a hugely valuable part of coming to terms with their circumstances and can have beneficial effects on their well-being.[60] International research by Kilkelly has found that "[m]ore than anything, they want to speak directly to those who take decisions about them".[61] Indirect participation through a GAL and/or solicitor will not achieve this. Therefore, any reforms of the Child Care Act 1991 should make allowance for modes of direct participation.

However, this is not an issue that can be addressed solely in the Child Care Act, or indeed by legislation alone. According to the Committee on the Rights of the Child, there are two essential pre-requisites to children and young people being effectively heard in court

58. [2016] IEHC 555 at [90].
59. UN Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc No CRC/C/GC/12, 20 July 2009 at [35].
60. See further A Daly, "The Judicial Interview in Cases on Children's Best Interests—Lessons for Ireland" (2017) 20(3) *Irish Journal of Family Law* 66 and E O'Callaghan, C O'Mahony and K Burns "'There is nothing as effective as hearing the lived experience of the child': Practitioners' Views on Children's Participation in Child Care Cases in Ireland" (2019) 22(1) *Irish Journal of Family Law* 2.
61. U Kilkelly, Listening to Children about Justice: Report of the Council of Europe's Consultation with Children on Child-Friendly Justice (Council of Europe, 2010) at p 39, available at https://rm.coe.int/168045f81d. Similar findings were reported by P Parkinson, J Cashmore, and J Single, "Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia" (2007) 21 *International Journal of Law, Policy and the Family* 84.

proceedings. First, in order to adequately prepare the child for contributing their views in an informed way, information concerning the decision must be provided to the child in advance of the decision-making process. This information must be child-appropriate and must be provided all the way throughout the proceedings. Second, children must have a safe space within which to contribute their views where they are not subject to fear or intimidation in the surrounding environment.[62] Past research on District Court child care proceedings in Ireland suggests that it is the absence of an appropriate environment that currently acts as the biggest barrier to direct participation by children.[63]

Some District Court judges in Ireland have developed a practice of meeting with children in chambers or in an empty courtroom and gained significant experience of doing so. However, this has been on a largely *ad hoc* basis, with no rules governing the practice and no consistency as between judges with respect to whether or how this is done. Some judges are strongly against the practice on the basis that they do not have the requisite skills and training to speak directly with children, and other professionals involved in child care proceedings have expressed concern that the suitability of judges to meet with children varies widely.[64]

There is clearly an important place for direct participation of children in child care proceedings; but this needs to be underpinned by a firm statutory basis, accompanied by measures designed to make the courtroom environment more child-friendly and to give the professionals working in that environment the necessary skills in communicating with children. The most effective way to achieve this is through the establishment of specialist family courts. This proposal has formed part of successive Programmes for Government since 2011, but has progressed slowly in that time. The benefits of such a reform (which was strongly endorsed by the Joint Oireachtas Committee on Justice and Equality in 2019)[65] are potentially extensive and extend well beyond the specific issue of child participation.[66]

Legislation providing for the establishment of specialist family courts should make specific provision for a number of important points governing child participation and judicial interview. Section 4.3.4 above set out the reasons why it is desirable that GALs be suitably trained and qualified to perform their roles. By the same token, it is desirable that judges who interview children (and also solicitors appointed to represent children) be required to undergo suitable interdisciplinary training in skills which do not form part of their core legal training—most obviously in respect of communication with children, but also in other aspects of child and adolescent development and welfare, as well as in best international practice in judicial interviews of children. Guidelines should be developed to assist both judges and lawyers in performing these tasks.[67]

62. UN Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc No CRC/C/GC/12, 20 July 2009 at [34] and [41].
63. See generally Parkes *et al.* (n 12 above) and O'Callaghan *et al.* (n 60 above).
64. Parkes *et al.* (n 12 above) at pp 432-437. See further Joint Oireachtas Committee on Justice and Equality (n 21 above) at p 36. For evidence from other jurisdictions on this point, see Raitt (n 13 above) at p 156.
65. Joint Oireachtas Committee on Justice and Equality (n 21 above) at pp 43-45.
66. See further C O'Mahony, C Shore, K Burns and A Parkes, "Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland" (2016) 30 *International Journal of Law, Policy and the Family* 131.
67. At present, the Law Society's *Guide to Good Professional Conduct for Solicitors* (3rd ed., 2013) at p 118 (available at https://www.lawsociety.ie/globalassets/documents/committees/conduct-guide.pdf) states: "You should only accept instructions from a child if you have the necessary training and expertise in this field and the child is of an age and understanding to instruct. You must continually assess the child's competence to give instructions." However, it does not specify what constitutes "necessary training and expertise", or how a child's competence should be assessed by a lawyer who may have no training to allow him or her to perform this task.

A further issue that needs to be addressed in respect of judicial interviews of children is how the rules of evidence should apply to the information gleaned in such interviews so as to ensure fair procedures for all parties. While concerns have been expressed about this point,[68] experience in jurisdictions such as New Zealand illustrates how rules and guidelines can be put in place that can balance the child's right to directly participate in the proceedings with the procedural rights of the other parties.[69] Some previous guidance has been provided by the Irish High Court on the conduct of judicial interviews which might provide a starting point;[70] however, it has been observed that these guidelines "focus on adult-centric concerns about securing the agreement of parents and compliance with principles of fairness. There is little emphasis on ensuring that children are comfortable …, that children's consent is given at all times, and that children later receive feedback on how their views were weighed in the decision-making process."[71] Thus, a more comprehensive framework governing judicial interviews is a necessary part of future reforms.

4.5 RECOMMENDATIONS

In order to give full effect to the obligations imposed by the enactment of Article 42A.4 of the Constitution, the Child Care Act 1991 should be amended to make it mandatory rather than discretionary to ascertain the views (if any) of all children capable of forming views, and to provide for a range of mechanisms designed to facilitate this. Maintaining the relevant provisions of the 1991 Act in their current form represents a shortfall on clearly stated constitutional obligations. The Child Care (Amendment) Bill 2019 provides a basis from which such reforms could potentially be developed, and contains a range of welcome measures governing the independence, regulation and qualifications of GALs and dual representation. However, on a number of crucial points (including the functions, powers and status of the GAL, the criteria for appointment, legal advice and representation for GALs, and service of documents), the Bill does not go far enough in its current form to adequately discharge the constitutional obligation. The following changes to the Bill and accompanying policy measures are necessary to this end:

1. Paragraphs (d) and (k) of section 31(2) of the Guardianship of Infants Act 1964 (as inserted by section 63 of the Children and Family Relationships Act 2015) should be included in the list of factors specified in the proposed new section 24(2) of the Child Care Act 1991.

2. The functions and powers of the GAL should be defined in such a way as to ensure that important functions currently performed by GALs (such as cross-examination, adducing evidence, making submissions, seeking disclosures or participating in reviews) can continue to be performed. Section 35F should explicitly itemise any powers that the GAL is intended to have; this should be accompanied either by the retention of the function of representing the interests of the child (currently included in section 35E(1)(c)), or by stipulating that the list of powers contained in section 35F is non-exhaustive.

68. See Clissman and Hutchinson (n 13 above).
69. See Daly (n 60 above) at p 67.
70. See *O'D v O'D* [2008] IEHC 468.
71. Daly (n 60 above) at p 69.

3. The provisions governing the criteria for appointing GALs should provide for a presumption that GALs be appointed in District Court child care proceedings by stating that a GAL should be appointed in all cases, subject only to defined (and narrowly drawn) exceptions. Such exceptions should require the Court to satisfy itself that the requirements of Article 42A of the Constitution can be adequately discharged in the proceedings without the necessity to appoint a GAL, and also r equire the Court to give reasons for its decision and to determine the alternative means by which to facilitate the expression by the child of his or her views.
4. The proposal to remove the discretionary access to legal advice and representation currently enjoyed by GALs should not proceed in the absence of clear cost/ benefit analysis which demonstrates that the detrimental impact of unnecessary costs outweighs the risk that section 35D would undermine the effectiveness of GALs. Until such evidence is available, the wording contained in section 13 of the Child Care (Amendment) Act 2011 provides a better model and should be replicated in the Bill.
5. The provisions governing service of documents in section 35G should not be limited to Tusla, but should extend to other agencies or bodies who may hold important information relating to a child's welfare necessary for the performance of the GAL's functions. Section 35G would also benefit from the addition of a "for the avoidance of doubt" provision clarifying that Article 6(1)(c) of GDPR authorises the processing of personal data in fulfilment of the obligation imposed by section 35G.
6. The provisions of section 35H(2) governing cessation of appointment should be amended by the replacement of the phrase "whichever is the sooner" with the phrase "unless the Court in its discretion directs otherwise".
7. The terms and conditions offered to GALs by the new service should be carefully considered and designed to ensure that experienced GALs are attracted to work for the service in sufficient numbers.
8. Section 35H(5) governing dual representation should be re-phrased as a positive power of the court to appoint both a GAL and a solicitor rather than an exception to the general rules governing when the appointment of the GAL shall cease.
9. In the context of reviews of voluntary care agreements, provision should be made for the appointment of a GAL for younger children for a short period leading up to and during the review process.
10. Adequate resources should be made available to ensure that more children can benefit from the appointment of a GAL without a diminution in the level of service provided by GALs.
11. Provision should be made for a statutory basis for direct participation of children in child care proceedings, including (but not necessarily limited to) judicial interviews.

In addition to the above changes to the provisions of the 2019 Bill, the establishment of a specialist family court structure, with dedicated staff and facilities designed to ensure a

child-friendly environment conducive to direct participation, should proceed as a matter of priority. Provision for specialist family courts should include provision for minimum training requirements for judges and lawyers working in this area of law, and for guidelines governing the conduct of judicial interviews of children.

Finally, while it is clear that the above recommendations carry resource implications which will be challenging in the aftermath of the COVID19 crisis, it should be recalled that ascertaining the views of children in all court proceedings concerning child protection, private family law and adoption is something which the Irish State is obliged to do as a matter of constitutional and international law. The people voted to approve this constitutional obligation in 2012, at a time when the State was still severely affected by the financial crisis that began in 2008. The European Court of Human Rights has in recent years found violations of Article 8 of the European Convention on Human Rights in cases where provision was not made to ascertain the views of children in court decisions concerning their custody.[72] Of particular note, the UN Committee on the Rights of the Child has specifically stated that the right of the child to be heard under Article 12 of the Convention on the Rights of the Child "does not cease in situations of crisis or in their aftermath".[73] Thus, the economic challenges that will be faced in the coming years do not absolve the State from fulfilling its legal obligations in this respect. Savings can and should be identified in the manner in which the GAL service operates. However, if these savings are not sufficient to extend an effective service to all children who need it, then some additional resources may be required to avoid reducing the level of service experienced by individual children. Ireland's Constitution and international human rights law obligations demand no less.

72. See, eg, *M and M v Croatia* (10161/13, 3 September 2015). See further C Mol, "Maturity and the Child's Right to be Heard in Family Law Proceedings: Article 12 UNCRC and Case Law of the ECtHR Compared" in K Boele-Woelki (ed), *Plurality and Diversity of Family Relations in Europe* (Intersentia, 2019) at pp 237-254 (discussed further in Chapter 5 of this report).
73. UN Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc No CRC/C/GC/12, 20 July 2009 at [125].

Chapter 5

Legal Developments and Research Update

With material contributed by
Dr Elaine O'Callaghan

5.1 INTRODUCTION

This chapter will summarise developments of relevance to child protection in international law and the case law of international and Irish courts during the course of 2019. Material to be considered includes several judgments of the European Court of Human Rights (ECtHR) on the issue of adoption of children from care without parental consent; a new General Comment of the UN Committee on the Rights of the Child on juvenile justice; and numerous Irish judgments on a range of issues.

Within the Irish case law, special care cases feature prominently, with judgments considering the threshold for making a special care order; the timeframe within which an application for a special care order must be made; and the power of the High Court to review a child's circumstances after the expiry of a special care order. A range of other judgments are also highlighted on topics including judicial review of child care proceedings, adoption, investigation of complaints of abuse and notifications to the National Vetting Bureau.

The chapter will also present an overview of notable research of relevance to child protection law published during 2019. Areas in which research of note has been published include mandatory reporting, comparative child protection research, youth justice, immigration, child participation and children's testimony. The chapter will conclude with a discussion of lessons to be drawn from the material discussed.

5.2 INTERNATIONAL LAW DEVELOPMENTS

5.2.1 Adoptions from care

The compatibility of adoptions of children from care without parental consent with the right to family life has generated multiple judgments of the ECtHR in recent years, with three further judgments in 2019 finding violations in such cases. In a long line of cases, beginning with *W v United Kingdom*[1] in 1987, the ECtHR has repeatedly reiterated the principle that "[t]he mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. Furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into public care."[2] Building on this principle, the Court has repeatedly held that placing children in the care of the State should be regarded as a temporary measure, to be discontinued as soon as circumstances permitted; moreover, any measures of implementation of a care order should be consistent with the ultimate aim of reuniting the child with its family.[3] The Court has found that the placement of a child in care for adoption is permissible in the most extreme cases where reunification is not a realistic prospect and provided that sufficient efforts towards reunification have been made initially.[4] However, adoption orders of this nature have been found to violate Article 8 in numerous cases in which measures supporting reunification (such as contact or case reviews) were inadequate.[5]

Most of the cases in which a placement for adoption was found to violate Article 8 involve a relatively clear-cut failure to pursue measures that might have made reunification possible. However, the 2019 decision of the Grand Chamber in *Strand Lobben v Norway*[6] is an example of a less clear-cut case where the authorities could claim to have complied with the headline obligations laid down in the case law, but the quality of that compliance was at issue. The adoption was authorised when the child was three and a half years old, and had lived with the foster family since he was three weeks old. He had not bonded psychologically with his mother in spite of extensive contact. The Chamber had found in 2017 that his "fundamental attachment in the social and psychological sense was to his foster parents",[7] and was found that the placement did not violate Article 8:

> "The best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development … When a "considerable period of time" has passed since the child was first placed in care, the child's interest in not undergoing further *de facto* changes to its family situation may prevail over the parents' interest in seeing the family reunited …"[8]

1. 9749/82, July 8, 1987.
2. *Ibid* at [59]. This was quoted with approval in, *inter alia*, *Olsson v Sweden (No. 1)* (10465/83, 24 March 1988 at [59]; *Eriksson v Sweden* (11373/85, 22 June 1989) at [58]; and *Andersson* v Sweden (12963/87, 25 February 1992) at [72].
3. See, e.g., *Olsson v Sweden (No. 1)* (10465/83, 24 March 1988) at [81] and *Johansen v Norway* (17383/90, 7 August 1996) at [78].
4. *R and H v United Kingdom* (35348/06, 31 May 2011) at [82] to [89]. See further *Aune v Norway* (52502/07, 28 October 28, 2010); *SS v Slovenia* (40938/16, 30 October 2018); and *Hasan v Norway* (27496/15, 26 April 2018).
5. See, e.g., *Johansen v Norway* (17383/90, 7 August 1996); *EP v Italy* (31127/96, 16 November 1999); *RMS v Spain* (28775/12, 18 June 2013); and *SH v Italy* (52557/14, 13 October 2015).
6. 37283/13, 10 September 2019 (Grand Chamber).
7. 37283/13, 30 November 2017 (Chamber) at [122].
8. *Ibid* at [109].

Notably, Judges Grozev, O'Leary and Hüseynov wrote a joint dissenting opinion in which they accused the majority of only taking cognisance of the previous case law of the court in an abstract manner and only partly applying the established principles to the circumstances of the case at hand:

> "The general principles outlined in Section III reflect the case-law as it stands and clearly point to procedural and substantive requirements which must be met in a case like this. Once it comes to the concrete application of those principles to the circumstances of the individual case, it would appear that the focus becomes almost exclusively procedural. However, an excessive focus on procedures risks rendering banal what are far-reaching intrusions in family and private life. In addition, the Court's general principles when read in the abstract risk providing false hopes of reunification which, as this case demonstrates, are unlikely to be fulfilled once a child has been taken into care, access rights have been significantly limited, time has passed and domestic proceedings formally meet Article 8 procedural standards."[9]

Upon referral to the Grand Chamber, these sentiments were reflected in the decision (by thirteen votes to four) to reverse the ruling of the Chamber.[10] The Grand Chamber re-emphasised the importance of urgency in taking measures to facilitate reunification,[11] and stipulated that the mere passage of time is not a sufficient reason justifying a placement for adoption.[12] The Court found that:

> … the process leading to the withdrawal of parental responsibilities and consent to adoption shows that the domestic authorities did not attempt to perform a genuine balancing exercise between the interests of the child and his biological family …, but focused on the child's interests instead of trying to combine both sets of interests, and moreover did not seriously contemplate any possibility of the child's reunification with his biological family.[13]

A number of factors were highlighted as contributing to this flawed decision-making process. The authorities had decided at an early point that the child was likely to remain in foster care; consequently, contact sessions were arranged with a view to keeping the child in touch with his roots rather than facilitating reunification, and were not conducive to allowing the parties to bond freely. The Court was not satisfied that the limited contact provided clear evidence from which to draw conclusions about the applicant's caring abilities.[14] Moreover, the decision was based on psychological reports that were several years old; while accepting that "it would generally be for the domestic authorities to decide whether expert reports were needed", the Court considered that "the lack of a fresh expert examination substantially limited the factual assessment of the first applicant's new situation and her caring skills at the material time."[15] Finally, while the

9. *Ibid* at [28].
10. 37283/13, 10 September 2019 (Grand Chamber).
11. *Ibid* at [208].
12. *Ibid* at [212].
13. *Ibid* at [220].
14. *Ibid* at [221].
15. *Ibid* at [223].

child's vulnerability had formed a central part of the reasoning for the initial decision to place him into care, there was little assessment of this issue in the final decision to place the child for adoption.[16] For these reasons, the Court held that it was "not satisfied that the said procedure was accompanied by safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake", and found a violation of Article 8.[17]

The ECtHR found violations of Article 8 in two further Norwegian cases concerning adoption orders following limited contact in December 2019. In *AS v Norway*, the child was two years old when placed in "long-term" foster care.[18] Contact was supervised and limited to one to two hours, twice a year, with the aim of facilitating the child to know his roots rather than to have a relationship with the applicant.[19] Referencing *Strand Lobben v Norway*, the Court observed that "the conclusion that the placement must be considered to be long-term should only be drawn after careful consideration and also taking account of the authorities' positive duty to take measures to facilitate family reunification".[20] Similarly to *Strand Lobben*, the Court was critical of the domestic authorities' position that placement would be long-term "thereby cementing the situation already at the very outset, in particular through a very strict visiting regime".[21]

In *Abdi Ibrahim v Norway*, the child was ten months old when placed in foster care and four years old when adopted. Prior to the adoption order, contact was supervised and limited to one hour, six times yearly with the aim of facilitating the child to learn about its cultural background.[22] The applicant appealed the adoption order but it was upheld by the District Court and the High Court.[23] The Court described the contact arrangements as "a very restrictive contact regime"[24] and noted that the domestic authorities failed to take "any real measures to facilitate family reunification in the longer term after the care order had been issued … before they decided to opt for the most far-reaching measure, namely his adoption".[25] Referencing *Strand Lobben v Norway*, the Court stated that "where the authorities are responsible for a situation of family breakdown because they have failed in their above-mentioned obligation, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child".[26]

Taken together, these three judgments emphasise the obligations on State authorities to keep the possibility of reunification open and to facilitate contact arrangements that are conducive to achieving it. Recommendations for Ireland arising from the judgments will be made in section 5.5.1 below.

16. *Ibid* at [224].
17. *Ibid* at [225] to [226].
18. 60371/15, 17 December 2019 at [8] and [31]. See also the Court's assessment at [62].
19. *Ibid* at [8] and [9].
20. *Ibid* at [62].
21. *Ibid* at [63].
22. 15379/16, 17 December 2019 at [11]. Contact was originally limited to two hours, four times yearly but this was varied by the District Court to one hour, six times yearly.
23. *Ibid* at [16] and [17].
24. *Ibid* at [60].
25. *Ibid* at [61].
26. *Ibid*.

5.2.2 Youth justice

Ireland marked the 30th anniversary of the UN Convention on the Rights of the Child (CRC) by reiterating its commitment to the rights provided for in this treaty.[27] In particular, seven specific pledges were detailed, including a commitment to ratify the Second Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.[28] Reference was also made to the launch of the Onehouse pilot project (as discussed in Chapter 1 of this report) and to the publication of the Child Care Amendment Bill 2019 (as discussed in Chapter 4 of this report).

In September 2019, the Committee on the Rights of the Child published *General Comment No 24 on children's rights in the child justice system*,[29] replacing its previous General Comment on the subject from 2007.[30] This new General Comment provides a thorough update incorporating not only legal developments since 2007 but also new knowledge about child and adolescent development and evidence of effective practices. In developing the new General Comment, the Committee invited input from all interested parties on the 2007 General Comment and received 65 submissions from a wide range of countries and international organisations.[31] The new General Comment acknowledges stakeholders' concerns, including surrounding the minimum age of criminal responsibility and the use of deprivation of liberty.

As regards the minimum age of criminal responsibility, States parties are now encouraged to raise the age from 12 years (as previously recommended in the 2007 General Comment) to "at least 14 years".[32] In making this change, the Committee references recent evidence on child development and neuroscience which specifies that:

> "… maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence".[33]

Furthermore, the Committee reiterated its criticism of States Parties that facilitate exceptions to the minimum age of criminal responsibility, for example, where a "child is accused of committing a serious offence" or where two minimum ages are put forward, requiring an assessment of the individual child's maturity in determining whether they are criminally responsible.[34] Instead, the Committee recommends that States parties set one minimum age of criminal responsibility, without exception.[35]

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27. Ireland's pledge is available at https://www.ohchr.org/Documents/HRBodies/CRC/30Anniversary/Pledges/Ireland.pdfs.
28. This Optional Protocol is available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx.
29. Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc No CRC/C/GC24, 18 September 2019.
30. Committee on the Rights of the Child, *General Comment No 10 (2007): Children's rights in juvenile justice*, UN Doc No CRC/C/GC/10, 25 April 2007.
31. See https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx.
32. Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc No CRC/C/GC24, 18 September 2019 at [22].
33. *Ibid*.
34. *Ibid* at [25] to [26].
35. *Ibid* at [25] and [27]. At [28], a new section sets out that children with certain conditions such as developmental delays, neurodevelopmental disorders and disabilities including autism spectrum disorders, fetal alcohol spectrum disorders and acquired brain injuries should not have criminal responsibility, either automatically or based on an assessment.

The minimum age of criminal responsibility in Ireland is governed by Part 5 of the Children Act 2001, as amended by the Criminal Justice Act 2006. Section 52(1) of the 2001 Act, as amended by s. 129 of the Criminal Justice Act 2006, provides that "a child under 12 years of age shall not be charged with an offence". However, this is subject to exceptions; for example, in cases of serious crimes such as murder, manslaughter, rape or aggravated sexual assault, a child of 10 or 11 years can be held criminally responsible.[36] This section is plainly in contravention of General Comment No 24 and is accordingly in need of amendment in order to bring Irish law into line with the State's obligations as a State Party to the CRC.[37] Further, according to the Committee, "the most common minimum age of criminal responsibility internationally is 14,"[38] meaning that Ireland is also out of step with other countries such as Germany (14 years), Finland (15 years) and Portugal (16 years).[39]

International law instructs that the use of deprivation of liberty, in the case of children, "… shall be used only as a measure of last resort and for the shortest appropriate period of time".[40] This principle is reiterated by the Committee on the Rights of the Child in its General Comment No 24.[41] The Committee implores States parties to "immediately embark on a process" of reducing reliance on detention to a minimum, noting that it envisages deprivation of liberty as necessary in a "minority of cases".[42]

The Committee recommends that "no child be deprived of liberty, unless there are genuine public safety or public health concerns", adding that States parties are encouraged to "fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age".[43] The Committee also recommends that States Parties review the report of the Independent Expert leading the United Nations global study on children deprived of their liberty.[44]

Further, in the context of pretrial detention, the Committee notes that where "the child is considered a danger (to himself or herself or others) child protection measures should be applied".[45] The Committee is also critical of the use of surety for bail in the case of children as they "cannot pay and because it discriminates against poor and marginalized

36. Children Act 2001, s 52(3) (as amended by Criminal Justice Act 2006, s 129) also abolished the rebuttable presumption that "a child who is not less than 7 but under 14 years of age is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong". Also, children who commit serious crimes are tried in the Central Criminal Court, not the Children Court, in Ireland. This is in contravention of the new General Comment where it is recommended that children should always be before children courts and not adult focused courts: see Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc No CRC/C/GC24, 18 September 2019 at [30].
37. The Committee on the Rights of the Child in its *Concluding observations on the combined third and fourth periodic reports of Ireland*, UN Doc No CRC/C/IRL/CO/3-4, 1 March 2016 at [72] recommended that Ireland "[r]einstate the provisions setting the age of criminal responsibility at 14 years, as established in the Children Act 2001". For consideration of the minimum age of criminal responsibility in Ireland see, SJ Judge "Youth Justice" in *Making Rights Real for Children: A Children's Rights Audit of Irish Law* (Children's Rights Alliance, 2015), pp.151-153, available at, https://www.childrensrights.ie/sites/default/files/submissions_reports/files/MakingRightsReal2015.pdf.
38. Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc No CRC/C/GC24, 18 September 2019 at [21].
39. For information on the minimum age of criminal responsibility by country in Europe, see the website of Child Rights International Network (CRIN): https://archive.crin.org/en/home/ages/europe.html.
40. Convention on the Rights of the Child, Article 37(b).
41. Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc No CRC/C/GC24, 18 September 2019 at [85].
42. *Ibid* at [83] and [84].
43. *Ibid* at [89].
44. *Ibid* at [4], citing the United Nations global study on children deprived of their liberty, Un Doc No A/74/136, 11 July, 2019, available at https://undocs.org/en/A/74/136.
45. Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc No CRC/C/GC24, 18 September 2019 at [87].

families".[46] In addition, surety for bail suggests that "there is a recognition in principle by the court that the child should be released, and other mechanisms can be used to secure attendance".[47]

The Children Act 2001, as amended by the Criminal Justice Act 2006, provides that detention should be used "only as a measure of last resort".[48] This is in line with standards set out in the CRC and General Comment No 24.[49] In practice, however, children are remanded in custody in Ireland for a variety of reasons including "breach of bail conditions, the seriousness of the offence, or the inability of the defendant to provide surety for bail."[50]

A pilot Bail Supervision Scheme, operated in Smithfield, Dublin, provides judges with an option to return children to their communities, while adhering to bail conditions, instead of remanding them.[51] The Scheme is based on Multisystemic Therapy provided by the courts service, Young Persons Probation and An Garda Síochána. In short, it offers support to the child's parent or other caregiver in addressing the child's behaviour, assisting them to deal with problems.[52] An evaluation of this Scheme has reported considerable success in supporting young people to avoid detention.[53]

Recommendations on steps to be taken by Ireland to achieve compliance with its CRC obligations in the field of youth justice will be made in section 5.5.2 below.

5.3 IRISH COURT DECISIONS

5.3.1 Special care

5.3.1.1 CK v Child and Family Agency (threshold for special care order)[54]

The applicant, a mother, sought to quash a decision made by Tusla's Special Care Referral Committee refusing to place her son, NK, in special care. NK was placed in voluntary care when he was eleven years old in 2013. Following an unsuccessful attempt at reunification in 2017, the High Court ordered he be placed in secure care and subsequently in special care in 2018. He remained in special care until January 2019, when Tusla applied for him to be discharged from special care. An interim care order under section 17 of the Child Care Act 1991 was obtained instead.

46. *Ibid* at [88].
47. *Ibid*.
48. *Ibid* at p 1.Children Act 2001, s 96(2). See also s 227(1)(b). For a recent judicial perspective of the court system's treatment of children, see Judge J O'Connor, "Reflections on the Justice and Welfare Debate for Children in the Irish Criminal Justice System" (2019) 3 *Irish Judicial Studies Journal* 19.
49. *Ibid* at p 1.Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, UN Doc No CRC/C/IRL/CO/3-4, 1 March 2016 at [72] recommended as follows: "In cases where detention is unavoidable, ensure that the detention is for the shortest possible period, that these children are not detained together with adults and that detention conditions are compliant with international standards, including with regard to access to education and health-care services".
50. Judge (n 37 above) at p 164. For an insight into pretrial detention in Ireland, see Irish Penal Reform Trust, *The practice of pre-trial detention in Ireland research report* (April 2016), available at https://www.iprt.ie/site/assets/files/6381/ptd_country_report_ireland-24.pdf. See also European Committee of Social Rights *Conclusions 2019: Ireland*, pp.35-36, available at https://rm.coe.int/rapport-irl-en/16809cfbc0.
51. C Naughton, S Redmond and B Coonan, *Evaluation of The Bail Supervision Scheme for Children (Pilot Scheme)*, Department of Children and Youth Affairs (December 2019), available at https://www.gov.ie/en/publication/0a6bc8-evaluation-of-the-bail-supervision-scheme-for-children-pilot-scheme/.
52. *Ibid* at p 1.
53. *Ibid* at p x.
54. [2019] IEHC 635.

NK did not wish to remain in the placement made in early 2019. After it came to an end in March, he was living in a hostel for the homeless. He was involved with drugs, alcohol, and criminal activity including assault and theft, both while in care and thereafter. He was deemed to be a risk of harm to himself and others due to his violent and criminal propensity and there was an added risk that he could get involved in gangland crime.

However, the Special Care Referral Committee formed the view that NK's behaviour did not meet the threshold for admission to special care and further, that his behaviour required "addressing through consequences in the criminal justice system".[55] It was also of the view that special care had not been wholly beneficial to NK to date and that re-admission to special care would therefore not be of therapeutic benefit to him.

MacGrath J in the High Court granted the relief sought to the applicant. The judge referenced the judgment of Whelan J. in *Child and Family Agency v ML*[56] on a number of occasions throughout his decision. In particular, MacGrath J observed that:

> "It is clear from that decision that in the assessment of what constitutes a real and substantial risk to life, health, safety, development or welfare the assessment must take into account behaviour of the child which poses a risk to others. I see no reason why a similar meaning should not be afforded to the provisions of s. 23F(2)(a), which enjoys similar wording to s. 23H(2)(a); and no such difference was advanced or suggested at hearing".[57]

Accordingly, MacGrath J concluded that,

> "In my view, there is nothing in the reports which were before the Committee that express a view other than that NK's behaviours poses a real and substantial risk of harm as that term has been interpreted by the Court of Appeal. In fact, the Committee accepted that there had been a deterioration in NK's behaviour since his discharge from special care. To that extent, therefore, it appears to me that the expressed decision of the Committee that there was insufficient evidence that NK's behaviour (emphasis added) did not meet the threshold under s. 23F(2), with particular reference to para (a), is unsupported by the contents of the reports which were before it. Therefore, in my view, the expressed reason for the decision not to apply to have NK admitted to special care is unreasonable in that it is not only against the evidence but is a conclusion arrived at without evidence in support".[58]

In his concluding comments, the High Court judge noted the importance of affording "due deference" to the decision of the Committee. However, he reiterated the absence of evidence for the Committee to reach its decision.[59]

55. At para. 14 of judgment.
56. (unreported, Court of Appeal, 12th April, 2019).
57. *Ibid* at [62].
58. *Ibid* at [72].
59. At para. 78.

5.3.1.2 Child and Family Agency v ML (otherwise G) (threshold for special care order)[60]

G appealed a special care order granted by the High Court in 2018. G was taken into care when she was ten years old after she violently attacked her mother. G experienced "extreme depravity and domestic violence" during her childhood, most often perpetrated by her father on her mother.[61] Since then, she had been in foster care, residential care and also in detention in Oberstown for several months following convictions in the District Court for assault and criminal damage. Throughout her time in care, she displayed aggressive and sexualised behaviour. A special care order was sought by Tusla as G was deemed to be suicidal.

Whelan J stated that the Court of Appeal was in "as good a position to draw inferences from the facts as was the High Court" given that the hearing was on affidavit.[62] She noted that:

> "The words 'a real and substantial risk' in s. 23H imposes [*sic*] a burden on the CFA to demonstrate to the satisfaction of the High Court by probative evidence the existence of a real risk on substantial grounds arising from her own behaviour to G's life, health, safety, development or welfare. The second limb – s.23H (2) requires the court to be satisfied that a special care order is in the best interests of G".[63]

Whelan J reviewed the evidence relied on by the trial judge and concluded that there was a "severe risk particularly of self-harm and suicide".[64] The judge also concurred with the trial judge that the special care order was in G's best interests, offering her "the necessary therapeutic interventions to enable her development to be adjusted so that she can develop the capacity to participate in society and live her life to the fullest extent possible".[65]

Whelan J held that the trial judge protected and vindicated G.'s constitutional right to liberty and that the special care order did not amount to preventative detention. In making this decision, Whelan J referred to Article 37 of the UN Convention on the Rights of the Child as well as Article 5 of the European Convention on Human Rights and the accompanying case law of the European Court of Human Rights.

Whelan J cited the Supreme Court case of *DPP v Daniels* where Dunne J stated that "[i]n order to reach the conclusion that a sentence included an element of preventative detention, it would be necessary to show that no court acting properly could have imposed the sentence."[66] In the present case, extensive expert evidence was reviewed by the trial judge in reaching a decision about a special care order for G. Whelan J held that this, and the absence of any expert evidence to support a proposition that making a special care order was not in G.'s best interests, "fatally undermines the proposition that the order could be characterised, on the evidence, as preventative detention."[67]

60. [2019] IECA 109.
61. *Ibid* at [6].
62. *Ibid* at [96], citing *Hay v O'Grady* [1992] 1 IR 210, *O'Donnell v Bank of Ireland* [2015] IESC 14, *McDonagh v Sunday Newspapers* [2017] IESC 46 and *Delany and McGrath on Civil Procedure* (4th Ed; Round Hal, 2018)./
63. [2019] IECA 109 at [105] and [106].
64. *Ibid* at [122].
65. *Ibid* at [138], citing *DG v Eastern Health Board* [1997] 3 IR 511, *DG v Ireland* (2002) 35 EHRR 33 and *SS v Health Service Executive* [2008] 1 IR 594.
66. [2014] IESC 64 at [17], cited by Whelan J at [2019] IECA 109 at [146].
67. [2019] IECA 109 at [147].

Whelan J held that the trial judge did give sufficient weight to the views of the Director of Oberstown Detention Centre as well as to G's own views. G was represented by a solicitor, junior counsel and senior counsel. A guardian *ad litem* was also appointed on her behalf. In addition, G gave evidence by video link and three letters written by G, were also taken into account by the Court. In relation to G's wishes, Whelan J. stated:

> "To accede to G's wishes would, on the evidence, be to deprive her of a vital intervention in circumstances where there was clear and compelling evidence before the High Court and this court that satisfied the court that her behaviour continued to pose a real risk, on substantial grounds, of harm to her life and safety and development, such that the vindication of her best interests required a special care order being made for the purposes of protecting her welfare development, and indeed her life".[68]

Having reviewed the extensive evidence placed before the High Court, the Court of Appeal concluded that the trial judge had carried out a careful and comprehensive balancing exercise, weighing the relative rights of G, and in all the circumstances correctly concluded that G's constitutional rights warranted the making of a special care order.[69]

5.3.1.3 AF (a minor) v Child and Family Agency (timeframe for application for special care order)[70]

O'Regan J considered the timeframe within which Tusla is mandated to apply to the High Court for a special care order in circumstances where it has determined that one is necessary for an individual child under s. 23F of the Child Care Act 1991. This involved the interpretation of s. 23F(8), which neglects to expressly include reference to a timeframe. The section provides that:

> "Where the Child and Family Agency determines that there is reasonable cause to believe that for the purposes of protecting the life, health, safety, development or welfare of the child, the child requires special care the Child and Family Agency shall apply to the High Court for a Special Care Order."

The applicant was 16 years old and was in the care of the CFA under an interim care order. The National Special Care Committee of the CFA deemed a special care order necessary, having determined, pursuant to s. 23F(2)(a) of the 1991 Act, that it was "satisfied that there is reasonable cause to believe that the behaviour of the child poses a real and substantial risk of harm to his or her life, health, safety, development or welfare". Despite having made this finding under s. 23F of the 1991 Act, the Service Director of Tusla "refused to make a formal determination under s.23F(7)" because no appropriate place was available for the applicant.[71] Following judicial review proceedings, presided over by Faherty J, which found it unlawful to refuse to make a "formal determination" under this section, the Service Director subsequently made a "formal determination" on 6 February 2019.[72]

68. *Ibid* at [160].
69. *Ibid* at [175].
70. [2019] IEHC 435.
71. *Ibid* at [3].
72. *Ibid* at [3] and [4].

However, having made this formal determination, Tusla decided not to apply to the High Court under s. 23F(8) for a special care order, again noting that no appropriate place was available for the applicant.[73] Tusla submitted to the court that on a "purposeful" interpretation, s. 23F did not require an application to be made for a special care order until a fully staffed placement for such care was available and a child had reached priority status on the list of children requiring special care.[74] O'Regan J rejected this submission, holding that such an understanding of s. 23F(8) in the context of the steps which would have been taken under s. 23F(1)-(7) would amount to an "absurdity", and cannot be considered consistent with the plain and ordinary reading of s. 23F as a whole or the intended purpose of the 1991 Act.[75]

Instead, the judge noted that this section "requires some element of expedition in making the application to the High Court" and accordingly, "the availability of a fully staffed placement and prioritisation of an individual applicant for such placement" is not adequate to delay making an application.[76] The judge further stated that applications under this section should "be made as soon as is practicable".[77] O'Regan J stated that she was satisfied that the "deliberate and intentional policy of the respondent not to take any steps to apply to the court as per the mandate incorporated within subs.8 at a time when the requirements of subs.1 to subs.7 of s.23F have been fulfilled (based on available placement and priority status) is inconsistent with the meaning of subs. 8".[78]

5.3.1.4 Child and Family Agency v MO'L (review of special care order after expiry)[79]

In this case, Faherty J was tasked with assessing whether the High Court has jurisdiction to review a child's case in circumstances where a special care order, or an interim special care order has expired. In addition, the Court was asked to consider whether it can retain the guardian *ad litem* who was previously appointed for the child after the orders have expired.

Tusla argued that the High Court's role "should cease save in the most exceptional circumstances" when the special care order expired.[80] In making this argument, they stated that the Child Care Act 1991 was the appropriate legal framework to use. They also cited the dicta of MacMenamin J in *AM v Health Services Executive*, where the judge stated that "inherent jurisdiction must not be used as a first port of call when, by legislation, the Oireachtas has spoken on the matter".[81] Instead, they argued that s. 47 of the Act of 1991, concerning the child's welfare, was the most appropriate section to invoke following the expiry of a special care order, as in these circumstances.[82]

Counsel for the respondent argued that the High Court retains its inherent jurisdiction to make orders in respect of children in need of care, regardless of the framework provided

73. *Ibid* at [5].
74. *Ibid* at [28].
75. *Ibid* at [29].
76. *Ibid*. See also [30]. Counsel for the Applicant referred to Tusla's "Criteria for Admission to Special Care" which uses the word "immediately" in the context of children requiring special care. This was noted by O'Regan J at [26].
77. *Ibid* at [31].
78. *Ibid* at [33].
79. [2019] IEHC 781.
80. *Ibid* at [27]. See also [55] to [57] and [60].
81. [2019] IESC 3 at [89], cited by Faherty J at [2019] IEHC 781 at [62].
82. [2019] IEHC 781 at [45], [65], [68] to [69] and [72].

for in the Act of 1991, and that the High Court has power to vindicate the constitutional rights of the child.[83]

Faherty J commented that "the erstwhile inherent jurisdiction of the High Court to make special care orders has been replaced by the provisions of Part IVA" of the Child Care Act 1991.[84] However, the judge proceeded to quote the dicta of MacMenamin J in *HSE v DK*,[85] which discussed the power of the High Court to review such cases as follows:

> "(b) Where a detention order is ended and the child is placed in a step-down facility his or her case should be adjourned to a date in the Minor's List for review. If during the adjourned period or subsequent adjourned periods, the child behaves in such a manner to place himself or herself at risk the court should be informed of this within a reasonable period and should be given an assessment of the level of risk together with an assessment of the action required, including whether the minor requires to be returned to a secure unit.
>
> (c) If a minor requires to be returned to a secure unit but no place is available, the court should be informed of the level of risk applicable to him or her and the steps which may be taken to alleviate that risk."

On the role of the guardian *ad litem* regarding subsequent placements for the child, Faherty J again cited MacMenamin J, as follows:

> "(l) When the Health Services Executive moves to have a minor discharged from secure care, the guardian *ad litem* should apprise the court of the child's view regarding his onward placement. In addition, the guardian *ad litem* should inform the court of his or her professional opinion regarding such a move and the promised onward placement. …
>
> (o) The guardian *ad litem* should express a view to the court as to how a case is best kept under review after a minor is discharged from secure care. When a minor is discharged from such care the guardian *ad litem* should confirm with the court whether they are to continue to remain involved in the proceedings."[86]

Faherty J was confident that the High Court retained jurisdiction to review special care orders "particularly where the transition plans for a child are not finalised prior to the expiry of the special care order".[87] The judge commented that "the very basis for the making of such orders or directions is 'the welfare of the child', as referred to in s. 23NK".[88] She went on to hold that as she was satisfied that the Court has the power to review, "it must follow that it has the power to retain the guardian *ad litem* to ensure that S's welfare is protected during the transition to his step-down placement".[89]

83. *Ibid* at [28] to [34]; [38] to [40]; and [49] to [54].
84. *Ibid* at [77].
85. [2007] IEHC 488 at [58], cited by Faherty J at [2019] IEHC 781 at [83].
86. [2007] IEHC 488 at [59], cited by Faherty J at [2019] IEHC 781 at [84].
87. [2019] IEHC 781 at [89].
88. Para. 89 of judgment.
89. *Ibid* at [102].

5.3.2 Judicial review

5.3.2.1 DH v Child and Family Agency (role of child and GAL in judicial review)[90]

In this case, Ní Raifeartaigh J discussed the role of the child in judicial review proceedings. The child, who was in the care of Tusla, was the second named applicant in proceedings concerning access by the father (the first named applicant) to the child and to information about the child. The judge considered whether the child should be removed from the position of applicant and instead joined as a notice party to be represented by a guardian *ad litem*.

The judge elucidated the importance of establishing the appropriate role of the child in a judicial review case, as follows:

> "Not only may there be conflicts of fact in such cases in respect of which the child's voice may be relevant, but the implications of any relief ultimately granted (albeit in respect of past factual events) may well impact upon ongoing or future arrangements in respect of the child's care and the father's access to him while in care".[91]

Ní Raifeartaigh J. noted that there was a conflict of facts between the father and Tusla concerning the child's reaction to access with their father.[92] Accordingly, she held that the child should not be an applicant in this case, stating that the "potential for a conflict of interest to arise in a variety of ways, is, to my mind, obvious".[93] Since this case "involves something of a tug-of-war between the CFA and the child's father", "it would be most inappropriate that the issue of the legal representation in the litigation develop similar tug-of-war aspects".[94]

Ní Raifeartaigh J made an order removing the child as an applicant, and instead joined the child as notice party and appointed the guardian *ad litem* who was involved with the child in the District Court to represent the child in the judicial review.[95] According to the judge, this was "the best way of ensuring that there is an independent voice in court to convey the views of the child and articulate submissions on his behalf, from a party who has no interest of any sort in the outcome of the proceedings".[96] The judge also observed that "the GAL mechanism has a long history and is clearly within the inherent jurisdiction of the High Court. Further, the GAL would look at the case in its entirety and not merely act as a conduit for the child's voice, although of course that is an essential part of the GAL's role".[97]

5.3.2.2 A Foster Mother v Child and Family Agency (judicial review – costs and delay)[98]

The applicant in this case sought an order directing Tusla to pay some of her costs arising from the substantive hearing of her case, *A Foster Mother v Child and Family Agency*[99] ("the

90. [2019] IEHC 459.
91. *Ibid* at [37].
92. *Ibid*.
93. *Ibid* at [38]
94. *Ibid*.
95. *Ibid* at [41].
96. *Ibid*.
97. *Ibid* at [42].
98. [2019] IEHC 8.
99. [2018] IEHC 762.

principal case"), which was heard over six days in 2018. Tusla claimed that its costs should be paid for by the applicant. In seeking this order, the applicant relied on the Supreme Court decision of *Dunne v Minister for Environment (No 2)*,[100] arguing that she "was seeking to vindicate the rights of the child"[101] and that the case "raised issues of special and general public importance" regarding "the duty of foster parents to vindicate the rights of the children in their care".[102] Tusla argued that costs should follow the event and that the applicant should cover its costs since Tusla was successful in the principal case.[103]

Simons J was critical of the applicant's conduct, noting that the application for judicial review had been made outside the three month time-limit, and that a "six day hearing could have been avoided had the case simply been withdrawn on the first day".[104] He held that it would undermine the effectiveness of the three month time-limit were a court to make an order for costs in the favour of an applicant who had brought proceedings out of time. Such costs orders would risk encouraging others to institute proceedings that were clearly out-of-time.[105]

Simons J ruled that each party should bear their own costs. The judge noted that "the proceedings were motivated by a genuine concern on the part of the applicant for the welfare of the child", and not for "any 'private personal advantage'".[106] He also stated that he attached "some significance to the exemplary manner in which the applicant cared for the child for the thirteen months that the child was in her care. It would be disproportionate to make a costs order against the applicant in the circumstances".[107] He remarked:

> "A requirement to pay the other side's costs of a six day High Court case would be financially ruinous for all but the most wealthy of individuals. To apply the usual costs rule, and to make an order against the applicant, would undoubtedly discourage other foster parents from having recourse to the courts to seek to vindicate the rights of children in their care. I do not think that it would be in the public interest to create such a deterrent."[108]

Simons J also referenced the best interests of the child in the context of judicial review proceedings:

> "… there can be no doubt that the court is entitled to take into account the best interests of the child in the exercise of its discretion in judicial review proceedings. It is well established that judicial review is a discretionary remedy, and that one of the factors which a court can consider in the exercise of its discretion is whether the proceedings serve any useful purpose. It must follow *a fortiori* that a court is entitled to consider whether the proceedings, far from serving any useful purpose, might actually have a detrimental effect on the interests of a child".[109]

100. [2008] 2 IR 775.
101. [2019] IEHC 8 at [6].
102. *Ibid* at [7].
103. *Ibid* at [11]
104. *Ibid* at [26].
105. *Ibid* at [23].
106. *Ibid* at [32].
107. *Ibid* at [34].
108. *Ibid* at [33].
109. *Ibid* at [67].

5.3.3 Sexual offences

5.3.3.1 PP v The Judges of Dublin Circuit Court (gross indecency – consent as element of offence)[110]

This case concerned a trial scheduled to take place in Dublin Circuit Court in which the appellant, a school teacher, was accused *inter alia* of engaging in buggery and oral sex with a student aged between 15 and 17 years from 1978 to 1980. The Supreme Court granted leave to appeal on three grounds:

> "(i) Is the consent of both parties an essential ingredient of the offence of gross indecency under s. 11 of the Criminal Law Amendment Act 1885?
>
> (ii) Having regard to the answer to the first question, does the appellant have *locus standi* to challenge the compatibility of that section with the Constitution?
>
> (iii) Having regard to the answer to the foregoing question is s. 11 of the 1885 Act compatible with the Constitution?"[111]

The now repealed s. 11 of the Criminal Law Amendment Act 1885 (the 1885 Act) provides for the offence of gross indecency between males as follows:

> "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

Section 11 of the 1885 Act was replaced by s. 4 of the Criminal Law (Sexual Offences) Act 1993. However, O'Donnell J. detailed that s. 11 of the 1885 Act "may now be the only method of prosecution of certain serious offences arising from conduct prior to 1993":[112]

> "The repeal of s. 11 did not, as a matter of law, have the effect of immunising pre-1993 conduct. Instead, that position was regulated at the time by the provisions of s. 21 of the Interpretation Act 1937 (now effectively reproduced in s. 27 of the Interpretation Act 2005), which provided that repeal of an enactment did not affect the previous operation of the enactment, and any legal proceedings in respect of any offence could be instituted and any penalty applied "as if such statute or portion of a statute had not been repealed".[113]

In considering whether consent of both parties is "an essential ingredient of the offence of gross indecency" under s. 11 of the 1885 Act, O'Donnell J cited O'Higgins CJ in *Norris v The Attorney General* who stated that evidence of consent is not required.[114] He observed that:

110. [2019] IESC 11.
111. *Ibid* at [10].
112. *Ibid* at [28].
113. *Ibid* at [4].
114. [1984] IR 36 at p 51.

> "… there does not appear to be any example of an Irish case stating that consent (in any sense) was a necessary ingredient of the offence. Indeed, there are a number of cases described which would appear inconsistent with any such requirement. It certainly was the case that the offence was often charged along with charges of indecent assault, and on the facts, many of the cases involved children who as a matter of law could not consent".[115]

O'Donnell J also referenced the case of *DW v Director of Public Prosecutions*, where Hardiman J posited that "once gross indecency is established, any party to it is criminally liable regardless of his own or another's consent".[116] O'Donnell J concluded that "the consent of both parties is not an essential ingredient of the offence of gross indecency under s. 11 of the Criminal Law Amendment Act 1885".[117]

O'Donnell J confirmed that the appellant had *locus standi* to challenge the constitutionality of s. 11, "but only on grounds related to his personal circumstances".[118] As the facts of this case involved gross indecency with a boy of 15 to 17 years, O'Donnell J ruled that "the appellant does not have *locus standi* to argue that the criminalisation of consensual conduct between adult males is impermissible and renders s. 11 of the 1885 Act repugnant to the Constitution".[119]

O'Donnell J observed that s. 11 of the 1885 Act "has not been shown to be incompatible with the Constitution on the grounds in respect of which the appellant has *locus standi* arising from his personal circumstances".[120] He dismissed the appeal, holding that the Constitution could not preclude PP's trial. MacMenamin J and Dunne J concurred while Clarke CJ and O'Malley J dissented.

5.3.3.2 Director of Public Prosecutions v Kelly (headline sentence – mitigating factors)[121]

This case concerned an appeal against the severity of a sentence of nine years' imprisonment imposed by Dublin Circuit Criminal Court in 2017. The appellant pleaded guilty to the sexual abuse of two brothers, CC and BC, from 2009 to 2015, involving eleven counts of sexual assault, one count of attempted sexual assault and one count of sexual exploitation. CC was 14 years old when the abuse commenced in 2009, which continued until he was 19 years old in 2015, while BC was 15 years old when the abuse commenced in 2015.

The appellant claimed that the judge of the Circuit Court erred in law and in fact when imposing his sentence. In particular, the appellant claimed that the judge failed to identify a headline sentence and equally failed to give sufficient weight to mitigating factors. In dismissing the appeal, the Court of Appeal noted that the sentencing judge took a "global" approach which reflected "the gravity of the conduct with due discount for mitigation"[122] and that the sentence was "one within the discretion of the judge".[123] The Court also specifically noted that a "two tier" approach to sentencing is "not the only approach"

115. [2019] IESC 11 at [35].
116. [2003] IESC 54 at [16], cited by O'Donnell J at [2019] IESC 11 at [35].
117. [2019] IESC 11 at [37].
118. *Ibid* at [42].
119. *Ibid*.
120. *Ibid*.
121. [2019] IECA 95.
122. *Ibid* at [32].
123. *Ibid* at [31].

that a judge can use.[124] In this case, the sentencing judge had specifically stated that he was taking the balance of counts into consideration. The Court of Appeal stated that "it is important to note that the appellant was not sentenced for a single offence in which instance there might be merit in the appellant's submission that the notional sentence was in fact maximum sentence permitted by law for sexual assault".[125] Instead, this case involved "extensive sexual misconduct":[126]

> "The offending was over a prolonged period of time in respect of two vulnerable young boys, perpetrated by a grown man who groomed the boys from a position of trust. In some instances, providing money or alcohol and in one instant, fireworks in return for sexual activity. It was on any analysis, very serious offending indeed.".[127]

5.3.4 Adoption

5.3.4.1 Adoption Authority of Ireland v X (A Minor) (adoption without consent of father)[128]

The Adoption Authority applied to the High Court to permit a child's adoption without consulting their natural father. The child, X, was born in 2008. Their parents were not married and the relationship ended five months after X's birth. X's mother married a new partner in 2013 when X was 5 years old and the stepfather subsequently applied to adopt X, with the mother's consent.

Section 30 of the Adoption Act 2010, as amended, concerns consultations with the father. Subsection 4 requires the Authority to apply to the High Court for approval to make an "adoption order without consulting the father" where the Authority is satisfied that "it would be inappropriate for the Authority to consult the father in respect of the adoption of the child", because of "(a) the nature of the relationship between the father and mother, or (b) the circumstances of the conception of the child".

The Authority's application in this case was based on "the nature of the relationship between the father and mother" which involved "physical and emotional domestic violence", culminating in a barring order against the father for three years in 2008.[129] While the father was granted supervised access with X, his attendance was "sporadic" and "ceased entirely" in 2014, following physical and verbal abuse of both X and their mother.[130] The father was convicted of assault and the mother was granted a safety order for 5 years. X attended counselling and stated that "she did not want to see" her father.[131] He was removed as X's guardian in 2015 by the District Court and was deported from Ireland in 2018.

Jordan J noted that the High Court "must adopt a cautious approach to applications such as this in circumstances where the father did cohabit along with the mother for a period and was a guardian of the child and did have access to the child".[132] Nonetheless, he noted that in the present case:

124. *Ibid* at [23].
125. *Ibid* at [27].
126. *Ibid* at [24].
127. *Ibid* at [29].
128. [2019] IEHC 946.
129. *Ibid* at [5], [7] and [8].
130. *Ibid* at [8] to [10].
131. *Ibid* at [12].
132. *Ibid* at [16].

> "... it is clear on the evidence before me that the true position is that no parental or filial bond, no father-daughter relationship was formed between them both, rather a situation was arrived at whereby this young girl was afraid of the man who was her biological father ... It is also the position that there was, and it is what gave rise to that fear in the mind of the child, there was an abusive relationship, not alone between the father and the mother, physical and emotional abuse directed by him towards her, but there was quite starkly physical and emotional abuse of the child herself".[133]

Referencing Article 8 of the ECHR, the High Court judge stated that:

> "I am satisfied in this case that family life as such does not exist and did not exist in a way in which would engage Article 8 rights in favour of the father. In fact, the evidence proves, in my view, that the natural father unfortunately had very little understanding of what family life meant, or if he did have an understanding he had no commitment to having a family life with this mother and child. He abrogated his obligations as a father and ignored some very basic principles in terms of behaving as a father and as a partner in a way which might have created a family life for himself, his daughter, and the mother of his daughter".[134]

In granting the application to the Authority, the judge stated that the decision was in the child's best interests, in accordance with Article 42A of the Constitution.[135]

5.3.4.2 Mr X v Tusla (access to adoption records)[136]

The applicant brought this case to the Office of the Information Commissioner following an unsuccessful attempt to gain access to records concerning his time in an institution. Tusla, following an internal review, decided to withhold two records from the applicant under s. 6 of the Freedom of Information Act 2014 and one record under s. 37 of the Act. The requested records are two letters from the Adoption Authority concerning the applicant's tracing request. Accordingly, the Adoption Authority also made submissions to the Information Commissioner regarding s. 41 of the Freedom of Information Act 2014 and ss. 86 and 88 of the Adoption Act 2010.

The Information Commissioner stated that the core question was whether Tusla was correct in refusing access to the records under ss. 6, 37 or 41 of the FOI Act. Following a discussion of each of these sections, the Information Commissioner pointed to regulations concerning deceased individuals' records made pursuant to s. 37(8). The Freedom of Information Act 2014 (Section 37(8)) Regulations 2016 (SI No 218/2016) "provide for the grant of access to the records of a deceased individual if the requester is the spouse or the next of kin of the individual and, in the opinion of the head, having regard to all the circumstances, the public interest, including the public interest in the confidentiality of personal information, would on balance be better served by granting than by refusing to grant the request".

133. *Ibid* at [17] to [20].
134. *Ibid* at [27].
135. *Ibid* at [28].
136. Case no. OIC-53238-H6C3M7 (180405), 20 November 2019.

The Information Commissioner noted that as the applicant stated that his birthmother and adoptive parents were deceased, these Regulations may apply, as his access to the records in question may be justified as a next of kin. The Information Commissioner cautiously stated that no finding was made as to the applicant's status in relation to any persons. It was for Tusla to establish whether the regulations apply to any of the records and to apply the relevant provisions and guidelines, including consideration of the public interest in the confidentiality of personal information. Accordingly, the Information Commissioner annulled Tusla's decision and requested a new decision.

5.3.5 Miscellaneous Decisions

5.3.5.1 Child and Family Agency v MD (jurisdiction of District Court – type of placement)[137]

This case concerned the care of two siblings. The District Court made an order that they reside with their older sister during the week while they go to school and that they stay in secure foster placement at the weekend and during holidays. Tusla was opposed to the children residing with their older sister during the school week. They questioned "her capacity to provide care on an ongoing and long term basis".[138] The children's guardian *ad litem*, having taken their views into account, noted that the District Court order had "advantages and disadvantages" but "the disadvantages outweigh the advantages".[139]

Tusla claimed that the District Court did not have power under s. 47 of the Child Care Act 1991 to make an order directing the type of care that children should be provided with. Tusla argued that it "enjoys an exclusive function in relation to the initial placement of children",[140] citing s. 36(1) of the 1991 Act which concerns the accommodation and maintenance of children in care. Tusla also drew on the Child Care (Placement of Children with Relatives) Regulations, 1995 (SI No 261/1995), national foster care standards and their own internal policies.[141] It was also noted that the older sister had not undergone a fostering assessment, as required by the regulations, and that Tusla's principal fostering social worker stated that "it was unlikely that the placement of the children with their sister would pass a fostering assessment".[142]

MacGrath J in the High Court held that the District Court has power under s. 47 to make an order as to the type of care that a child should be provided with. MacGrath J cited, *inter alia*, the following passage from the judgment of Finnegan J in *Western Health Board v KM*:

> "… this section is couched in the widest possible terms and I can find nothing in the Act of 1991 insofar as the same deals with the powers, functions and duties of the District Court to suggest that a restrictive interpretation of s. 47 is appropriate. Unlike s. 36 there is no qualification requiring control and supervision in s. 47. It seems to me therefore that s. 47 empowers the District Court to do whatever it deems appropriate to achieve the policy of the Act of 1991 as a whole and the objective set out in s. 24 of the Act of 1991."[143]

137. [2019] IEHC 397.
138. *Ibid* at [5].
139. *Ibid* at [21].
140. *Ibid* at [3].
141. *Ibid* at [9].
142. *Ibid* at [10].
143. [2001] 1 IR 729 at 734, cited by MacGrath J at [2019] IEHC 397 at [52].

MacGrath J also referred to the Supreme Court's decision in that case. In upholding the decision of Finnegan J in the High Court, McGuinness J in the Supreme Court noted that:

> "This does not, of course, imply that s. 47 can be looked at apart from its context in the general framework of the Act, or that the widely drawn terms of the section means that the District Court is simply at large in the orders it may make pursuant to the section. Counsel for the respondent is correct in laying stress on the fact that the child in question remains in the care of the applicant pursuant to the order of the District Court … Both the applicant and the court must at all times bear that fact in mind when making any proposals for the future care of the child."[144]

MacGrath J took care to acknowledge Tusla's role in providing "a service of a specialist and expert nature" and, in this regard, observed that "this is an order of the type which must be made *rarely and with considerable caution*."[145] Therefore, as a matter of principle, due consideration ought to be given by the court to the recommendations, observations or decisions made by Tusla regarding the placement of children.[146]

5.3.5.2 EO'C v Child and Family Agency (investigation of complaint of abuse – fair procedures)[147]

This case focused on fair procedures in the investigation by Tusla of a complaint of child sexual abuse. A complaint of sexual abuse was made against the applicant by a female student. It was alleged that the applicant whispered to the student on a number of occasions to call him when his wife was out, and that the applicant "smacked her on the bottom". Criminal proceedings were initiated in the District Court but subsequently "failed on the evidence of the complainant".[148]

Tusla's investigation followed its 2014 *Policy and procedures for responding to allegations of child abuse and neglect* (discussed in Chapter 2 of this report). In informing the applicant of the allegation made against him, Tusla failed to furnish him with the written statement of the complainant; instead, he was furnished with a "version of the complaint".[149] Meenan J held that this undermined the process of investigating and reaching a conclusion on the complaint from the outset.[150] In addition, the applicant's account of what had transpired was not made known to the complainant by Tusla. Meenan J observed that "this is a very serious departure from fair procedures. I do not see how the first named respondent could reach a fair conclusion as to whether the allegation was true or not without taking this basis (*sic*) step".[151] Although the applicant chose not to put questions to the complainant, Meenan J noted that this does not relieve Tusla of the duty of, at least, putting to the complainant the applicant's account of the events complained of. There was no suggestion that this was not done by reason of the disability or vulnerability of the complainant.[152]

144. [2002] 2 IR 493 at 511, cited by MacGrath J at [2019] IEHC 397 at [53].
145. [2019] IEHC 397 at [58] (emphasis in original).
146. *Ibid* at [60].
147. [2019] IEHC 843.
148. *Ibid* at [35].
149. *Ibid* at [25].
150. *Ibid* at [26].
151. *Ibid* at [31].
152. *Ibid* at [35].

Further, an allegation of sexual abuse by the applicant on another female student in 2011 was also taken into account by Tusla when making a finding of sexual abuse in the 2015 allegation.[153] The allegation in 2011 was investigated separately by Tusla and found no evidence of sexual abuse. The applicant's behaviour was, however, deemed to be inappropriate professional conduct and he was subsequently referred for a risk assessment. Meenan J was critical of the fact that Tusla "took into account the early allegation of 2011 without attaching any or any sufficient weight to the fact that there was a finding of no evidence of child sexual abuse made against the applicant".[154] A further account of a concerning incident involving the applicant, separate to the 2011 and 2015 allegations, was also included in "Background Information" to this case. This was also not shared with the applicant and he, accordingly, did not have an opportunity to respond to it. According to Meenan J, this "was a clear departure from fair procedures which, given the seriousness of what was being investigated, can only be described as being inexcusable".[155]

5.3.5.3 MP v Teaching Council (National Vetting Bureau (Children and Vulnerable Persons) Act 2012 –notification of "specified information")[156]

This case was an appeal against a decision of the High Court earlier in 2019,[157] in which Allen J had dismissed an application for a permanent injunction restraining the Teaching Council from making a notification to the National Vetting Bureau under s 19 of the National Vetting Bureau (Children and Vulnerable Persons) Act, 2012. The notification arose in the context of a complaint made against the applicant by a 19 year-old student of his. Evidence was presented that the applicant had attempted to groom the student into a relationship; had consumed alcohol and cannabis with students; and had sent a series of messages to try to persuade the student to change his account of events. The school headmaster filed a complaint with the Teaching Council pursuant to Part 5 of the Teaching Council Act 2001. The Teaching Council notified the appellant of its intention to make a notification to the National Vetting Bureau, but not until after the conclusion of multiple processes, including the Disciplinary Committee, the Evidence of Character Panel, and High Court deregistration proceedings.

In dismissing the applicant's case for an injunction, the High Court and the Court of Appeal made a number of notable findings about the interpretation of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012:

- The requirement in s 19 for scheduled organisations to make a notification of specified information to the National Vetting Bureau "as soon as may be" following an investigation, inquiry or regulatory process does not impose successive obligations at the end of each of any process. What is contemplated is that the scheduled organisation should consider at the end of its process or processes whether a notification should be made. The possibility of a notification before the process has concluded was not ruled out, but in general, the scheduled organisation's procedures will have run their course before a decision is made whether a notification is required.[158]

153. *Ibid* at [43].
154. *Ibid*.
155. *Ibid* at [39].
156. [2019] IECA 204.
157. [2019] IEHC 102.
158. *Ibid* at [101].

- The obligation imposed on a scheduled organisation by s 19 does not arise upon or by reason only of the conclusion of the investigation, inquiry or regulatory process; rather, it arises when the scheduled organisation forms a *bona fide* concern. If at the end of the regulatory process, it is thought that there may be grounds for a concern, it is quite appropriate that consideration be given to whether the circumstances are such as to require a notification.[159]

- There is no procedure under the Act to allow the subject to attempt to forestall the notification. The scheme of vetting has the potential to impact on the rights of the subject of an application for disclosure but those rights are affected not by the collection of information but by its disclosure.[160]

- A lower threshold is intended to apply to the collection of information than to its release.[161]

- It is not necessary that the concerns of the Bureau relate to a child or vulnerable person who was the subject matter of the finding or allegation which has been received by the Bureau. Nor does the person alleged or found to have been harmed have to be a child or vulnerable person. The question is whether the finding or allegation gives rise to a concern that the person against whom the finding or allegation is made may pose a risk to children or vulnerable persons.[162]

- A s 19 notification does not involve a determination of facts but simply carries into effect the obligation of any scheduled organisation to notify the National Vetting Bureau of the specified information and also to notify the person affected of the fact of that concern and of the intention to notify the Bureau.[163]

5.3.5.4 Sheehy v Board of Management of Killaloe Convent Primary School (definition of emotional abuse)[164]

This case concerned the demotion of a primary school principal following a finding by the Board of Management that the applicant emotionally abused a child in junior infants by asking her to kneel on the floor and sit on the floor on two occasions as a means of disciplining her for spilling water and for "giddy behaviour". The applicant disagreed with this finding, claiming that she did not punish the child in this manner. The Board originally sought to dismiss the applicant from her role but following an appeal to the Disciplinary Appeal Panel, the sanction imposed was reduced to a demotion.

The applicant claimed that the decision-making process of the Board was flawed and biased and that it came about in the context of an industrial relations conflict where other staff had an issue with her behaviour towards them. She sought to have all decisions made by the Board in relation to the case quashed.[165]

The applicant was critical of the Board's use of the term "emotional abuse" in her dismissal and demotion, arguing that:

159. *Ibid* at [106].
160. *Ibid* at [109] to [110] and [148].
161. *Ibid* at [115].
162. [2019] IECA 204 at [14].
163. *Ibid* at [28].
164. [2019] IEHC 456.
165. *Ibid* at [73].

> "... this phrase had never been employed throughout the process until the conclusion was reached, and where the applicant had never been considered a threat to any child and continued teaching throughout the process and was only suspended from teaching very late in the day ... It was said that the reality was that the Board wished to dismiss the applicant and had reached a conclusion of emotional abuse in order to justify her dismissal, and had retrospectively injected a supposed child protection feature into the process which was not genuinely there at any earlier stage of the process".[166]

The definition of "emotional abuse" contained in the *Child Protection Procedures for Primary and Post-Primary Schools* was cited by the Court:

> "Emotional abuse is normally to be found in the relationship between a parent/carer and child rather than a specific event or pattern of events. It occurs when a child's developmental need for affection, approval, consistency and security are not met. Unless other forms of abuse are present, it is rarely manifested in terms of physical signs or symptoms. Examples may include:
> ...
> (ix) use of unreasonable or over-harsh disciplinary measures".[167]

The High Court did not agree with the applicant's submission that the Board should not have used the language of emotional abuse.[168] In referencing the wide definition of emotional abuse as outlined in the Guidelines and Procedures, Ní Raifeartaigh J observed that it "explicitly includes over-harsh disciplinary methods".[169] The judge stated that:

> "In my view, the conduct which the Board found the applicant to have engaged in would be reasonably considered to be at the lesser end of the spectrum over over-harsh discipline. One can well imagine the types of more serious patterns of emotional basis [*sic*] that could arise between a teacher and pupil, but the definition is also broad enough to include one or two incidents of over-harsh discipline."[170]

The High Court refused the reliefs sought by the applicant, and stated that "the applicant is not entitled to rely on alleged flaws in the Board's process when she subsequently had the benefit of a full hearing before the Disciplinary Appeals Panel in respect of which she now makes no complaint whatsoever".[171]

5.3.5.5 Child and Family Agency v IB and HB (placement in care – parental capacity assessment)[172]

Tusla sought the placement of two children (RB, aged 9 and CB, aged 7) in care until they turned 18 years old. The parents, IB and HB opposed the application and sought the return of their children. IB and HB also have a third child, HB, who was previously in

166. *Ibid* at [79].
167. *Ibid* at [9].
168. *Ibid* at [99].
169. *Ibid*.
170. *Ibid*.
171. *Ibid* at [92].
172. [2019] IEDC 1.

care. Care orders were put in place as physical chastisement of HB and RB occurred as well as domestic violence. Instability in the relationship between I and HB reportedly had an impact on the children. It was noted that "... HB's first response mechanism tended towards anger and aggression" and "Mrs IB could not mitigate the risk this posed to the welfare of the children"; furthermore, "IB was not always emotionally available to the children."[173]

The District Court judge observed in relation to psychological parenting capacity assessment that "there is no standardised methodology or structure that is guided by any professional association as to how these assessments are to be conducted".[174] The psychological assessor in this case had provided IB and HB with therapeutic intervention in 2016; but for the purpose of this case, the assessor did not personally interview the parents or observe the parents with their children as part of the parenting capacity assessment. Instead, these tasks were delegated to a final year doctoral student. The assessor's written report concluded, based on the student's findings, that "neither parent was deemed to have the capacity to parent all three children". In contrast, the assessor gave oral testimony to the court that "IB and HB have the capacity to parent".[175] In considering this evidence, Judge Quirke queried the methodology which the assessor used in completing the assessment:

> "It is accepted that it may have been legitimate to delegate the administration of standardised tests but this Court queries the appropriateness and the correctness of delegating the clinical interview and the observation of the parents with the children in a behavioural science of psychology which it is commonly understood has as one of its essential components the need to observe, to interview and to have dialogue before informed opinions can be made and advanced to this court."[176]

Judge Quirke stated that it was "difficult to accept that the written opinion advanced is the opinion of the professional when no direct clinical interview and /or observation was conducted in person by the psychologist seeking to state it is that psychologist's opinion that is being written down and made available to the court". She further noted that the psychological assessor expressed disappointment at the report's conclusion given that they believed this was a "nice couple", having worked with them in therapeutic sessions.[177] The judge formed the view that the oral evidence of the assessor was preferable, namely that the parents have capacity to care for their children.

Referring to Article 42A of the Constitution, as well as the ECHR, Quirke J commented that she would not be "satisfied to make a care order for the full duration of these children's childhoods. This court does not believe that such an order would secure the welfare of RB or CB and/or is a necessary and/or proportionate interference with family life in this case". Both the psychological assessor and the social worker acknowledged in evidence to the District Court that the parents have made "some progress". Further, the judge noted that the parents acknowledge their previous behaviour and have worked with

173. *Ibid* at p 1.
174. *Ibid*.
175. *Ibid*.
176. *Ibid* at p 2.
177. *Ibid*.

the family support practitioner in securing the return of H to live with them. Crucially, no child protection concerns were raised in respect of that child. The judge expressed willingness to make a supervision order under s. 18(5)(b) of the Child Care Act 1991, and directed that RB and CB should have a phased return to their parents' care and that they maintain the family support practitioner for this purpose. Further, the judge directed that they have family therapy including therapy for IB's relationship with the child, HB.[178]

5.3.5.6 Child and Family Agency v SAS (transfer of case to another jurisdiction)[179]

Tusla, supported by the guardian *ad litem*, sought to transfer the case to another jurisdiction under Article 15 of the Brussels II *bis* Regulation (Regulation (EC) No 2201/2003). Tusla believed that the courts of another jurisdiction were better placed to hear the case for a number of reasons, including the location of the necessary witnesses; the location of documentary evidence such as probation reports and mental health histories; the child's nationality indicating a "particular connection" with another country; the mother's nationality; the father's refugee status in said country; disability payments to the parents made in that other country; and that the parties have no connection with Ireland apart from the child being born here.[180]

Judge Horgan, President of the District Court, referenced Recital 12 of the Regulation which provides that the appropriate jurisdiction must be decided in the best interests of the child as well as the decision of the Court of Justice of the European Union in *Child and Family Agency v JD*.[181] She stated that:

> "To that end, the court having jurisdiction must determine whether the transfer of the case to that other court is such as to provide genuine and specific added value, with respect to the decision to be taken in relation to the child, as compared with the possibility of the case remaining before that court. In that context, the court having jurisdiction may take into account, among other factors, the rules of procedure in the other Member State, such as those applicable to the taking of evidence required for dealing with the case. However, the court having jurisdiction should not take into consideration, within such an assessment, the substantive law of that other Member State …."[182]

In addition, Judge Horgan extensively cited the *dicta* of the Supreme Court in *Child and Family Agency v JD* which detailed that the domestic court is required to "set out" its reasons for accepting or rejecting jurisdiction.[183] Following this guidance, Horgan P ruled that it was appropriate to transfer jurisdiction to the other country for a number of reasons including the fact that the mother's nationality was of the other country, the witnesses and evidence were located in that country, the guardian *ad litem* was of the view that it was in the best interests of the child and "[a]ll the connections between the child and his/her maternal family are in said European jurisdiction".[184]

178. *Ibid*.
179. [2019] IEDC 2.
180. *Ibid* at [4].
181. C-428/15 at [56] and [57].
182. [2019] IEDC 2 at [57].
183. [2017] IESC 56 at [35], cited by Judge Horgan at [2019] IEDC 2 at [9].
184. [2019] IEDC 2 at [11].

5.4 RESEARCH UPDATE

5.4.1 Mandatory reporting

A study by Margaret Nohilly examined the implementation of mandatory reporting in schools by way of interviews completed with sixteen Designated Liaison Persons (DLPs) for child protection in Irish primary schools.[185] While the participants were in general satisfied with training received in terms of being upskilled in the guidelines and procedures, there were a number of suggestions provided as to what would improve training in child protection for DLPs. These included an input from the different agencies involved in child protection (most especially Tusla), legal training and training on filling forms and dealing with families where a report has been made.[186] All of the participants agreed that training should be provided regularly for DLPs, with some participants feeling it was so important that it should be done on a yearly basis and that it should be mandatory (rather than by invite only).[187]

In relation to training provided to school staff in general as distinct from DLPs, all of the participants were unanimous in agreeing that training in the area of child protection was unsatisfactory. They felt that it was so important staff members were aware of their duties as they are the people who are working with children every day.[188] Nohilly questioned whether the Tusla online e-learning programme, which is designed to support people from all backgrounds and all experiences in recognising concerns, is sufficient training for teachers in the context of their mandatory role and the significant role that teachers play in detecting and reporting child abuse.[189]

5.4.2 Comparative child protection research

Child Care Proceedings: A Thematic Review of Irish and International Practice by Maria Corbett and Carol Coulter provided an overview as to how courts operate in child care proceedings within both the Irish and international legal framework.[190] Its objective was "to explore international approaches to court processes with a view to identifying elements that could offer lessons for child care proceedings in Ireland".[191] The authors addressed eight core themes and suggested a range of recommendations for reform in Ireland across the following areas: the court structure, the nature of proceedings, alternative dispute resolution, judicial case management, evidence, direct participation of children in proceedings, participation of parents in proceedings as well as family drug and alcohol programmes.

Notable findings included that Ireland was the only jurisdiction identified in which child care proceedings are held in a general, non-specialist court, which the report described as an "outlier of poor practice".[192] The report noted that alternative dispute resolution

185. M Nohilly, "Child Protection Training for Teachers and Mandatory Reporting Responsibilities" (2019) 19 *Irish Journal of Applied Social Studies* 75, available at https://arrow.dit.ie/ijass/vol19/iss1/7. /
186. *Ibid* at pp 80-81.
187. *Ibid* at p 81.
188. *Ibid*.
189. *Ibid* at p 82.
190. M Corbett and C Coulter, *Child Care Proceedings: A Thematic Review of Irish and International Practice* (Department of Children and Youth Affairs, 2019), available at https://www.gov.ie/pdf/?file=https://assets.gov.ie/27780/a770243297774574af9171c5226fdf74.pdf#page=1.
191. *Ibid* at p 3.
192. *Ibid* at p 22.

is underused in Irish child care cases by comparison to other jurisdictions,[193] and that consideration should be given to the adoption of a more collaborative, inquisitorial and informal approach to child care proceedings.[194] It was noted that the law on evidence is underdeveloped in Ireland by comparison to other jurisdictions, and that there is a need for a coherent national approach to the admission of hearsay evidence in particular.[195] Based on experience in other jurisdictions, the report recommended that Ireland should make provision in law for a parent to have a recognised advocate present at all stages of the process if s/he so wishes, and establish a statutory right for a parent with impaired capacity to access an independent advocacy service.[196] Finally, the report noted the positive experience of family drug and alcohol court projects in other jurisdictions and recommended the establishment of a pilot project in Ireland.[197]

The *Child Protection in Court: Outcomes for Children* study by researchers at the University of Bristol presented an evaluation of the Public Law Outline reforms introduced in 2013 and 2014 in England and Wales by comparing care proceedings before, and after, the reforms were introduced.[198] The evaluated data included court case files, administrative records, social care files as well as interviews and focus groups with social work managers, lawyers and judges. The report outlined a large number of recommendations for the reform of both policy and practice around care proceedings, including, for example, education for judges on how local authorities work as well as a need for judges to re-consider the use of supervision orders, depending on the individual parents' past behaviour. The authors also made recommendations around the need for improved data in the area.

Born into care: newborns and infants in care proceedings in Wales provided a detailed outline of the operation of the family justice and social care system in Wales for newborns and infants aged less than 12 months.[199] It was undertaken by the Centre for Child and Family Justice in Lancaster University and Population Data Science in Swansea University. It detailed new empirical evidence and provides information on the volume of newborn cases as well as their duration, incidence rates, siblings and court orders including urgent interim care orders. It also discussed implications for policy, practice and research. The data indicated that 30% of all children entering care proceedings in Wales between 2011-2018 were aged less than one year. Within the cohort of children aged less than one year, 43% of these were less than two weeks old, and a further 26% were less than 12 weeks old. The report observed that in Wales, similarly to in England, "intervention appears to be weighted to the very early weeks of an infant's life", and the incidence of care proceedings involving newborns had increased over time.[200] Approximately half of these cases were linked to mothers who had previously appeared in care proceedings.[201] Use of supervision

193. *Ibid* at p 38.
194. *Ibid* at p 39.
195. *Ibid* at p 96.
196. *Ibid* at p 136.
197. *Ibid* at p 145.
198. J Masson, J Dickens, L Garside, K Bader and J Young, *Child Protection in Court: Outcomes for Children* (University of Bristol, 2019), available at https://research-information.bris.ac.uk/files/214931511/FINAL_REPORT.pdf.
199. B Alrouh, K Broadhurst, L Cusworth, L Griffiths, RD Johnson, A Akbari, and D Ford, *Born into care: newborns and infants in care proceedings in Wales*, (Nuffield Family Justice Observatory, 2019) available at https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/Born%20into%20care%20Wales%20-%20main%20report_English_final_web.pdf.
200. *Ibid* at pp 20-22.
201. *Ibid* at p 32.

orders for children aged under one year is low;[202] the report noted that this appeared to be out of sync with the ethos of the Children Act 1989, which provides for a wide range of orders.[203]

A related publication involving some of the same researchers was *Pre-birth assessment and infant removal at birth: experiences and challenges*.[204] This literature review provided an insight as to the experience of birth parents and professionals regarding pre-birth assessment and the removal of infants at, or soon after, birth. It also addressed the challenges at system-level. Some 27 studies, dated from 1990 to 2018, were analysed, many of which were qualitative studies carried out in England and Australia. The dearth of research in this area is emphasised in this report, especially when considering "the gravity of professional decision making and the consequences for families and infants where the State intervenes at birth".[205]

The use of legal advocacy for parents in child protection cases was considered by Ravit Alfandari in "Legal Advocacy for Parents in Child Protection: Not a Question of If, but a Question of How".[206] In particular, the author sought to understand lawyers' roles and the impact that they have on the decision-making process. The methodology involved assessing the results of an online survey completed by 77 chairs of Social Service Departments (SSDs). The survey demonstrated that lawyers provided parents with a wide range of services including helping parents focus on the conversation" and providing parents with emotional support and helping them control their emotions.[207] An interesting dichotomy between private and public lawyers was also observed in this research which found that private lawyers were generally more adversarial to "'justify their presence'".[208] Some recommendations for lawyers were recommended including a coherent code of practice, well-defined preparation and professional training.[209]

5.4.3 Youth justice

The United Nations published its *Global Study on Children Deprived of Liberty* in November 2019.[210] A full description of this enormous piece of work, which gathered data from 92 countries, is outside the scope of this report. It will suffice to note the Study's overarching recommendations, which are based on the principles contained in the CRC and include the following:

- That States make all efforts to significantly reduce the number of children held in places of detention and prevent deprivation of liberty before it occurs, including addressing the root causes of deprivation of liberty in a holistic manner.

202. *Ibid* at p 35.
203. *Ibid* at p 38.
204. C Mason, L Robertson and K Broadhurst, *Pre-birth assessment and infant removal at birth: experiences and challenges. A Literature Review* (Nuffield Family Justice Observatory, 2019), available at https://www.nuffieldfoundation.org/wp-content/uploads/2019/12/Literature-review_Born-into-Care_Dec-2019.pdf.
205. *Ibid* at p 26.
206. R Alfandari, "Legal Advocacy for Parents in Child Protection: Not a Question of If, but a Question of How" (2019) 49 *British Journal of Social Work* 1601.
207. *Ibid* at p 1607.
208. *Ibid* at p 1609.
209. *Ibid* at pp 1614-1616.
210. M Nowak, *United Nations Global Study on Children Deprived of Liberty* (2019), available at https://omnibook.com/Global-Study-2019.

- States should develop national action plans with clear targets and benchmarks indicating how to reduce progressively the number of children in the various situations of deprivation of liberty and how to replace detention by non-custodial solutions.

- States should invest significant resources to reduce inequalities and support families to empower them to foster the development of their children, and invest significant resources in the child welfare system. They should ensure a close inter-agency cooperation between the child welfare, social protection, education, health and justice systems, the law enforcement as well as the administration of migration and refugee policies to build comprehensive child protection systems and implement detention prevention and early intervention policies.

- States should enhance the capacity of all professionals who work with and for children in decisions leading to their deprivation of liberty, and those who are responsible for their well-being while in detention.

- States are strongly encouraged to establish an appropriate system of data collection at the national level, involving all relevant ministries and other State agencies, coordinated by a focal point.

5.4.4 Immigration

The Council of Europe published a major study entitled *Promoting child-friendly approaches in the area of migration* in December 2019.[211] The document compiles international and European standards on child-friendly practices in the context of migration with illustrations from practice of the kind of initiatives, programmes and procedures that serve to implement these standards. Issues examined include the standards that must be applied to the child's registration and age determination, the child's treatment in the migration decision-making process, and measures that promote their right to protection, family care and to education. Emphasis is placed on the importance of finding a durable solution to what can often be a highly precarious situation for the child, and on keeping the child out of security or custodial settings while measures are taken to ensure that he/she is safely housed and provided with protection or is returned to their country of origin or resettled in their new home, after an appropriate assessment of the child's best interests. A child-friendly approach to migration is defined as:

> "… accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity".[212]

The compilation illustrates a number of examples of good practices that implement a child-friendly approach, such as the approach to age assessment in France;[213] the Belgian

211. Council of Europe, *Promoting child-friendly approaches in the area of migration* (2019), available at https://edoc.coe.int/en/refugees/8047-promoting-child-friendly-approaches-in-the-area-of-migration-standards-guidance-and-current-practices.html.
212. *Ibid* at p 15.
213. *Ibid* at pp 25-26.

model for reception of separated children;[214] social worker's statements about child's interests during application for a residence permit in Finland;[215] the use of guardianship for separated children in Italy;[216] and child-friendly interviews in Poland.[217]

The Irish Human Rights and Equality Commission (the Commission) published an independent review of the implementation of the UN Convention on the Elimination of Racial Discrimination in advance of the UN's review of Ireland's record in this area in 2019.[218] This report documents significant issues which have arisen since the Committee on the Elimination of Racial Discrimination (CERD) last reviewed developments in 2011. In particular, reference is made to "a troubling anti-immigrant and anti-refugee discourse"[219] around housing and a crisis in homelessness as well as a "lack of progress on review and reform of Ireland's legal framework on hate crime, [and] the continuing and widespread institutional discrimination faced by Travellers".[220] In compiling this report, the Commission sought the views of a wide range of stakeholders throughout 2019, including a group of young people aged sixteen to twenty-four years old about racial discrimination as well as a "national Civil Society Forum".[221] The Commission made recommendations across a variety of areas including human trafficking, gender-based violence, health and social services.[222] A number of specific recommendations were made concerning children, including that better data is required on separated children,[223] and that special measures should be in place to enable girls and women from minority ethnic groups to report gender based violence.[224]

An article by Milka Sormunen carried out a systematic review of the case law of the ECtHR considering how the best interests of the child has been interpreted in child protection and immigration cases.[225] The paper identified a prominent difference in approach to the best interests principle in these cases, particularly around the child's right not to be separated from their parents. It was observed that the starting point in immigration cases differs to that of child protection cases as in the former, "the court does not assume that best interests require living with both parents, but assesses this as a separate question" while in child protection cases, "the court assumes that it is in the child's best interests to live with her parents".[226] The author also noted a difference in the treatment of children of a young age; in immigration cases, for example, young children are referred to as "adaptable", which is in contrast to child protection cases where they are viewed as in need of care.[227] Further, children's views are rarely ascertained in immigration cases compared with child protection cases.[228]

214. *Ibid* at pp 29-30.
215. *Ibid* at p 48.
216. *Ibid* at pp 50-51.
217. *Ibid* at pp 61-62.
218. Irish Human Rights and Equality Commission, *Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report* (2019), available at https://www.ihrec.ie/app/uploads/2019/11/IHREC_CERD_UN_Submission_Oct_19.pdf.
219. *Ibid* at p 3.
220. *Ibid* at p 2.
221. *Ibid* at p 3.
222. *Ibid* at pp 151-162.
223. *Ibid* at p 160.
224. *Ibid* at p 158.
225. M Sormunen, "A comparison of child protection and immigration jurisprudence of the European Court of Human Rights: what role for the best interests of the child?" (2019) 31(3) *Child and Family Law Quarterly* 249.
226. *Ibid* at pp 266-267.
227. *Ibid* at p 267.
228. *Ibid*.

5.4.5 Child participation

A study by Robert Porter discussed the extent to which children's and young people's views are taken into account in cases concerning contact disputes in cases concerning looked after children in Scotland.[229] Porter analysed the cases of 160 children from 2013-2017, involving some 1,200 individual hearings and 2,003 decisions on contact. All reports for these hearings (including those of social workers, teachers and other professionals) were analysed. Porter's findings suggested that children and young people's views are routinely not ascertained in these cases; indeed, their views were not recorded in 64 percent of contact directions. Where children's views were ascertained, only 12 percent of these views were deemed to be "clearly recorded".[230]

Marie Føleide and Oddbjørg Ulvik published findings of a study on indirect participation in care proceedings in Norway, where "children's spokespersons" are appointed to indirectly represent the child in proceedings before the County Social Welfare Board.[231] The article noted "inherent contradictions in the mandate of an indirect participation arrangement, and contradictions between psychological and judicial aspects of the spokespersons' practices."[232] For example, children's spokespersons have to strike a balance between only reporting what the children say, while also encouraging children to say what they really mean in circumstances where they may not feel able to express their true feelings.[233] Some spokespersons aim to bring the assumed pre-existing true or honest view out without "forming" a view.[234] At the same time others make a distinction between "truth" and the child's subjective experience, and feel that the latter is more important.[235] A further challenge that was noted was the difference between offering factual observations on the spokesperson's interactions with the child (for example, in relation to the circumstances of the interaction) as distinct from interpretations of what the child is saying.[236] Spokespersons expressed their discomfort at the manner in which they are questioned by lawyers during hearings, feeling that the intention is to trip them up.[237] The authors conclude that their study findings "point to the need for a greater awareness of how we can assist children in their meaning making, and the relational and interactional impact that a representative has on the conversation with a child":

> "There is a tension between psychological relational rationality and forensic rationality, a contradiction that could be located in the mandate of the spokespersons, between their main task of forwarding the child's views and their duty in giving evidence. This in turn leads to many of the spokespersons' experiences of ethical and moral dilemmas … An arrangement of indirect participation should transcend instrumentality, and allow for a meta message of participation, of positioning children as subjects in their own right."[238]

229. RB Porter, "Recording of Children and Young People's Views in Contact Decision-Making" (2019) *British Journal of Social Work* (advance access version, available at https://academic.oup.com/bjsw/advance-article-abstract/doi/10.1093/bjsw/bcz115/5586649).
230. *Ibid* at p 11.
231. MH Føleide and OS Ulvik, "Dilemmas and Contradictions in Hearing Children in Care Proceedings" (2019) 27 *International Journal of Children's Rights* 602.
232. *Ibid* at p 602.
233. *Ibid* at pp 610-611.
234. *Ibid* at p 612.
235. *Ibid* at p 613.
236. *Ibid* at pp 614-619.
237. *Ibid* at pp 621-624.
238. *Ibid* at p 626.

A book chapter by Charlotte Mol considered how the concept of a child's maturity is understood within the United Nations Convention on the Rights of the Child (UNCRC) and the case law of the ECtHR in the context of realising the child's right to be heard in family law proceedings.[239] The author sought to identify similarities and differences within both legal frameworks in an effort to understand what European states should provide in domestic law and practice in order to comply with these standards. Mol noted that the ECtHR places a lot of emphasis on age, whereas the CRC is more focused on maturity.[240] While it was acknowledged that the case law of the ECtHR increasingly refers to the UNCRC in its interpretation of how the child's right to be heard should be realised, the chapter noted that a difference in approach "may be explained by the nature of the instruments" as the UNCRC contains express reference to "maturity", further elaborated on by the Committee on the Rights of the Child.[241] By way of contrast, the "ECtHR's subsidiary nature of testing states' margin of appreciation" means it is more focused on examining whether the approach taken in an individual case was acceptable than in setting general standards for States to adhere to; moreover, "the ECtHR must rely on the information provided to it and age is easier to judge from a distance than 'maturity'".[242] On the other hand, the ECtHR case law provides a more detailed understanding than the CRC of the concept of "due weight", and also develops the distinction between "due weight" and "decisive weight".[243]

5.4.6 Children's testimony

The Bar Council considered the prospect of introducing pre-recorded cross-examination for children and vulnerable witnesses in a submission to the *Review Group on the Protection of Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* in July 2019.[244] The submission noted that a pilot scheme facilitating children to pre-record cross-examination has taken place in certain crown courts across the UK.[245] As to whether a pilot scheme should similarly be introduced in Ireland, the Bar cautioned that such a development "should be preceded by a thorough consideration of the issues arising from the United Kingdom experience".[246]

The subject of pre-recorded cross-examination for children was also considered in Northern Ireland in the Gillen Report, which was published in April 2019.[247] Of note, Sir Gillen recommended that a pilot scheme should be launched in Northern Ireland.[248]

239. C Mol, "Maturity and the Child's Right to be Heard in Family Law Proceedings: Article 12 UNCRC and Case Law of the ECtHR Compared" in K Boele-Woelki (ed), *Plurality and Diversity of Family Relations in Europe* (Intersentia, 2019) at pp 237-254.
240. *Ibid* at p 251.
241. *Ibid* at p 253.
242. *Ibid* at pp 253-254.
243. *Ibid* at p 252.
244. Bar Council, *Submission on behalf of the Council of The Bar of Ireland to the Review Group on the Protection of Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (2019) at p 29, available at https://www.lawlibrary.ie/media/lawlibrary/media/Submission-to-the-O-Malley-Review-Group-FINAL_Issued.pdf.
245. This initiative has been rolled out in Bradford, Carlisle, Chester, Durham, Mold and Sheffield; see https://www.lawgazette.co.uk/news/sexual-offence-complainants-to-be-spared-live-cross-examination/5070473.article.
246. Bar Council (n 225 above) at p 29. See also https://www.rcni.ie/pre-recorded-direct-evidence-cross-examinations-alternatives-live-evidence-vulnerable-witnesses/.
247. J Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland, Part 1* (April 2019) at pp 135-157, available at https://www.justice-ni.gov.uk/publications/gillen-review-report-law-and-procedures-serious-sexual-offences-ni.
248. *Ibid* at p 149.

Sir Gillen observed of the Report, that "(p)re-recorded cross-examination is part of the necessary changing face of law and procedures to encourage complainants, particularly children and vulnerable adults, to be able to come forward and give their evidence in circumstances which are more likely to elicit the truth than at present".[249]

5.5 DISCUSSION AND RECOMMENDATIONS

5.5.1 Adoptions from care

In Ireland, section 24 of the Adoption (Amendment) Act 2017 has amended section 54 of the Adoption Act 2010 to lower the threshold that must be reached before adoptions can be authorised without parental consent. If such adoptions are to become more commonplace in Ireland, it is essential that regard is had to the jurisprudence of the ECtHR concerning when such adoptions are and are not permissible (discussed in section 5.2.1 above). This arises not only because an application may be made to the ECtHR after the event. Section 2 of the European Convention on Human Rights Act 2003 obliges the Irish courts, in so far as is possible, to interpret and apply Irish law in a manner compatible with the State's obligations under the ECHR; while section 3 obliges organs of the State (which includes Tusla and the Adoption Authority) to perform their functions in a manner compatible with the State's obligations under the ECHR.

In order to comply with the jurisprudence of the ECtHR and obligations under the European Convention on Human Rights Act 2003, Tusla must ensure to keep all cases in care under regular review with a specific focus on whether reunification is possible and whether circumstances of relevance have changed, or new information is available. Contact should be facilitated between the child and his or her parents to the greatest extent possible in a manner conducive to eventual reunification (and consistent with the best interests of the child). Adoptions from care should only proceed where reunification is not a realistic prospect and provided that sufficient efforts towards reunification have been made initially.

5.5.2 Youth justice

The new *General Comment No 24 on children's rights in the child justice system* (discussed in section 5.2.2 above) highlights the disparity between certain aspects of Irish law on youth justice and Ireland's international law commitments on children's rights. In order to comply with the CRC, Part 5 of the Children Act 2001 (as amended by the Criminal Justice Act 2006) must be updated. The minimum age of criminal responsibility in Ireland should be raised from 12 years to at least 14 years. The lower minimum age of criminal responsibility for serious offenses such as murder, manslaughter, rape or aggravated sexual assault should be abolished.

Related to this, the Committee on the Rights of the Child reminded States Parties that the relevant age for the purposes of determining whether youth or adult justice procedures should apply is the age of the child when the offence was committed, and not the age at the time of the trial.[250] The current approach in Ireland does not comply with this aspect of the General Comment.

249. *Ibid*.
250. Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc No CRC/C/GC24, 18 September 2019 at [20].

The General Comment also stipulates that youth justice hearings are to be conducted behind closed doors, subject to very limited exceptions that are clearly stated in the law. If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed.[251] Ireland's implementation of this principle is inconsistent at present, and not all children involved in youth justice hearings have their identity fully protected. Measures should be taken to rectify this issue.

Finally, the United Nations *Global Study on Children Deprived of Liberty* (see section 5.4.3 above) should be closely examined, with a view to ensuring compliance of Irish youth justice laws, policies and practices with the Study's overarching recommendations.

5.5.3 Special care

In two separate cases in 2019, the High Court ruled that Tusla was incorrect not to make an application for a special care order (see section 5.3.1 above). At agency level, Tusla needs to take on board the clarification provided by these judgments of its duties under Part IVA of the Child Care Act 1991. However, these cases are part of a broader context in which there is a shortage of adequate placements in Ireland for troubled teenagers (as particularly illustrated by *AF (a minor) v Child and Family Agency*[252]). The Child Care Law Reporting Project has documented how in numerous cases, adequate facilities and/or staffing is not provided in this jurisdiction and children are transferred to facilities in other countries.[253] The authors observed:

> "A true measure of progress in our society would be to offer residential high secure mental hospital care to all young people who need it in our own State instead of sending them out of the country, out of their communities and away from such families as they have, at enormous expense to the State. While this will require resources, it offers a more satisfactory and permanent solution than the current ad hoc system of sending these children out of the State. In addition, in order to provide all children in need of specialist mental health treatment appropriate treatment, changes to our mental health legislation are required.
>
> Ultimately all necessary resources need to be put into our own systems of care, including investment in children's psychological and psychiatric services to permit early intervention for those at risk of developing behavioural and psychological problems. Not only would this make more financial sense, it would save the State money in the long run and it would potentially save lives."[254]

This report fully endorses this conclusion and recommendation.

5.5.4 Immigration

It is recommended that a detailed review of legislation, policy and practice in the area of immigration be conducted with a view to assessing its compliance with the Council of Europe guidelines on child-friendly approaches in the area of migration discussed in section 5.4.4 above.

251. *Ibid* at [67].
252. [2019] IEHC 435.
253. L Colfer and C Coulter, "High Court oversight of children's complex care needs" (January 2020), available at https://www.childlawproject.ie/publications/high-court-oversight-of-childrens-complex-care-needs/.
254. *Ibid*.